



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 349 OF 2013

HIGHCHEM PHARMACEUTICALS LTD.....PLAINTIFF

- VERSUS -

PENTAPHARM LIMITED..... DEFENDANT

RULING

1. The **Notice of Motion** dated **6th February, 2017**, was filed by **Penta Pharm Limited** (*the defendant*). By that application, the defendant seeks that the default judgment entered against it be set aside and it be granted leave to file a defence.

2. **Highchem Pharmaceuticals Limited** (*the plaintiff*) filed the plaint on **12th August, 2013** in this matter against the defendant seeking judgment for **ksh 9,244,343**. This amount was due in regard to pharmaceutical product that the plaintiff supplied to the defendant.

3. The defendant filed, on **4th September, 2013**, a memorandum of appearance but did not file its defence within the prescribed period and judgment in default of a defence was entered, against the defendant, on the plaintiff's application.

4. The defendant relies on the grounds, for its application, that it had fully settled the plaintiff's debt; that the plaintiff's advocate failed to give it notice of the entry of judgment; that the defendant was condemned without being heard; and that the defendant has an arguable defence.

5. In the defendant's proposed defence, the defendant confirmed that it traded with the plaintiff then stated:

"...the defendant admits that it traded with the plaintiff, on account basis between the year 2009 – 2011 but all dues to the plaintiff have been fully paid and settled, the debt was in any event not Ksh nine million, two hundred and forty four thousand, three hundred and forty three (9, 244, 343) as demanded but what was due was fully paid and the plaintiff is put to strick proof to the contrary".

6. Looking at that defence, and it is all that the defendant intends to say, in regard to the plaintiff's claim, it becomes clear that the defendant is not forthcoming of how much it alleges it owed the plaintiff, how much it alleges it paid the plaintiff; and how much if any, it admits if at all, it owes the plaintiff.

7. That proposed defence is not satisfactory basis for setting aside an exparte judgment obtained regularly.

8. The defendant was correct to state that the plaintiff was required to give its notice of entry of judgment. That is what **Order 22 Rule 6 of the Civil Procedure Rules** states. That rule states:

"Application for execution [Order 22, rule 6.]

6. where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

9. That rule requires notice of entry of judgment to be served upon the defendant if the defendant fails to file a memorandum of appearance or defence. In this case, the defendant did file a memorandum of appearance but did not file a defence.

10. The defendant did through affidavit evidence provide detailed accounts of what it alleges it paid in respect of the claim before court. The plaintiff on its part has alleged that some of those payments were not made while others, which were made by cheques, were dishonoured by the bank.

11. In my view, the interest of justice will require that this court do receive oral evidence, only on one issue, that is, what amount is due and owing to the plaintiff by the defendant. It is after this court receives such evidence, that the court will make a ruling on the issue identified above. Otherwise on the matters brought before me, there is no basis of setting aside *ex parte* judgment.

12. In conclusion, the following are the orders of the court:

a. At the reading of this ruling, a date for oral hearing shall be given to determine the issue 'what amounts are due and owing to the plaintiff by the defendant'.

*b. If the plaintiff is dilatory in proceeding with the oral hearing, the court will be at liberty to set aside the **ex parte** judgement. If the defendant is dilatory in proceeding with the oral hearing, the court will be at liberty to order **that the** *ex parte* judgment entered in favour of the plaintiff do remain and the court will order the dismissal of the notice of motion dated 16th February 2017.*

c. Until further orders of the court there shall be a stay of execution.

d. The court reserves the decision on the cost of the notice of motion dated 16th February, 2017 until after hearing oral evidence or until further orders of the court.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant