



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 295 OF 2004

SURGIPHARM LIMITED.....PLAINTIFF

VERSUS

AKSHER PHARMACY LIMITED1ST DEFENDANT

HUSSEIN VIRJEE2ND DEFENDANT

RULING

By a Plaint dated 7.04.2004 and filed in Court on 8.06.2004 the Plaintiff claims a sum of Kshs.12,666,167/=, interest and costs from the 1st Defendant for supply of pharmaceuticals products and goods (collectively the "goods") and as against the 2nd Defendant as guarantor for the payment of the said goods.

The Defendants were at first represented by the firm of Kanyi and Ndurumo & Co. Advocates who filed a Memorandum of Appearance on 23.06.2004 although earlier on 18.06.2004, the firm of Gichuki Kingara & Co. Advocates sought further and better particulars per a Request for Particulars to which the Plaintiff's Advocates Hamilton Harrison & Mathews & Co. Advocates responded to by Particulars dated 12.07.2004, and filed on 27.07.2004. Thereafter the Defendants filed a defence.

Against the Defence, the Plaintiff filed a Notice of Motion under Order XXXV rule 1 in which it seeks an order that judgement be entered for the Plaintiff as prayed in the Plaint and the Defendant pay the costs of the application to the Plaintiff. The principal ground for the application is that the defence is a bare denial and that there are no triable issues to go to trial. The application is also supported by the Affidavit of VIPINCHANDRA DHIRAJLAL SHAH, sworn on 31st August 2004 and filed together with the Application on 07.09.2004.

This deponent says that the Defendants are justly and truly undebted to the Plaintiff in the sum of Kshs.12,666,167/= for goods sold and delivered to the first Defendant by the Plaintiff at the 1st Defendants request at Nairobi between February and March 2001, and that they were so indebted at the commencement of the suit. The particulars of the claim are set out in the Plaint. This deponent further avers in his Affidavit that on 10th July 1999 the first Defendant applied for credit facilities from the Plaintiff and offered the personal guarantee of its director the Second Defendant as security.

The rest of the facts are not disputed; that orders were placed by telephone by the 1st Defendant to the Plaintiff's staff, that the goods were delivered the same day, invoices were issued in quadruplicate, original invoices would be issued to the 1st Defendant who would cause two copies to be stamped to the Plaintiff confirming the receipt of the goods, and that no local purchase orders were issued. Copies of

invoices were requested for by the Defendant's Advocates who studied and returned them to the Plaintiff's Advocates without comment, a statement of account was delivered to the 1st Defendant every month, and that demand was made through the Plaintiff's Advocates and that no payment has been made by the Defendants.

To this motion, the Defendant's Counsel Gichuki Kingara filed grounds of opposition on behalf of the first Defendant, and Replying Affidavit on behalf of the Second Defendant, Hussein Virjee sworn on 5.11.2004. The Plaintiff's Counsel gave notice under Order XVII rule 2 of the Civil Procedure Rules of intention to cross-examine the 2nd Defendant on the contents of the Affidavit, and in the event this did not materialise. When the application was urged before me on 17.11.2004, although Mr. Shah, the deponent of the Affidavit in Support of the Application was available for cross-examination, Mr. Kingara pointed out to the Court that he had been served with a Further Affidavit sworn and filed in Court on 17.11.2004 by the same deponent, Mr. Vipinchandra Dhirajlal Shah, and that this had been done without leave of the Court. Mr. Kiragu Counsel for the Plaintiff readily admitted that this Further Affidavit had indeed been filed without leave of Court. He however submitted that the Court still had jurisdiction under Order L rule 16 (2) of the Civil Procedure Rules to grant leave even after an Affidavit has been filed and that there is nothing to bar the Court from admitting the Further Affidavit.

Mr. Kiragu's argument was that the Defendant's Counsel had had enough time to raise any objections. He gave a chronology of events to support this contention. The motion was filed on 7.09.2004, and an Affidavit of Service was filed on 30.09.2004 confirming that the motion was served on 8.09.2004 the next day after filing thereof. Grounds of Opposition and Replying Affidavit in respect of the Second Defendant were filed on 5.11.2004. The defendants have had two (2) months to respond to these papers.

With regard to the First Defendant the Grounds of Opposition were filed on 12.11.2004 and the point taken was that the guarantee was inadmissible because it had not been stamped, Mr. Kiragu submitted that Section 19 (3) of the Stamp Duty Act allows the stamping of documents out of time, and that this had been done and that the Further Affidavit does no more than introduce the guarantee duly stamped. He submitted that in saying this, there was no prejudice to the Defendants for the object of Order XXXV was to deal with matters in a speedy manner where they qualify, and he urged the Court to grant leave for the filing of the Further Affidavit. The deponent of the Further Affidavit Mr. Shah was still available for cross-examination, and another date could be taken for cross-examination of the 2nd Defendant.

In his predictable response, Mr. Kingara, Counsel for the Defendants was of the view that no basis had been made to seek leave to file a Further Affidavit. The Grounds of Opposition had raised the issue of the inadmissibility of the guarantee, and the Plaintiff's Counsel had given no indication that the document had been taken for stamping. This action of surreptitiously stamping the guaranty out of time was designed to wriggle out of the provisions of Section 19 (3) of the Stamp Duty Act Cap 480, Laws of Kenya. He had sought for the production of the original guarantee documents for impounding in Court, so that the same would not be available to be relied upon by the Plaintiff against the 2nd Defendant.

Mr. Kingara submitted Order XXXV rule (2) provided for the application to be supported by an Affidavit (singular) and that there was no room for further affidavits. The operative rules were not those of rule 16 (2) of Order L. The Defendants would suffer prejudice as they had premised the grounds of opposition and argument replying upon the very document which had now been stamped. To allow this document (the Further Affidavit) would seriously prejudice the Defendant's case. He urged the Court to strike out the Further Affidavit.

Out of the rival parties', rival arguments, I am able to discern the following issues for my consideration and determination. These are:

- (1) Whether a documents may be stamped out of time in terms of Section 19(3) of the Stamp Duty Act, Cap 483 Laws of Kenya,
- (2) Whether more than one affidavit is available to a party under Order XXXV rule 1 (2) of the Civil Procedure Rules

(3) Whether cross examination of a deponent is permissible under Order XVIII rule 2 (1), vis - avis the a proviso to rule 1 of the said order,

(4) For what reasons will a Court strike out an Affidavit?

(5) Whether the Court has the discretion to grant leave to file an Affidavit under Order L rule 16 (2),

(6) Whether the Defendants would be prejudiced by the Further Affidavit of the Plaintiff's filed on 17.11.2004.

On the first issue, (whether a document liable to be stamped but which has not been stamped within the time prescribed) may be stamped out of time) Section 19 of the Stamp Duty Act, (Cap 480 Laws of Kenya) provided as follows -

"19

(1) subject to the provisions of Section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except -

(a) in criminal proceedings

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped

(2) No instrument chargeable with stamp duty shall be filed enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production in any Court other than a criminal Court, arbitrator, referee, company or other corporation, or to any officer or servant of any public body of any instrument which is chargeable with stamp duty and which is not duly stamped, the Court, arbitrator, referee, company or any other corporation, officer or servant shall take notice of the omission or insufficiency of the stamps on the instrument and thereupon take action in accordance with the following provisions -

(a) If the period of time or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall be forwarded to a collector.

(b) In any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires be given a reasonable opportunity of applying to a collector for leave under Section 20 or of obtaining a certificate under Section 21.

(c) In any other cases, unless otherwise expressly provided in this Act, the instrument shall saving all just exceptions on other grounds, be received in evidence upon payment to the Court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence."

My understanding of the above captioned provisions of Section 19 of the Stamp Duty Act, is that no document chargeable to stamp duty shall be received in evidence except in the case of the prescribed exceptions, that is, pursuant to criminal proceedings, or if produced by the collector to recover duty unless it is duly stamped (Section 19 (1)), nor can the document be filed or acted upon by any person unless it is duly stamped (section 19 (2)) of the Act.

My further understanding is that under Section 19 (3) if any unstamped is produced before it, the Court is empowered to take note of the omission or insufficiency of the stamp duty and is impelled to take any of the following three courses of actions: -

(i) If the document is liable to be stamped by a person specified in the Schedule and the time for stamping has expired the instrument shall be impounded and, unless the document has been produced to a collector, shall be forthwith be forwarded to a collector.

(ii) The person tendering the instrument shall be given a reasonable opportunity of applying to a collector for leave to stamp the instrument out of time under Section 20 or the collector's certificate under Section 21 of the Stamp Duty Act, that the instrument has been duly stamped,

(iii) In all other cases the instrument is receivable in evidence upon payment of the amount of the unpaid duty and of penalty which is then remitted to the collector with the instrument after the instrument has been admitted in evidence.

The answer to the first issue herein is that an instrument which is liable to stamp duty may indeed be stamped out of time, and may be received in evidence. The second issue was whether more affidavits than one may be received by the Court under Order XXXV rule 1 (2) of Civil Procedure Rules. Firstly, rule 1 (1) provides that where a Plaintiff seeks judgement for a liquidated demand with or without interest the application therefor shall be made by motion supported by Affidavit either of the Plaintiff or some other person who can swear positively to the facts verifying the cause of action and any amount claimed (rule 1 (2)).

Mr. Kingara, Counsel for the Defendants cited this rule for his submission that since the rule provided for an affidavit, there could be no room for supplemental or further affidavit once an application has been filed. The object of this submission was of course to persuade the Court to reject the Plaintiff's Further Affidavit formally filing the stamped instrument of guarantee which I have held above may be stamped out of time. Mr. Kingara cannot of course be right in this submission. It is for the following reason. The Interpretation and General Provisions Act (Cap 2 Laws of Kenya) Section 3 (4) provides as follows -

"(4) In every written Law, except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular."

There being no contrary intention in Order XXXV rule (2) as to the number of affidavits the Plaintiff or for that matter the Defendant in reply thereto may file, I must reject this contention by learned Counsel for the Defendants.

The third issue was whether cross examination of a deponent was available in terms of order XVIII rule 2 (1) in relation to the proviso to Order XVIII rule 1. There is in my view no contradiction in these provisions. In effect they are complementary and not contradictory to each other. The provision lays the onus on the Court that either party bona fides desires the production of a witness for cross-examination and that witness can be produced, an order shall not be made authorising the evidence of such evidence to be given by affidavit. Rule 2 (1) of Order XVII enables the Court on application of either party to order attendance for cross-examination of a deponent of an affidavit.

So far as the requirements of the proviso to rule 1 of Order XVIII is concerned, it was Mr. Kiragu's Counsel for the Plaintiff's submission that if the Defendants were doubtful of the bona fides of the deponent of the Supporting Affidavit and the Further Affidavit sworn and filed on 17.11.2004, the deponent thereof, Mr. Vipinchandra Dhirajlal Shah was on that day available for cross-examination by the Defendants' Counsel. The challenge was not taken by the Defendant's Counsel.

I can find no contradiction in the proviso to rule 1 and rule 2 (1) of Order XVIII of the Civil Procedure Rules.

The fourth issue was on what grounds will a Court strike out an affidavit? These grounds or reasons are clearly stated in rule 6 of Order XVII. They are that the Court may strike out from any affidavit any matter which is scandalous, irrelevant or oppressive.

According to the Shorter Oxford English Dictionary Vol. II 3rd Edition 1959, a matter is said to be

scandalous in law if it is injurious to another person or party and may lead to foundation of a law suit. It is said to be an irrelevancy or indecency introduced into a pleading to the derogation of the Court. If any unnecessary matter in a pleading contains any imputation on the opponent or makes any charge of misconduct or bad faith against him or any one else, it will be struck out, for it then becomes scandalous. The sole consideration in these matters is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed. Having these considerations in mind, I can discern nothing scandalous with regard to Further Affidavit of Vipinchandra Dhirajlal Shah.

Is it irrelevant? A fact is said to be irrelevant if it does not form part of the same transaction as the fact in issue (Section 6) of the Evidence Act, (Cap. 80, Laws of Kenya). The issue of the guarantee is very much part of the matters in issue. And is the fact of the stamping of the guarantee "oppressive". Again my old Shorter Oxford English Dictionary referred to above defines "oppressive" "as being unjustly burdensome, harsh or merciless, depressing and overpowering." According to "Words and Phrases Legally Defined 2nd Edition Vol. 4 page 37, "oppression" means - that there has been a disregard of the essentials of justice and infliction of a penalty which is not properly related to the crime of which the party stands convicted, but is either to be regarded as merely vindictive or having proceeded upon some improper or irregular consideration or it may be upon some misleading statement of facts put before the Sheriff by the prosecutor or the like(Steward -vs- Cormalk [1941] S. C. (5) per the Lord Justice - General (Lord Normand at page 79.)

In the Australian case of PAINTER -VS- PAINTER [1964] A.L.R. 277, the Court was considering the phrase harsh and oppressive in section 37 (1) of the Matrimonial Cause Act, 1959 and said - "it seems to us that the two concepts "HARSH AND OPPRESSIVE", "Contrary to the public interest", have this in common, both refer to "injuria" in the first instance to the individual, in the second to society at large As we see it the epithet "harsh and oppressive" is more appropriately applied to the attitude of one who insists upon his pound of flesh" than it is to the use of an enactment which relieves the other party from the rigours of a burdensome obligation. It seems to us that a Court of equity is not acting harshly or oppressively when it grants relief against a penalty or forfeiture or refuses to grant an injunction where damages are an adequate remedy. It seems to us that the policy of this enactment bears some analogy to the equitable doctrine"

The expression "oppressive" is also employed in Section 211 of the Companies Act Cap 486, Laws of Kenya. In considering the said expression in Section 210 of the English Companies Act 1948 (which is in pari materia with Section 211) in the case of ELDER -VS- ELDER & WATSON [1952] S. L. T. 112 at 116, Lord Keith said - "The Company's affairs must be conducted in a manner oppressive to some part of the members and that connotes to my mind an abuse of power by some person or persons controlling the company and resulting in injury to the rights of some part of its members."

Having the above considerations in mind I cannot say that the Plaintiff's conduct in stamping the guarantee dated 10.07.1999 caused any injury or prejudice to the Defendants or that the stamping thereof was either irrelevant, harsh or oppressive of the Defendants.

I have in the above conclusion also answered the fifth issue whether the stamping of the guarantee did not cause any prejudice to the Defendants. I may only add that even if the original guarantee had been produced, the Court's statutory duty was to impound it, give the Plaintiff reasonable opportunity to have it stamped, after admitting it in evidence. The observation of the law, could not in any way cause the Defendant prejudice however, irritating it may be. I may also add that it has been practice of these Courts that where a document otherwise admissible in evidence has not been duly stamped to impound the document and give reasonable opportunity to the person liable to stamp the instrument. Mr. Kiragu Counsel for the Plaintiff referred me to previous decisions of this court including -

(1) Morjaria -vs- Kenya Batteries Ltd. & Others [2002] K.L.R 1707 where Ringera J. (as he then was) at page 2 thereof says inter alia "in the course of arguments, it was pointed out the agreement was stamped fairly late. I say it matters not. As long as it is admissible in evidence for the agreement complies with Section 19 of the Stamp Duty Act (Cap 480) of the Laws of Kenya."

(2) Stephen Kiprop Chesire -vs- Hako Industries (HCCC No. 2177 (unreported), Lady Justice Angawa, held that the Court may give to the Plaintiff opportunity and reasonable time to comply with the requirements under Section 20 of the Stamp Duty Act.

(3) Bank of Baroda (Kenya) Ltd. -vs- Timwood Products Ltd. (Civil Appeal No. 132 of 2001,) the Court of Appeal (relying upon its previous decisions in SHANTI -VS- HINDOCHA) held that "an extension of time may be granted where the record has been lodged out of time and before the application for extension of time."

(4) The Iron & Steel Wares Limited -vs C. W. Martyr & Company [1956] 23 EA CA 175, the Court of Appeal for Eastern African, while considering the requirements of Order XVI rule 2 of the Uganda Civil Procedure Rules and Indian Civil Procedure Rules (which are similar to Order XVII rule 2 of our Civil Procedure Rules), that Court said "Procedural rules are intended to serve as handmaidens of justice, not to defeat it, and we think the High Court in its inherent jurisdiction to control its own procedure has a discretion to waive strict application of Order XVI rule 2 (similar to order XVII) and has a duty to ensure that each party is given a fair opportunity to state its case and to answer the case made against it.

(5) In Milimani Commercial Courts HCCC NO. 1585 of 2000, Giro Commercial Bank Ltd. -vs- Nakumatt Holdings Ltd. & 3 Others my brother Hon. Mr. Justice Azangalala granted leave to the plaintiff to file a Further Affidavit in support of an application for summary Judgement, very much the same as in this case.

If the above be the position of these Courts in very much similar circumstances, I have no reason for disallowing the Plaintiff leave to file a Further Affidavit even though it be filed before such leave is granted for it does not take effect until such leave is so granted. The answer to the 6th issue (whether the Court has authority to grant leave under Order L rule 16 (2) must therefore be in the affirmative. The said rule provides as follows -

"(2) Any applicant upon whom a replying affidavit has been served under subrule (1) may with leave of the Court filed a supplementary affidavit." The sole issue for decision arising out of the objection by Mr. Kingara was the filing of the Further Affidavit of Vipinchandra Dhirajlal Shah sworn and filed on 17.11.2004, was that the admission of the said affidavit would be prejudicial and oppressive to the Defendants, I have demonstrated above that in terms of Section 19 of the Stamp Duty Act. (Cap 480, Laws of Kenya), the Court may allow an instrument liable to be stamped out of time, and the Courts have clearly held that such instrument having been duly stamped and it does not matter that it was stamped out of time, is admissible in evidence. In the all the circumstances therefore I grant leave that the Further Affidavit aforesaid is duly filed as of the said date of 17.11.2004, and the preliminary objections by Mr. King'ara, learned Counsel for the Defendant are hereby overruled.

Dated and delivered at Nairobi this 29th day of November 2004.

ANYARA EMUKULE

Ag. JUDGE