



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 378 of 2009

VETERAN PHARMACEUTICALS LIMITED PLAINTIFF

VERSUS

PHARMACY AND POISONS BOARD 1ST DEFENDANT

VETERAN AFRICA LIMITED 2ND DEFENDANT

RULING

By an amended chamber summons brought under **Order XXXIX** of the Civil Procedure Rules, the applicant is seeking inter alia for an order directing the 1st defendant, his employees, servants and agents to re enter the name of the plaintiff in its register as the sole agent of Korea United Pharm. Inc. pending the hearing and determination of the suit. Secondly, this honorable court is pleased to grant the plaintiff/applicant a prohibitory order restraining 1st defendant/respondent, its servants and/or agents from further dealing with the 2nd defendant pending the hearing and determination of this suit. Lastly a declaration that the plaintiff/applicant is the bona fide agent of Korea United Pharm Inc. in the country.

This application is premised on the grounds stipulated on the body thereto, and the supporting affidavit of **Dr. Robert Kamau Ngige** sworn on 30th July 2009. According to the applicant, the 1st defendant had a contract made way back in October 2007, under which it was supposed to supply pharmaceutical products from Korea to the Kenyan market. In December 2008, the applicant was removed from the register of the 1st defendant although he was not given any communication. The applicant got to know about the removal in April 2009. They have contracts to supply goods made in Korea to the Kenyan market as the sole agents. This agency is verified by a letter dated 3rd February 2009 by Korea United Pharm Inc. that they are represented in Kenya by the applicant to deal with certain products. The applicant also applied for the registration of the products from Korea United Pharm Inc. with Ministry of Medical Services Pharmacy and Poisonous Board.

This application was opposed by the respondents who in addition to filing a replying affidavit filed grounds of objections on points of law. Firstly, it was argued that the chamber summons was amended without the leave of the court. The plaintiffs' purported to withdraw the original chamber summons dated 24th July 2009 by merely filing a notice of withdrawal on 4th August 2009. The prayers sought by the applicant were also faulted for failure to specify the exact orders sought by the plaintiff. Moreover, the 1st defendant is a statutory body. The applicant is seeking for a declaratory order which can only be done by way of Judicial Review under the provisions of order LIII of the Civil Procedure Rules.

Counsel for the 2nd defendant also opposed this application, by relying on the grounds of objection. He submitted that this suit was filed without the resolution by the board of directors. Counsel relied on the case of **Bugerere Coffee Growers Ltd vs. Sebaduka and another (Youds, J)** where it was held:-

“When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or board of Director’s meeting and recorded in the minutes; no such resolution had been passed

authorizing these proceeding”

This is because the plaintiff is a share holder and a director of the 2nd defendant. In addition the plaintiff was one of the promoters of the 2nd defendant. For the plaintiff to institute a suit against the 2nd defendant a board resolution was necessary. The plaintiff is also accused of engaging in unethical practices by using confidential information that is a letter sent by Korea United Pharm Inc to register a product sent to the 2nd defendant in their name. Moreover the authenticity of those documents is in issue and the matter is being investigated by the police. Finally the plaintiff's case does not meet the standards set out in the case of **Giella vs. Cassman Brown** for granting an order of injunction. No prima facie case has been established with a probability of success.

The above is the summary of the rival submissions. The issue for determination is whether the plaintiff has established a prima facie case with a probability of success to warrant the granting of the orders sought. All the orders sought by the applicant are mandatory in nature such as the order of prohibition and declaration. An application seeking for mandatory orders ought to be by way of notice of motion and not chamber summons. Apart from that, a mandatory order granted at an interlocutory stage, can only be granted in very clear cases where the evidence is not at all disputed due to the final effect of the order. Secondly, this application is bad in law as far as the 1st defendant which is statutory body is concerned. If there is anything the 1st defendant failed to do under the law, the applicant should have filed a Judicial Review application under order LIII of the Civil Procedure Rules.

Lastly and more importantly, the plaintiff filed this suit on 26th May 2009. Simultaneously with the filing of the suit, a chamber summons was filed. The plaintiff did not obtain the leave of the court when they filed an amended chamber summons on 30th July 2009. It was necessary for the plaintiff to obtain the leave of the court, as the defendants had already filed their replying affidavit and defence. There is no way the plaintiff could have just sneaked in an unamended chamber summons and purport to withdraw the original chamber summons by a letter. This application is incompetent, bad in law, and an abuse of the court process.

It is hereby dismissed with costs to the defendants.

RULING READ AND SIGNED ON 30TH OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE