



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 118 OF 2015**

**VITABIOTICS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**HARLEYS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RIPPLES PHARMACEUTICALS LIMITED.....1<sup>ST</sup> DEFENDANT**

**METRO PHARMACEUTICALS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application before the Court is the Defendants' Notice of Motion dated **16<sup>th</sup> November, 2015** and filed on **17<sup>th</sup> November, 2015**. It was expressed to have been brought pursuant to the provisions of **Sections 3A and 22 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as well as **Order 19 Rule 2 and Order 51 of the Civil Procedure Rules, 2010**.

2. The Defendants sought for the following orders:-

1. **That the Court do order that Hardip Singh attends Court upon the hearing of the Respondent's Notice of Motion dated 3<sup>rd</sup> November, 2015 for the purposes of being cross-examined on the contents of his affidavit sworn on 3<sup>rd</sup> November, 2015.**

2. **THAT the costs of this application be awarded to the Defendants/Applicants herein.**

3. The application is supported by the Affidavit of the Director of the 2<sup>nd</sup> Defendant Company, **Niraj shah** and sworn on **16<sup>th</sup> November, 2015**, as well as the further affidavit sworn on **16<sup>th</sup> November, 2015** by **Daniel Wachira**, a director of a company known as **Njimia Pharmaceuticals Limited**. The grounds set out in the Notice of Motion in support of the application are:

a. **That the 1st Plaintiff/Respondent filed an application to have the directors of the 2nd Defendant committed to civil jail for contempt of court and/or sequestration of their properties to compensate the 1st Plaintiff for the loss incurred.**

b. **That in paragraph 8 of the supporting affidavit, the deponent averred that the 1<sup>st</sup>**

**Defendant had failed and/or refused to comply with the court's orders and continues to import, supply, sell, distribute vitabiotics products and/or passing off the same using pseudo names and different batch numbers, solely for the purpose of deceiving the public and by-passing the orders of the court.**

**c. That given the nature of the allegations made herein, and the consequences of a finding of contempt of court, it is necessary for the interests of justice to be met for the deponent to be examined as to what he had deponed to in his affidavit, more so in view of the discrepancies in the documents annexed to the affidavit.**

**d. That no prejudice will be cause to the Respondents in any event.**

4. It is the Defendants' case that the deponent has attached copies of certain documents which are at variance with the originals that are in the possession of the 2<sup>nd</sup> Defendant. It is therefore the Defendants' position that since the deponent has said that the information in the affidavit is of his knowledge, it is necessary that he be examined so as to test the veracity of the information to which he lays claim.

5. It is further the Defendants' case that contempt of Court being a quasi-criminal offence, it is imperative and in the interests of justice that a person accused of such an offence be given a full and fair opportunity to test the evidence in support of such an allegation. They reiterated their position that the allegations made by the deponent on oath were complete falsehoods which were designed to mislead the Court as to the true conduct of the 2<sup>nd</sup> Defendant.

6. In the further affidavit, **Mr. Wachira**, a director of **Njimia Pharmaceuticals Ltd** also averred that the documents annexed to the affidavit of **Hardip Singh** and marked **HS 3 (a)** and **(b)** related to transactions between Njimia Pharmaceuticals and the 2<sup>nd</sup> Defendant are false documents. It was his assertion that neither the 1<sup>st</sup> Plaintiff nor Mr. Hardip Singh was a party to the aforesaid transactions. It was therefore his position that he did not know the circumstances under which Mr. Hardip obtained copies of the invoices from **Njimia Pharmaceuticals Ltd** as it had not been explained in his affidavit. He further averred that he had never issued copies of the said invoices to the **Mr. Hardip Singh** or the 1<sup>st</sup> Plaintiff.

7. He therefore maintained that the products that were subject matter of the transaction which generated the invoices in question were not products manufactured by the 1<sup>st</sup> Plaintiff and that the photographs annexed as **HS 3 (e), (f)** and **(g)** were not photographs of the products which were the subject matter of those invoices.

8. In response to the application, the Plaintiffs/Respondents filed the Grounds of Opposition dated **24<sup>th</sup> November, 2015** as well as an affidavit sworn by **Sakayo Stephen Ndoyo** on **24<sup>th</sup> November, 2015**. Their case, in summary is that:

- a. No proper or valid basis had been laid to warrant the cross-examination of Hardip Singh;**
- b. That there are no discrepancies in the light of the totality of all the invoices in question to warrant cross-examination;**
- c. That the instant application offends the Oxygen Principles set out in Sections 1A and 1B of the Civil Procedure Act;**
- d. That the cross-examination proposed will not in any way change the nature, character or content of the invoices in question.**

9. In his affidavit, **Mr. Ndoyo** who described himself as the Procurement Officer of **M/s Njimia Pharmaceuticals Limited** averred that the aforesaid company dealt with the 2<sup>nd</sup> Defendant herein by purchasing Vitabiotics products by use of pseudo names and without giving the batch numbers, date of expiry of the products with the sole aim of concealing the true nature and identity of the products as the

2<sup>nd</sup> Defendant was not authorised to deal with Vitabiotic products. He further averred that the invoices in question and issued by the 2<sup>nd</sup> Defendant to **Njimia Pharmaceuticals Ltd** indeed related to Vitabiotic products and he procured the said products for and on behalf of **Njimia Pharmaceuticals Ltd**. It was therefore his position that there were no discrepancies in the invoices in question.

10. It was the deponent's assertion that invoices ordinarily issued by the 2<sup>nd</sup> Defendant to **Njimia Pharmaceuticals Ltd** were issued in original and duplicate. He averred that the invoices marked as **HS 3A** and **HS 3B** in the supporting affidavit of **Hardip Singh** were invoices that were issued by the 2<sup>nd</sup> Defendant and whose original duplicate copies were retained by **Njimia Pharmaceuticals Ltd**. He further averred that the writings in ink by hand thereto were done at the point of receipt of the products for purposes of confirming the actual identity of the Vitabiotics Products. The deponent produced a copy of an invoice of Vitabiotics products to confirm that the 2<sup>nd</sup> Defendant had sold vitabiotics products to **Njimia pharmaceuticals** and which products were procured through him. (**The said invoice is marked as "SN 2"**.) He concluded by stating that the affidavit of **Daniel Wachira**, the director of **Njimia Pharmaceuticals Limited** was patently false and misleading in light of the invoices and documentary evidence.

11. The application was prosecuted by way of written submissions which were highlighted before this Court on **23<sup>rd</sup> March, 2016**. The Defendants filed their submissions dated **2<sup>nd</sup> February, 2016** on **9<sup>th</sup> February, 2016** while the Plaintiffs filed their reply on **4<sup>th</sup> March, 2016**. I have carefully considered those submissions in the light of the Notice of Motion dated **16<sup>th</sup> November 2015** and the pleadings filed herein.

12. Needless to say that the Court has the discretion to order the attendance of a deponent for purposes of cross-examination. This power is donated by **Order 19 Rule 2 (1)** of the **Civil Procedure Rules** which states as follows:-

**"(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent."**  
(Emphasis supplied)

13. Counsel for the Defendant/Applicant drew the attention of the court to the fact that the application in support of which the affidavit of Mr. Singh was filed are contempt proceedings, which entail the possibility of committal to jail; and therefore that it is in the interests of justice to ensure the process is fair, just and accords with constitutional tenets pertaining to the right to fair trial. Nevertheless, it is trite that the discretion donated by **Order 19 Rule 2 (1)** of the **Civil Procedure Rules** above can only come into play upon a proper basis being laid by an applicant. The position taken by the court in the case of **Kibaki vs Moi & Another ( Election Petition No.1 of 1998) UR**, is still valid thus:

**"In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross- examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross-examination will not be ordered."** (emphasis added)

And in **Hudson Enterprises Ltd. Vs. Kenya Cold Storage (foods) Ltd. & 14 others [2006] eKLR, Azangalala, J.** had similar views when he held that;

***"the right to cross examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judicially and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application. All the complains made by the plaintiff can be established by means other than cross examination."***

14. Accordingly the question is whether a proper basis has been laid down by the Defendant/Applicant in the instant application for the court to require the attendance of Mr. Singh for purposes of cross-examination. In this regard, useful guidelines were set out in the case of **G G R vs H- P S [2012] eKLR**

thus:

**"The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or where the evidence deponed (sic) to is conflicting in itself."**

15. In paragraph 8, which is the paragraph in issue, Mr. Singh averred thus:

**"The 1<sup>st</sup> Defendant has failed and/or refused to comply with Court orders and is importing, supplying, selling, distributing Vitabiotics products and/or passing off the same using pseudo names and different batch numbers solely for the purpose of deceiving the public and by-passing the orders of this court."**

16. It is plain from the foregoing paragraph that the deponent has not only imputed bad motive on the part of the 1<sup>st</sup> Defendant, but alleged that some form of deception through the use of pseudo names had been committed by the 1<sup>st</sup> Defendant, with the sole objective of defeating the orders of the court, for which reason the application for contempt had been filed.

17. Secondly, there is an apparent conflict in the affidavits of Daniel Wachira, a Director of Njimia Pharmaceuticals Ltd and Sakayo Stephen Ndoyo, the Procurement Officer of Njimia Pharmaceuticals Ltd, with regard to the documents filed in support of the affidavit of Mr. Singh and marked HS 3. In the affidavit of Mr. Wachira, he deponed at paragraph 6 that:

"I can state unequivocally that the products that were the subject of the transaction which generated those invoices were not products manufactured by the 1<sup>st</sup> Plaintiff. I can also say unequivocally that the photographs which are annexed as HS 3(e), (f) and (g) are not photographs of the products which were the subject matter of those invoices."

On the other hand, Mr. Ndoyo took the position that the invoices marked were properly issued and that there were no discrepancies. Since the documents in question are documents annexed to the affidavit of Mr. Singh, I would agree with the Defence that a sound basis has been laid for the cross-examination of Mr. Hardip Singh to warrant his being in attendance at the hearing of the contempt application.

18. In the light of the foregoing, the Notice of Motion dated 16<sup>th</sup> November 2015 is hereby allowed as prayed in paragraph 1 thereof.

Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>th</sup> DAY OF MAY 2016**

**OLGA SEWE**

**JUDGE**