



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

HCCC. NO. 516 OF 2014

MEDIPOINT PHARMACEUTICALS LT.....PLAINTIFF

VERSUS

MAGANN PHARMACEUTICAL LTD.....DEFENDANT

RULING

[1] By motion dated 23.3.2015 the Plaintiff/Applicant seeks an Order for striking out defence filed herein and the judgment to be entered as prayed in the Plaintiff.

[2] The application is hinged on the provisions of Order 2 Rule 15(1) Civil Procedure Rule 2010. The same motion is predicated on the grounds that the statement of defence discloses no reasonable defence. The affidavit admits the debt owed to the Plaintiff. The Defendant issued Plaintiff with several postdated cheques being payment of the same debt but they were all dishonoured on account of insufficiency of the funds in the Defendant's account.

[3] The parties agreed to canvass the application by way of written submissions. On record it is noted that, only the Plaintiff filed and served the submissions.

[4] The Plaintiff's case is that on diverse dates between May and July 2014 the Plaintiff delivered to the Defendant goods worth Ksh.42, 757,135/61 which Defendant received. It was agreed that the aforesaid amount was to be paid within 60 days from date of the invoice.

[5] The Defendant issued postdated cheques for the amount as was the practice between two parties. When the cheques were presented for payment, the same cheques were dishonoured as the account had no sufficient funds. A demand notice with intention to sue was issued to the Defendant but same was not honoured and thus the lodging of the instant suit herein.

[6] The Defendant filed defence dated 18.12.2015 admitting the claim and issuing the cheques. The Defendant has not made good in payment of the debt subject of the claim. Order 2 Rule 15(1) Civil Procedure Rules Cap 21 states that;

'At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that;- it discloses no reasonable cause of action or defence in law'.

[7] To support the argument that the court has power to strike out a pleading the Applicant refer to **Blue Sky Epz Limited vs. Natalia Polyakova & Another (2007) Eklr** where the court struck out the defence and entered judgment against the defendant and stated the following:

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.....”

[8] In another case of **BLUE SKY EPZ ltd Vs. NALIA & ANOTHER (2007)**, the court emphasized the impact of the aforesaid provisions. It reiterated that for a defence to be saved from striking it must raise triable issues. In the case of **National Bank of Kenya Limited vs Daniel Opande Asnani (2002) Eklr** the judge held that:

“The law is now settled and it is that the admission upon which a court of law will act to strike out a Defence and enter judgement must be clear and unambiguous. The same admission need not be in the pleadings only. It can be discerned in any other way.....I am satisfied that the debt herein had been admitted.....I do allow the application.”

[9] The respondent submit that the application by the Applicant is bad in law and incompetent as it willfully fails to make full and frank disclosure of all material facts known to the applicant.

[10] The respondents cites the case of **D.T Dobie & Company Limited vs Muchina (1982) KLR1**, where the Court stated.

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the courts itself is not usually informed so as to deal with the merits without discovery”, without oral evidence tested by cross-examination in the ordinary way”.

He also relies on the case of **Jackson Ngecho Kimotho vs Equity Bank Limited & Another (2013) eKLR**, where the Court stated:

“The law relating to the exercise of judicial discretion to strike out a pleading or a suit for that matter are trite. That is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. Therefore if a pleading raises a triable issue even if at the end of the day it may not succeed, the suit ought to go to trial since in civil litigation as opposed to criminal trials there is no provision for holding mini-trials or a trial within a trial. However where the suit is without substance or groundless or fanciful and or is brought or is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be as a forum for such ventures since to do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

[11] After going through the pleadings herein, I am satisfied that the debt herein has been admitted. It is not in dispute that the Defendant has not paid for the goods. The Defendant has admitted in his defence that he was not able to pay for the goods because his customers left the country. Further the Defendants response to the Plaintiff’s demand letter was to make a repayment proposal dated 13th August 2014 on page 114 of the bundle of documents, which he even did not honour. He admits indebtedness in the sum of Kshs. 42,757,135.61/= through issuing of the Post-

dated Cheques and giving a repayment proposal. In fact the Defendant contention is that the postdated cheques were presented for payment whereas it had furnished them as a commitment.

[12] The Defendant issued Post-dated cheques to the Plaintiff to demonstrate commitment with no intention of paying for the goods which is tantamount to fraudulent misrepresentation.

[13] Based on the above facts the Defendant's defence is therefore to be struck out and judgment entered as prayed, thus the court makes the following orders.

1. Prayer No.1 of the Motion dated 23.3.2015 are granted.

Dated, signed and delivered in court at Nairobi this 29th day of September, 2015.

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C. KARIUKI

JUDGE