



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 177 OF 2011

HIGHCHEM PHARMACEUTICALS LIMITED.....PLAINTIFF

VERSUS

LEMUMA CHEMIST LIMITED.....DEFENDANT

RULING

1. The plaintiff through a plaint dated 28th March 2011 filed on 12th May 2011 sued the defendant claiming Kshs.4, 839,340/20. The defendant upon being served with summons to enter appearance drew a defence under protect dated 2nd June 2011 and filed on 22nd June 2011. The plaintiff subsequently filed Reply to the defence dated 5th July 2011 and filed on 6th July 2011.

2. The Plaintiff/Applicant filed a Notice of Motion pursuant to **order 2 Rule 15(1) (b) (c) and (d); order 51 Rule 1 of Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the following orders:-

1) That the Defendant's/Respondent's statement of defence be struck out and judgment entered in favour of the Plaintiff/Applicant for the sum of Kshs.4,839,340/- with interest at court rates from the date of filing suit until payment in full;

2) That costs of this application and of the entire suit be borne by the Defendant/Respondent.

3. The main grounds in support of the application are on the face of the application and supported by an affidavit of Nelson Gacuri sworn on 3rd May 2018. The Respondent did not file any Replying affidavit or any grounds of opposition.

4. This court directed the Applicant to file submissions in support of the application and the same were filed on 9th October 2018.

5. I have carefully considered the pleadings, the application and submissions and the only issue that arises in this application is whether the Applicant has met the threshold for having the defence being struck out.

6. Under **Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules** it is provided:-

"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

7. The defendant's defence on the face of it is a mere denial; it admits being aware of sums claimed but alludes to fraud. The defendant through a written debt acknowledgement letter marked "NG-1" through its director, Boniface Kibunja Mburu acknowledged the debt owed to the plaintiff and made a proposal of settlement of the debt; that director has capacity to bind the company in his actions (*attached is a copy of CR-12 issued by Registrar of Companies stating the names of the directors of the Defendant/Respondent company marked ("MH-2")*).

8. The defendant in the defence alleges fraud, however it has not given the particulars against the plaintiff's alleged acts of fraud. It is further averred by the Plaintiff/Applicant since the institution of the suit the defendant has made some payments towards the settlement of the debt (see copy of cheques marked ("NG-3" "NG-4" and "NG-5").

9. In the instant case, the defendant filed its defence making a general denial as of 2nd June 2011 yet thereafter it admitted the indebtedness in writing through a letter dated 9/10/2013 and offered to pay the debt; that the defendant made payments through cheques dated 27/2/2016 and 26/9/2011. Its actions are clear indication that the defendant's defence is merely intended to buy time; it is a mere sham, frivolous, vexatious and scandalous and it is for striking out.

10. Having carefully considered the Plaintiff's/Applicant's application and the conduct of the defendant, I find that it makes no sense for a party to dispute a debt and proceeds to allege fraud but all against the odds, he writes to the other party admitting the indebtedness, offer to pay and even proceed to issue some cheques as part payment. The defendant's director's letter admitting liability simply demonstrates the defence is frivolous, scandalous, vexatious and is only intend to delay the expeditious determination of the suit. I have considered the Applicant's affidavit in support and annexures thereto and find no purpose will be served by having this matter proceeding to trial.

11. In a case involving a company, a company acts through its agents and directors and once a director acknowledges debt, as is the case herein, the company is bound by such actions.

12. In the case of **Margaret Njeri Mbugua Vs Kirk Mweya Nyaga (2016) eKLR** the court dealing with a defence of mere denial held as follows:-

"A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence...

...When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with diverse circumstances, it shall be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

13. The upshot is that I find the the plaintiff's Notice of Motion dated 3rd May 2018 meritorious and the same is allowed. I proceed to make the following orders:-

a) The Defendant's statement of defence dated 12th October 2011 be and is hereby struck out.

b) Judgment be and is HEREBY entered in favour of the plaintiff for the sum of Kshs.4,839,340/20 with interest at court rates from the date of filing the suit until payment in full.

c) The Plaintiff is awarded costs of the main suit and the application.

Dated, signed and delivered at Nairobi this 6th day of December, 2018.

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J .A. MAKAU

JUDGE