



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 233 OF 2018

MAGNOLIA PVT LIMITED.....PLAINTIFF

VERSUS

SYNERMED PHARMACEUTICALS (K) LTD.....DEFENDANT

RULING

1. Before me is an application dated 21st June 2018 brought to the court pursuant to order 26 Rule 1 of Civil Procedure Rules and the inherent jurisdiction of the court. The Applicant M/s Synermed Pharmaceuticals (K) Ltd seeks the following orders:-

- a) **The Plaintiff does, within the time prescribed by this Honourable Court, provide adequate security for the whole of the costs of the Defendant in defending this suit in the sum of Kenya Shillings 5 million only or such costs as the court may deem just.**
- b) **The said sum be deposited in an interest earning account to be held in the joint names of the Plaintiff's and the Defendant's Advocates pending further orders of the court.**
- c) **In default of providing the said security within the time prescribed, the Plaintiff's suit as against the Defendant be struck out with costs.**
- d) **The costs of this application be awarded to the Defendant.**

2. The application is premised on the grounds on the face of the application being *inter alia*:-

- a) **The Plaintiffs claim as against the Defendant is frivolous for the reasons set out in the Replying Affidavit in response to the Plaintiff's Notice of Motion dated 7th June 2018 sworn by TIRUVALANCHUZI SWAMINATHAN VISWANATHAN.**
- b) **The Plaintiff by its own admission at paragraph 1 of the Plaint, a private Limited Liability Company duly incorporated as such under the Laws of the republic of India, outside the jurisdiction of this Honourable Court as would be sufficient to meet the Defendant's costs of the suit in the event that its claims against the Defendant are dismissed.**
- c) **Taking into account the nature of these proceedings, the issues raised, the nature of information required for the just and fair determination of the same and anticipated interlocutory proceedings for obtaining the said information including applications for discovery and particulars, witness summons and interrogatories and general witness preparation, hearing and legal research, there is no doubt that the proceedings will be rigorous, laborious and time consuming. Unless the orders sought are granted, the Defendant stands to suffer immense injustice in the event that the suit is dismissed and he is unable to recover the costs expended in Defending the suit.**
- d) **No prejudice shall be occasioned on the Plaintiff's in the event the orders sought are granted.**
- e) **It is just and equitable to grant the reliefs sought.**

3. The Application is further supported by supporting affidavit of **TIRUVALANCHUZI SWAMINATHAN VISWANATHAN**, the Managing Director of the Defendant company, a Kenyan living and working for gain in the Republic of Kenya who has deponed; that the Respondent as admitted at paragraph 1 of the Plaint is not a resident of the Republic of Kenya neither does it have known assets within the jurisdiction of the Honourable Court capable of satisfying any decree and consequential cost that may be made against it by this Honourable

Court or at all; that the defendant has a good defence to the plaintiff's case, and if it succeeds on it, it will be difficult to get the resultant and cost from the defendant which is not a Resident Company nor does it have any assets in the Republic of Kenya; that from the material placed before court, there is no evidence of ownership of the assets by the Plaintiff nor existence of a place of business in Kenya; recovery of such costs would require execution against the plaintiff; a company domiciled in India which would be uneconomical; inconvenient and time consuming from the amount entailed.

4. It is further deponed in support of the Applicant's application that the plaintiffs are artificial persons whose operations; business; financial means; attachable assets or properties are unknown to the defendant and the defendant believe that the plaintiff is not able to pay the cost of the suit and the counter-claim to the defendant in the event that the plaintiff is unsuccessful; that considering the nature of the dispute, the amount of time likely to be expended in researching the law and canvassing the same, the orders sought and the complexity of the issues involved, it is deponed by the defendant, that it is likely that the cost it shall expend to defend the proceedings is in the region of approximately Kshs. 5,000,000/-. It is further deponed that the Applicant is apprehensive that unless the plaintiff is compelled to deposit security for cost in advance, it may abscond the jurisdiction of the Honourable court to defeat a possible order of cost against it; urging further that the plaintiff's claim as pleaded in the plaint has not reasonable chance of success and it is urged the defendant believe it has a *bonafide* defence to the plaintiff's claim and unless the application is granted, the defendant may be put through unnecessary and unjust expense of defending a frivolous law suit. It is further deponed that the defendant believe that owing to the nature of business, the plaintiff is not impecunious and is very well capable of depositing the security for cost as prayed and/or as deemed fit by the honourable court as the application has been filed expeditiously and without unreasonable delay.

5. The plaintiff is opposed to the application and in doing so relies on a Replying affidavit dated 21st June 2018 sworn by **PRAKASH GHATE**, who averred that he is authorized person by the plaintiff, and has deponed *inter alia*:- that there is no dispute that the defendant has breached the contractual provision on intellectual right; that despite the plaintiff being a foreign company, it is established company with vast wealth, hence capable and able to settle whatever cost the court may order in the unlikely event that the suit herein is unsuccessful (**attaching and marked PG-1**) a duly certified copy of the list of fixed asset owned by the plaintiff; that the Applicant having failed to annex a draft defence to the Application it has offended a mandatory provisions under which the application is premised and the allegation of a bona fide defence are therefore mere conjecture; that the defendant has not demonstrated that the plaintiff is facing any financial difficulty that would render it incapable of satisfying any order as to cost at the conclusion of the matter; that the defendant has not demonstrated the basis for the sum sought, which is purely intended to deprive the plaintiff of its operational cost thereby hampering the plaintiff's business progression, which is in competition with the defendant; that the Defendant's application is an abuse of the court process, meant to cripple the plaintiff's business and the same should therefore be dismissed.

6. The defendant filed further affidavit dated 16th July 2018 deponed upon by **TIRUVALANCHUZI SWAMINATHAN VISWANATHAN** in reply to plaintiff's Replying affidavit dated 2nd July 2018. It is averred that the Replying affidavit is not properly and lawfully executed as it is only bearing photocopy of stamps and the signature of the deponent is also a photocopy and a certification that it is a true copy of the original has not been produced; that the allegation in the Replying affidavit, it is further deponed are false and misleading; in that the defendant has disputed, it is in breach of the plaintiff's intellectual rights or at all; that the defendant as at the time of making the affidavit had not been served with summons to enter appearance to enable the defendant respond to the plaint substantively through a defence; that the defendant has raised a **bonafide** defence to the claim in the application through the Replying affidavit sworn on 21/6/2018; that the declaration of fixed assets annexed by the plaintiff are for period ending March 2010; which assets must have worn out long time ago; that lack of current declaration of a single asset confirms the defendant's fears that there is a high possibility of inability to pay any cost that may arise in this suit; that there is no demonstration of single assets in Kenya within the jurisdiction of the court neither has it been demonstrated where plaintiff trades the drugs subject of dispute or marketed in Kenya; that the list of plaintiff's directors, financial ability or place of residence has not been disclosed to point that they are within the jurisdiction of this court.

7. At the hearing the Applicant/Defendant was represented by Mr. Ochieng, learned Advocate, whereas Miss Nyaga, learned Advocate appeared for the Plaintiff/Respondent having taken date for highlighting on the submissions on 20th June 2018 she did not attend the hearing on 18th July 2018, hence the matter proceeded for highlighting in her absence. I have noted the submissions as drawn by the plaintiff did not touch on the application I am dealing with. The defendant has on the other hand dealt with it application in its submissions. The issue for consideration is therefore as follows:-

(a) **whether the defendant has proved whether the plaintiff should provide adequate security for cost?**

(b) **Where should security deposit, if the application is allowed, should be deposited pending further orders of the court?**

8. Under **Order 26 Rule 1 and (2) of Civil Procedure Rules** it is provided:-

"1) In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

2) If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged."

9. The first issue for consideration is whether the defendant has proved whether the plaintiff should provide adequate security for cost? The defendant in seeking security has demonstrated that the plaintiff is a foreign company; a fact which is admitted by the plaintiff in that it is a private limited liability company duly incorporated as such under the law of the Republic of India, outside the jurisdiction of this honourable court and further that it does not have assets in Kenya and/or within the jurisdictional reach of this Honourable court as would be sufficient to meet the defendant's cost of the suit in the event that the claims against the defendant are dismissed.

10. The plaintiff filed a replying affidavit, dated 2nd June 2018 which is a photocopy of the purported Replying affidavit to which the

Applicant has raised an objection on its authenticity and validity. I have very carefully perused the Replying affidavit and note the filed copy is a photocopy; it bears copies of stamps and the signature thereto is also a photocopy; it lacks certification that it is a true copy of the original; the notary stamp is not at the jurant part but is put at the bottom of the document, and I find that the same is not properly and lawfully executed. The affidavit offends **order 19 Rule 4 of Civil Procedure Rules** in that it does not state the description, true place of abode and postal address of the deponent is lacking. I find the Replying affidavit to be fatally defective, incurable in law and incompetent hence the same cannot be allowed to be on record, I accordingly expunge the same from the record. On the annexures, I find the same cannot be relied upon as there is no affidavit on which they can be said to be pegged on. Further the same are in respect of alleged assets of 2010 and amongst them there is no single asset said to be in the Republic of Kenya. Further there is no disclosure of the particulars of the plaintiff's directors, and their financial ability or places of residence in Kenya or any confirmation they are within the jurisdiction of the Honourable court. I have considered the above and I have no doubt that absence of proof of assets held by the plaintiff, non-disclosure of particulars of directors and business (*if any*) in Kenya as well as the directors residence, I am convinced that the court that this is a suitable case in which court should exercise its discretion to order the plaintiff, a foreign company, to deposit security as cost.

11. In the case of **Clearspan Construction (A) Limited Vs. East Africa Gas Company Limited & another [2014] eKLR**, the court held,

"Where a limited company is plaintiff in any suit or other legal proceedings, any Judge having jurisdiction in the matter, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

12. In view of the above I find no rebuttal of the defendant's reasonable believe that the plaintiff has no financial capability, or means or attachable assets capable of satisfying the defendant's estimated cost of the suit in case the plaintiff is unsuccessful in this matter.

13. The suit was filed on 16th June 2018 and summons to enter appearance were signed by the Deputy Registrar on 9th July, 2018. The present application was filed on 21st June 2018 before service of the summons to enter appearance was effected. There is no evidence of service of the same todate. The defendant's have not filed their defence as of today, however they cannot be faulted for that failure, as they had filed a Replying Affidavit dated 2nd June 2018 setting out the grounds of the defence; thus satisfying the conditions set out under order 26 Rule 2 of the Civil Procedure Rules. The failure therefore in the application for cost made before a defence is filed is cured by the Replying affidavit filed in this matter setting out the grounds of defence. I find the application as drawn and filed to be proper and within the armpit of order 26 Rule (2) of the Civil Procedure Rules.

14. The second issue for consideration is where should security deposit, if the application is allowed, should be deposited pending further orders of the court? The cost sought by the Defendant in this matter is Kshs. 5,000,000/- which is substantial by all standards. The court amount should be deposited in a joint interest earning account pending the outcome of the case, to the plaintiff's and the defendant's in joint name of Advocates pending the outcome of the case. The amount should not be tied without earning any interest. It is my view that the best place for depositing the amount would be where it will continue to generate additional income by way being deposited in the interest earning account. I have considered the reasons advanced for seeking security of cost of Kshs. 5,000,000/- but do not find any justification in the current sought. The court taking into account of the nature the claim, time that it may take and the subject matter and bearing in mind this is an application for security of costs and that security for cost should not be used to deny any party access to justice, if I am of the view that Kshs. 1,500,000/- would be fair and reasonable.

15. The upshot is that the application dated 21st June 2018 is allowed in the following terms:-

- a) **The Plaintiff do within 60 days from the date of this ruling, provide adequate security for the whole of cost of the defendant in defending this suit in the sum of Kshs. 1,500,000/-.**
- b) **That the said sum of Kshs. 1,500,000/- be deposited in an interest earning account to be held in the joint names of the plaintiff's and the defendant's Advocates, pending further orders of the court.**
- c) **That in default of providing the said security within the time prescribed herein above, the plaintiff suit as against the defendant be struck out with cost.**
- d) **Cost of the application awarded to the defendant.**

Dated, signed and delivered at Nairobi this 4th day of **October, 2018.**

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J .A. MAKAU

JUDGE