



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT

CIVIL SUIT NO. 413 OF 2007

KARURI STORES PHARMACEUTICALS LIMITED.....PLAINTIFF
VERSUS
KILIMANJARO PHARMACY LIMITED.....1ST DEFENDANT
KWELI WAINAINA JOHN.....2ND DEFENDANT
HARRISON NDUNGIRE MUCHINA.....3RD DEFENDANT
MAKANGA JOHN.....4TH DEFENDANT

RULING

By a Plaint dated 13th August, 2007, and filed on the same date, the Plaintiff has sued the 1st, 2nd, 3rd and 4th Defendants herein seeking judgment against them jointly and severally as follows:-

- (a) An injunction restraining the 2nd, 3rd and 4th Defendants from resigning as shareholders, directors members of the 1st Defendant and selling or disposing off (sic) their shares.**
- (b) The corporate veil of the 1st Defendant be lifted.**
- (c) Kshs. 17,630,903.90.**
- (d) Interest and costs of the suit.**

The cause of action is said to have arisen from an oral agreement alleged to have been “**evidenced in writing**”, by which the Plaintiff sold to the Defendants assorted Pharmaceutical Products delivered on diverse dates, as represented by copies of invoices and delivery notes within the Plaintiff’s custody, all valued at the claimed sum of Kshs. 17,620,903.90.

Defences were duly filed in respect of the four Defendants subsequent to which the 4th Defendant served the Plaintiff with a Request for Particulars dated 27th October, 2008, requesting that particulars of the Plaint be furnished as follows:-

“1. Of paragraph 6, the date, the time and place the oral agreement was entered into, the names

of the persons present when the agreement was entered into and the terms of agreement.

2. Of paragraphs 6 and 7, specify the goods supplied to the 4th Defendant and the delivery notes and invoices raised in respect of the said supplies.

3. Of paragraph 9 the dates, the time and place the goods were orally ordered for by the 4th Defendant specifying the quantities ordered for in each instance”.

On 2nd March, 2010, the Plaintiff filed and served their Answer to the Request of Particulars as follows;-

“1. Of paragraph 6;

On various dates and times between 31/08/2002 upto 30/04/2007, Mr Makanga John was present. The terms of the Agreement was supply of Pharmaceutical products and payment on credit terms by cheque. Attached are copies of the unpaid cheques

2. Of paragraphs 6 and 7; the goods were assorted pharmaceutical products. Attached is a copy of specimen list of products.

3. Of paragraph 9; see answers to paragraphs 6 and 7 together with documents attached”.

Being dissatisfied with the answer provided the 4th Defendant then filed the present Chamber Summons dated 11th August, 2010 praying for orders as follows;-

1. THAT the Plaintiff do provide further and better particulars of its claim in answer to the Request for Particulars dated 27th October, 2008 within 14 days of this Honourable Court’s order.

2. THAT in default of (1) above paragraphs 6, 7 and 9 of the Plaint in as far as they relate to the 4th Defendant/Applicant be struck out.

3. THAT the Plaintiff/Respondent bears the costs of this application.

The 4th Defendant/Applicant contends that the answer provided falls short of providing sufficient particulars of the Plaintiff’s claim and that in the circumstances the omission is prejudicial to the 4th Defendants defence and an abuse of the process of court. For that reason the applicant prays that this court orders the Plaintiff/Respondent to provide further and better particulars of its claim in default of which paragraphs 6, 7, and 9 of the Plaint be struck out in as far as they relate to the 4th Defendant. The Plaintiff/Respondents insist that the particulars as provided in their answer are adequate and that this application is only intended to delay justice. They have asked the court to dismiss it with costs.

The purpose of the requirement that particulars of any pleading be furnished is to avoid any party against whom a claim is made, being embarrassed at the trial. Regarding the answers furnished, the Plaintiff/Respondent has reiterated the same in the Replying Affidavit of Mr. Jitendra Shantilal Patel at paragraph 5 he depones as follows;-

“THAT I am informed by my advocates on record, which information I verily believe to be true that the further particulars that the 4th Defendant seeks shall be adduced orally in court.”

In my considered view, the above proposition goes against the known principles of pleading. The 4th Defendant has stated in his defence that any deeds performed by him, as may be relevant to this suit, were done under the authority of the 1st defendant and on its behalf. He is alleged, under paragraph 8 of the Plaint, to have signed a cheque in part payment of the alleged invoices and under paragraph 9, together with the 1st, 2nd and 3rd Defendants, to have by way of an oral contract, assumed personal liability for the sums said to be due and owing to the Plaintiff. Under paragraph 5 of the Plaint, he is alleged to have

been a non-director/shareholder of the 1st Defendant which he has controverted under paragraph 4 of his Defence dated 24th September, 2008.

The sums sought herein are by no means small. The Plaintiff claims the same as against the Defendants jointly and severally and also prays for the drastic order of lifting the 1st Defendant's veil of incorporation. The answer given in respect of the particulars of the oral contract only specifies that the 4th Defendant/Applicant was present when the oral agreement for supply was made, between 31st August, 2002 and 30th April, 2007, a period spanning five years or thereabouts. Nothing is said as to the identity of parties to the oral communications. Neither is the Plaintiffs' own representative in the same specified.

In view of the claims made against the 4th Defendant and the Defence he has filed in reply thereto, I am of the considered opinion that further and better particulars as are sought herein are both necessary and relevant; and that failure to furnish the same, particularly in view of paragraph 5 of the Replying Affidavit, would be prejudicial and embarrassing to the 4th Defendant. The said paragraph and the averment that the oral agreements are evidenced in writing, presupposes that the said particulars are available, in which case the Plaintiff's refusal to furnish the same as requested is not justified.

For these reasons I allow the application and order that the particulars sought be furnished within 21 days from today.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND day of DECEMBER, 2010

M. G. MUGO
JUDGE

In the presence of:

Mr. Omolo For the Applicant

Ms Mingi holding brief for Mr. Wandabwa For the Respondent