



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 411 of 1999

ELIKEM PHARMACEUTICALS LIMITED.....PLAINTIFF

VERSUS

SIPRI PHARMACEUTICALS LIMITED.....1ST DEFENDANT

THE DELPHIS BANK LIMITED.....2ND DEFENDANT

J U D G M E N T

The 1st defendant contacted the plaintiff with a view to the plaintiff supplying consignment of pharmaceutical drugs and medicine, to be delivered in Mombasa.

The plaintiff is a Limited Liability Company incorporated in the Republic of India, whereas the defendants are incorporated in Kenya.

The plaintiff, as a precondition to supply those goods requested the 1st defendant to obtain, from its bankers an irrevocable letter of credit to its favour for an amount sufficient to cover the purchase.

The 1st defendant procured from the 2nd defendant an irrevocable letter of credit dated 22nd February 1996, under which 2nd defendant undertook to pay the plaintiff USD 21, 850.

Plaintiff called one witness, Mr Dilip Patel. He said that he is a director of the plaintiff. That he is authorised to give evidence on behalf of the plaintiff.

He said that the plaintiff had been in business contact since 1994, with the 1st defendant. That the plaintiff supplied them with many containers of pharmaceuticals products. That it was in 1994 that the 1st defendant director, Kishore Thakrai applied from the plaintiff Pharmaceutical products and to this end he provided a list of their requirements.

The 1st defendant sent to the 1st defendant import declaration forms with irrevocable letters of credit No. KSM/03/96. The 1st defendant also sent another irrevocable letters of credit No. KSM/05/96, which was also accompanied by import declaration form and which contained the approval of Registrar of Pharmacy and Poison Board. P W 1 said that sometimes a consignment would not fit into one container and in that case the plaintiff would send some of the items in one container, and the balance of the items would be sent with the other container. That plaintiff would however only charge for the items sent. In this case P W 1 said that plaintiff's exhibit No. 4 was an invoice of a consignment, sent against letter of credit No. KSM/03/96, which showed that the plaintiff was not charging the defendant anything else but the goods

that has been despatched. The invoice was for US \$ 19, 850. P W 1 referred to the bill of lading MLCU 2414066 which was in relation to the goods sent on letter of credit KSM/03/96.

After that consignment was despatched, P W 1 said that all the relevant documents were submitted to the plaintiff's bankers, that is the Union Bank of India, to be forwarded to the Delphis Bank Limited, the 2nd defendant hereof. He said that on the container reaching Mombasa, it was taken to the inland container depot at Kisumu. The plaintiff ought to have been paid within 60 days from the date of Bill of Lading. In this case the Bill of Lading, plaintiff's exhibit No. 5, was dated 30th July 1996.

P W 1 referred to letter from the 2nd defendant addressed to the plaintiff's bankers, dated 20th September 1996, whereby the 2nd defendant sought an extension of 30 days to enable the 1st defendant clear the relative goods. P W 1 said that the 2nd defendant again on 23rd September sought extension of the Bill of Lading to 23rd November, 1996, and if extension was not given, that the goods would be reshipped back to India. P W 1 said faced with that alternative the plaintiff agreed to give the extension. By its letter dated 6th January 1997, the 1st defendant wrote to the plaintiff's bankers, in India, and said that the container had been seized by customs and Ministry of Health. P W 1 said that he said Ministry of Health had taken samples of the consignment to verify the same and the 1st defendant confirmed that it would retire the documents within that period. PW 1 explained that retiring documents meant that the payment for the consignment would be made. P W 1 referred to a telex dated 21st February 1997 the 2nd defendant to the plaintiff's bankers, which stated:

"The goods under the above L/C remain seized by the Kisumu customs authorities as the drugs are not registered in Kenya. Todate they have refused to release the goods or reship them to India." P w 1 said that this was the first time that the defendants were raising a discrepancy on the consignment, and yet this was a year later after shipment of goods. P W 1 said that the plaintiff's bank responded to this by stating that the discrepancies stated in the aforesaid letter, were not tenable because they had not been notified as per Article 13 (B) of UCDPC. P W 1 explained that UCDPC is a booklet printed by ICC setting banking norms acceptable for International Trade. Plaintiff's exhibit NO. 12, a telex written by the 2nd defendant to the plaintiff, dated 22nd March 1997 provided as follow: -

"The Kenya Ministry of Health have refused to allow the release of the drugs under your Bill 0625211/96 as the same are not registered in Kenya. The drawee have arranged for the reshipment of the goods to India. M/s Elikem Pharmaceutical Ltd. have been advised in the matter. The Bill and the documents will be returned to you once the goods are reshipped." P W 1 said that the goods were never re-shipped nor were the documents returned by the 2nd defendant. P W 1 said that he personally had to travel and come to Kenya specifically to resolve the matter of payment; that was in April 1997. He said that although he travelled to Kisumu, none of the defendant directors were available to see him. He therefore returned to India on 10th May 1997. P W 1 again travelled to Kenya in February 1998. He instructed an advocate to make demand to the defendants for the payment. Following the demand, the 2nd defendant forwarded the payment to the plaintiff's bankers on 3rd August 1998.

P W 1 produced the travel bills for his travel to Kenya, which showed as follows: · Directors trip 18th September 1996, amount, India Rupee (I.R.) 19, 156 · P W 1's travel I.R. 22, 565 · P W 1 travel I.R. 16, 601 P W 1 said that the plaintiff is seeking a refund of these amounts. P W 1 said that while they were in Kenya, he and his co-director travelled by air, taxi or borrowed vehicles from their relatives, who live in Kenya and also spent money on food. He estimated that they incurred US\$75 per day but stated that the plaintiff is seeking US\$1,500 for each trip.

That as a consequence of following up the issue of the payment, they had to make many calls to Kenya from India. P W 1 produced in evidence a statement and receipts of the calls they made for the period of tow years. The total amount the plaintiff was claiming was I.R. 28, 774. P W 1 said that the plaintiff had obtained from their bankers a credit facility/bankers availed under L.C. KSM/03/096, and as a consequence of the delayed payment by the defendants the plaintiff had been charged penalty interest by the bank. P W 1 said that the plaintiff was claiming from the defendants the interest as follows:

· I.R. 83, 255 dated 31.3.1997. · I.R. 98, 283 dated 22.7.1997 · I.R. 27, 223 dated 29.9.1997 · I.R. 69, 403

dated 29.11.1997 · I.R. 16, 741 dated 1.12.1997 P w 1 said that as a result of the delayed payment, an order for medicine that had been made by the 1st defendant was not honoured by the plaintiffs, this is because the plaintiff feared they would not be paid for the same. As consequence of that the packaging of those medicines that the plaintiff had printed specially for the 1st defendant went to waste. P W 1 said that the plaintiff was claiming the cost of printing those packages/cartons as follows:

· I.R. 62, 670 for 27 248 cartons · I.R. 63, 500 for 25, 400 cartons. P W 1 said that contrary to what the 1st defendant stated, that the container sent by the plaintiffs had been seized by the customs, a letter he produced as an plaintiff's exhibit No. 22, dated 21st March 1997 did not indicate that the plaintiff's container was amongst the ones seized.

P W 1 said that the plaintiff was relying on the exchange rate seen in plaintiffs exhibit No. 23, which was a print out of a foreign exchange financing company in India in the conversion of the Indian Rupee to the dollar at 14th September 1996 was 36.40 US\$ to an Indian Rupee. P W 1 finally stated in chief that the plaintiff was seeking judgment in the sum of: · US \$ 1, 593 air fares · US \$ 4, 500 allowances · US \$ 900 telephone calls · US \$ 1, 544 penal charges · Total amount = 16, 854.

On being cross examined P W 1 replied that the 1st defendant told the plaintiff that the drugs in the consignment had to be registered with the pharmacy and Poison Board by the plaintiff. He accepted that those drugs were not registered for two years and some were later registered even as late as after this suit had been filed. P W 1 also accepted, on cross examination, that he had not produced in evidence the air tickets that he and his co-director had used to travel to Kenya. He also accepted that that he had not produce the ticket for his travel to Kisumu. On further being cross-examined P W 1 accepted that he had relatives and his former in-laws and many friends who live in Kenya, and that, therefore, plaintiffs claim for allowances related only to the Kisumu trips. Defence called one witness SHILEM DHIRATLAL THAKERAR. He said that he is a director of the 1st defendant. That the defendant had ordered goods from the plaintiff company that is pharmaceutical goods. That under cap 244, it is the duty of manufacturer to ensure that drugs were registered under the pharmacy and Poison Board.

That the importation of the consignment the 1st defendant order was by letter of credit by the 2nd defendant, and the means of the transportation of these goods was by sea. He confirmed that the consignment did arrive in Kenya but he found that they were not despatched as per order. That the defendant complained to the plaintiff about this shortfall. Further he said that the defendant could not take delivery of those goods because the drugs had not been registered and they were accordingly seized by customs.

He said that the drugs were never released to the 1st defendant because they had expired while they had been seized. That the 1st defendant as result of that seizure had incurred demurrage. D W 1 denied that the plaintiff's directors travelled to Kenya to specially sort out this matter since the plaintiff's directors often travelled to Kenya because they had relations living in Kenya. D .W. even stated that at one point he spotted P W 1 helping out in a restaurant, which belonged to his relative, in the evening, that is a restaurant in Kenya. D W 1 disputed the alleged calls, the plaintiff claimed to have made and generally stated that the plaintiff's claim is denied. On being cross-examined D W 1 stated that the 1st defendant ceased to trade because of financial difficulties. He accepted that the plaintiff did not invoice the 1st defendant for goods not sent. He also stated that the container was destroyed by customs and it was, therefore, never received by the defendant. Before the court considers what I believe in the main issue, that is, are the defendants liable to the plaintiff, there are ancillary issue to consider first.

The defendants failed to make immediate payment on the L.C. because the allegations were that the plaintiff's container was seized by customs and the pharmacy and poison board. There was no sufficient evidence presented before court that the plaintiff's container No. MLCU – 2414066, was seized. The letter the defendant relied upon to prove such seizure is the one dated 21st March 1997 written to the 1st defendant by Kenya Revenue Authority. That letter listed the containers seized and the plaintiff's, subject container, is not one of them.

The other ancillary issues is, who amongst the parties, hereof, ought to have applied for registration of the

drugs in the consignment, with the Pharmacy and Poison Board. Rule 3 of the Pharmacy and Poison (Registration of Drugs) Rules (I.N. 147/1981) Cap 244 states: - "No person shall import, manufacture for sale or sell any drug in Kenya unless that drug has been registered in accordance with the provisions of these rules". That rule is more understandable if looked at in segments. It is clear that, no one can import, manufacture or sell drugs in Kenya without registration. The operative words are "in Kenya". The plaintiff is based, and incorporated in India. The plaintiff was not the importer manufacturer or seller of those drugs in Kenya. The responsibility of registration falls squarely on the 1st defendant who was the importer in Kenya of those drugs. The plaintiff cannot therefore be blamed for seizure of the drugs for lack of registration.

The last ancillary issue is what is the effect of the 2nd defendant granting to 1st defendant a irrevocable letter of credit. The answer can perhaps be found in the case: URQUHART LINDSAY AND COMPANY, LIMITED VERSUS EASTERN BANK LTD: 1 KB [1922] 318 and more particularly page 322, which stated: "The answer to this is that the defendant undertook to pay the amount of invoice for machine without qualification, the basis of this form of banking facility being that the buyer is taken for the purposes of all questions between himself and his banker or between his banker and the seller to be content to accept the invoice of the seller as correct."

The holding of that case is as follows: "The credit being irrevocable, the refusal of the defendants to take and pay for the particular bills on presentation of the proper documentation constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages so reckoned....." The plaintiff as result of the delayed payment of the amount due on the L.C., issued by the 2nd defendant has made claims for damages under various heads. The question the court needs to consider is whether the defendants are liable and if liable whether the plaintiff has proved its case. As stated earlier, there was no proof of seizure of the container and the court did find that it was the 1st defendant's responsibility to register the drugs in Kenya. These were the reasons given by the defendants for failing to pay the L.C. The court has also found that the effect of a L.C. is that the defendants had irrevocably bound themselves to pay the amount thereof. The answer of the court is undoubtedly that the defendants are liable to pay the plaintiff. The next question to consider has the plaintiff proved its claim. AIR TRAVEL

The plaintiff produced as evidence of travel two invoices, of a travel agent in India. There is no evidence that those were paid. The plaintiff additionally produced a payment slip of air ticket made to a travel agent in India. There is no evidence either from the invoices or the payment receipt, which can prove that the plaintiff's directors travelled as alleged. It would have assisted the court if the plaintiffs produced counterfoil of the airline tickets or passports as evidence of travel. The plaintiff failed to prove on a balance of probability on this head. HOTEL EXPENSES The plaintiff failed to produce receipt representing this head, and this head too fails to be proved to the satisfaction of the required proof in law. TELEPHONE CALLS

The plaintiff produced receipts, which resemble cash register receipts to prove that they made calls. What the court finds difficult to comprehend is that the plaintiff which was incorporated and trades in India; if that be so, why make the calls on a public telephone. I find that the plaintiff has not proved this head also. PENALTY INTEREST

The plaintiff alleged that to finance the transaction the subject of this suit, the plaintiff obtained financing from its bankers and because of the defendant's delayed payments on L.C. the plaintiff was charged penalty rate of interest. The plaintiff did not produce before this court evidence of such financing. Had they done so the court would have verified that the loan was granted at a time this transaction started.

This head too, is not proved. COMPENSATION FOR PACKAGING/CARTONS PRINTED The plaintiff alleged to have printed cartons in readiness to supply drugs to the 1st defendant but stopped such supply when it realised the 1st defendant could not be relied upon on payment. The plaintiff did not prove that the 1st defendant made such an order, indeed one would expect that an order made for export would be in writing and not verbal. Additionally the plaintiff failed to prove that the packaging/cartons printed were so printed solely for the order allegedly made by the 1st defendant.

It is obvious from the above finding that the plaintiff has failed to prove its case against the defendants on a standard required under law. However having found so, the plaintiff cannot be condemned on cost because the defendants contributed or provoked the filing of this suit by their failure to honour payment for the plaintiff's consignment. Accordingly the judgement of this court is that the plaintiff's case is dismissed with each party bearing their own costs hereof.

Dated and delivered this 15th day of December 2005.

MARY KASANGO

JUDGE