



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 84 of 2009

NIMIA PHARMACEUTICALS LTD..... PLAINTIFF

VERSUS

ACACIA APOTHEKE TWO LTD.....DEFENDANT

RULING

Default judgment was entered in favour of the plaintiff on 21st April 2009, for the sum of Kshs.3, 722,462.32 against the defendants. The plaintiff instituted execution proceedings which prompted the filing of the Chamber Summons dated 28th July, 2009. The plaintiff seeks for following orders:-

- (1) That there be a stay of execution herein pending the hearing and determination of this application inters partes.**
- (2) That there be a declaration by this honourable court ha the attachment carried out by the plaintiff's duly appointed agents and/or servants Messrs Daystar Auctioneers on 23rd July, 2009 is illegal, wrongful and void ab nitio.**
- (3) That the court do issue an order directed at Messrs. Daystar auctioneers;**
 - (a)to refund forthwith the sum of Kshs.400,000/= to the Defendant; and**
 - (b)To release to the Defendant forthwith motor vehicle registration number KAV 546L.**
- (4) That the court does order the plaintiff to settle the auctioneers fees.**
- (5) That the court do order that the decretal sum herein be settled by way of equal monthly installments of Kshs.200,000 with effect from 31st August, 2009 or other period as this court may direct and thereafter at the end of each subsequent month until payment in full.**
- (6) That the costs of and incidental to this application be costs in the cause.**

This application is supported by the grounds stipulated on the body thereto, and the supporting affidavits by Mr. Alex Mwenda sworn on 28th July, 2009 and a further affidavit sworn on 14th August, 2009. briefly stated, the defendant/applicant is challenging the execution carried out by Daystar Auctioneers which they contend was illegal because the requisite (10) ten days' notice as provided for under Order XXI Rule 6 of the Civil Procedure Rules was not effected. The auctioneers also failed to issue a proclamation as required under the auctioneer's rules. When the auctioneers went to attach the defendants goods, they were forced to pay a sum of Kshs.400, 000/= as auctioneers fees due to duress, the defendant is now

claiming the refund of the same money.

It was also argued that the acknowledgement stamps and signature affixed on the proclamation orders did not belong to the defendant's and also the signatures were not those of their employees. They annexed their official stamp and signatures which are said to be different from those appearing from the proclamation order. In addition, the defendant is seeking to be allowed to settle the decretal sum by installments of Kshs.200, 000/= with effect from 31st August 2009, and thereafter at the end of each subsequent month until full payment. As a sign of good faith the defendant has already issued a cheques of Kshs.1, 000,000/= towards the decretal sum.

It was submitted that payment of the decretal sum by installment will enable the defendant continue to do business with the plaintiff which has in any event been continuing in spite of this suit and it is in the interest of both parties that the matter be resolved amicably. The defendant has annexed copies of audited accounts to show their financial position. He has also annexed documents to show there are other creditors where the defendant has been sued. The defendant is therefore not able to pay the decretal sum in one lump sum.

This application was opposed by the plaintiff, among the grounds of opposition, the application was faulted because it was based on the wrong provisions of the law. Counsel urged the court to be guided by the case of **Muniu versus Giovanni EALR (1995-1998). EA page 218**. Secondly, the application was opposed for seeking orders against an auctioneer who is not a party to these proceedings. The sum of Kshs.400, 000/= was paid to the auctioneers and the defendant's remedy lies in filing a complaint against the auctioneers before the auctioneers Board. The plaintiff contends that the ten days notice was issued on 23rd April, 2009.

On the contention that the rubberstamps affixed on the proclamation did not belong to the defendants, counsel submitted that the defendants were duly served with the summonses to enter appearance which they have not denied. If they wanted to demonstrate the difference on the acknowledgement stamps, they should have annexed the stamp they affixed on the summonses when they were served. Moreover there is no affidavit by the receptionist who is denying service. Another interesting scenario is the whole suit was compromised when the defendant paid a cheques of Kshs.1, 000,000/= and gave postdated cheques for the entire outstanding sums.

It is not proper for the defendant to ask the court to stop the payment of postdated cheques which they claim to have paid under duress. Execution is always done under duress to compel a party who refuses to pay his debts. In any event, the defendant did not even disclose when they obtained the exparte orders that they had issued postdated cheques. Counsel was of the view that, it is unconscionable for the court to stop the payment of postdated cheques and allow payments by installments because circumstances, under which the debt arose, must also be looked into.

The debt became due in 2007 after the defendant issued bouncing cheques for goods supplied. The defendant has not shown the court what they did with those goods and the fact the defendant has other debtors is no good reason to stop the plaintiff from recovering their own debt. The statements of accounts attached are not credible because the defendants are busy opening new branches including one at up market place called Westgate Mall. They have assets to pay the debt, moreover the defendant's conduct is not deserving of the exercise of this court's discretion.

Having set out the summary and the gist of the rival submissions, the applicant is challenging the execution and also seeking for leave to settle the decretal sum by installments of Kshs.200,000/=. They also seek for a refund of Kshs.400, 000/= which they claim was paid to the auctioneers under duress. The execution against the defendant is as a result of a default judgment entered against the defendants. The defendants deny that they were issued with ten days notice of entry of judgment and that they were served with the proclamation order as provided for under the Auctioneers Act. They deny the signatures on the proclamation and also the stamp purportedly affixed on the proclamation.

On the part of the plaintiff, they have annexed a letter dated 23rd April, 2009 duly acknowledged and

signed by the defendant. Regarding the proclamation, these are complaints against the auctioneer who is not a party to this suit. The allegations of forgery are serious allegations which the defendant should forward to the auctioneers board, because the auctioneer is not a party to this suit thus no orders can be made against them. The record shows that judgment was entered and the warrant of attachment was issued to Daystar Auctioneers. The notification was served upon the defendants on 23rd July, 2009 upon the defendants, after which they gave a proposal of payment and issued several postdated cheques up-to 31st January, 2010.

When considering a claim of this nature, the circumstances under which the debt was incurred should also be brought to bear. This was a debt for goods supplied by the plaintiff to the defendant. The defendant issued bouncing cheques. This was followed by a suit which the defendant did not defend and default judgment was entered. Does the defendant deserve an order of stay and leave to pay the decretal sum by way of installments? The principles to guide the court on whether to allow the settlement of decretal sum by installments are well settled. Firstly, this court has unfettered discretion to allow payment of the decretal sum by installments, but in all matters involving the exercise of discretion, it is exercised on the basis of the principles of law and the evidence before the court. In this respect I have to consider the circumstances, under which the debt was incurred, the conduct of the defendant, their financial position and the bona fides in offering to pay a fair portion of the debt.

As regards the financial circumstances of the defendant, this debt arose as a result of goods supplied. The defendants have not said what they did with the goods, such that they cannot pay for them. The defendant has annexed documents to show other creditors who are pursuing them but in my humble view, the existence of other creditors cannot stop the plaintiff from recovering their own debt, indeed the existence of other creditors presents further risk as to recovery. The defendant's financial statement is for the year 2007 but no bank statements have been annexed to show the current financial position of the defendants. This has to be considered against the background that indeed the defendant is carrying on business and even opening new branches in up market shopping malls.

Borrowing from the decision in the case **of Rajabali Alidina versus Remtulla Alidina and another 1961 EA page 565 as per Law J** the Judge while dealing with a similar issue as this one, expressed himself as follows:-

“A debtor must show sufficient reason for indulgence and the matters to be taken into consideration by the court are the circumstances in which the debt was incurred and the financial position, conduct and bona fides of the debtor.”

Taking the totality of the evidence in this matter and based on the above analysis, I find the applicant does not deserve the exercise of this court's discretion. There are no compelling reasons why the plaintiff should be denied the fruits of their litigation by an order of stay. I have already indicated if the defendant has a complaint against the auctioneers they are not parties to these proceedings and the plaintiff in any event is at liberty to pursue the matter with the auctioneers Board.

The application is dismissed with costs to the respondent.

Ruling read and signed on 21st August, 2009.

M. K. KOOME

JUDGE