

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 470 OF 2000**

SKY PHARMACY LIMITED PLAINTIFF

VERSUS

LYNX PHARMACY LIMITED DEFENDANT

RULING

This is an application under O. XXXV Rule 1, O. L Rules 1 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for summary judgment to be entered against the defendant for Shs.749,481.50 plus costs and interest at 20% from 31.3.1999 until payment in full. The application is based on the following grounds:-

- a) That the Defendant is truly indebted to the Plaintiff for the sum claimed in respect of goods supplied to the Defendant at their request.
- b) That the Defendant has indirectly acknowledged the debt in the Defence, while at the same time raising a general mere denial to the claim, and at the same time claiming they had been allowed by the Plaintiff to pay the same debt piecemeal.

The plaint on which the application is based avers in paragraph 3 that the plaintiff's claim against the defendant is for Shs.749,481.50 in respect of goods sold to the defendant at Nairobi in or about 1999 at the request of and instance of the defendant. In the defence the defendant implicitly admits part of the plaintiff claim by stating:-

"The defendant avers that any indebtedness to the plaintiff has significantly been met and as at the date of filing the suit, the amount owed by the defendant to the plaintiff had substantially been settled and could not be the amount claimed."

My understanding of the above averment is that the defendant is not wholly and in total denying the plaintiff's claim; it admits that there was a sum owing but that a substantial part was settled. This means that a portion of the claim remains outstanding. As to how much, the plaintiff has tendered evidence which has not been seriously challenged (see the statement of account annexed to Mr. Ruparelia's affidavit sworn on 8.8.2000 in support of this application) which shows that as at 18.07.2000, the defendant owed the plaintiff Shs.710,000/=. Given the defendant's admission of some indebtedness to the plaintiff and the plaintiff's establishment by cogent evidence that such debt was in the tune of Shs.710,000/=:, the defendant is, on an application such as this obliged to show what sums, if any, he has paid towards the reduction of the debt (see Magunga General Stores Vs. Pepco Distributors Limited (1987) 2 KAR 89 at p. 90). Instead of doing so the defendant has sought through a replying affidavit sworn by Dr. Wahu Kereithi, a director of the defendant, to introduce new and irrelevant arguments which are not to be found in the defence, such as allegations of dead stock and return of such dead stock. Such averments and allegations are alien to the defence and must be ignored. Without them the defendant has no answer to the plaintiff's application.

In the event the application succeeds and judgment is entered in favour of the plaintiff against the defendant for Shs.749,481.50 with costs and interest at court rates.

Dated at Nairobi this 19th day of January, 2001.

T. MBALUTO

JUDGE