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 NO.2

1. Before me is a Notice of Motion dated 11th October 2018 brought pursuant to Order 12 Rule 7, Order 51 rule 7, of Civil Procedure Rules, section 3A and B of the Civil Procedure Act and Article 50(1) and 159 (2) (e) of the Constitution of Kenya 2010. The Application seek the following orders:-

1. That the application be and is hereby certified as urgent, heard on a priority basis and service be dispensed with in the first instance.

2. That pending the hearing and determination of this application the Honourable Court be pleased to stay execution of the Ruling delivered herein on 4th October, 2018.

3. That the Honourable Court be pleased to review and/or set aside the Ruling delivered herein on 4th October, 2018.

4. That the Honourable Court be pleased to set aside the proceedings of 18th July, 2018.

5. That leave be and is hereby granted to the Plaintiff to respond to the Defendant's application dated 21st June, 2018.

6. That the Honourable Court grants any other order that it deems fit and just to grant.

7. That costs of the application do abide the cause.

2. The application is based on grounds numbering from (a) to (k) on the face of the application and is further supported by an affidavit of Esther Nyaruai Kabau, Advocate sworn on 11th October 2018 and annexures thereto and supplementary affidavit sworn by Esther Nyaruai Kabau.

3. The application is opposed. The defendant filed a Replying affidavit sworn by Tiruvalanchuzi Swaminathan Viswanathan sworn on 26th October 2018.

4. I have perused the application dated 11th October 2018, the affidavit in support as well as the supplementary affidavit, the Replying affidavit and counsel rival submissions dated 5th November 2018 and 7th November 2018 respectively and the issues raising thereto in my view are as follows:-

a. Whether the ruling delivered on 4th October 2018 was regular and whether the plaintiff raises triable issues to warrant setting aside of the orders issued?

b. Whether the application meets the threshold for reviewing the orders of 18th July 2018 and 4th October 2018?

c. Whether the plaintiff's Advocate has capacity to swear the affidavit in this application?

d. Whether the plaintiff should be granted leave to respond to the defendant's application dated 21st June 2018?

5. In this matter prayers numbers 1 and 2 of the application dated 11th October 2018 are spent, and what is pending for determination are prayers numbers, 4, 5, 6 and 7 of the application.

A. Whether the ruling delivered on 4th October 2018 was regular and whether the plaintiff raises triable issues to warrant setting aside of the orders issued?

6. In the instant suit, it is not disputed that the suit commenced on 7th June 2018 under certificate of urgency through a plaint and application of the same day. The defendant filed a Replying affidavit and an application for security dated 21st June 2018. On 12th June 2018 in presence of the Advocates for both parties; the matter was set down for highlighting on parties' written submissions. On 22nd June 2018 both Advocates appeared when court directed the parties applications dated 7th June 2018 and 21st June 2018 be heard together and that they be determined by way of written submissions and the same be filed within 7 days from then. The highlighting was set for 18th July 2018. The Defendant/Respondent filed its submissions on 4th July 2018 in respect of its application dated 7th June 2018 and its application dated 21st June 2018. The Applicant/Plaintiff did not file submissions as directed in respect of both applications but proceeded to withdraw its application dated 7th June 2018 as per the notice of withdrawal dated 4th July 2018. On 18th July 2018 the Plaintiff/Applicant's Advocate in spite of the matter being cause listed, having taken the date for highlighting before court, failed to attend court. The matter was called in the morning session, placed aside to await for counsel and later at around 12.35 pm when the Plaintiff/Applicant failed to show up in court, the court allowed highlighting on submissions by the Respondent/Defendant to be heard and matter was set down for ruling on 4/10/2018.

7. The Plaintiff/Applicant Advocate aver that though they were before court on 22nd June 2018 when the two applications were set down for highlighting on submissions on 18th July 2018, the counsel who is handling the matter, on behalf of the firm, diarized the matter as coming up on 19th July 2018 and attached a copy of the diary **ENK-1 (a) (b)** and **(c)** together with a Notice of withdrawal indicating the matter was coming up for 19th July 2018. It is further urged the matter was not listed for 19th July 2018 and M/s Nyagah Advocate, who attended court did not find the matter cause listed, and proceeded to visit the registry and confirmed the matter was not listed. That the Plaintiff Advocate made several visits and concerted efforts from registry with a view to trace the file but with no success. That I was only on 6th October 2018, when the Plaintiff's Advocate were advised that the file could be traced as it was in chambers for ruling and that the same was now available.

8. The ruling of 4th October 2018 is regular as all parties were present on 22nd June 2018 when directions were given on how the applications of 7th June 2018 and 21st June 2018 should be dispensed with by way of written submissions and in which court gave limited period of 7 days for parties to file written submissions by 18th July 2018, when the matter was for highlighting, on parties written submissions. The Plaintiff/Applicant failed to file its submissions and never gave any reasons for its failure and even todate has not done so. No copies of the said submissions have been supplied to court even at the time of hearing of this application in opposition of the defendant's aforesaid application dated 21st June 2018 for security of costs. I considered the contents of plaintiff's Replying affidavit of 2nd July 2018 despite the fact that the same was expunged. There is no new evidence that has been availed that would change the position if the court were to reconsider the matter.

9. It is of great significant to note; that though the plaintiff's Advocate did not attend the court for highlighting on 18th July 2018, no submissions as I have pointed out had been filed by then and no reason for such failure has been given even as of now, so even if the Counsel had attended, on what would the counsel have highlighted on. In the case of **Wachira Karani Vs Bildad Wachira (2016) eKLR,** the court had the following to say:

> **Mulla, the Code of Civil Procedure (2) has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgment/decree. Essentially, setting aside an ex parte judgment is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & two others Vs. Safaricom Ltd (3) the court citing relevant cases on the issue held inter alia:-**
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> **"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Service Ltd (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo (5).] The nature of the action should be considered, the defence if any should also be considered; [6]) It also goes without saying that the reason for failure to attend should be considered."**

10. In the instant case, it is averred by the plaintiff's Advocate, the failure to attend court was due to an honest mistake on part of the plaintiff's Advocate and relied on numerous authorities which I have considered and which are not disputed. I note that notwithstanding, the Applicant's counsel has selectively avoided to disclose to this court the reason for their failure to file their submissions within 7 days, period as directed by court and why they did not serve the submissions on the defendant's counsel. Even assuming the plaintiff's counsel attended court on 18th July 2018 what would they have come to highlight on without having prepared and filed any written submissions.

11. I am alive to the fact, that setting aside an ex-parte order or judgment or decree is a discretion of court upon sufficient cause being demonstrated before court by the Applicant. Sufficient cause is an expression which has been used in large numbers of statutes; meaning *"sufficient" "adequate"* or *"enough"*. In the Black's Law dictionary; Tenth Edition on page 266 *"good cause"* is defined as follows:-

> "**Good cause is often the burden placed on a litigant (use. by court rule or order) to show why a request should be granted or an action excused. The term is often used by employment-termination cases. Also termed good cause shown; just cause; lawful cause; sufficient cause;**

> **"Issues of 'just cause,' or 'good cause,' or simply 'cause' arise when an employee claims breach of the terms of an employment contract providing that discharge will be only for just cause. Thus, just cause is a creature of contract. By operation of law, an employment contract for a definite term may not be terminated without cause before the expiration of the term, unless the contract provides otherwise."**

12. I therefore find and order the ruling of 4th October 2016 was regular and the Plaintiff/Applicant has failed to raise sufficient cause to warrant this court exercise its discretion to set aside the orders issued on 4th October 2018.

B. Whether the Applicant meets the threshold for reviewing the orders of 4th October 2016?

13. It is urged by the plaintiff's Advocate, the grounds upon which a party can move the court for review are set out under order 45 of Civil Procedure Rules and the same include discovery of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or for any other sufficient reason. It is urged by the Applicant that it cannot be gainsaid that the order made by the High Court of Judicature at Bonbay India prohibiting the manufacture of the Vagiclin Plus branded pessaries and produced as annexture **ENK-4,** the trademark of which is the subject of the present proceedings has a bearing on the application for security for costs made by the Defendant.

14. It is further urged for the Plaintiff/Applicant that if the product is no longer in production the Defendant cannot trade in the same in Kenya and will therefore suffer no loss for which security needs to be deposited. We therefore urge the Honourable Court to review the said order and set the same aside.

15. It is in view of the above that it is submitted for the plaintiff that the above-mentioned grounds relied upon by the plaintiff form sufficient reasons for which the Honourable Court should exercise its discretion to set aside the order made on 18th July 2018 and 4th October 2018 and allow the plaintiff to participate in the hearing of the application dated 21st June 2018.

16. It is urged when the matter came up for highlighting on 18th July 2018 the Applicant's Advocate was absent due to the misdiarisation of the date and further urged that it is trite law that the mistake of counsel should not be visited upon he litigant. In the case of **Esaiah Kaberia Vs Meme M'Ikiara & 2 others (2007) eKLR** stated:-

> **"Two wrongs cannot make a right and misconduct on the part of the Respondents cannot clothe the Applicant with legality."**

17. The conditions for seeking orders of Review are set out under order 45 rule 1(a) & (b) of Civil Procedure Rules which provides:-

> **Any person considering himself aggrieved—**
>
> **''(1) (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

18. In the case of **Grace Akinyi Vs Gladys Obiri & another [2016] eKLR** quoting with authority the Court of Appeal in Civil Appeal No. 2111 of 1996, **National Bank of Kenya Vs Ndungu Njau,** the Court of Appeal held that:-

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."**

19. The basis for seeking review is on the ground mainly due to misdiarisation of the date by M/s Nyagah Advocate and who is alleged to have not found the matter in the cause list of 19th July 2018. I find the said counsel has not sworn an affidavit to confirm what has been deponed by another counsel as correct and no reason has been given for her failure to do so. This court was sitting on 19th July 2018 and if the counsel found the matter not listed, I am of the view, that the Counsel should have enquired from the court, why its matter was not listed and informed the court that she wanted to highlight on her submissions or wanted to file the same. That had the counsel exercised due diligence and enquired from the court or checked on the cause list for that week, she would have alerted the court of the alleged misdiarisation in good time and even before delivery of the ruling.

20. In view of the above, I find that the applicant has not demonstrated that there is discovery of new and important matter or evidence which, after exercise of due diligence, was not within its knowledge or could not be produced by it at the time when the decree was passed or order made to warrant review. The threshold for granting order of review has not been met. I find no basis for setting aside or reviewing the orders made on 18th July 2018 and 4th October 2018.

C. Whether the plaintiff's Advocate has capacity to swear the affidavit in this application?

21. The Defendant raises on issue regarding the plaintiff's capacity/authority to commence the suit herein, in this regard, it is contended the

plaintiff has been filing copies of improperly deponed and/or executed affidavits. That it is further contended with the aim of avoiding the significant issues, the plaintiff's Advocate on record resorted to swearing the supporting affidavit on behalf of the client who it is alleged cannot be the Advocate and litigant at the same time.

22. In the case of **Barrack Ofulo Otieno Vs Instarect Limited (2015) eKLR,** the Hon. Justice A. Mabeya observed as follows:-

> **"The learned authors of Halsbury's Laws of England, 3rd Edition, Paragraph 845 say as follows with regard to affidavit:-**
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> **"Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated…**
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> **However, under our law (Advocates Practice Rules) Rule 9 Advocates are not permitted to swear affidavits in contentious matters. The issue of whether security for costs should be paid is a contentious matter. I think it was improper for Counsel to have sworn the supporting affidavit."**

23. Additionally similar issue was handled in case of **Regina Waithira Mwangi Gitau Vs Boniface Nthenge (2015) eKLR** in which Hon. Justice R.E. Aburili, stated:-

> **"On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugu Vs. Overseas Courier Services (K) Ltd 1998 eKLR and Kisya Investments Ltd & Others Vs Kenya Finance Corporation Ltd, it was held that:-**
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> **"…it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit."**

24. In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.

25. In **Republic Vs Nairobi County Government & 6 others Ex-parte Mike Sonko Mbuvi [2015] eKLR** the court held:-

> **"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."**

26. In the case of **East African Foundry Works (K) Ltd Vs Kenya Commercial Bank Ltd [2002] eKLR** the court held;

> **"I have considered the rival arguments. I accept the submissions of Mr. Akiwumi that in reality paragraphs 3, 4 and 8(c) of the affidavit of Mr. Ngatia contain not statements of facts of which he had personal knowledge but statements based on information the source whereof he has not disclosed. Accordingly those paragraphs offend Order 18 rule 3(1) of the Civil Procedure Rules. I also accept the further submission of Mr. Akiwumi that indeed they consist of contentious averments of fact which an advocate should not be allowed to depose to in a case where he is appearing as such. I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvass before the courts and I have never had any hesitation in striking out such depositions as a matter of good practice in our courts. The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice. As regards paragraphs 9, I accept the submission of Mr. Ngatia that it is no more than a deposition as to his understanding of the law in response to an affidavit by a fellow advocate."**

27. The Applicant on its part relies on the case of **Kamlesh M.A. Patni Vs Nasir Ibrahim Ali & 2 others CA 354/2004** adopted by the learned Justice Aburili in **Factory Guards Limited Vs Factory Guards Limited [2014] eKLR** in dismissing an application for the striking out of an affidavit sworn by an advocate where it was stated:-

> **"…There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client…In the foregoing premises, the objection on the replying affidavit sworn by the respondent's counsel in opposition to the applicant's application cannot be sustained and I accordingly disallow it."**

28. As regards the application of Article 159(b) of the Constitution of Kenya 2010 and the overriding objectives of the court, in the case of **Karuturu Networks Ltd & another Vs Dally Figgis Advocates, Nairobi Court of Appeal CA No.293/2009** it was held that:-

> **"The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution."**

29. I have considered the rival arguments advance for and against the assertion that the plaintiff lacks capacity to swear the supporting affidavit of the application. Some of the paragraphs of the affidavit by Esther Nyaruai Kabau, learned advocate, specially paragraphs 1,2,3,9,23, 24 and 25 contain statement of facts which she had personal knowledge whereas the rest are statements based on information the source whereas has been disclosed. I also find the rest of the paragraphs consist of contentious averments of fact which an advocate should not be allowed to depone to in a case where she is appearing as an Advocate. Such deposition as a matter of good practice, should be avoided as may result in counsel being called upon to be cross-examined in matters where they appear as Advocate. In addition to the above Rule 9 of the Advocates Practice Rules prohibit advocate from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. It is a risk business to swear an affidavit on behalf of a client where issues are contentious. In view of the aforesaid, I agree with the Defendant/Respondent counsel that, the advocate appearing for the plaintiff being on record and resorting to swearing the supporting affidavit on behalf of the client has created a legal muddle and as such the issues raised in this matter cannot be resolved by the Advocate purporting to be the Advocate and the litigant at the same time.

D. Whether the plaintiff should be granted leave to respond to the defendant's application dated 21st June 2018?

30. In the Plaintiff/Applicant's application, it is urged, that it in the interest of justice that the Applicant be allowed to participate in the proceedings and defend the application dated 21st June 2018. It is urged that if the Applicant is granted an opportunity to participate in the proceedings and defend the application dated 21st June 2018, the plaintiff will persuade the court to dismiss the said application with costs.

31. I should point out that it is in the application dated 21st June 2018, in which the Plaintiff/Applicant is seeking orders of either setting aside the order of 4th October 2018 or review the same. That on 22nd June 2018 the Plaintiff/Applicant counsel participated in the court proceedings and admitted the application dated 21st June 2018 had been served upon the Plaintiff/Applicant. On the same day the Plaintiff/Applicant was granted leave to file Replying affidavit to the application dated 21st June 2018. The submissions were to be filed within 7 days from 22nd June 2018. The highlighting was set for 18th July 2018. In view of the above the Plaintiff/Applicant was given an opportunity to participate in the hearing of the application dated 21st June 2018 but decided not to comply with the courts clear and express orders by failing to file the necessary documents as ordered by court. I find no justification of the Applicant having disobeying the court order why its application should be allowed as sought and be granted leave to respond to defendant's application of 21st June 2018 which is already decided and being sought to either be set aside and/or be reviewed in the same application dated 11th October 2018.

32. The upshot is that the Plaintiff/Applicant's application dated 11th October 2018 is without merit and is accordingly dismissed with costs.

Dated, signed and **delivered** at **Nairobi** this **22nd day** of **November, 2018.**

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J .A. MAKAU

JUDGE