



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.363 OF 2014

ELDOHOSP PHARMACEUTICALS LTD.....PLAINTIFF

VERSUS

PENTAPHARM LIMITED.....1ST DEFENDANT

JULIUS IRUNGU NGIGI.....2ND DEFENDANT

RULING

Before Court is the Notice of Motion dated 15th April 2015 in which the Plaintiff/Applicant sought the following Orders:-

“(i) That the defence filed by the Defendants be struck out for want of service upon the Plaintiff.

(ii) That in the alternative, the said defence be struck out as it is an abuse of the Court process, discloses no reasonable cause of action and is frivolous.

(iii) Costs of this application be borne by the Defendants”.

The application was premised upon **Order 7 Rule 1 (4) Rules (b)(c) (d), Order 11 Rule 2(i), Order 2 Rule 15(1)(b)(c)(d)** of the **Civil Procedure Rules** and **Section 1A(1)(2), 1(B), 1(C) and Section 3A of the Civil Procedure Act** and was supported by the affidavit sworn by **TONY MATHEW** the Financial Controller of the Plaintiff company sworn on 15th April 2015.

The Respondents opposed the application through the Replying Affidavit sworn by **JULIUS IRUNGU NGIGI** on 11th June 2015.

The Court gave directions that the application be disposed of by way of written submissions. The Plaintiff/Applicant filed their written submissions dated 2nd February 2018 whilst the Respondents filed their written submissions on 13th March 2018.

BRIEF FACTS

The genesis of this suit is an agreement between the Plaintiff/Applicant and the 1st Defendant, for the supply of pharmaceutical goods to the 1st Defendant. The 1st Defendant acknowledges the supply to themselves by the Plaintiff/Applicant of pharmaceutical goods worth **Kshs.8,515,927.06**.

By way of a written agreement dated 10th July 2013 the 1st Defendant acknowledged its indebtedness to the Plaintiff/Applicant and the Directors of the 1st Defendant undertook to repay the debt in instalments as follows:-

(a) In the year 2013 – Kshs.100,000/= per month.

(b) In the year 2014 – Kshs.250,000/= per month.

(c) In the year 2015 – Kshs.350,000/= per month.

(d) The remaining outstanding balance was to be paid within the first month of the 4th year.

Initially payments were made as agreed however the Defendants later defaulted in making the payments. As a consequence the Plaintiff filed this suit by way of a Plaint dated **21st August 2014** in which it claimed the sum of **Kshs.7,826,701.63** being the balance due to it from the Defendants. Following the filing of the suit the parties again entered into negotiations with a view to settling the outstanding debt. An agreement was reached and the defendants commenced instalment payments in order to offset the debt. However in **February 2017** the defendant again defaulted in making the agreed payments. Thereafter the Plaintiff/Applicant filed this present application.

ANALYSIS AND DETERMINATION

The application seeks Orders to strike out the Defendants defence for want of service, and in the alternative that the defence be struck out as an abuse of the court process. The nature of the prayers contained in the application pre-supposes that there exists a defence on record.

I have carefully and anxiously perused the court file. I saw no defence on record. The Plaintiff/Applicant does not give the date of this defence or indeed the date when the same was filed in Court. The Defendants in their written submissions confirm that they in fact have never filed any defence to the suit.

This court cannot strike out that which does not exist. Where there is no defence on record then there is nothing to strike out. For this reason I find that the present application is incompetent and indeed is a non-starter. The proper course of action for the Plaintiff in these circumstances would have been to seek to have judgment entered in their favour in default of defence. They have not made any such prayer.

The Orders sought in present application are not capable of being granted. Accordingly, I do dismiss this application in its entirety and direct each party to meet its own costs.

Dated in Nairobi this.....day of October, 2018.

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Justice Maureen A. Odero

Ruling delivered at the Nairobi High Court this 19th day of October, 2018.

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JUDGE