REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 1670 of 2001

LADOPHARMA COMPANY LIMITED……..……PLAINTIFF

VERSUS

NATIONAL HOSPITAL INSURANCE FUND……DEFENDANT

R U L I N G

By his Plaint dated 24.10.2001 and filed on 1.11.2001, the Plaintiff herein sought judgement in the sum of Kshs. 2,534,250.35 plus interest in respect of alleged rental payments for the Plaintiff's premises known as Ladopharma Complex Plot No. 33 which the Plaintiff claims was rented to the Defendant pursuant to the terms of a letter dated 29.03.1999 written by the Defendant and accepted by the Plaintiff.

To this claim, the Defendant, a statutory corporation of the Republic of Kenya, filed a defence dated 30.11.2001 and filed the same day. The Defendant denies that there was any letter of acceptance dated 30.05.1999 or that there was any permission or licence to occupy the suit premises, and states that there were no terms of permission and licence for the occupancy of the premises implied or otherwise as alleged by the Plaintiff.

The Defendant concludes in its Defence that it only made an inquiry from the Plaintiff about office space in its premises, but it did not pursue further, a fact which was communicated to the Plaintiff that the Defendant has never occupied or taken possessionof the premises at any time; and that on the basis of all this, the Plaintiff's suit is incompetent and bad in law, and would apply to have the suit struck out. By an application brought by way of Chamber Summons under Order VI, rule 13 (1) (a) (b, (c) and (d) of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and all enabling provisions of the law, the Defendant has carried out its threat and seeks orders that the Plaint herein be struck out as it discloses no reasonable course of action, it is frivolous and vexatious and is an abuse of the Court process, that is fatally defective and bad in law, and that the Defendant be awarded the costs of the application.

The application is supported by the Affidavit of Ismail Hassan sworn on 15.05.2003 and the grounds following:-

(a) that there exists no lease agreement, implied or express existing between the parties herein,

(b) that the Defendant never accepted the Plaintiffs offer and did not take possession of the suit premises at any point in time as alleged in the Plaint and no reasonable cause of action can arise out

of non-acceptance,

(c) that failed negotiations cannot form a basis of a valid contract binding the parties thereto,

(d) that no rent arrears can accrue as the Defendant never took possession of the suit premises and/or utilized the suit premises,

(e) that the suit filed is a gross abuse of the Court process, is bad in law, frivolous and/or vexatious hence cannot be maintained and/or continued against the Defendant.

The grounds are amplified and expanded in the Supporting Affidavit of Ismail Hassan referred to above, and the Further Affidavit of DARIUS MBOGO sworn on 26.01.2004, and filed on 8.06.2004.

In response to the application, the Plaintiff has filed Grounds of Oppositions sworn on 28.06.2004 and a Replying Affidavit of Dr. Ladislaus Aduwo sworn on 16.07.2004, and filed on 16.07.2004.

The Plaintiff denies that the suit is bad in law or that it is an abuse of the Process of the Court, that there exists no basis for striking out the Plaintiff's suit, and that the Defendants having taken possession by receiving the keys of the suit premises failed to make any payments for the rents reserved forming the subject matter of this suit. The Affidavit of Dr. Ladislaus Aduwo, the Plaintiff's Director is to the same effect, and annexes the letter dated March 29, 1999 which is the basis of this suit. The letter is addressed to Dr. Ladislaus Aduwo, the Managing Director of the Plaintiff Company, and sets out as follows:-

"Dear Sir,

Re: REQUEST FOR RENT SECOND FLOOR LADOPHARMA BUILDING IN MIGORI TOWNSHIP

We wish to formally request you through this letter to allow us occupy the second floor of Ladophama Building in Migori Township for purposes of our operations in the South Nyanza Sugar Belt.We intend to soon send some of our officers to Migori to take measures of the office space required and to determine rent payable per month to facilitate the drawing up of a lease agreement to be signed by both you and ourselves in the presence of duly appointed witnesses.

Please acknowledge receipt of this letter after confirming your willingness to lease the said office space to NHIF.

Yours faithfully,

1. Hassan

For DIRECTOR

NATIONAL HOSPITAL INSURANCE FUND"

Below the said letter, and scribbled in handwriting is the following:-

"DR. NETIA 30.03.99

PLEASE ALLOW NHIF TO OCCUPY THE SPACE AS DESIRED BY THEM, MR. SIGEI WILL COLLECT KEYS FROM YOU, MOVE MIGORI PROFESSIONAL COLLEGE TO ANOTHER FLOOR.

Dr. Aduwo"

These are the pleadings upon which Miss Awinja and Miss Otieno, learned Counsel for the Defendant and Plaintiff respectively, relied when this application was urged before me on 4.05.2005.

The real answer to the issues raised in this application is what legally binding force can be attached to the Defendant's letter of March 29, 1999 addressed to the Plaintiff Company

The letter is clearly a request for permission, to occupy the Second Floor of the Plaintiff's suit property, that the Defendant's officers would visit the suit premises and if suitable take measurements of the office space the Defendant would require for the purpose of determining the rent payable per month to facilitate drawing up of a lease agreement to be signed by both parties, to be witnessed. The letter required the Plaintiff to acknowledge receipt thereof, so that the other steps contemplated to be taken, would be accomplished by the Defendant. But what is the response?

Instead of responding to the Defendant the Plaintiff's Managing Director scribbles a note to a Dr. Netia presumably one of his associates or managers, to permit the Defendant to occupy the designated floor, and move other tenants elsewhere. There is no communication whatsoever to the Defendant as required by the Defendant's request. Yet the Plaintiff wants to found suit on this letter, the terms of which they even blatantly breached by ignoring to respond thereto. That letter cannot in law be the foundation of any suit. This is why.

The letter in issue was merely an inquiry. The Plaintiff did not even respond to the inquiry. The Plaintiff says that a Mr. Sigei took the keys. He does not produce any memorandum to show that a Mr. Sigei took the keys to the suit premises. Even if Mr. Sigei took the keys, where is the agreement to lease the premises as clearly intended in the said letter of the Defendant where is the agreement to let setting out the rent per month? At best the Plaintiff's suit is a short into the depths of a dark blue sea. It is not sustainable.

In law, the Defendant's letter of March 29, 1999 was merely a request. It is so expressed. As the learned authors of CHITTY ON CONTRACTS (General Principles)(the Law of Contracts, Vol. 1), 27th Edn. pp. 93, para. 2 004, say when parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply ask, or respond to a request for information, or he may invite the other to make an offer. In the examples given by the said authors, in HARVEY vs. FACEY, the Plaintiffs telegraphed to the Defendants "Will you sell us Bumper Hall Pen? Telegraph lowest price." The Plaintiff's replied telegraphed "Lowest cash price for Bumper Hall Pen £900." The Plaintiff then telegraphed "We agree to buy Bumper Hall Pen for £900 asked for by you. The Judicial Committee of the Privy Council held that the Defendant's telegram was not an offer but merely a statement as to price, the Plaintiff's second telegram was in fact an offer to buy, but as this had never been accepted by the defendants, there was no contract.

Similarly, in GIBSON vs. MANCHESTER CITY COUNCIL [1979] 1 W.L.R. 294, it was held that a letter in which a local authority stated (in reply to an enquiry from the tenant of a Council house that "**it may be prepared to sell"** the house to him at a specified price was not an offer to sell the house, its purpose was simply to invite the making of a **"formal application"** amounting to an offer from the tenant. On the same principle, a telephoned request for the supply of goods suitable for a prospective customer's purpose has been held to be only, a preliminary enquiry, the offer being made by conduct, when the supplier subsequently despatched the goods.

Then what is the situation in the matter at hand? It is this, the Defendant intended to open offices in the Plaintiffs premises for the purposes of its operations in the South Nyanza Sugar-belt. The Defendant was to send some of its officers to view the premises, take measurements to determine the rent payable per

month, to facilitate the drawing up of a lease agreement to be signed by both parties and to be duly witnessed. Lastly, the Defendant asked the Plaintiff's Managing Director to acknowledge receipt of the letter expressing the Plaintiff's willingness to lease the said premises to the Defendants.

This type of communication is in law commonly referred to as an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not made with the intention that it shall become binding as soon as the person it is addressed to simply communicates his assent to its terms. A statement is clearly not an offer if it either expressly provides that the person who makes it is not to be bound merely by the other party's notification of assent but when he himself has signed the document in which the statement is contained or that statement sets out the terms under which the parties are to be bound.

The Plaintiff was invited by the Defendant to make an offer to the Defendant for the leasing of the Plaintiff's premises. He was firstly to acknowledge receipt of the Plaintiff's letter (invitation to treat), set out the terms, after the Defendants had ascertained the amount of space it required, the duration of the lease, the monthly rental, and the usual terms which would no doubt have been determined by the parties legal advisers. The Plaintiff did nothing of the kind. Having failed to do anything about that invitation to treat, he cannot in law found a binding contract on it. The Plaintiff's suit is based upon the good God's air. It has no foundation in law. It discloses no reasonable cause of action, and because it discloses no reasonable cause of action against the Defendant it is frivolous and vexatious and an abuse of the process of Court.

For all these reasons, the Defendant’s application dated 20.01.2004 and filed on 8.06.2004 succeeds and the Plaintiff’s suit dated 14.11.2001 and filed on 1.11.2001 is struck out with costs. The Defendant will also have the costs of the application herein.

Dated and delivered at Nairobi this 25th day of May 2005.

ANYARA EMUKULE

JUDGE