



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 607 OF 2014

RAFIKI MICROFINANCE BANK LTD.....PLAINITFF/RESPONDENT

VERSUS

ZENITH PHARMACEUTICALS LTD.....DEFENDANT/APPLICANT

RULING

1. The Notice of Motion dated 9th November, (February?) 2017, raises an issue which makes it resjudicata the Notice of Motion dated 23rd February 2015 and will therefore encounter some difficulties. The current Application seeks that the Plaintiff's suit be struck out on the ground that the Plaintiff failed to comply with the Court Order of 9th March 2016.

2. In a Notice of Motion dated 23rd February 2015, the Defendant sought an Order in the following terms;-

1. THAT this Honourable Court does compel by way of an order of production directed to the Plaintiff to produce before this Court by way of affidavit (or otherwise as the Court may direct) originals and/or certified copies of the following documents with respect to account numbers [particulars withheld];-

a. Duly executed account opening forms;

b. Up to date statements of account from the date the individual accounts were opened up to the date the present suit was filed (19th December 2014); and

c. Duly executed letters of offer and loan application forms.

2. THAT in default of complying with the Order for production within a period of fourteen (14) days or such other time as the Court may determine, the Plaint be struck out with costs to the Defendant.

3. The Court allowed prayer 1(c) only and ordered that the Documents be delivered within 14 days of 19th February 2016. This is what Kariuki J. held,

“In the result, it is my opinion that the Defendant's application dated 23rd February, 2015 partially succeeds in terms of prayer 1 (c) be and is hereby allowed. The documents and information sought in the application in terms of the executed letters and loan application forms should be delivered to the Defendant within 14 days of the Court's ruling”.

Notably prayer (2) was not allowed in its entirety. The effect was that while the Judge ordered that the Documents be produced within 14 days of this Ruling, the limb for striking out in default was not granted. To my mind prayer (2) of that Motion had been determined by that Decision albeit not in the manner that the Defendant would have wanted. It was nevertheless determined. The Defendant has not sought a Review of that Decision.

4. This Court is now told the Order made on 19th February 2016 and issued on 9th March 2016 has been breached. This is denied by the Plaintiff. But even if there was breach, is the fallback a striking out order? I hold not because whether or not striking out was to happen in default is a matter res judicate having been raised in the application of 23rd February 2015 and the Court having not granted it.

5. The Motion of 9th November (February) 2017? and filed on 9th February 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of

June, 2017.

F. TUIYOTT

Ouma for Applicant

Thiongo for Nyaosi for Plaintiff

Alex - Court clerk