



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E402 OF 2020

BETWEEN

EMAMI LIMITED.....PLAINTIFF

AND

ORANGE PHARMA LIMITED.....DEFENDANT

RULING NO. 2

1. On 23rd December 2020, I dismissed the Plaintiff's application seeking an order of injunction restraining the Defendant from passing off, importing, manufacturing, selling, supplying, distributing or marketing any products bearing any mark which is confusingly and/or deceptively similar in part or whole to the Plaintiff's trademarks **EMAMI MENTHOPLUS** and **EMAMI MENTHO PLUS** including by use of the marks **KALUMA MENTHO PLUS** and/or **MENTHO PLUS**. In exercise of its undoubted right of appeal, the Plaintiff has now preferred an appeal to the Court of Appeal against the decision.

2. The Plaintiff has now moved the court by the Notice of Motion dated 9th March 2021 seeking to stay further proceedings in this matter pending the hearing and determination of the intended appeal. The application is supported by the affidavit of its Vice President- Finance & Business Development, Chirag Sheth, sworn on 9th March 2021. It is opposed by the Defendant through the replying affidavit sworn on 20th June 2020 by Javan Omondi Odhiambo, its General Manager. Counsel for the parties made brief oral submissions in support of their respective positions.

3. The general principle governing the grant of stay of proceedings was elucidated by Ringera J., in **Re: Global Tours and Travels Ltd NRB HC Winding Up Cause No. 43 of 2006 (UR)** cited in **Kenya Wildlife Service v James Mutembei MRU HCCA No. 40 of 2018 [2019] eKLR** as follows:

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

4. As I understand, the duty of the court is to consider the respective positions of the parties in order to do justice to a party who wishes to exercise its right of appeal and one who is entitled to proceed with the case expeditiously. The key consideration in my view, is whether, in the circumstances of the case the Appellant is entitled to stay.

5. The Plaintiff contends that it has an arguable appeal which will be rendered nugatory if the matter proceeds for hearing. It urges that if the application is granted, the Defendant will not suffer any prejudice and that it is the interests of justice to stay execution. The Defendant takes the position that the appeal is not arguable and that the application for injunction having been dismissed, the proper cause is to set down the matter for hearing. In the Defendant's view, the interests of justice lean towards prosecution of the suit expeditiously.

6. I am not prepared to hold that the intended appeal is frivolous hence the issue for my consideration is whether, in the totality of

circumstances of the case, an order of stay is merited. In my view, the ruling subject of the appeal was preliminary in nature as the application was intended to preserve the subject matter. If the matter proceeds for hearing, the parties will have the full opportunity to ventilate their respective legal rights. On the other hand, if the appeal succeeds, the Court of Appeal would only issue an injunction pending the hearing and determination of the suit and the suit would still proceed for hearing.

7. I do not see what prejudice the Plaintiff will suffer and I am not satisfied that there is any basis for the court to stay proceedings. Consequently, the Notice of Motion dated 9th March 2021 is now dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Mwangi instructed by CFL Advocates for the Plaintiff.

Mr Mochu instructed by Mochu Kahura and Company Advocates for the Defendant.