

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 261 OF 2001

ALSAFRA HEALTH CARE LTD. PLAINTIFF

VERSUS

KAM PHARMACY LTD. 1ST DEFENDANT

KAM PHARMACY (WESTLANDS) LTD. 2ND DEFENDANT

KAM PHARMACY (HARAMBEE AVENUE) LTD. ... 3RD DEFENDANT

RULING

This application has been brought by the defendants under O. 6 Rule 13(1) (a) of the Civil Procedure Rules to strike out the plaint filed herein by the plaintiff on the ground that it does not disclose a cause of action.

The basis of the defendants' contention is that the suit is based on an alleged breach by the defendants of a contract to which, the pleadings clearly show, the defendants were not parties. That position is borne out by the averment in paragraph 3, 4 and 5 of the plaint which are as follows:-

- “1. That the Plaintiff is a pharmaceutical distributor who was granted sole agency and distributorship of Lifescan Inc.’s products in the Republic of Kenya for valuable consideration;***
- 2. That of the items covered by the sole agency and distributorship agreement are One Touch Basic Glucometers and One Touch Strips;***
- 3. That the Defendants have in breach of the sole agency and distributorship agreement between the Plaintiff and Lifescan Inc . imported, continue to import stocked and continue to stock and distribute Lifescan Inc. One Touch Strips and One Touch Basic Glucometers.”***

The averments quoted above disclose that the contract was between the plaintiff and Lifescan Inc. and that the defendants were not parties thereto. In Chitty on Contracts, at paragraph 18-014 (page 911) it is stated:-

“The doctrine of privity (of contracts) means, and means only, that a person cannot acquire rights, or be subjected to liabilities arising under a contract to which he is not a party.” (emphasis mine).

Whether or not the defendants were aware of the contract between the plaintiff and Lifescan Inc. as claimed by Mr. Omosa, learned counsel for the plaintiff is in my view irrelevant. Even if they were aware, that alone does not make them liable. The fact of the matter is that they cannot be made liable under contracts to which they were not parties.

The claim against the defendants as pleaded does not therefore disclose any cause of action. As observed by Mr. James Singh for the defendants, there is no application as of this moment to amend the plaint and consequently, I am unable to determine whether or not an amendment can breathe some life to the action. Given those circumstances, the only option this court has as of now is to allow the application and strike out the plaint with costs. There will be orders accordingly with costs.

Dated at Nairobi this 7th day of March, 2001.

T. MBALUTO

JUDGE