REPUBLIC OF KENYA

IN THEHIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 502 OF 1999

QUEENS PHARMACEUTICAL LTD.....APPLICANT

VERSUS

RUP PHARM LTD.....DEFENDANT

JUDGMENT

In the Plaint dated 15th April 1999, and filed into the Court on 29th April 1999, the Plaintiff says at paragraphs 3,4 & 5 as follows:-

> "3. By an agreement made between the Plaintiff and the Defendant, the Plaintiff agreed to sell and transfer to the Defendant who agreed to purchase and pay for medical and non medical stock, production of relevant marketing and good will at a total cost of Kshs 1,267,952/32
>
> 4. The said agreement was made orally at a meeting in 1997 held between Amin Mansour Alibhai acting on behalf of the Plaintiff and Doctor R.T. Vaghela acting on behalf of the defendant. 5. The said agreement was reduced into writing in a letter of understanding dated 18th February 1998 between the Plaintiff and Defendant and signed by Mr. E.O. Yinda for the Plaintiff and Dr R.T. Vaghela for the defendant."

It claims further in the same plaint that on or about 18th February 1998 it did transfer all the said stock to the Defendant. However at paragraph 7, the Plaintiff says that the Defendant has paid to the Plaintiff Ksh 459,000/ = but says further that the balance unpaid and which is being claimed from the Defendant is Kshs 1,468,952/32. He claims from the Defendant the same amount.

The Defendant in its written statement of defence denies the claim and denies the existence of any valid agreement between the parties and is in a counter-claim seeking from the Plaintiff Kshs 364,871/85 being the amount it claims to have paid to Amin Mansour Alibhai towards marketing of the subject goods and a balance of invoice No 3774 dated 17th March 1997. There was a defence to the same counter-claim.

Plaintiff called two witnesses and Defendant called one witness.

Amin Mansour Alibhai was the first witness for the Plaintiff. He stated briefly that he was Managing Director of the Plaintiff company between 1996 and 1998. He negotiated the entire transaction with Dr R.T. Vaghela who was then the Director of the Defendant company. They initiated negotiations to procure agency lines and stocks from Queensbury to Defendant. They agreed on the region of Ksh 2,000,000/= but he was not certain. The amount of Ksh 2,000,000/= included stocks, goodwill, and condoms. It also negotiated payment structure to be spread out in instalments. He believed the first instalment was made and was to the tune of 1/2 million. He produced a copy of the same against Exh 1 and said the first statement was Ksh 300,000/= The agreement was signed by Dr Vaghela and he

(witness) signed for the Plaintiff. After the first payment, the other payments were not made although the same goods were supplied and were sent by Securicor, Mombasa by Coast Bus Service together with Delivery note. He produced transport Receipt Exh 2(a) and Securicor Courier Receipt Exh 2(b). The witness went to Nairobi and he and Dr Vaghela received the goods which were transferred to Dr Vaghela's warehouse at Industrial area. He says in the agreement the Plaintiff was to be paid by post dated cheques which the Plaintiff did not receive. The Balance of Kshs 1,500,000 has not been paid. Thereafter he resigned and teamed up with Dr Vaghela and registered another company. He produced stock–list of what was supplied to the Defendant. He denied having received Ksh 345,971/85 from the Defendant. He got Ksh 50,000/= per month plus fuel allowance as employee of Rup Pharm (Msa) Ltd and not as payment on behalf of the Plaintiff. He admitted that he was signing for this payment in one of the Defendant's diaries. He denied that he was to market the goods of Rup Pharm (Msa) Ltd and not plaintiff goods as by the time the transaction between the parties took place Rup Pharm was not there and lastly in his evidence in chief he said Defendant sold its goods to Kenyatta and Private Dentists.

On cross-examination, the witness said they talked of taking over the agency lines. This entitled the purchase of the stocks and future import and marketing of the lacer range by oral hygiene products. They were receiving goods from Germany and from United Kingdom. He emphasized that he was never working with Rup Pharm as a representative of the Plaintiff. He signed the agreement as employee of the Plaintiff. He was being paid for his work with Rup Pharm. He was not being paid on behalf of the Plaintiff. On being shown Exh 1, the said it was addressed to the Chairman of the Plaintiff company, but he signed it as he was the Managing Director and he had authority to sign the agreement. Shown Exh D1 he said it was in response to the agreement and then the letter was making a counter-proposal. After the goods were transferred to Nairobi Plaintiff had nothing to do with them. He denies having pledged his log book and the log book was with Defendant for Road Licence. Stock was taken and Exh 3 was prepared by himself and served upon Defendant before the goods were dispatched from Mombasa to Nairobi. It was Rup Pharm that was paying him and not the defendant. In re-examination, he said goods were sent before signing the agreement. When Dr Vaghela was signing for the agreement in February, the Defendant already had the goods. In the agreement there was no clause for him to market the goods nor is there a clause that he would be paid on behalf by the Plaintiff. When agreement was signed goods were already with the Defendant and they would not have signed agreement if the goods were not selling.

PW2 was the accountant who carried out the stock taking of the goods allegedly sent to the Defendant. He said he carried out stock taking in the month of February. Shown Exh 3 he said it was the list they prepared. It was dated 23.2.1998 whereas they began to take stock on 15.2.1998. The value of the stock for the stock taking was Ksh 1,267,952/32, the value of good will was Ksh 300,000/= and there was a sales marketing of Ksh 360,000/= which Defendant had agreed to pay to the plaintiff as plaintiff was agent of Voco company from Germany. This was being paid in respect of rights from Germany. Total figure was to be Ksh 1,937,952/32 and there was also an amount of Ksh 39,981/= which was in the account. Grand total was Ksh 2,141,142/=. This is what was owing at the time the agreement was signed. The Defendant has paid Ksh 100,000/= on behalf of the Plaintiff and on 7.3.98, they paid Ksh 289,000/= by telegraphic transfer and on 31.7.98 they made a payment of Ksh 70,000/= by cheque and cash to Managing Director Alibhai and Ksh 50,000/= which was for sales. In total they had paid Ksh 459,000/=. The remaining amount owing on the agreement was Ksh 1,468,952/32. He then later said that from the agreement the plaintiff expected Ksh 1,927,952/32. Out of that amount Ksh 459,000/= has been received, leaving a balance of Ksh 1,468,952/32 but the amount the plaintiff is claiming is Ksh 1,508,933/=.

Pursuant to this evidence, the plaintiff applied to amend the plaint so that at paragraph 7 the amount of Ksh 509,000/= was amended to read Ksh 459,000/= and again the same paragraph 7 was amended so that the sum of Ksh 1,508,933/40 as amended to read Ksh 1,468,952/32 and prayer (a) to read Ksh 1,468,592/32. P.W 1 was never an agent of the plaintiff and he left the company.

In cross-examination, the witness stated that the two parties started doing accounts in 1996 as Defendant was buying books for the plaintiff and as at the time of the case there was still outstanding balance which is not the subject of this case. He was not personally involved in the negotiation and the agreement. He was only invited after the agreement to prepare stock sheets that were being taken over. First agreement was finalized on 28.2.1998. He identified the agreement and stated that subsequent to that agreement he

did take stock which was done at Mombasa office of the plaintiff in the absence of the Defendant. It was done on 23.2.98. Agreement was dated 18.2.1998.

In re-examination this witness repeated that agreement was finalized on 28.2.1998, prior to that they were still negotiating how the goods would be transferred. The goods were forwarded to Nairobi after the agreement had been signed. The plaintiff's chairman's written letter which was written later on the agreement was just a suggestion.

Dr Rajuikant T Vaghela was the Defence witness. He was the Managing Director of the Defendant company. He made a proposal to the Defendant's Chairman on the sale of the goods the subject matter of this suit. They negotiated by phone as well as by letter but they never reached any final settlement. He agreed that in 1998 the Defendant had intended to purchase some goods from the plaintiff and a form of negotiations took place but no final settlement. He wrote Exh 1, executed it on his part and sent it to Yinda the plaintiffs chairman but he received a letter from Yinda dated 27.2.98 which stated that the Defendant company was not happy with the payment terms concerning the letter dated 18.2.1998 a copy of which this witness never received. Later the letter dated 27.2.1998 was discussed but no agreement was reached. The letter of 18.2.1998 Exh 1 was not signed by the plaintiff's Chairman and no sealed copy was returned to the Defendant. Alibhai (P.W1) signed it for Defendant. Witness produced as Exh D1, letter dated 27.2.1998. He denied having received the goods subject matter of this suit and stated that the last goods they received physically from the plaintiff were received in 1997, but he admitted that prior to 1998 his company had been trading with the plaintiff company. The plaintiff had been using their offices in Nairobi for marketing their goods and payments were made to the Defendant on the account which the defendant paid back to the plaintiff. Sometimes in 1998 he received a letter of demand from the plaintiff's lawyers demanding Ksh 1,508,932/ 42. He produced it as Exh D2. He replied vide letter he produced as Exh D3. His lawyers also responded vide letter Exh D4. Alibhai (P.W1) was supposed to sell the goods but he did not sell the goods. He paid to Alibhai Ksh 345,971/85 in cash and fuel allowance. He kept the records for such payments in a diary and on a statement. He produced both diary and statement as Exh D5 (a) and D5(b). Some goods were not sold because Alibhai disappeared. These were part of the goods that Defendant received before the alleged agreement. They also claim Ksh 20,000 as the Defendant's storage charges as the goods were not moving since the disappearance of P.W1. He maintained however that goods in Exh 3 were not received by them and agreement was not finalized.

In cross-examination he said when he signed the alleged agreement he was referring to stock in Exh 3 but he had not gone to Mombasa to see the stock. The amount payable is not in question. The main thing that was not settled was the mode of payment. Amin Alibhai was the negotiator but the agreement was to be signed by the Chairman. Amin Alibhai started working for him on 19th February 1998. He was on salary of Ksh 45,000 per month plus expenses to be paid to him. He was to market the stock that had been shifted into defendant's firm and dispose of it. There were goods that had come from Mombasa in the normal way as the Defendant had been dealing with the Plaintiff company for some time before the disagreement. The first payment was made by Defendant on 2.2.98 of Ksh 48,298/40 and the other payment was for Ksh 289,000/= made on 16.3.98. In respect of Voco, he sent Ksh 103,485/60 on 21.3.1998. This was on discretion of the plaintiff directly defendant to pay directly to Voco to the Account of Plaintiff the Defendant had. On 22.7.1998 he paid a cheque for Ksh 70,000/= and on 15.3.98 they sent a cheque for Kshs 100,000/= making a total of approximately Kshs 650,000/=. Shown Exh D3, he admitted that the said goods were sent but he says the goods he was talking about were different goods. He ends his evidence in crossexamination by saying that he confirms in his defence that there was some form of an agreement and pursuant to the same payments were made. He still has some goods which could not sell because Alibhai abandoned the goods and that he was giving Alibhai salary on behalf of the plaintiff.

In re-examination he stated that before he wrote Exh 1, he had plaintiff stock to the tune of Ksh 1,400,000/=. That was the stock Alibhai was marketing. After 18.2.98, Defendant did not receive any stock from the plaintiff. Prior to February 1998, Defendant was dealing with the same goods. The goods received in November 1997 and January 1998 are the goods the Defendant is still having, and that is the account which is still being settled. He refutes the allegation of goods as per agreement.

The above are the facts as given in evidence. The law is now well settled that as to the plaint, the plaintiff must prove its case within the balance of probability. In the same way as to counter-claim, the Defendant must prove its case within the balance of probability. It is the legal requirement that a party must prove what is in the pleading and no party can be allowed to shift its goal posts and prove what is not pleaded.

In this case as I have stated above, the Plaintiff's plaint is clear at paragraph 3, 4 and 5 that an agreement was made orally at a meeting in 1997 held between Alibhai (P.W1) acting for plaintiff and DW 1 Dr Vaghela for the Defendant and that that agreement was reduced into writing in a letter dated 18th February 1998 between the plaintiff and defendant signed by Mr E Yinda for the plaintiff and Dr R T Vaghela for the Defendant. These are the allegations in the pleadings and these are the allegations the plaintiff set out to prove. The plaintiff based its entire claim on the same pleading and has in law a duty to prove the same i.e to prove that an agreement binding on both parties duly signed by Yinda and by Vaghela existed. Secondly the same plaintiff also had a duty to prove that the same agreement clearly spells out that the agreement pay for medical and nonmedical stocks, production of relevant marketing, and good will was to be Ksh 1,267,952/32. It also had to prove that on or about 18th February 1998, it did transfer all the stock the subject of this suit to the defendant.

In his attempt to prove the existence of an agreement, the plaintiff produced a document Exh 1. It is the alleged agreement. I will reproduce the entire document for its full purport.

"THE CHAIRMAN
Queensbury Pharmaceuticals Ltd
P.O. Box 84285,
MOMBASA
Tel. – 493589/517

18th February 1998

Dear Sir

LETTER OF UNDERTANDING BETWEEN RUP PHARM LTD AND QUEENSBURY PHARMACEUTICALS LTD

With reference to the above, this letter is to further confirm the meeting held with one of your directors, Mr Amin Mansour Alibhai, and the following points were discussed and agreed with, please sign and stamp the second copy of this letter to confirm acceptance and forward it to us forthwith for execution of the same. THE FOLLOWING POINTS HAVE BEEN DISCUSSED:-

1. **Complete purchase of your LACER stocks at cost plus current VAT**
2. **Purchase of your VOCO stock**
3. **Purchase of Q.C HEALTHCARE stock.**

It has also been agreed that the principal amount of Kshs 360,000/= which was incurred for the production of relevant marketing will be paid once we have reconfirmation from Lacer with regard to compensation from their end.

i. **That in view of us not taking over the present setup in Mombasa inclusive of assets, we will pay a sum of 300000/= as goodwill for the semi-active agency lines.**
ii. **Payment of the stock, goodwill Jan purchases will be made as follows; A current cheque of 300,000/= will be paid on signing of this agreement and the balance will be paid via post dated cheques at 30, 60, 90, 120 and 150.**

SINCERELY

RUP PHARM LIMITED

DR R.T. VAGHELA"

This document does not state the value of the goods that were to be sold. It is clearly subject to the Plaintiff signing and stamping a second copy and could not be treated as an agreement until and unless a second copy was signed and stamped and released to the Defendant. I have not seen any second copy duly signed and stamped by the plaintiff and certainly there is no evidence that the plaintiff did stamp the agreement with its stamp or seal. The copy produced which I have reproduced here is signed by P.W 1, Alibhai but is sealed by the seal of the Plaintiff. It is certainly not signed by E.O Yinda as alleged in the plaint. In evidence non alleged it was signed by Yinda. Even if I do accept that Alibhai, being the Managing Director of the plaintiff company could have had authority to sign the same document, none the less, the document, if it was meant to bind a limited liability company like the Plaintiff had to have the company's seal or at least its stamp. Plaintiff needed not state in the plaint that it was signed by Yinda as that is not true. Further more, this document has not been stamped or sealed by the plaintiff, but the plaintiff instead of signing it and sealing it and returning it to the Defendant as a binding agreement, reacted to it as follows in a letter dated 27th February 1998:

"27th February 1998

Dr R.T. Vaghela Rup Pharm Limited
P.O. Box 79677
NAIROBI

Dear Sir,

RE: LETTER OF UNDERSTANDING

With reference to your letter dated 18th February, 1998 we are in agreement with the points that were discussed; we feel that the payment proposed is not conducive, kindly arrange for payments as follows:-

1. **An initial down payment of Ksh 600,000.**
2. **Balance of payment to be made inclusive January purchases should be split to 60 and 90 days post dated cheques. Looking forward to a prompt reply.**

Yours faithfully,

EDWIN O YINDA
CHAIRMAN"

The response clearly raised certain matters that needed to be incorporated into the proposals in Exh 1 and as that Exh 1 had not been sealed, and returned to the Defendant, this Plaintiff's reaction reduced the same document into a mere draft proposals which had to be further negotiated to see if the proposals in the letter dated 27th February 1998, made by the plaintiff could be incorporated in Exh 1 or not. In my humble opinion, this document Exh 1, as it stands cannot in the circumstances of this case bind the plaintiff which never sealed it and was still seeking other proposals to be incorporated into it. It cannot be binding further because the purchase price is not stated in it and the period of payment of the same purchase price has not been stated in the document and was in fact still being negotiated with the plaintiff still making proposals that the amount agreed upon be paid by an initial payment of Ksh 600,000/= and balance to be paid together with January purchases and 90 days post dated cheques. As it could not bind the plaintiff, so would the plaintiff not use it as a basis for suing the Defendant. It was not a valid and binding agreement. The plaintiff alleges that the agreement stipulated that the Defendant agreed to purchase and pay for medical and non-medical stocks, production of relevant marketing and goodwill at a total cost of Ksh 1,267,952/32. This is not anywhere in document produced as agreement. In any case PW2 gave evidence and in his evidence he stated that the value of stock is what amounted to Kshs 1,267,952/32 and gave different payments such as for goodwill and production of marketing so that the amount of Ksh 1,267,952/ = was not the entire total value of goods purchased, goodwill and production

by relevant marketing. This in effect means what the plaint states is at variance with what the plaintiff did set out to prove.

The other matter I need to comment on is at paragraph 7 of the plaint. That paragraph states that the Defendant had paid to the plaintiff a sum of Ksh 459,000/=. If we were to consider that against the allegation at paragraph 3 of the same plaint, one would think that the balance would be Ksh 808,952/32, but No! The amount still claimed in that paragraph and in the prayer is Ksh 1,468,952/32. The pleading do not state why there is such a serious variance in the Plaint. There is no explanation as to why the "agreement" which was the alleged basis of the relationship of the parties never stated anything about this figure being claimed after Ksh 459,000/= has been paid per agreement (as the plaintiff alleges) is still far in excess of the figure that should have been the balance if "agreement" is anything to go by.

The next point I need to consider is whether the goods the subject matter of this dispute were actually sent to the Defendant company or not. The plaintiff says it did send the goods and has produced two documents Exh 2(a) and 2(b) to prove that the relevant goods were actually sent and received by the Defendant. PW 1 also says he went to Nairobi and both himself and Dr Vaghela received the same goods. The defendant's witness Dr Vaghela states that the goods the Defendant received were goods sent in March 1997 and January 1998 and not the goods which are the subject matter of this suit. The alleged agreement was written on 18th February 1998. The stock taking document Exh 3 shows that Voco stocks were taken as at February 23rd 1998 and another document also Exh 3 refers the stocks as at February 18, 1998. These would show that the stocks were in Mombasa on 23rd February 1998 for it would not have been possible to do stock taking of what was not available. However, a look at Exh 2(a) (a receipt issued by Coast Mail Co Ltd which was produced by plaintiff to show transportation of the relevant goods) reveals that whatever goods were transported, were transported on 20.1.98 about one month before the alleged stock taking. Exh 2(b) does not state any dates. PW2 says he was not involved in the negotiations and he was only instructed after the agreement to prepare the stock. He stated further that Amin Alibhai (PW1) followed the goods after stock taking on 23.2.1998 whereas Alibhai PW1 says the goods were sent before signing the agreement. PW2 is certain that stock taking started on 15.2.1998. Whichever way one looks at it, the plaintiffs case on this aspect cannot hold. If stock taking started on 15.2.1998 and ended on 23.2.1998 then which goods were sent to Nairobi vide Exh 2(a) and 2 (b) which were sent on 20.1.1998 (see Exh 2 (a))? If they were the same goods then was stock taking a proper one, if it was being done on documents only without the goods? If Alibhai followed the goods to Nairobi immediately after the agreement and witnessed their receipt then which goods were these as he says in re-examination that agreement was signed long after the goods and had been sent to Nairobi. It was the Plaintiff's duty to prove that they honoured their part of the alleged agreement in that they sent the goods to the Defendant. As it now appears this is not proved as the two witnesses have given evidence that one cannot believe and the only evidence (written) to prove receipt of goods is indeed in support of the Defendant and in support of a letter written by Yinda dated 27.2.1998 which stated as the Defendant that there were purchases in November 1997 and January 1998 which were still with the Defendant. How else can one come to any other conclusion when the Receipt Exh 2(a) is clearly dated 20th January 1998 and that could not have been in respect of transport of goods which by 15th February 1998 were still with the plaintiff for stock taking and which were allegedly sent to Nairobi after stock taking. Indeed, according to PW 2 the agreement was finalized on 28.2.98 and the goods were transferred to Nairobi after agreement had been signed. (see his evidence in Re-examination). In my humble opinion, whatever actually happened, the Plaintiffs two witnesses' evidence is so confused that I cannot be certain that the goods the subject of the suit were actually sent to Nairobi and received by the Defendant. They had a duty to prove this and they have not proved it.

Thus the plaintiff has not proved that a valid, enforceable agreement did exist between it and the Defendant. Even if any agreement did exist the plaintiff has not proved that it did honour the same agreement and sent the goods to the Defendant. Further, the pleadings in the plaint as to the amounts that should be due is so confused to the extent that the amount pleaded in the body of the plaint is not the amount sought in the prayer for judgment and no acceptable explanation or no explanation at all is forthcoming for the same confusion. I am unable to grant the prayers sought in the plaint.

The counter-claim is seeking Ksh 364,871/85 being the amount drawn by Amin Mansour Alibhai towards

the marketing of the subject goods as described in the Defence and counter-claim plus balance on invoice No 3774 dated 17th March 1997. The Defendant says he paid the amount of Ksh 345,971/85 to PW1 as a salary and fuel allowance on behalf of the plaintiff. He says this was agreed upon. He has not stated when the agreement took place; with whom this was discussed and agreed upon; who were present in case it was an oral agreement and if it was a written agreement, he has not produced a copy of it. There were no doubt payments made some acknowledged and many not acknowledged. In any case, the same PW 1 (Alibhai) did admit readily that the Defendant paid him some money plus fuel expenses but he said this was paid as a salary to himself and not paid on behalf of the Plaintiff at all. In an undated letter Exh 3 addressed to the Advocates for the Plaintiff, the Defendant says at penultimate paragraph that Mr Amin Alibhai had gone to Nairobi "to settle all the outstanding debts he had incurred with Dr R.T. Vaghela. In his evidence he says he was paying Alibhai salary. Further the exact amount that was being paid is not certain with Alibhai saying he was being paid Ksh 50,000/= plus fuel allowance whereas DW1 does not state precisely how much he was paying to Alibhai per month. The Defendant also claims Ksh 20,000/= as storage charges per month from March 1998. This is pleaded at paragraph 7 of the Defence but in the same counter-claim the Defendant did not specify for what amount the judgement should be entered and it has not demonstrated how that amount of Ksh 20,000/= which is arrived at. The Defendant had a duty to prove the allegation into the counter-claim. He has not proved the same within the balance of probability.

The sum total of the above is that this suit is dismissed. Counter-claim is also dismissed. The Defendant will have half of the cost of the suit.

Judgement accordingly.

Dated and delivered at Nairobi this 28th day of February, 2002

J.W.O OTIENO

JUUDGE