REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCICAL AND TAX DIVISION

CIVIL CASE NO. 118 OF 2015

VITABIOTICS LIMITED.....,,,1ST PLAINTIFF

HARLEYS LIMITED.....2ND PLAINTIFF

VERSUS

RIPPLES PHARMACEUTICALS LIMITED.....1ST DEFENDANT

METRO PHARMACEUTICALS LIMITED.....2ND DEFENDANT

RULING

[1] Before the Court for determination is the Defendants' Notice of Motion dated **16 March 2017**. The application was filed under **Sections 1A, 1B, 3, and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 40 Rule 6** of the **Civil Procedure Rules, 2010**, for Orders that:

> **[a]** Spent
>
> **[b]** The Court be pleased to set aside the injunctive orders granted on **9 November 2015** to the Plaintiffs/Respondents;
>
> **[c]** That the Defendants/Applicants be allowed to sell the 11,865 packets of Vitabiotics products that they hold in stock valued at **Kshs. 7,035,510.00;**
>
> **[d]** In the alternative, the 1st Plaintiff do give an undertaking as to the damages for the sum of **Kshs. 7,035,510.00** being the value of the stocks held by the Applicants that the Applicants have been prevented from selling on account of the Orders aforesaid;
>
> **[e]** That costs of the application be provided for.

[2] The application is based on the grounds that it has been 14 months since the Court issued injunctive orders herein; and that the Applicants currently hold in stock 11,865 packets of Vitabiotics products valued at **Kshs. 7,035,510.00** which they had purchased before the Orders aforesaid were granted. The Applicants are apprehensive that the stocks will expire from the months of **March 2018** to **August 2018**, and therefore risk suffering unnecessary and unsecured and unjust loss should the drugs expire before the determination of this case. The application was supported by the affidavit of **Dr. Premal A. Sanghani**, a

Director of the 1st Defendant, sworn on **16 March 2017**; as well as the affidavit of **Niraj Shah**, a Director of the 2nd Defendant, also sworn on **16 March 2017.**

[3] In the affidavit of **Dr. Premal A. Sanghani**, it was deposed that an application for injunction was made by the 1st Plaintiff in this matter; whereupon on **9 November 2015**, the Court granted an Order of Injunction restraining the Defendants from selling the products in issue, which are manufactured by the 1st Plaintiff. It was averred that by the time the Injunctive Order was given, the Defendants already had in stock substantial amounts of the products, which had been purchased on diverse dates; and which are set to expire in the period between **March** and **August 2018**. Annexed to the affidavit of **Dr. Sanghani** are copies of the packaging, bearing the expiry dates, hence the application for the lifting of the Order to enable the Plaintiffs sell the products. It was further averred that no prejudice shall be suffered by the Plaintiffs if such an order is granted; on the other hand if the order is not granted, the Defendants stand to suffer an unnecessary, unsecured and unjust loss.

[4] In the affidavit of **Niraj Shah,** it was similarly averred that the 2nd Defendant currently holds some stock of Vitabiotics drugs whose particulars are set out at paragraph 4 of that affidavit; and that some of the drugs have already expired. It was further averred that the 2nd Defendant shall incur great financial and reputational loss should the rest of the drugs expire before the conclusion of this case; and that it is in the interest of justice and fairness that this application be allowed.

[5] The Plaintiffs opposed the application, contending, vide the Replying Affidavit sworn by **Charles Kuria Maina**, the Country Manager of the 1st Plaintiff, that the instant application lacks merit; is an afterthought; has been made in bad faith; and is an abuse of the process of the Court, bearing in mind that the Defendants have a pending application dated **9 November 2015** which is yet to be determined. It was further averred that the products in question are wholly owned by the 1st Plaintiff herein, by virtue of being the manufacturer and the holder of the registered intellectual proprietary rights thereof both in Kenya and in the United Kingdom. It was further the averment of **Mr. Kuria** that on the face of their application, the Defendants admit to be in possession of the 1st Plaintiff's products illegally and without authority; and therefore, in seeking the Court's authority to sell the said products, they are in effect asking for the Court's intervention to promote an illegality.

[6] The Plaintiffs further contended that the application is an abuse of the process of the Court in that the Defendants already preferred an appeal from the Ruling of **9 November 2015**, and had taken steps to obtain proceedings for purposes of facilitating the appeal in the Court of Appeal. The Court was also urged to note that the Defendants are guilty of material non-disclosure for having failed to disclose earlier that they had such quantities of Vitabiotics products in their possession; and that they continue to conceal the source of the said products to the detriment of the Plaintiffs. Further, it was contended that the Supporting Affidavit sworn by **Niraj Shah** conveniently fails to disclose the dates of manufacture of the products in the possession of the 2nd Defendant; and therefore that the Defendants are not entitled to the exercise of the Court's discretion.

[7] In addition to the foregoing, the Plaintiffs also expressed concern that since it had not authorized the Defendants to import, sell or distribute its products, and given that the products in question are sensitive, requiring proper handling, so that, in the event of the need to exercise the right of recall, it would not be needlessly exposed to the risk of liability for any harm that may occur to the general public by any continued infringement of its rights by the Defendants. Thus, it was the contention of the Plaintiff that such an occurrence would visit on it massive monetary losses which cannot be compensable by way of damages. The Plaintiffs thus urged for the dismissal of the application with costs.

[8] In its written submissions filed herein on **7 June 2017,** the Defendant proposed two issues for determination, namely:

> **[a]** Whether the Court can vacate interim injunctive orders in the interest of justice;
>
> **[b]** Whether an injunction, being an interim relief, can be discharged by effluxion of time.

[9] In my view however, the only issue to consider is whether the injunctive order issued herein ought to be discharge as sought by the Defendant. Learned Counsel for the Defendants, **Mr. Mogere**, cited **Order 40 Rule 7** of the **Civil Procedure Rules** as the provision that gives the Court the discretion to discharge, vary or set aside an injunction. The case of **Harrishchandra Bhovanbhai Jobanputra & Another vs. Paramount Universal Bank Limited & 3 Others [2014] eKLR** to support this argument. The Defendant further submitted that it is evident from Paragraph 20 of the Replying Affidavit that the Plaintiffs are not opposed to the Defendants selling the products so long as certain conditions are met; and therefore that it would be unjust for the Defendants to incur preventable losses, yet the orders sought by the Plaintiffs seemingly are not permanent in nature; and the drugs in issue are readily available in the Kenya market through supermarket outlets. The case of **Mobil Kitale Service Station vs. Mobil Oil Kenya Limited & Another [2004] eKLR** was relied on for the proposition that the orders of injunction cannot be used to intimidate and oppress another party.

[10] It was further submitted that when the interlocutory orders were granted, the presumption was that the matter would be heard and determined within 12 months. The suit having not been disposed with within that prescribed period, the orders automatically lapsed in accordance with **Rule 6 of Order 40, Civil Procedure Rules**. Counsel for the Defendant relied on **Eunice Kavindu Kioko & Another vs. Kenya Commercial Bank Limited [2014] eKLR** in urging the Court to allow the application.

[11] On behalf of the 1st Plaintiff, written submissions were filed herein on **18 July 2017** by **Mr. Masika**, whose argument was that, the 1st Plaintiff having established that the Defendants were infringing on its trademark by distributing and selling Vitabiotics products and obtained an injunction to restrain the infringement, it would be prejudicial to the Plaintiff if the injunctive orders are set aside, given the risk that the Defendants may revert to the impugned acts. It was further the submission of **Mr. Masika** that since the Court has powers to extend time under **Section 59** of the **Interpretation and General Provisions Act, Chapter 2** of the **Laws of Kenya** and **Section 95** of the Civil Procedure Act, all that need consideration is whether the enlargement is necessary for the effectual and complete adjudication of the issues in controversy; and whether it is just and fair to enlarge time in the circumstances of this case. The case of **Caltex Oil (K) Limited vs. Rono Nairobi Civil Application No. 97 of 2008** was cited to buttress the argument that even a default clause imposed by a court does not necessarily deprive a court of its jurisdiction to extend time.

[12] It was the contention of Counsel for the Plaintiffs that the process of readying the case for trial, which includes compliance with the pre-trial requirements set out in the Case Management Practice Directions had to be complied with; and that in all that, the Court still retains the control of the dispute until the case is heard and fully determined. He urged the Court to note that todate, the Defendants have not filed any Defence notwithstanding that they were properly served with the Summons to Enter Appearance on **6 November 2015**. Citing **Sections 1A** of the **Civil Procedure Act,** Counsel argued that the overriding objective of the Act and the Rules thereunder is to facilitate the just, proportionate and affordable resolution of disputes. He urged that since there are serious conflicts of facts that have emerged herein which require resolution by the Court and therefore that, if need be, the Court should be minded to grant a *status quo* order pending the hearing and final determination of this suit.

[13] It is a requirement of **Order 40 Rule 6** of the **Civil Procedure Rules** that:

> **"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."**

Since the provision is couched in peremptory terms, there can be no gainsaying that the interlocutory injunction that was issued herein on **9 November 2015** has since lapsed and is therefore void. That being the case, any order for the setting aside, discharge or varying or even extension of the order would, in my considered view, be inconsequential. As aptly observed by **Lord Denning** in **Macfoy Vs United Africa Company Limited [1961]3 ALLER 1169**:

> **"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no**

need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[14] Having so held, the question that then arises is what the implications of the finding aforesaid on the subject matter of the suit are. By subject matter is meant the products that were the object of the injunctive order. One natural consequence that flows from the invocation of the provisions of **Order 40 Rules 6** and **7** of the **Civil Procedure Rules**, is that the Respondents would be at liberty to sell the products, for which they have sought leave herein. However, as rightly pointed out by the Applicants, that would work out injustice, as it would serve to perpetuate the wrong that made them come to court for injunction. It is a cardinal precept that no court should aid or be seen to be aiding an illegality. In***MapisInvestment (K) Ltd vs. Kenya Railways Corporation[2005] 2 KLR 410***the Court of Appeal cited with approvalthe remarks of ***Lindley L.J***in***Scott V Brown, Doering, McNab & Co(3) [1892]2 QB 724, at 728***as follows:

> ***"Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences.No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him." (Emphasis added).***

[15] Accordingly, sanctioning the sale by the Defendants of the subject products would be inappropriate in the circumstances. However, it is also a fact that the products' shelf life is about to expire. Thus, the orders that commend themselves to me would be to grant a *status quo* order that would ensure the continued preservation of the drugs pending the hearing and final determination of the suit; and that the matter be fast tracked to hearing and final determination. In the premises, the Defendant's application is dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2017.

OLGA SEWE

JUDGE