



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 469 OF 2014

C.MEHTA & COMPANY LIMITED.....PLAINTIFF

VERSUS

HETERO DRUGS LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed the suit herein on 23rd October, 2014, vide a plaint dated 9th October 2014, seeking for judgment against the defendant for a sum of; USD 617,695.00 with interests at commercial rates, from 12th June, 2013 until payment in full, costs of the suit and interests thereon and any other relief the court deems fit to grant.
2. The Plaintiff averred that, it is a limited liability company, incorporated with registered offices in Kenya, whereas the Defendant is a limited liability company incorporated, having its registered office in India. That through a distribution agreement dated 13th May 2002, the Defendant appointed it as its exclusive distributor for the purpose of importing and/or resale of pharmaceutical drugs from India to Kenya. The terms and conditions of the agreement stipulated inter alia that, the agreement would subsist for a period of 5 years with effect from 1st March 2002, and the Plaintiff was entitled to a distribution fee of 10% of the total sales.
3. That on or about 1st March 2008, the agreement was terminated by effluxion of time, whereupon the parties entered into another agreement, made partly; orally, in writing and by conduct of the parties. That the terms of subsequent agreement were renegotiated whereupon the Plaintiff accepted to continue with the agency relationship at a distribution fee of 5%.
4. The Plaintiff avers that between the months of September, 2010 and August, 2011, it duly performed its express and implied obligations under the agency agreement and made sales in the sum of USD 12,353,900. Thus, it is entitled to a payment of commission in the sum of; USD 617,695, based on the rate agreed on and the sales. However, despite several requests and demands, the Defendant has refused and/or failed to make good the claim hence the suit and the prayers therein.
5. However, the Defendant denied liability through an amended statement of Defence and Counter-claim dated 9th September 2015, but joined issues with the Plaintiff on the creation of the relationship between the parties. It was conceded that on or about 2002, the Defendant engaged the Plaintiff as distribution agent of its products in Kenya. That the Plaintiff's only task was liaison with government procurement units and Kenya Pharma Project (KPP) while the defendant task since 2010 until sometime in 2011 was to directly be involved in tender participation and negotiations with those companies.
6. The Defendant averred that, although the company sold goods valued at about USD 12,353,900 the Plaintiff is not entitled to any commission based on the fact that, the Plaintiff had no role in the generated sales and although the Plaintiff requested to be paid a sum of USD 60,000.00, the Defendant declined to pay, whereupon the Plaintiff's director, Mr. Ashok Doshi, conceded to payment of USD 40,000. Even then, the Plaintiff failed to offer a debit note for that sum, as such the payment thereof was not made.
7. The Defendant however, averred that, before it made the payment, it found out that in the months of September 2011, that the Plaintiff had in total breach of its obligations as an agent, engaged in fraudulent packaging and distribution of the its products together with counterfeit products, which were of a lower quality than the Defendant's products with the intention of leading or in a manner that was likely to lead the public to believe that the altered goods were Zidolam-N pharmaceuticals manufactured by the Defendant.
8. The Defendant further argues that, the Plaintiff sold the counterfeited pharmaceuticals in the market, and enriched itself with the proceeds of the sales thereof to the Defendant's detriment, and had the Plaintiff not sold the counterfeited pharmaceuticals, the Defendant's sales for the period would have been higher. That as a result of the actions of the Plaintiff and its agents, the Defendant suffered loss which is not just limited to the value of counterfeit goods sold in the market.

9. The Defendant averred in support of its counter-claim that, on 12th September, 2011, it became aware that a complaint had been lodged at the Geneva office of the World Health Organization (hereinafter WHO) by Mediciens Sans Frontiers, France (hereinafter MSF France) to the effect that the Defendant's Zidolam-N drug was not in compliance with the quality standards set by the World Health Organisation (WHO). On 13th September 2011, a team of Auditors and Inspectors from WHO, arrived at the Defendant's factory in Hyderabad, India to inspect the manufacturing quality and standards at the factory. Control samples of Zidolam-N were tested and the results showed it was up to standard.

10. The Defendant then initiated its own quality control, investigations of the complaint made by MSF France, to determine the cause thereof. On 20th September 2011, the Defendant's officials were invited by the inspectors of the Pharmacy and Poisons Board (herein "the Board") to visit the premises of the Plaintiff's agents namely; Infusion Medicare Limited situated, on Mogadishu road in Nairobi. That an accumulation of the Defendant's Zidolam-N pharmaceuticals products together with packaging tapes bearing the Defendant's name and logo were found in premises and were confiscated by officials from Board. That the Zidolam-N pharmaceuticals discovered in Infusion Medicare Limited's premises bore the batch number E110467, which has never been supplied to Kenya by the Defendant.

11. As a result, the Defendant lodged complaints before the Anti-Counterfeit Agency and Board against the Plaintiff's conduct. That the complaints before the Anti-Counterfeit Agency is pending determination while the one before the Board has been determined and the Plaintiff found guilty. That during the hearing of the complaint before the Enquiries and Disciplinary Committee of the Board on 20th December 2011, the following facts came to light:-

(a) Infusion Medicare Limited was purchased by the Plaintiff herein;

(b) The Plaintiff's officials and/or agents had initially denied having any Zidolam-N Pharmaceuticals but later admitted that the Plaintiff had some Zidolam-N Pharmaceuticals at Infusion Medicare Limited's stores;

(c) The pharmaceuticals found to be in the possession of the Plaintiff and Infusion Medicare Limited were not supplied to them by the Defendant.

12. The defendants tabulated the particulars of breach of obligations by the Plaintiff and its agents as here below reproduced;

(a) Packaging and distributing altered and adulterated pharmaceuticals with the intention of leading or in a manner that is likely to lead the public to believe that the altered goods are Zidolam-N pharmaceuticals manufactured by the Defendant;

(b) Packaging and distributing pharmaceuticals of a lower quality with the intention of leading or in a manner that is likely to lead the public to believe that they are Zidolam-N pharmaceuticals of the original quality and standard as manufactured by the Defendant;

(c) Packaging and distributing stale or deteriorated pharmaceuticals with the intention of leading or in a manner that is likely to lead the public to believe that the stale or deteriorated pharmaceuticals are at the usual state of Zidolam-N pharmaceuticals produced by the Defendant;

(d) Selling of the counterfeited pharmaceuticals in the market as if they were the Defendant's products;

(e) Enriching themselves with the proceeds of the sale of the counterfeited pharmaceuticals to the detriment of the Defendant.

(f) Quoting a price of United States Dollars (USD) 10.75 which was higher than USD 9.90 which was the price that the Plaintiff had been advised by the Defendant. The Plaintiff intended to sell the counterfeit drugs at the higher price to KEMSA.

13. However, the Plaintiff filed an amended statement of Defence and Defence to the counter-claim dated 24th November, 2015, in which it argued that, the Defendant lodged a malicious complaint against it in an attempt to evade its obligations, but the complaint was investigated and on 30th July 2012, the Plaintiff was exonerated of any wrong doing by the Anti-Counterfeit Agency. The Plaintiff denied that there has been any decision made by the Board.

14. The Plaintiff reiterated that, what was agreed on between the parties was a review of the previous commission percentage from 10% to 5% of the scales because it was no longer involved in the distribution. That in any event the Defendant could only sell its products in Kenya after the Plaintiff had issued letters of no objection; which entitled the Plaintiff to a commission as agreed between the parties. As such there is no basis for the proposed amount of USD 40,000, and it could not sign the debit note.

15. The Plaintiff argued that, Infusion Medicare Limited is not a party to the suit and the Plaintiff had no agreement or arrangement with that party as claimed or at all. Even then, investigations against company were conducted and it was exonerated on 13th March 2012, of any wrong doing.

16. The defendant therefore prayed for judgment against the plaintiff in the following orders:-

i) A declaration that the actions of the plaintiff amount to a breach of the agency agreement and/or relationship between the plaintiff and the Defendant

ii) The Plaintiff be dismissed with costs to the Defendant;

iii) *An inquiry as to loss suffered by the Defendant as a result of the Plaintiff's actions by taking of accounts of the Plaintiff's total sales for the years 2010 and 2011 and an order be made for payment of the amount shown to be due to the Defendant on the taking of such account;*

iv) *Interest on (ii) above on court rates until payment in full; and*

v) *Costs of this suit.*

17. The case was fully heard after the close of pleadings. The Plaintiff's case was supported by the evidence of Mr Alkash Kukadia who basically, adopted the witness statement he signed on 24th May, 2018 and the documents filed in support of the case. The Defendant's case on the other hand, was supported by the evidence of Mr Phanindranath Reddy, who similarly adopted the statement filed in court on 19th December 2014, and bundles of documents in support of thereof filed on the same date and supplementary list of documents filed on 15th March, 2016. In view of the fact the evidence is similar to the averments in the pleadings in all respects, I shall not reproduce it herein but will make substantive reference thereto.

18. The parties subsequently, filed their final submissions considered herein and in addition, filed their respective issues for determination. The Plaintiff's filed the following issues for determination:-

a) *whether there was an agency agreement between the plaintiff and the defendant from 2nd March, 2008. If so, what were the terms of the agreement;*

b) *whether the plaintiff is entitled to any commission from the defendant? If, in the affirmative, how much;*

c) *whether the plaintiff sold counterfeited pharmaceuticals as if they were the defendant's products;*

d) *whether the plaintiff breached the agency relationship between it and the defendant, If so how;*

e) *whether the defendant suffered any loss? If so, how much and who is liable for the loss incurred;*

f) *whether the plaintiff is entitled to the prayers sought in the plaint;*

g) *whether the defendant is entitled to the prayers sought in the defence and the counterclaim; and*

h) *who should bear the costs of the suit?*

19. The Defendant on its part raised the issues here below for determination: -

a) *what were the terms of the agency agreement between the plaintiff and the defendant?*

b) *whether the agreed agency fees that was due to the plaintiff on account of the goods it distributed valued at about USD 12,353,900 was:*

(i) 5 % commission on the total sales amounting to USD 617,695; or

(ii) USD 60, 000 or USD 40, 000(sic)

c) *whether the plaintiff was entitled to a commission on account of the supplies made to the Kenya Pharma Project (KPP);*

d) *whether the plaintiff breached the terms of the agency agreement as particularized in the defence and counterclaim;*

e) *whether the plaintiff has made any profits on the account of breach of the agency agreement;*

f) *Is the plaintiff entitled to the prayers sought?*

g) *Is the defendant entitled to the prayers sought? and*

h) *who will bear the costs?*

20. In my considered opinion the following issues have arisen for determination:-

a) *did the defendant appoint the plaintiff as its agent vide an agreement dated 13th May 2002 as alleged, if so what were the terms and conditions thereof;*

b) *if the agreement existed, did it terminate on 1st March 2008, by effluxion of time as alleged;*

c) did the parties thereafter enter into any other agreement either orally or in writing or by conduct? If so what were the terms and conditions thereof (if any);

d) if there was a subsequent agreement, did either the plaintiff or the defendant perform its contractual obligations and/or breach the agreement;

e) is either the plaintiff and/or the defendant entitled to the prayers sought; and

f) who will bear the costs of the suit?

21. I have considered the above issues in the light of evidence adduced herein and I find that, the entire matter rests on the alleged agency relationship entered into by the parties, consequently, the first issue to determine is whether, there was an agreement and/or an agency relationship between the parties. In that regard I find that, the Defendant wrote to the Plaintiff, a letter dated 13th May 2002, which is produced herein, accompanied by a distribution agreement executed by the parties on the same date. The agreement details out the terms of the relationship of the parties and the nature of their engagement. In my considered opinion, this letter is proof that, the parties entered into the subject agreement. Even then both parties have conceded to the same as pleaded under paragraph 4 of the Plaintiff and admitted under paragraph 3 of the statement of the Defence.

22. In fact, both parties agree that, the subject agreement expired on or about 1st March 2008, and is not a subject of the dispute herein. Therefore, I shall not delve into the terms and conditions thereof. However, the issue in dispute is the subsequent agreement the parties entered, which was not executed vide a formal document. The dispute centers on the role of the Plaintiff therein and the commission payable.

23. The parties herein concede that, after the expiry of the first agreement, they agreed to extend the agreement on renegotiated terms. The Plaintiff has produced letters of "no objection" and invoices for the period September 2010 to August 2011, in proof thereof. I note that these letters originate from the Plaintiff and signed by Mr, Doshi, addressed to the Registrar Pharmacy and Poisons Board. They are in relation to "exportation of goods" as stated in the various accompanying pro-forma invoices of different dates.

24. The details of these letters indicate that, the Defendant is the exporter and the manufacturer and Chemonics Pharmacy LLC c/o Philips Healthcare Services Limited is the consignee, whereas Chemonics Pharmacy LLC as the buyer. The invoices also show that, the Defendant is the exporter and Philips Healthcare Services Limited is the importer.

25. The question that arises is; what then, was the role of the Plaintiff in the whole transaction? Was the Plaintiff an agent as alleged or a mere liaison person? In this regard, I note that the Defendant's witness states at paragraph 6 of his statement that;

"after five year period the parties entered into an oral agreement for the plaintiff to continue acting as the defendant's agent and the plaintiff was to inter alia; execute its duties with utmost good faith and ensure that the defendant's products were distributed to all the contracted purchasers directly from the port of import. Further, the plaintiff was to take adequate precautions to execute the import permissions from PPB and other competent authorities for the smooth delivery of the defendant's products and issue letters of no objection for supplies into Kenya for KPP".

26. It is therefore clear from the witness statement that, the parties entered into another agreement after the expiry of the initial one and the plaintiff continued to act as the Defendant's agent. What remains to be resolved though, is whether the Plaintiff is entitled to any commission and if so how much. Apparently the parties are in agreement that the commission was renegotiated from 10% to 5% based on the sales. The issue is how much is payable (if any) or whether the commission is payable in view of the alleged breach of agreement by the Plaintiff.

27. I have considered the evidence on this issue and note that the Defendant send the Plaintiff an email dated 7th February 2011 requesting the Plaintiff to issue "NOC" and forward to KPP office. The Plaintiff responded to the email on the same day at 7:21 pm, promising "to do the needful" and sought for clarity on the accumulated commission due on KPP invoices and when it would be paid.

28. On the following day the Defendant wrote back and promised to give the details requested for and requested the Plaintiff to ensure that the NOC was issued that day. The communication went on with the Defendant sending reminders on the 17th and 23rd August 2011. Finally, the Defendant wrote to the Plaintiff on the 25th August 2011, as follows:

"Based on the sales and realization figures, I have convinced my account people to increase the royalty up to USD 40,000.00 finally....."

29. However, the demand letter from the firm of; Henia Anzala & Associates acting for the Plaintiff to the Defendant, was seeking for commission of 5% of the total sales. The plaintiff therein declines the offer of USD 40,000 as royalty, arguing that, it was not the owner of any of the drugs sold by the Defendant, therefore not entitled to royalties.

30. The plaintiff submitted that even then, the Defendant has not discharged the burden of proof under section 109 of the Evidence Act, as to how it arrived at the figure of USD 40,000. However, the Defendant maintained that, the agency fees payable for the extended period was determined on a case to case basis, and that the Plaintiff was to be paid commission of 0.5% of the sales for direct sales and 0.25 % of the sales for indirect sales.

31. It is therefore clear that the rate of commission payable and the basis thereof is in dispute. The unfortunate issue is that; the parties did not reduce their agreement into writing. Be that as it were, I find that the Defendant has admitted in the pleadings and evidence that the commission was renegotiated to 5% from 10%, therefore, the alleged commissions of; 0.5% and 0.25% is afterthought, as the Defendant

does not make reference to the same in their amended statement of defence but merely denies that the rate of commission payable was 0.5%.

32. Even then, although as pleaded under paragraph 6 of the amended statement of defence, the sales were in the sum of USD 12, 353, 900, the Defendant does not indicate there under, whether that figure represents direct and indirect sales, yet the Defendant submitted under paragraph 15 of its submission that, the Plaintiff's claim was in relation to indirect sales and at paragraph 16, it is submitted that the correct rate applicable is 0.25%. If the Court were to consider the Defendant's argument and apply the said rate, then the sum payable at the rate of 0.25% of USD 12, 353,900, would be USD 30, 884,75 and at the rate of 0.5% it would be USD 61, 769.50. However, the plaintiff's claim is USD 617,695.00.

33. I also note that indeed the parties engaged into correspondence on the issue after it became clear that they could not agree on the same due lack of express agreement on the commission payable. During negotiation the Plaintiff stated that it would concede to USD 60,000, being 5% of the sales. In that regard by an e-mail dated 25th August, 2011, A.C Doshi wrote to the Defendants under reference; "commission" and stated as follows: -

"I am not very happy but will accept it since we do not have any firm arrangements"

He goes on to state:-

"once again I will request you consider 60K which is about 0.5%."

34. This communication was in response to an e-mail of the same date from M Phanindranath writing on behalf of the Defendant offering to pay USD 40,000. Had the Defendant accepted to pay that sum of USD 60,000 the matter would have been settled. However, for unknown reason the Defendant offered USD 40,000.00 and Mr Doshi for the Plaintiff conceded.

35. The question that arises is; does the court have a basis to award the sum claimed, in the light of the negotiated sum and in the absence of an express agreement to the same? The answer in my considered opinion is in the negative. I find and hold that the plaintiff conceded to the sum of; USD 40,000 albeit unhappily so and that is the sum payable.

36. Be that as it were, the Defendant seem to have retracted on the offer to pay the sum of; USD 40,000 on the ground that the Plaintiff breached the agreement. I shall revert to that, when I deal with the counter-claim.

37. In that regard the Defendants produced documents to show that, the World Health Organization (WHO) was investigating falsified lamivudine, zidovudine, and neviraphine tablets (Zidolam-N) in Kenya. The genuine tablets are manufactured by the Defendant. The investigation at the Defendant's premises revealed that the suspect batch number E100766, was manufactured according to the WHO specification and was of acceptable quality, but the Defendant's company record showed the batch number had not been supplied to Kenya.

38. The Pharmacy and Poisons Board in Kenya established that the packaging and labelling of the falsified products were of poor quality and contained tablets in various degrees of deterioration, in terms of; mouldings, discolouration and friability and recommended that the Board conducts further investigation.

39. The question is; whether there is evidence in support of the Defendant's counterclaim? The Defendant averred that, at the risk of repeating what is already stated that, the batch number E110467, found in possession of the plaintiff and Infusion Medicare Limited, was not supplied by the Defendant and that, the Plaintiff's action of, packing and distributing altered, adulterated, stale and deteriorated pharmaceuticals of low quality with the intent to deceive the public that they were genuine products from the Defendant, amounts to breach of contract. As a result, the Plaintiff unjustifiably enriched itself and limited the defendant's market.

40. It suffices to note that, the Defendant states in the pleadings and statement in evidence that:

"The complaint before the Anti-Counterfeit Agency is pending determination while the complaint before the Pharmacy and Poisons Board has been determined and the plaintiff has been found guilty."

41. The Defendant then outlines the results of investigations by the Pharmacy and Poisons Board, at paragraph 18 (a) to (c) of the defence. However, I further note from the supplementary documents provided by the Defendant, a letter dated 12th June 2015, from the Pharmacy and Poisons Board to the firm of; M/s Hamilton, Harrison and Matthews Advocates, who represent the Plaintiff, the Board states that:-

"This is to inform you that, C Mehta and company East Africa was found guilty and ordered to close down. The main culprits were also suspended."

42. However, the finding above is not supported by a full report giving the basis of decision of the Board. It is therefore not surprising that, in the amended reply to the amended defence and defence to the counter-claim, the Plaintiff denies knowledge of that decision of the Board and states under paragraph 3A of the pleadings as follows:-

"Further to paragraph 3, hereinabove, the plaintiff denies that there has been any decision made by the Pharmacy and Poisons Board, as claimed or at all and the defendant is put to strict proof."

43. In my considered opinion, without the full report of the Board, the court cannot be certain that, the decision faulted the Plaintiff purely on the basis of the allegations leveled against it by the Defendant. In finding by the Board should have been produced by it and the mere

filing of the alleged decision which is contested is not sufficient. In that case, I find no evidence to support prayer (i) of the counter-claim and disallow it.

44. I shall now consider prayer (ii) seeking that the plaintiff's suit be dismissed with costs. I have already held that, the defendant conceded to a sum of USD 40,000.00 as payable to the Plaintiff, save for the alleged breach, therefore that prayer for dismissal of the suit does not lie, it has been overtaken by events.

45. As regards prayer (iii), the defendant seeks that, accounts be taken to ascertain the loss it has suffered as a result of the Plaintiff's actions during the period of the years 2010 to 2011. Further to the finding above, the World Health Organisation (WHO) ordered for further investigations to be conducted. The Pharmacy and Poison Board and Anti-Counterfeit Agency took over the investigations, I find that the report of the Agency is not available, yet it is alleged the Plaintiff sold counterfeit drugs. That report was critical.

46. Having ruled that, there is insufficient evidence to prove the Plaintiff is liable and/or in breach of the contract, then the issue of accounts to ascertain the alleged loss if any, does not arise. Even then, there are no records or evidence that the Defendant's sales dwindled and/or the plaintiff offered the generic drugs. Finally, the letters dated 13th March 2012 and 30th July 2017, from the Board exonerates Infusion Medicare (K) Limited from wrongdoing. In that case, I find prayer (iii) of the counter-claim not proved.

47. Based on the findings on prayer (i), (ii) and (iii) of the counter-claim, the only issue to determine is costs. The law is established that costs follow the cause. The Defendant's claim has failed in totality. The defendant is thus liable to pay the Plaintiff's costs.

48. However, to revert back to the Plaintiff's case, I find as aforesaid, the defendant offered to pay the Plaintiff the sum of; USD 40,000. The court has found the Plaintiff is not in breach of the contract therefore, that sum is payable. However, defendant cannot be held liable for delayed payment because the Plaintiff declined it. In that case, I decline to order for any costs and interest in favour of the Plaintiff.

49. In summation, I enter judgment in favour of the Plaintiff as prayed for in prayer (a) of the plaint, save that the amount payable is USD 40,000.00 and I award interest thereon from the date of judgment to payment in full. On the other hand, the Defendant's counter-claim is dismissed. Each party will bear its own costs,

50. It is so ordered.

Dated, delivered and signed in an open court on this 3rd June day of 2019.

G.L.NZIOKA

JUDGE

In the presence of:

Ms Mueni for the Plaintiff

Ms Obwangi for Mr Makori for the Defendant

DennisCourt Assistant