



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

CIVIL CASE NO. 542 OF 2011

WILSON MURIITHI KARIUKI T/A WISKAM AGENCIES.....PLAINTIFF

VERSUS

SURGHIPHARM LIMITED.....DEFENDANT

R U L I N G

1. This matter was awaiting trial when Counsel for the Defendant raised a preliminary objection. On **10th March 2014**, Counsel for the Defendant submitted that the preliminary issue was that the Defendant being an agent of a disclosed principal was not the right defendant. It was her submission that the suit should have been filed against ION Exchange Ltd and not Surgipharm Ltd.
2. It was further her submission that the current defendant did not produce the Zero B water purifier but that they only distributed them as agents of the Principal. Counsel then referred to the List of authorities they had filed in support of their Preliminary Objection.
3. In opposition to the Preliminary objection, counsel for the Plaintiff submitted that the Defendant had filed a Counterclaim in the suit and was seeking to have the name of the Plaintiff as the registered proprietor of Zero B trademarks expunged from the register of trade marks. He noted that this was the main prayer in the Counterclaim. It was further submitted by Counsel that whether or not the Defendant was an agent of ION Exchange Ltd was a contested fact. It was Counsel's submission that what the Plaintiff was seeking for was an injunction restraining the Defendant from using the trade mark.

ANALYSIS

4. This is basically an issue of parties to a suit. I have considered the authorities referred to by the Defendant for the proposition that where a principal is disclosed an agent cannot be sued. This is the general rule at common law which has various exceptions to it.
5. In its pleadings, the Defendant has disclosed that it was an agent of ION Exchange (India) Ltd who are the registered innovators and proprietors of the ZERO B trademark in India. On record, there is a Certificate of Registration of trademark issued by the Government of India as of 19th July 1988 to this effect. However, there is no document on the Court record for example a distribution agreement between the Defendant and ION Exchange Limited to show that there was indeed a principal-agent relationship between the two. Further Counsel for the Plaintiff submitted that the issue of whether or not the defendant was an agent was a contested fact. Therefore the court cannot at this stage conclude that the defendant was an agent of ION Exchange Ltd.

6. That notwithstanding, it is not in dispute that the defendant launched a product with a similar name to that of the Plaintiff some time in 2010 hence the reason for the Plaintiff instituting the current suit against the defendant. In my view, the Defendant is a proper party in this matter.

7. Therefore, the Preliminary objection herein as raised by the Defendant is dismissed.

8. I think it was not necessary to raise the Preliminary Objection since the same could still have been raised in the main hearing when it would be abundantly clear the legal position on all the issues.

DATED, READ AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Nyaosi holding brief for Ondebu for Plaintiff

M/s Kanini for Respondent

Teresia – Court Clerk