



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 370 OF 2013

UNILEVER KENYA LIMITED.....PLAINTIFF

VERSUS

PROCTER & GAMBLE INTERNATIONAL OPERATIONS SA.....1ST DEFENDANT

PROCTER & GAMBLE SERVICES LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated and filed on 22nd August 2014 was brought under the provisions of **Order 10 Rule 6, 10 and 11; Order 51 Rule 1 of the Civil Procedure Rules, 2010; Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 of the laws of Kenya and all enabling provisions of the law.** It sought the following orders:-

1. **THAT Interlocutory Judgment and Decree issued against the Defendants by the Deputy Registrar on or about the 11th November 2013 be set aside *ex debito justitiae* (sic) and all orders and proceedings subsequent thereto be vacated.**
2. **THAT the Honourable Court do issue leave to the Defendants to file their Defence out of time.**
3. **THAT the Honourable Court make further Orders and issue other directions as it may deem just and expedient.**
4. **THAT the costs of the Application be provided for.**

THE 1ST AND 2ND DEFENDANT'S CASE

2. On 15th August 2014, Mogamat Faiz Nacerodian swore a Supporting Affidavit on behalf of the 1st and 2nd Defendants. The same was filed on the even date. The said Defendants' Written Submissions were dated and filed on 8th October 2014. Their List of Authorities was also dated and filed on 8th October 2014. Their submissions in reply to the Plaintiff's Written Submissions were dated and filed on 24th November 2014.

3. The Defendants contended that despite the several applications that were on record and in particular their Notice of Motion that was dated and filed on 30th October 2013 in which they had sought to have

the dispute between them and the Plaintiff referred for determination to the Advertising Standards Committee, the Plaintiff applied and obtained interlocutory judgment due to their failure to file a Defence in the matter herein.

4. They averred that the entry of the said interlocutory judgment was irregular for the reason that none of the reliefs that had been sought in the Plaintiffs Amended Defence dated 9th October 2013 and filed on 10th October 2013 were for either liquidated demand, pecuniary damages or detention of goods. They therefore sought to have the said interlocutory judgment set aside and they allowed to file their Defence out of time.

THE PLAINTIFF'S CASE

5. In response to the said application, on 16th September 2014, Inviolata Oriwo swore a Replying Affidavit on behalf of the Plaintiff herein. It was filed on the same date. The Plaintiff's Written Submissions and List of Authorities were both dated and filed on 7th November 2013.

6. It was the Plaintiff's contention that the court had jurisdiction to enter interlocutory judgment when the Defendants defaulted in filing their Statement of Defence. They therefore urged the court to dismiss the said application with costs to it.

LEGAL ANALYSIS

7. The Defendants submitted that Order 10 Rules 4, 5, 6 and 7 of the Civil Procedure Rules, 2010 provided that an interlocutory judgment could only be entered where the suit was for a liquidated demand, pecuniary damages or the detention of goods. They argued that in view of the fact that the Plaintiff's Amended Complaint had sought declaratory prayers, none of them could avail the granting of an order for an interlocutory judgment and as a result, the Deputy Registrar's decision amounted to nothing in law, being null and void *ab initio* for lack of jurisdiction and it should accordingly be declared as such and be set aside.

8. They pointed out that the claim for '**costs of running advertisements**' estimated at 1.85 Million Euros provided at paragraph 11(iv) of the Amended Complaint was not substantiated by evidence and could not be termed as a liquidated damage necessitating this matter to be determined by way of formal proof.

9. They referred the court to the **Halsbury's Laws of England Fourth Edition, Re-Issue Volume 12 at Para 808** which defined what liquidated and unliquidated damages were and several cases where the courts set aside interlocutory judgments that had been entered irregularly- **See Kenya Commercial Bank Ltd vs Joshua Aggrey Oburi Another [2001] eKLR, Edward Kings Onyancha Maina t/a Matra International Associates vs China Jiangsu IETC Corporation & 8 others [2013] eKLR** other cases they relied upon were listed in their List of Authorities.

10. In the case of **Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR**, the Court of Appeal held as follows:-

"The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof" (emphasis Defendants).

11. On the other hand, the Plaintiff referred the court to the provisions of Order 10 rules 4, 5, 6 and 7 of the Civil Procedure Rules, 2010 to support their argument that the Deputy Registrar had jurisdiction and power to enter interlocutory judgment when the Defendants defaulted in filing their Statement of

Defence.

12. It was the view of the court that Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010 were the relevant provisions herein as there was no claim for detention of goods. The same provide as follows

“4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

14. A perusal of the Amended Plaintiff dated 9th September 2013 showed that it was not correct as the Plaintiff had contended that it had sought both pecuniary and non-pecuniary reliefs. The said reliefs were as follows:-

- a. A permanent injunction restraining the Defendants by themselves, its (sic) their servants, agents or employees from running, flighting or airing the Ariel One Wash campaign advertisements in its (sic) current form on all outdoor advertising media including billboards, all in-store point of sale materials and all forms of print or electronic media.
- b. A declaration that impugned advertisements are in breach of Section 55 of the Competition Act, 2010.
- c. A declaration that the impugned advertisements offend the provisions of Section 12 of the Consumer Protection Act, 2012.
- d. A declaration that impugned advertisements are contrary to the express provision of section 9 of the Trade Descriptions Act and thus illegal.
- e. An unreserved and unconditional retraction, at the Defendant's Defendants' (sic) cost, of the entire impugned advertisement campaign.
- f. Damages in terms of paragraph 10 above.
- g. Costs on full indemnity basis.
- h. Such other further reliefs that this Honourable Court may deem just and expedient to grant.

15. As was rightly pointed out by the Defendants the Plaintiff did not controvert the factual and legal position that no interlocutory judgment could be entered where the reliefs sought in a plaintiff were declaratory in nature. There was no claim for pecuniary damages or liquidated sum in the reliefs of the said Amended Defence. The Plaintiff's written submissions of what not could or could be referred to as liquidated damages, though noted by the court, were not persuasive the court to come to any other conclusion other than that interlocutory judgment could not be entered where relief sought in a Plaintiff were not liquidated, nature or for pecuniary damages or for detention of goods.

16. Notably, Paragraph (10) of the said Amended Plaintiff that the Plaintiff purported to rely upon to demonstrate that there was a liquidated claim against the Defendants merely enumerated reasons why the Plaintiffs had been aggrieved by the Defendants' action. Paragraph (11) therein only itemised particulars of loss and damages but the same were not quantified.

17. Particular (11) (iv) therein provided that "costs of running advertisement to correct the misleading depiction of its product is estimated at 1.85 Euros." That could not in any way be deemed to have qualified to be regarded as a liquidated claim for the reason that the same was an estimated figure and was contained in the body of the claim as opposed to being part of the reliefs. A liquidated claim can only be sought as a relief to entitle a party to interlocutory judgment in case of default in filing of a Memorandum

of Appearance or Defence

18. It was not possible to ascertain the Plaintiff's liquidated claim from the way the Amended Plaint had been drafted. In this regard, the court was not persuaded by the Plaintiff's submissions that in determining the nature of the claim, it was not the words employed by the parties but the substance of the claim that was important. In fact it was the relief rather than the form of pleading that determined whether a demand was liquidated or not. In the disclosed circumstances, it was abundantly clear that the interlocutory judgment entered on 11th November 2013 was improper and irregular.

19. The court thus agreed with the Defendants' submissions that the Deputy Registrar's entry of interlocutory judgment was null and void *ab initio* and was therefore a nullity as was held by Lord Denning in *Macfoy vs United Africa Co Ltd* [1961] 3 All ER at Page 1172(1) wherein he stated as follows:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is it to sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

20. On the other hand, the case of **Winnie Wambui Kibinge & 2 Others vs Match Electricals Limited [2012] eKLR** that was relied upon by the Plaintiff was clearly distinguishable from the circumstances of the case herein as there was reference to a liquidated sum of Kshs 16,276,975/=. In the case of **Naju Investments Ltd v George Adongo & 6 Others [2006] eKLR** that was also relied upon by the Plaintiff, Ojwang J (as he then was) held that: -

"...I believe, the money figures claimed by the plaintiff as stated in the said paragraph 19 of the plaint, are specific enough to be dealt with as liquidated demand."

21. The court found itself in agreement with the Defendants once again that the cases of **Gurbaksh Singh & Sons Limited vs Njiri Emporium Limited [1985] eKLR** and **G.L. Baker Ltd vs Barclays Bank Ltd & Others [1956] 3 ALL ER519** that the Plaintiff placed reliance upon were distinguishable from the facts of this case as the same addressed themselves to situations where figures were quantifiable and exact so as to have been deemed to have been liquidated sums, facts which were very different from those in this matter.

22. The court did not find it necessary to consider whether or not the Defendants' Draft Defence annexed to the Supporting Affidavit had raised triable issues as their application seeking the setting aside of the interlocutory judgment that had been entered herein was merited and successful in the first instance.

23. Accordingly having carefully considered the pleadings herein, the affidavit evidence, the Written Submissions and the case law in support of the parties' respective cases, the court came to the conclusion that disallowing the Defendants' present application would actually cause injustice, prejudice and hardship to them as they would be denied an opportunity to access the court, a right that is enshrined in Article 50 of the Constitution of Kenya, 2010. The court found that this was a good case where it could exercise its discretion to set aside the interlocutory judgment that was irregularly entered herein.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's ruling was that the 1st and 2nd Defendant's Notice of Motion application dated and filed on 22nd August 2014 was merited and Prayer Nos (1) and (2) are hereby allowed in the following terms:-

- a. **The court hereby grants leave to the 1st and 2nd Defendant to file and serve their Statement of Defence within fourteen (14) days from the date of this ruling.**

- b. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence to the Defendant's Defence within fourteen (14) days from the date of service.**
- c. **In the event the Defendant shall fail to comply with order 24 (a) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**
- d. **Costs in the cause.**

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2015

J. KAMAU

JUDGE