



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 134 OF 2017**

**NJIMIA PHARMACEUTICALS LTD.....APPELLANT**

**VERSUS**

**SOUTH B HOSPITAL.....1<sup>ST</sup> RESPONDENT**

**MEDIHEAL GROUP LTD & MEDIHEAL SOUTH B HOSPITAL....2<sup>ND</sup> RESPONDENT**

**(Being an appeal against the entire judgment by Hon. L. W. Kabaria (Ms) RM,**

**dated and delivered on 14<sup>th</sup> March 2017 in Milimani CMCC No. 4860 of 2013)**

**JUDGEMENT**

1. Njimia Pharmaceuticals Ltd, the appellant herein, filed an action against South B Hospital Ltd, the 1<sup>st</sup> respondent herein before the Chief Magistrate's court claiming a sum of ksh.2,245,895/= on account of Pharmaceutical products supplied and not paid in full. The 1<sup>st</sup> respondent denied the appellant's claim contending that the hospital was taken over by Mediheal South B Hospital, the 3<sup>rd</sup> respondent herein. The 3<sup>rd</sup> respondent and Mediheal Group Ltd, the 2<sup>nd</sup> respondent were later enjoined as Third parties to the suit by the 1<sup>st</sup> respondent.

2. After hearing the parties Hon. L. W. Kaberia, learned Senior Resident Magistrate entered judgment in favour of the appellant and against the 1<sup>st</sup> respondent in the sum of ksh.391,957/=. He further stated that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (Third Parties) would indemnify the 1<sup>st</sup> respondent therefore judgment was entered in favour of the 1<sup>st</sup> respondent and against the Third parties (2<sup>nd</sup> and 3<sup>rd</sup> respondents).

3. The appellant being aggrieved preferred this appeal and put forward the following grounds:

**i. THAT the learned trial magistrate erred in law and fact in failing to find in favour of the plaintiff.**

**ii. THAT the learned trial magistrate misapprehended the law in arriving at the conclusion that liability could not attach on the third party who had been properly enjoined.**

**iii. THAT the learned trial magistrate misapprehended the law in concluding that third party proceeding are not the right forum to enjoin a party.**

**iv. THAT the learned trial magistrate erred in both law and fact in failing to appreciate the flow of evidence the privity of contract between the plaintiff and the defendant and the third party.**

**v. THAT the learned trial magistrate misdirected herself in evaluating the evidence placed before her in concluding that the third party was not liable whereas evidence was led by the defendant to that effect.**

**vi. THAT the learned trial magistrate erred in law and fact by failing to properly scrutinize and evaluate the evidence tendered by the appellant and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of compensation to the respondent.**

**vii. THAT the learned trial magistrate erred in law and fact in failing to find that the debt owed to the appellant by the 1<sup>st</sup> respondent was kshs.2,245,895/=.**

**viii. THAT the learned trial magistrate erred in law by exonerating the 1<sup>st</sup> respondent's liability to pay the debt owed.**

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the written submission and the authorities cited by the parties. The first ground of appeal put forward for consideration is the question whether the trial magistrate erred in failing to find in favour of the appellant.

5. It is the submission of the appellant that it had proved that it supplied goods to the respondents for which it was not compensated thus suffering tremendous financial loss. In the second ground of appeal the appellant argued that the trial magistrate misapprehended the law in concluding that liability could not attach on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who had been properly enjoined.

6. The appellant further pointed out that there was an unequivocal connection between the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' role in the contract between the appellant and the 1<sup>st</sup> respondent since they took over the 1<sup>st</sup> respondents premises and conducted business with all its former suppliers under the old contract without creating new agreements with them therefore liabilities and losses incurred while they conducted business in the 1<sup>st</sup> respondent's premises should be extended to them as well.

7. The appellant further pointed out that the 1<sup>st</sup> respondents successfully sought for leave to enjoin the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the suit to indemnify it for any debts and further liabilities accrued by their actions. The appellant further argued that the trial magistrate erred when she agreed with the 1<sup>st</sup> respondent that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had a duty to the appellant yet she denied that they were liable to the appellant.

8. This court was urged to find that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as liable to pay the appellant all for the supply of pharmaceuticals. The appellant further argued that the learned Senior Resident Magistrate erred when she failed to find that the 1<sup>st</sup> respondent owed the appellant ksh.2,345,895/=.

9. The respondent opposed the appeal stating that the learned Senior Resident Magistrate considered the evidence, the submissions and the authorities supplied and came to the correct conclusion.

10. The main issue which arose on appeal is the question of liability.

Having re-evaluated the evidence that was presented before the trial court, it is apparent that the appellant's claim is in respect of the supply of goods to the 1<sup>st</sup> respondent. The appellant avers that it was paid a portion of the amount owed leaving some amount outstanding. The 1<sup>st</sup> respondent contended that the goods in question were not supplied to it but to third parties who had taken over the hospital and that the third parties had admitted indebtedness.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents (third parties) contended that they cannot be ordered to pay since the supply contract was between the appellant and the 1<sup>st</sup> respondent, therefore there was no privity of contract.

12. I have re-evaluated the evidence and it is clear that the supply of the goods by the appellant to the 1<sup>st</sup> respondent is not denied as shown in the minutes of the meeting held between the appellant and the 1<sup>st</sup> respondent produced before the trial court.

13. There was also evidence showing that the 1<sup>st</sup> respondent issued cheques to settle a sum of ksh.1,800,000/= owed to the appellant leaving a balance of ksh.391,957/=. The evidence presented also show that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents took possession of goods and acknowledged receipt in their meeting. The trial magistrate came to the conclusion that the appellant is entitled to claim from the 2<sup>nd</sup> and 3<sup>rd</sup> respondents a sum of ksh.1,853,938/= being goods supplied and received by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

14. With respect, I agree with the learned senior resident magistrate that the appellant could not claim the aforesaid amount from the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through these proceedings. The duo were basically brought to these proceedings as third parties by the 1<sup>st</sup> respondent to indemnify it. Had the duo been enjoined as defendants then the plaintiff could have been entitled to judgment against them.

15. In the end, this appeal is found to be without merit. It is dismissed with costs being awarded to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/respondent

.....for the Respondent/Applicant