



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & 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 1<sup>st</sup> Plaintiff's Notice of Motion dated **22<sup>nd</sup> July 2015** and filed on **23<sup>rd</sup> July 2015**. It is expressed to be brought under the provisions of **Sections 1, 1A, 1B, 3, 3A, 63(c) & (e)** of the **Civil Procedure Act** and **Order 40, Rules 1, 2, 3, 4 & 10** and **Order 51 Rule 1** of the **Civil Procedure Rules**.
2. The 1<sup>st</sup> Plaintiff sought for the following orders, some of which are already spent:-
  1. *Spent*
  2. *Spent*
  3. **The Defendant whether by themselves, agents, servants or otherwise howsoever be restrained from importing, packaging, supplying, selling or offering for sale, distributing and/or passing off or otherwise dealing with vitabiotics products owned by the First Plaintiff/Applicant herein, Vitabiotics limited, as the applicant has exclusive rights especially as the manufacturer thereof over the vitabiotics products in question pending the hearing and determination of this suit.**
  4. **The costs of this application be provided for.**
3. The application is based on the several grounds set out therein and is supported by the Affidavit of the Applicant's Director, **HARDIP SINGH** sworn on **22<sup>nd</sup> July, 2015**. The 1st Plaintiff/Applicant also relied on its written submissions together with its List of Authorities filed on **14<sup>th</sup> September, 2015** in support of the application.
4. The 1st Plaintiff/Applicant's director averred that the Applicant is the manufacturer of the vitabiotics products in question and the duly registered trademark owner of thereof in the United Kingdom. He further averred that the Applicant is in the process of finalizing the registration for the trademark in the Republic of Kenya. The 1st Plaintiff/Applicant attached a copy of thier said

application as HS 1. He confirmed that the 2<sup>nd</sup> Plaintiff has otherwise been their exclusive agent, importer and distributor of the vitabiotics products in question having been appointed as such from 23<sup>rd</sup> May, 2013 to date.

5. It is the further assertion of the 1st Plaintiff/Applicant's Director he was alerted by a Director of the 2<sup>nd</sup> Plaintiff to the effect that it had come to their knowledge that the Defendants were selling products bearing marks similar or confusingly similar to the vitabiotics products manufactured by the 1st Plaintiff/Applicant at various outlets within the country. Having satisfied itself that the foregoing actions by the Defendants amount to an infringement of the 1st Plaintiff/Applicant's rights aforesaid products thereby exposing them to risk as to liability that might occur to the public, authority was given by the 1st Plaintiff/Applicant for the 2nd Plaintiff to institute this suit for appropriate relief, as the Defendants have no authority from them to deal with the products in question.
6. The 1st Plaintiff/Applicant further averred that its decision to be joined in the current suit was informed by the Ruling of this Court delivered on **28<sup>th</sup> May, 2015** concerning the application for injunction that was filed by the 2<sup>nd</sup> Plaintiff against the Defendants/Respondents. In the said Ruling, the Court indicated that the 2<sup>nd</sup> Plaintiff could not purport to speak for the 1<sup>st</sup> Plaintiff/Applicant herein who, as the manufacturer stood to incur greater liability. It was on that basis the 1st Plaintiff/Applicant caused itself to be enjoined to these proceedings with a view of an effectual determination of the dispute between the parties.
7. It is further the case of the 1st Plaintiff/Applicant's that, following the aforesaid Ruling and the resultant dismissal of the 2nd Plaintiff's application for injunction, the Defendants have continued to deal in its products notwithstanding the lack of authority so to do. Thus, the 1st Plaintiff/Applicant is apprehensive that the Defendants will continue with their aforesaid illegal acts and dealership in the vitabiotics products unless restrained by an order of the court.
8. In opposition to the application, the Defendants filed the Grounds of Opposition dated **28 July, 2015**. The Defendants also filed their written submissions together with their list of authorities both dated **15 September, 2015** and filed on **16 September, 2015**.
9. In a nutshell, it is the Defendants' case that the current application is *res judicata* in so far as it raises issues that were raised or ought to have been raised in the Plaintiff's application of **12<sup>th</sup> March, 2015**. It is further the Defendants' case that the application lacks any legal foundation for the reason that it seeks to restrain them from selling that which does not belong to the Plaintiffs. The Defendants also contend that the application is an abuse of the Court Process and therefore ought to be dismissed with costs in the interests of fairness and justice. Having considered the application, the grounds of opposition and the written submissions as well as the authorities cited by Counsel for both parties, the following are the main issues for determination:
  - a. **Whether the current application is indeed *res judicata* as posited by the Defendants/Respondents; and**
  - b. **Whether the Applicant is entitled to the restraining orders against the Defendant with regard to the vitabiotic products.**

**Whether the current application is res judicata:**

10. The law on *res judicata* is provided for under **Section 7** of the **Civil Procedure Act** which stipulates as follows:

**“No court shall try any suit or issue in which *the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*” (Emphasis supplied)**

The Black's Law Dictionary defines *res judicata* it as:

**“...a thing adjudicated; an issue that has been definitely settled by judicial decision...”**

11. In the Defendants' submission, the 2<sup>nd</sup> Plaintiff being an agent of the 1<sup>st</sup> Plaintiff/Applicant, brought the application dated 12th March 2015 at the behest of and on instructions of the 1<sup>st</sup> Plaintiff/Applicant. That once the agent has come to court and made an application, which has been decided and dismissed on its merits, it is not open to the principal to make the same application to court. The Defendants' submission is based on the doctrine that the principal is bound by the actions of the agent and therefore, the 2<sup>nd</sup> Plaintiff's application having been heard and dismissed, it is not open for the 1<sup>st</sup> Plaintiff/Applicant to make a similar application. In response, the Applicant submitted that the doctrine of *res judicata* would not apply in the present circumstances granted that the 1<sup>st</sup> Plaintiff/Applicant was not a party to the previous application and that the circumstances of the case had changed as the Applicant had stepped in as the manufacturer of the vitabiotics products.
12. Upon a careful consideration of this issue and from the standpoint of the Section 7 of the Civil Procedure Act aforementioned it is apparent that first and foremost the 1<sup>st</sup> Plaintiff/Applicant herein was not a party to the previous application. It could very well be argued, as did Counsel for the Defendants that the parties to the first application were litigating "under the same title" on the basis of Principal/Agent principle. However, it is evident that the court, in its ruling dated **28<sup>th</sup> May, 2015** came to the conclusion that the Plaintiff was not entitled to the orders sought on the ground that it was not the owner of trademarks it was seeking to protect. At paragraphs 27 to 34 of the said Ruling the court dealt with the pertinent question of the 2<sup>nd</sup> Plaintiff's *locus standi* to file the first application as a preliminary issue and concluded that:

**"...Having found that the Plaintiff had no *locus standi* to institute the proceedings herein, it could not therefore purport to restrain the Defendants from dealing with products in the manner it had set out in Prayers (4) and (5) of its application for the reason that it was not the manufacturer of the said products and it could not claim the trademarks..."**

In the circumstances, the court did not have occasion to consider the issues in dispute in the instant application on the merits. Hence, the Defendants' *res judicata* argument on the basis of principal-agent relationship is off the mark.

**Whether the Applicant is entitled to the restraining orders against the Defendants with regard to the vitabiotic products.**

13. The restraining orders sought against the Defendants by the Applicant are in the nature of an injunction. It is now well settled that for an injunction to be granted, the Court will consider the basic principles set out in the renowned case of **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**. The principles are that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.
14. In the present case, has the Applicant established a *prima facie* case with a probability of success? A *prima facie* case was defined by the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** to be one in which an applicant establishes that his legal right has been infringed by a Defendant thereby calling for a rebuttal by the latter.
15. The 1<sup>st</sup> Plaintiff/Applicant herein avers that it is the manufacturer of the vitabiotics products and the duly registered trade mark owner of the said products in the United Kingdom; and further, that they are in the process of completing registration of the trademark in Kenya. The Defendants do not appear to dispute the 1<sup>st</sup> Plaintiff/Applicant's ownership over the said products. In their Replying affidavit sworn on 13<sup>th</sup> April 2015 in response to the previous injunction application by the 2<sup>nd</sup> Plaintiff, the Defendants averred thus at paragraphs 4(vi) of the Replying Affidavit sworn by Dr. Premal A. Sangani:

**"...the Plaintiff has not shown that the products distributed by the Defendants infringe the trademarks belonging to Vitabiotics Ltd. The products sold by the Defendants**

**are genuine Vitabiotics products; they have not been repackaged and are from the same country and manufacturer thus there is no question of the products bearing marks similar or confusingly similar to the trademarks belonging to Vitabiotics Ltd..."**

They further averred that Vitabiotics Limited, the 1st Plaintiff/Applicant herein, operated an online platform through which anyone could order for their products and have the same delivered internationally. In a synopsis, the Defendants admit that the 1st Plaintiff/Applicant is the owner and manufacturer of the vitabiotics products and all they do is to sell the same. In the premises, the issue of passing off or trademark infringement may not arise as the Defendants have not claimed ownership of the products as manufacturers; but then again, these are matters than can only be effectually dealt with at the hearing.

16. The 1st Plaintiff/Applicant however contends that the Defendants have no authority from it to deal with the vitabiotics products and that their continued dealership in disregard of the its exclusive rights and authority over the said products is in breach of its rights as a manufacturer. The 1st Plaintiff/Applicant recognizes only the 2<sup>nd</sup> Plaintiff as its exclusive agent, importer and distributor of the vitabiotics products in Kenya, having been appointed as such from 23<sup>rd</sup> May, 2013 to date.
17. It is not in dispute that, presently, there is no dealership agreement between the Applicant and the Defendants with regard to the sale and distribution of the vitabiotics products. The Defendants case, however, is that the said products are available in the international markets and can be shipped from the said markets for sale and distribution. It is also their submission that they are licenced wholesale dealers and have the authority under the Kenyan law to procure and supply any vitabiotics from appointed agents. The Defendants also submitted that the orders sought by the Applicant were a hindrance to competition contrary to section 21 of the Competition Act.
18. On the issue of the vitabiotics products being available in the international market, evidence is yet to be tendered as to what arrangements, if any, the Applicant may have with the said international markets to sell and distribute its vitabiotics products. However, what is clear to the Court is that the Applicant has not authorised the Defendants to import, sell or distribute the same. The Defendants may be licenced wholesale dealers as they claim but the contention of the 1st Plaintiff/Applicant herein is that authority to procure and supply the vitabiotics products can only come from the owner and manufacturer of the said products. There is evidence before the Court that, to that end, the Applicant appointed the 2<sup>nd</sup> Plaintiff as their exclusive distributor of the vitabiotics products which application was noted and accepted by the Pharmacy and Poisons Board vide its letter dated 14<sup>th</sup> June, 2013. Therefore, prima facie, a good case has been made out by the 1st Plaintiff/Applicant for the grant of the injunctive orders sought. Any arguments to the contrary, such as whether the arrangement between the Plaintiffs would amount to an infringement of Section 21 of the Competition Act, are matters that can only be canvassed and determined at the trial of this matter.
19. In view of the foregoing, the Court is satisfied that the 1st Plaintiff/Applicant has established a *prima facie* case by demonstrating to the Court that it is the manufacturer of the subject products and that Defendants have no authority from them to import and distribute the vitabiotics products, there being no distributorship agreement between the parties.
20. As to whether the 1<sup>st</sup> Plaintiff risks suffering irreparable harm, it was averred that the medicaments are sensitive products requiring proper handling and that in the event of the need to exercise right of recall, it is the manufacturer who runs the risk of being held liable for any harm that may occur to the general public. That is serious enough to warrant the granting of the orders sought. Besides, authorities abound that the mere fact of adequacy of damages does not oust the Court's discretion to grant an interlocutory injunction. In **Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207** for instance, **Ringera J** (as he then was ) held at page 216:-

**“I would for those reasons alone accede to the Plaintiff’s prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial.”**

**In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”**

Again in Waithaka –vs- Industrial and Commercial Development Corporation (2001) KLR 374 Ringera J (as he then was) once again delivered himself thus at page 381:-

**“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages maybe an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses.”...**

In Joseph Siro Mosioma –vs H.F.C.K and 3 others Nairobi HCCC No. 265 of 2007 (UR) Warsame J on his part held that:-

**“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”**

On a balance of convenience, the Court in responding to prayers for injunction should always opt for the lower rather than the higher risk of injustice. If granting the applicant’s prayers will support the process towards full hearing, then the Court should grant those prayers. This was held to be so in the case of Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589 in which **Ojwang Ag. J** (as he then was) quoted Justice Hoffman in the English case of **Films Rover International** in which the said judge made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:-

**“ A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’ ...”**

21. In the current application, it has been established that the 1st Plaintiff/Applicant is the owner and the manufacturer of the vitabiotics products and that there is no distributorship agreement between it and the Defendants. Therefore, failure to grant it the orders sought for is more likely to lead to an injustice as opposed to the Defendants, granted that the Defendants can continue trading in other products for which they are authorised so to do. The scales of justice therefore tilt in favour of ensuring that the 1st Plaintiff/Applicant’s interests are protected pending the hearing of the suit.

1. In view of the foregoing, the upshot of this Court’s ruling is that the Applicant’s Notice of Motion dated 22<sup>nd</sup> July, 2015 and filed on 23<sup>rd</sup> July, 2015 is hereby allowed and orders granted in terms of prayer 3 thereof. The costs of the application shall be in the cause.

Orders accordingly.

**OLGA SEWE**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER 2015**