



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 455 OF 2014

GESTO PHARMACEUTICALS LIMITED.....PLAINTIFF

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF MEDICAL SERVICES.....1ST DEFENDANT

KENYA MEDICAL SUPPLIES AUTHORITY.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The application before me has been brought by the 2nd Defendant, **KENYA MEDICAL SUPPLIES AUTHORITY**. It seeks the striking out of the 2nd Defendant from the suit.
2. Primarily, the applicant contends that there was no privity of contract between it and plaintiff, **GESTO PHARMACEUTICALS LIMITED**.
3. The contract in issue was entered into in the 1998-1999 Financial Year, when the applicant did not exist.
4. The plaintiff concedes that the 2nd Defendant had not yet come into being, at the time when the contract, if any, was entered into between the plaintiff and the 1st Defendant, **THE PRINCIPAL SECRETARY, MINISTRY of MEDICAL SERVICES**.
5. The role currently being performed by the 2nd Defendant was, in 1998-1999, being performed by the **MINISTRY of HEALTH SUPPLIES CO-ORDINATING UNIT**.
6. It is common ground that the 2nd Defendant is a State Corporation which was established under the Kenya Medical Supplies Authority Act No. 20 of 2013. Clearly therefore, the 2nd Defendant was not in existence when the plaintiff and the 1st Defendant entered into a contract.
7. At paragraph 6 of the plaint, the 2nd Defendant was described as an entity which;

“...was previously a department of the first defendant known as Medical Services Unit (MSU)”.
8. It was the plaintiff's case that the said Medical Services Unit (**MSU**) was subsequently established as an autonomous agency known as **KENYA MEDICAL SUPPLIES AGENCY (KEMSA)**.
9. It is common ground that the Kenya Medical Supplies Agency (*hereinafter "The Agency"*), was established by Legal Notice No. 17 of 2000.
10. At paragraph 6 of the Plaint, it is expressly recognized by the plaintiff that the Medical Services Unit was a Department of the Ministry of Health Services.
11. In the understanding of the plaintiff, the Medical Services Unit was to perform the obligations of the 1st defendant, under the Contract

between the plaintiff and the 1st Defendant.

12. By virtue of that understanding the plaintiff submitted that the Medical Services Unit was automatically incorporated into the contract, because the 2 parties to the said contract could not have been able to play their respective roles in the contract, if the Unit did not perform its role.

13. The plaintiff further submitted that there arose a Privity of Contract as the subject matter of the contract was to be delivered to the Unit, and also because the 1st defendant would not pay the purchase price unless the Unit had received the subject matter.

14. In my understanding, the fact that the Unit, which was part of the Ministry of Health Services, had the mandate to undertake some responsibilities under the contract between the plaintiff and the Ministry, did not give rise to a privity of contract.

15. Pursuant to the definition of the phrase "*Privity of Contract*", as defined by **BLACK'S LAW DICTIONARY**, the phrase means;

"The relationship between the parties to a contract, allowing them to sue each other, but preventing a third party from doing so".

16. Of course, the learned authors of the Black's Law Dictionary have acknowledged that the requirement of privity has been relaxed under modern laws and doctrines of implied warranty and strict liability.

17. Quoting from **G.H. TREITEL'S "THE LAW of CONTRACT"**, 8th Edition, 1991, Black's Law Dictionary noted thus;

"The doctrine of privity means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party. It does not mean that a contract between A and B cannot affect the legal rights of C, indirectly".

18. In this case, the plaintiff acknowledged that the Contract in issue was between the Plaintiff and the 1st Defendant.

19. It therefore follows that the Medical Services Unit was not a party to the Contract. And the plaintiff has not demonstrated to this court how the Unit acquired rights or became subject to liabilities arising under the contract.

20. The Unit could not, in my considered view, have had locus to sue the plaintiff, if the latter had breached the contract which was between the plaintiff and the Ministry.

21. In the event, if the application was to be determined based on the question as to privity of contract, alone, I would have allowed the application made by the 2nd defendant.

22. However, the 2nd defendant has expressly submitted thus;

"8. My Lord, Paragraph 11 (2) of the Kenya Medical Supplies Agency Order, Legal Notice No. 17 of 2000 provided that the Board of the Kenya Medical Supplies Agency was the successor of Government in respect of all rights, duties, obligations, assets and liabilities concerning the Agency. We submit that this referred to operational aspects of the Unit, precisely, all rights, duties, obligations and liabilities entered into by the then Ministry of Health on behalf of the Medical Supplies Coordination Unit that aided its funding".

23. The 2nd defendant submitted that it did not inherit any liability under the Supply Contract in issue in this suit.

24. Whilst it is possible that the reasoning of the 2nd defendant is correct, I find that it is also possible that the rights, duties, obligations, assets and liabilities which the Agency inherited from the Unit were not limited to the said Unit's "*operational aspects*".

25. In effect, I hold that there is possibly a sustainable cause of action against the 2nd defendant. The said possible cause of action is not founded upon the doctrine of privity of contract. It is founded upon statute.

26. I so hold because, section 3 (3) of the Kenya Medical Supplies Authority Act, No. 20 of 2013 stipulates that;

"The Authority shall be the successor to the Kenya Medical Supplies Agency established under the State Corporations Act".

27. As between the Agency and the Authority, the nexus is expressly stipulated.

28. Meanwhile, as between the Unit and the Agency it is possible that the provisions of Paragraph 11 (2) of The Kenya Medical Supplies Agency Order may have constituted the Agency as the successor of the Unit.

29. Assuming, but not yet determining that the Authority was ultimately a successor to the Unit, that would imply that the Authority had taken on board, the duties, rights, obligations, assets and liabilities which were once upon the Ministry.

30. In the circumstances, the question which must be asked is whether or not the Ministry continues to be liable for that which the Authority had assumed responsibility for.

31. By suing both the Ministry and the Authority, it would appear that the plaintiff intends to have both of them held liable in relation to the alleged breach of one contract.

32. I have already held that there was no privity of contract between the plaintiff and the 2nd defendant. Therefore, the 2nd defendant could not be in breach of the terms of a contract that it was not a party to.

33. The liability, if any, on the part of the 2nd defendant appears to flow from the legal provisions which render the Authority the successor of the Agency, which in turn was the successor of the Ministry of Health Supplies Co-ordinating Unit.

34. The plaintiff cannot have it both ways. It cannot hold the Ministry accountable under the Contract, whilst also holding the Authority accountable by virtue of having been the successor of the liabilities which were originally the responsibility of the Ministry.

35. I find that justice demands that the plaintiff must make an election. If it chooses to pursue its claim against the 2nd defendant, it would have to relinquish the claim against the 1st defendant.

36. In the meantime, the claim against the 2nd defendant is not struck out.

37. Nonetheless, the costs of the application dated 30th April 2015 are awarded to the Applicant. I so order because it is the said application which has propelled the court to order the plaintiff to make an election. In effect, the application did register a notable success.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of March 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ongoro for Arwa for the Plaintiff

No appearance for the 1st Defendant

Barasa for Nyamodi for the 2nd Defendant

No appearance for the 3rd Defendant.