



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NUMBER 118 OF 2015**

**HARLEYS LIMITED.....PLAINTIFF**

**VERSUS**

**RIPPLES PHARMACEUTICALS LIMITED.....1<sup>ST</sup> DEFENDANT**

**METRO PHARMACEUTICALS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 12<sup>th</sup> March 2015 was brought pursuant to the provisions of Sections 1, 1A, 1B, 3, 3A, 63 (e) of the Civil Procedure Act Chapter 21 of the Laws of Kenya, Order 40 Rules 1, 2, 3, 4 & 10 and order 51 Rule 1 of the Civil Procedure Rules of 2010. Prayer Nos (1) and (2) were spent. The Plaintiff indicated that it would not pursue Prayer Nos (3) and (6) It sought the following remaining orders:-

1. Spent.

2. Spent.

3. Spent.

4. **THAT an injunction do issue restraining the Defendants whether by themselves, servants, agents, employees or otherwise howsoever from removing any vitabiotic products or packaged products paper bearing the marks similar or confusingly similar in get up to the trademarks owned by vitabiotics limited including those in their various outlet operating in the territory of Kenya, from the jurisdiction of this court disposing, interfering with, selling, distributing or otherwise dealing with them in any way whatsoever, pending full hearing and determination of this suit.**

5. **THAT the Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from importing, packaging, supplying or offering for sell or otherwise dealing with vitabiotics products or packaging products bearing the marks similar or confusingly similar in get up to the trademarks owned by vitabiotics limited in the territory of Kenya as the applicant has exclusive rights over vitabiotics products in the territory of Kenya pending the hearing and determination of this suit.**

**6. Spent.**

**7. THAT the costs of the application be provided for.**

**THE PLAINTIFF'S CASE**

2. The Plaintiff's application was supported by the Affidavit Ravi Soni, the Plaintiff's Finance Manager that was sworn on 12<sup>th</sup> March 2015. Dr Rupen Haria, a Director of the Plaintiff company swore a Further Affidavit on 27<sup>th</sup> April 2015. The same was filed on 29<sup>th</sup> April 2015. The Plaintiff's Written Submissions dated 11<sup>th</sup> May 2015 and filed on 12<sup>th</sup> May 2015.

3. It stated that on 23<sup>rd</sup> May 2013, Vitabiotics Limited (hereinafter referred to as "the Company") situated in England appointed it as the exclusive agent, importer and distributor of vitabiotics products (hereinafter referred to as "the Products") for a period of twenty four (24) months.

4. It contended that the Defendants were initially dealing with the Products but that their services were terminated by the Company. It averred that contrary to its exclusive distributorship of the Products, the Defendants were distributing the Products bearing similar marks or confusingly similar in get up to the trademarks owned by the Company in various outlets in Kenya without authority which was an infringement to its exclusive rights over the Products in Kenya thus prejudicing its interests and causing it to suffer loss and decline in sales.

5. It was its averment that it had not been able to meet its targets and that if the Defendants were not restrained from their illegal dealing with the Products, it would suffer irreparable loss and damage. It attributed its delay in filing its application on the ground that they only came in possession of proof that the Defendant was dealing with the Products in March 2015 and urged the court to grant it the orders it had sought in its application.

**THE DEFENDANTS' CASE**

6. In opposition to the said application, on 13<sup>th</sup> April 2015, Dr Premal A Sanghani, a Director of the 1<sup>st</sup> Defendant company swore a Replying Affidavit on behalf of both Defendants companies. The same was filed on 16<sup>th</sup> April 2015. The Defendant's Written Submissions and List and Bundle of Authorities were both dated 19<sup>th</sup> May 2015 and filed on 20<sup>th</sup> May 2015.

7. The Defendants contended that the Plaintiff knew that it was dealing with the said Products as was evidenced in the several invoices it had relied upon and that it had actually engaged them to further its business. It was their averment that the Plaintiff had filed its application towards the end of their distributorship agreement and that if the injunction was granted, it would prevent them from engaging in the business beyond the expiry of the said contract.

8. They denied having infringed on the Plaintiff's trademark and stated that even if they had, the Plaintiff did not have the *locus standi* to institute the proceedings herein as the Company was the proper complainant. They also contended that there was no privity of contract between them, the Plaintiff and the Company and could therefore not be bound by the same. Further, they averred that the Pharmacy and Poisons Board of Kenya had not complained that they had compromised the standards of the Products which were sold over the counter over various supermarkets in Kenya.

9. They therefore urged the court to dismiss the Plaintiff's present application with costs to them as the Plaintiff was not entitled to the injunctive orders that it had sought.

**LEGAL ANALYSIS**

10. During the pendency of the application herein, the Plaintiff furnished the court with an Appointment of Renewal for Kenya of the distributorship of the Products dated 18<sup>th</sup> May 2015. The same was filed in

court on 20<sup>th</sup> May 2015. The Defendant's counsel did not have objection to the same being considered by the court for purposes of extending the interim orders that had been issued on 30<sup>th</sup> April 2015. It was on the basis of this letter that the court extended the interim orders as it made a determination of the dispute herein as the said distributorship agreement would be in place until 17<sup>th</sup> May 2015, unless terminated earlier.

11. It did appear to the court that the following were the issues for its determination:-

- a. **Whether the Defendant's Replying Affidavit was defective?**
- b. **Whether or not the Plaintiff had *locus standi* to institute the proceedings herein?**
- c. **If so, was the Plaintiff entitled to the orders it had sought in its application?**

12. The court found it prudent to address the question of the competence of the Defendant's Replying Affidavit as a preliminary issue as this would have the effect of it finding whether or not the present application was unopposed.

13. The Plaintiff's first contention was that the entire Replying Affidavit by Dr Premal A Sanghani consisted of advise of the Defendants' advocates and there was nothing expressly factual and directly from the deponent himself. It averred that the same was improperly sworn as he did not disclose his source of authority.

14. Its second contention was that the swearing of the said Replying Affidavit by the said deponent, on behalf of the 2<sup>nd</sup> Defendant, without the Board Resolutions of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant companies amounted to an illegality.

15. It placed reliance on the case of **East Africa Portland Cement Ltd vs Capital Markets Authority & 4 Others [2014] eKLR** in which Njage J (as he then was) cited the case of **HCCC No 524 of 2004 Affordable Homes Africa Limited vs Ian Henderson & 2 Others** and held that it was not a procedural technicality as contemplated under the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 to require a company to authorise any legal proceedings brought in its name, a position that this court wholly agreed with.

16. The Defendants did not submit on or address the two (2) issues in their Written Submissions despite having been given notice of the same in the Plaintiff's Written Submissions which were presented to court before they filed their submissions.

17. The court perused the said Replying Affidavit and noted that the same only contained information whose source was the Defendants' advocates. The court was not aware of the provision of the law that precluded a deponent from contending that he had been advised by his advocates of issues in the entire affidavit where he has disclosed the source of his information, as in this case.

18. Indeed, the proviso to Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 stipulates that in interlocutory proceedings like in this case, an affidavit could contain statements of information and belief showing the sources or the grounds thereof. The court was therefore of the view that to that extent, the said Replying Affidavit was not improperly sworn.

19. Regarding the second issue, the court agreed with the Plaintiff that a company would be required to pass a board resolution authorising a director to file pleadings on its behalf. Niraj Shah, a Director of the 2<sup>nd</sup> Defendant company together with Dr Wafula Ripu executed Letter of Authorisation on 10<sup>th</sup> April 2015 authorising Dr Premal A. Sanghani to swear all necessary pleadings in the said suit on behalf of the 2<sup>nd</sup> Defendant.

20. Notably, the 2<sup>nd</sup> Defendant was a corporation within the meaning of Order 9 Rule 2 of the Civil

Procedure Rules. The only recognised agent in respect of a corporation is an officer of the corporation duly authorised under the corporate seal.

21. In view of the foregoing, the aforesaid letter of Authorisation was of no legal effect as it was not authorised under the seal of the 2<sup>nd</sup> Defendant and that in any event, it is only an officer of the 2<sup>nd</sup> Defendant who could do any act on its behalf.

22. It therefore follows that the said Dr Prenal A Sanghani could not purport to swear the Replying Affidavit on behalf of the 2<sup>nd</sup> Defendant. For all purposes and intent, the 2<sup>nd</sup> Defendant did not file any response in opposition to the Plaintiff's present application.

23. The question that therefore arises is whether or not the court should consider the Defendant's Replying Affidavit when determining this matter. It is clear from the provisions of Order 19 Rule 6 of the Civil Procedure Rules that a court can strike out from any affidavit, any matter which is irrelevant.

24. The swearing of the said Replying Affidavit by the said Dr Premal A. Sanghani on behalf of the 2<sup>nd</sup> Defendant was irrelevant as it was irregular. In that regard, the court hereby strikes out that part in Paragraph 1 of the said Replying Affidavit that indicated that the deponent was swearing the said Replying Affidavit **"on behalf of the 2<sup>nd</sup> Defendant"**.

25. Despite striking out of that part of the said Replying Affidavit or the irregularity in the form thereof, the court could nonetheless receive the Replying Affidavit as could be seen in Order 19 Rule 7 of the Civil Procedure Rules. It was thus clear that the contents in the said Replying Affidavit were an adequate response to the Plaintiff's present application.

26. Turning to the substantive issues, the court noted that it was not in dispute that the Company had appointed the Plaintiff as its distributor of the Products. This was evidenced in the Letter of Appointment for Kenya dated 23<sup>rd</sup> May 2012, a fact that was acknowledged by the Pharmacy and Poisons Board of Kenya (hereinafter referred to as "the Board") and further extended by the Company on 18<sup>th</sup> May 2015. It was also not in dispute that the Products were listed with the said Board as shown in the Kenya Gazette dated 21<sup>st</sup> March 2014 regarding application for registration of dietary substances in line with the WHO Regulations that were relied upon by the Plaintiff.

27. Before the court could consider any of the contentious issues, it was of the view that the pertinent question of whether or not the Plaintiff had the *locus standi* to file the proceedings herein had to be disposed of first.

28. A perusal of the Letter of Authorisation dated 23<sup>rd</sup> March 2013 to the Board attached to the Plaintiff's Supporting Affidavit marked "RV 1c", was by the Company. The Board's letters dated 14<sup>th</sup> June 2013 and 30<sup>th</sup> October 2014 also attached to the Plaintiff's Supporting Affidavit that was marked "RV 1b" and to the Further Affidavit marked as "RH 3b" respectively show that the same were addressed to the Company through the Plaintiff's postal address. The listing of the food supplement was also issued to the Company and not to the Plaintiff. The dealings were clearly between the Board and the Company with the Plaintiff being a go-between in respect of the correspondence that was being exchanged between them.

29. While the Plaintiff argued that it was necessary that the Defendants be restrained from distributing the Products based on the principles of traceability and recall from the market in case the Products harmed the general public, it was abundantly clear that any cause of action could only lie against the Company and not against the Plaintiff, which was merely a distributor of the Company's Products.

30. The court was clear in its mind that in case of such an eventuality, the Plaintiff could not be said to be the one that would suffer loss and damage necessitating the granting of an interlocutory injunction herein. Indeed, the court was not sure what would be left for hearing during the trial of the suit herein if the said interlocutory injunction was granted for the reason that the Plaintiff was not the manufacturer of the

Products and would not be held liable if the general public was harmed by such Products.

31. Appreciably, the Plaintiff could not purport to police the dispensation or safety of the Products in the Kenyan jurisdiction as it was neither the manufacturer nor the Board. It was only the Company that could pursue the Defendants as they were distributing its Products despite its termination of its distributorship agreement with them.

32. As was evident in the Company's letter dated 26<sup>th</sup> August 2014 marked as Exhibit "RV 1c", the Company had stated as follows:-

**"To Whom it May Concern**

**...Please note Ripple Pharmaceuticals or Metro Pharmaceuticals are not authorised to import or sell Vitabiotics products in the territory of Kenya. We will take all necessary actions to stop the unauthorised sale of Vitabiotics Products (emphasis court) which has a negative effect on the credibility of our reputable Kenyan Distributor, Harleys and goes competly (sic) against Vitabiotics' code of business."**

33. As there was a previous agreement between the Company and the Defendants, the Plaintiff could not purport to act on behalf of the Company. In any event, just as the Plaintiff had correctly submitted, it could not bring proceedings on behalf of another corporate without a board resolution from the Company authorising it to commence proceedings on behalf of the Company, if at all. It was therefore evident that the Plaintiff therefore had no *locus standi* to institute the proceedings herein.

34. Having found that the Plaintiff had no *locus standi* to institute the proceedings herein, it could not therefore purport to restrain the Defendants from dealing with Products in the manner it had set out in Prayers (4) and (5) of its application for the reason that it was not the manufacturer of the said Products and it could not claim the trademarks. It did not demonstrate to the court that it had registered the said trademarks as is provided in the Trade Marks Act Cap 506 (Laws of Kenya).

35. There was, indeed, no evidence that the Products the Defendants were distributing bore marks that were similar or confusingly similar in get up to the trademarks owned by the Company. In fact, the Defendants had admitted that it was distributing the exact Products as the Plaintiff herein and hence an infringement of the trademarks did not obtain. The court did also note that Defendant's submission that the said products could also be found in super-markets in the Kenyan territory.

36. The fact that the Plaintiff admitted in its prayers that the trademarks were owned by the Company, the question of it seeking orders to restrain the Defendants from dealing in Products that bore marks that were similar or confusingly similar in get up to the trademarks owned by the Company could not in any way arise. In this respect, it was irrespective that it had exclusive rights over the Products in the territory of Kenya.

37. Just as the court found that interlocutory injunction could not be granted because it would be difficult to identify the issue that would be heard at trial if the public was harmed by the Products for the reason that the Company would be responsible for such harm, the court could also not find any issue that would warrant the hearing of the suit at full trial when the Plaintiff did not even own the trademarks it was seeking to restrain the Defendants from using.

38. The Defendants rightly submitted that the Plaintiff could not purport to seek the orders herein for the sole purpose of lessening competition as no exemption had been sought under the provisions of Section 21 of the Competition Act, 2010.

39. Section 21 of the said Competition Act provides as follows:-

**1. Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or**

**lessening of competition in trade in any goods or services in Kenya, or part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section C of this part.**

**2. Agreements, decisions and concerned practices contemplated in subsection (1), include agreements concluded between-**

**a. Parties in a horizontal relationship, being undertakings trading in competition; or**

**b. Parties in a vertical relationship, being an undertaking and its suppliers or both.**

**3. Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which-**

**a. ....**

**b. divides markets by allocating customers, suppliers, areas or specific types of goods or services...**

40. Appreciably, the distributorship agreement between the Plaintiff and the Company would fall within what could be considered **“concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya”** and for which no exemption was shown to have obtained by the Company. This section did not in any way exclude the Products as had been submitted by the Plaintiff.

41. Accordingly, having considered the pleadings, the affidavit evidence, the oral and written submissions and the case law in support of the parties' respective cases, the court came to the conclusion that the Plaintiff had imposed upon or assigned itself the mandate belonging to the Company, the Board and KRA to pursue the Defendants for whatever it thought they were supposedly doing wrong.

42. The Plaintiff's assertions that the Defendants were not paying taxes was not a dispute that was before the court for determination. The court could not therefore adjudicate the same as that was within the purview of Kenya Revenue Authority (KRA). Further, the fact that the Board had at one point warned the 2<sup>nd</sup> Defendant of its illegal parallel imports of Durex products in Kenya that were being to be imported by M/S Reckitt Benckiser, Kenya as was evidenced in the letter dated 1<sup>st</sup> April 2015 and marked “RH 2a”, was irrelevant in the circumstances of this case.

43. It appeared to the court that the Plaintiff's major concern was that it was not meeting its targets while the Defendants were continuing to make enormous profits. This was not a ground that could persuade this court to grant the Plaintiff an interlocutory injunction as it had sought.

44. Having applied the principles of granting an interlocutory injunction pending the hearing and determination of the suit herein against the facts of this case, this court was not satisfied that this was an appropriate case for it to exercise its discretion in favour of the Plaintiff herein. It did not meet the criteria that was set out in the case of **Giella vs Cassman Brown Company Limited (1973) EA 358** or the other cases it had placed reliance upon.

45. Instead, the court found and held that the Plaintiff did not remotely demonstrate that it was entitled to the orders that it had sought. Granting the said orders would create an absurdity as the Plaintiff was not the owner of the trademarks it was seeking to protect, and which it admitted were owned by the Company.

## **DISPOSITION**

46. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 12<sup>th</sup> March 2015 was not merited and the same is hereby dismissed. Costs shall be in the cause.

47. For the avoidance of doubt, the injunctive orders that were issued by this court on 30<sup>th</sup> April 2015 are hereby vacated and set aside.

48. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of May 2015

**J. KAMAU**

**JUDGE**