



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 365 OF 2010

NILA PHARMACEUTICAL LTD.....PLAINTIFF

Vs.

DR. CHARLES WASIKE & DR. ADELAIDE KITUYI T/A

INTERGRATED HEALTH SERVICES.....DEFENDANT

JUDGMENT

1. Nila Pharmaceutical Limited (Nila) sues Dr. Charles Solomon Godwin Wasike and Dr. Adelaide Masambu Kithinji both trading as Afya Roya Clinics for a sum of Kshs.3,983,000.70 together with interest thereon at commercial rates from 1st December 2009 until payment in full.
2. The debt is said to accrue from the supply of pharmaceutical products by the Plaintiff to the Defendants on diverse dates in the year 2009. In an attempt to make payment thereof, the Defendants tendered a cheque for Kshs. 500,000/= on 20th November 2009 but which cheque was returned dishonored upon presentation. These averments, made in the Plaint of 27th May 2010, were rehashed in the testimony of Dr. James Irungu to Court. He is a Director of Nila.
3. The Defendants filed a joint statement of Defence dated 20th July 2010 and filed on 21st July 2010. It makes general denials to the Plaintiff's claim. They chose not to call any evidence at the hearing.
4. The hearing of the suit was exceptionally short. Mr. Irungu testified on behalf of Nila. His testimony was a restatement of the Plaintiff's pleadings. He also produced documents in support of the claim being invoices from the Plaintiff to the Defendant, bounced cheque No.000053 dated 20th November 2009, a personal guarantee dated 19th January 2008, statement of account and a demand letter of 12th March 2010.
5. The sales invoices are for diverse dates made out in support of pharmaceutical products supplied to the Defendant by Nila. On each invoice is a stamp of Afya Royal Clinics acknowledging receipt. This was not refuted by the Defendants. The statement of account is a summation of the amounts involved and represent the sum of Kshs.3,983,006.70 sued for. This Court believes this unchallenged evidence and also accepts that an attempt to make part payment by way of cheque No.000653 of 20th November 2009 failed when it was not honoured.
6. Nila has on a balance of probabilities, proved that it made supplies to the Defendants which have not been paid for. Nila has also proved that on account of the supplies Kshs.3,983,006.70 is owed to it by the Defendants.
7. In the Plaint of 20th July 2010 it is averred by Nila that the two Defendants are partners in the name and style of Afya Royal Clinics. This is expressly admitted by the Defendants. The effect would be that both Defendants are jointly and severally responsible for the debt to Nila. In that event the personal guarantee executed by the 2nd Defendant binding herself to pay the partnership debt would be superfluous because by the very nature of the business model, the partners of Afya Royal Clinics would, in their personal capacities be liable for the debt.
8. The interest sought is commercial rates from 1st December 2009 to date. A claim for interest other than at Court rates and to be applied on a date before the date of suit is a matter of substantive law requiring proof. Has such proof been provided? On each invoice is the following note on interest,

“Interest at 3% per month will be charged on all overdue accounts”.

9. What, however, has not been proved by Nila is when each invoice was due and therefore the date when interest would run. In addition, on 12th March 2010, Nila's lawyers issued a demand notice upon Afya Royal Clinics for the principal sum without a claim for interest. In those circumstances the Court is constrained to find that the Plaintiff is only entitled to interest at Court rates from the date of presentation of the suit.

10. The upshot is that Judgment is entered for the Plaintiff against the Defendants jointly and severally for the sum of Ksh.3,983,006.70 plus interest thereon at Court rates from the date of filing suit until payment in full and costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 7th day of June, 2019.

F. TUIYOTT

JUDGE

PRESENT:

Mutua for Kabue for Plaintiff

..... for Defendant

Nixon – Court Assistant