REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO. 228 OF 1995

KEMIPHARMA (KENYA) LIMITED ..... 1ST APPELLANT

HARISHBHAI MULJIBHAI PATEL ..... 2ND APPELLANT

SULESH KUMAR HARISHBHAI PATEL ..... 3RD APPELLANT

VERSUS

NOVO INDUSTRI A/S ..... RESPONDENT

(Appeal from an order of the High Court of Kenya at Nairobi (Justice ole Keiwua)
dated the 19th day of May, 1994
in
CIVIL CASE NO. 2250 OF 1990)
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JUDGMENT OF THE COURT

Novo Industri A/S, the respondent in this appeal (hereinafter called "the plaintiff") sued Kemipharma (Kenya) Ltd (the first defendant), Harishbhai Patel (the second defendant) and Sulesh Patel (the third defendant) in the superior court seeking from them jointly and severally the recovery of US$207,015= and Danish Kronors 95,417.50 on account of goods sold and delivered to the first defendant between 1985 and 1987. The first defendant apparently admitted the debt and offered to pay by instalments and in consideration of the plaintiff accepting this scheme, the second and third defendants executed a guarantee in favour of the plaintiff on 20th February, 1989. Under the terms of the guarantee the second and third defendants became liable to pay the debt if the first defendant defaulted. The first defendant defaulted and the plaintiff filed proceedings for the recovery of the balance outstanding by a plaint dated 25th April, 1990.

After the summons had been served on the second and third defendants, the third defendant went to see Mr Richard Omwela, a partner in the firm of Hamilton Harrison & Mathews, Advocates, the Advocates on record for the plaintiff, on 8th May, 1990.According to the Attendance Docket prepared by Mr Omwela, the third defendant said they had been served and Mr Omwela confirmed that he had instructions to proceed with the suit. The third defendant said they were due a small credit of US$100 in respect of expired goods. He promised to send a cheque for Shs.25,000/- payable that month and thereafter to pay by monthly instalments of Shs.50,000/- each. Mr Omwela warned him that he would proceed to obtain judgment although he would consider not executing the decree if the defendants paid the agreed instalments regularly.

The defendants did not enter appearance nor did they file any defence but shortly after the meeting between Mr Omwela and the third defendant, the latter returned the summons to him under cover of his letter dated 19th June, 1990, along with a cheque for an undisclosed amount as promised. On 22nd August, 1990, the plaintiff's Advocates obtained judgment and decree in default of defence for US$214,259.03 and Swedish Kronors 98,774.11. A copy of the sealed decree was forwarded to the first defendant by Mr Omwela under cover of his letter dated 15th April, 1991, with a warning that if he did not receive a satisfactory arrangement as to how the debt was to be paid he would execute by the attachment of the defendants' goods. It was at this point that the defendants decided to engage an Advocate to act for them in the matter.

On or about 15th October, 1992, the Advocate applied by Chamber Summons under Order IXA rules 10 & 11 and Order XXI rule 22 of the Civil Procedure Rules to set aside the ex parte judgment entered more than 2 years earlier on 22nd August, 1990; for leave to enter and defend; and for stay of execution. The application was supported by a lengthy affidavit sworn by the third defendant in which he made all sorts of allegations. He deponed that the amount claimed by the plaintiff included an element of commission which was payable to the defendants by the plaintiff. He claimed that Mr Omwela had advised him that there was no need to file a defence to the claim, or engage an Advocate, an allegation which Mr Omwela strenuously denied. They also complained that the decree was silent on the rate of exchange. The gist of their complaint was essentially that they had a good defence to the claim which they would have put up had it not been for the fact that they had been misled by Mr Omwela. Mr Omwela swore an affidavit in reply in which he denied all the allegations made against him by the third defendant.

The application was heard by Ole Keiwua J who after going carefully over the grounds put forward by the defendants found no substance in them. He held that the judgment was regular as the defendants had been served with summons and had chosen not to appear or to defend. He did not believe the third defendant's claim that he had been misled by Mr Omwela. He dismissed the application with costs and it is against that decision that the defendants have now appealed.

The decision of the learned Judge has been attacked on 10 grounds the essence of which was that the plaintiff owed the first defendant a substantial sum of money from unpaid commissions for which credit was not given in the decree; that the defendants were misled by Mr Omwela as a result of which they did not file a defence; and that the decree is vague as it is expressed in foreign currency without specifying the rate of exchange. A careful examination of all these grounds reveals that they have no merit. If there was any commission due to the first defendant, there is no reason why the third defendant could not have raised it at the meeting he had with Mr Omwela. Apart from that the guarantee given by the second and third defendants in relation to the debt makes no reference to the commission at all. Thirdly, if the plaintiff's claim was denied, there was no need at all to put forward a scheme for the liquidation of the debt by instalments and actually making payments even after they had instructed an Advocate to apply to set aside the default judgment. And finally, there is a clear admission of the debt in the correspondence exchanged between the defendants and the plaintiff's Advocates. With regard to the point about the rate of exchange, we can do no better than to refer to a passage in the judgment of Akiwumi, JA in the case of Beluf Establishment v Attorney-General (Civil Appeal No.134 of 1986) (unreported) where the learned Judge said -

"Finally, the decisions in Milliangos and Despina R, have in my view, put it beyond doubt that the conversion date should be that when payment is made or judgement enforced. I hope that it is now clear that Kenya courts in applying the common law can in proper cases, express judgment in foreign currency convertible at the rates prevailing on the date of payment or enforcement of the judgment."

For all these reasons, this appeal fails and is dismissed with costs. The stay of execution pending appeal granted by the learned Judge on 19th May, 1994 is hereby vacated and the money held in joint accounts to be released to the plaintiff forthwith

Dated and delivered at Nairobi this 11th day of July, 1997.

R.O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR