REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1522 OF 2001

SURGIPHARM LIMITED……..…….PLAINTIFF

- **VERSUS -**

ISAAC AWUONDO…….……...…….....1ST DEFENDANT

LIZA KIMBO……2ND DEFENDANT

RULING

1. The 2nd defendant, **LIZA KIMBO,** has moved the court by an application dated 17th March 2015, seeking the dismissal of the suit for want of prosecution.
2. The application is premised on the plaintiff's failure to take any or any significant step to set down the case for hearing for a period of almost four years.
3. Secondly, the applicant pointed out that the cause of action accrued more than 14 years ago, thus the delay in having it prosecuted was said to have caused irredeemable prejudice to the applicant.
4. The applicant swore an affidavit to support the application.
5. A separate application was filed by the 1st defendant, **ISAAC AWUONDO,** seeking the dismissal of the suit for want of prosecution.
6. Primarily, the 1st defendant was blaming the plaintiff for the delay in the prosecution of the suit, over the last 4 years.
7. The 1st defendant's application was supported by the affidavit sworn by his advocate, **EDWIN ODUNDO.**
8. The 2 applications were heard together, and the same were canvassed through written submissions.
9. It is common ground that the suit was filed on 3rd October 2001.
10. The 1st Defendant filed his Defence on 8th November 2001, whilst the 2nd Defendant filed her Defence on 5th November.
11. On 20th November 2001 the plaintiff filed an application for summary judgement. Through that application, the plaintiff also asked the court to strike out the Defences filed by the 2 defendants.
12. After giving due consideration to the application, Nyamu J. delivered his Ruling on 21st March 2003. The learned Judge held that the defences did not raise any *bona fide* triable issues or defence. Accordingly, the court granted summary judgement in favour of the plaintiff. The plaintiff was also awarded the costs of both the application and of the suit.
13. The 1st defendant was dissatisfied with the Ruling, and he lodged an appeal at the Court of Appeal.
14. On 8th April 2011, the Court of Appeal delivered its Judgement, setting aside the summary

judgement. It was the considered opinion of the Court that the defences on record raised triable issues which should have been allowed to go for adjudication through a full trial.

15. The defendants have told this court that ever since the Court of Appeal delivered its verdict, the plaintiff had failed to take any steps to prosecute its case.
16. The plaintiff, **SURGIPHARM LIMITED,** responded to the application through the affidavit of **VIJAI MAINI,** who is its Managing Director.
17. The plaintiff did not dispute the fact that it had taken no steps for almost 4 years. However, the plaintiff tendered an explanation for the inaction on its part.
18. First, the plaintiff said that at all times, the plaintiff's case was being handled by the plaintiff's Credit Controller, **SUBODHBHAI MAINBHAI PATEL.**
19. Regrettably, the said S.M. Patel passed away on 17th July 2007.
20. Following the demise of S.M. Patel, the plaintiff's case was handled by **MUKUND RAJDEV.** But the said M. Rajdev left the company in the year 2010.
21. Two years later, in September 2012, the plaintiff moved its officers from **COMCRAFT HOUSE,** Haile Selassie Avenue Nairobi; to **NAVINE TOWER** at 71 Westlands Road.
22. During the move, the plaintiff's file was misplaced, which led to a situation in which the case was left un-attended.
23. The plaintiff's Managing Director deponed that;

> ***"It is only now that the file has emerged?.***

24. It is not at all clear when exactly the file emerged. However, it is probable that because the deposition above was in the affidavit sworn on 16th November 2015, it is about that date when the file emerged.
25. In a nutshell, the plaintiff attributed the inaction to the combination of the death of S.M. Patel, and the resignation of M. Rajdev.
26. The parties expressed a similar understanding of the law which governs the dismissal of snits for want of prosecution. The starting point is Order 17 Rules 2 and 3 of the Civil Procedure Rules.
27. If no application is made or if no step is taken by any party in a case, for a period of one year, any party may apply for the dismissal of the case.
28. But even if none of the parties makes an application to the court, the court may, of its own motion, give notice in writing to the parties to show cause why the suit should not be dismissed.
29. If cause is shown to the court's satisfaction, the suit would not be dismissed.
30. It therefore follows that if cause is not shown to the satisfaction of the court, the suit may be dismissed.
31. In this case the defendants have submitted that there has been inordinate and inexcusable delay.
32. The plaintiff has admitted that there has been a delay. But the plaintiff believes that the delay was excusable.
33. Why would a delay be inexcusable?
34. The Constitution of the Republic of Kenya, at Article 159(2) (b), enjoins the courts to administer justice expeditiously. However, it is appreciated that sometimes, delays may be inevitable. That is why the court is expected to give consideration to the explanation given by the plaintiff, to ascertain whether or not it was satisfactory.
35. An explanation would not reduce the period of the delay. It could only provide reasons why and how the plaintiff found himself in that situation.
36. But even if the explanation sounded plausible, the court may find itself unable to excuse the delay, if by doing so, the defendant would be prejudiced to an extent which was not redeemable by an award of costs.
37. As Lord Denning M.R said, in **FITZPATRICK Vs BATGER & CO. LTD [1963] 2 ALL E.R 657, at page 658;**

> ***"It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition?.***

Of course, in Kenya, it is now a constitutional imperative that Justice shall not be delayed.

38.But delay alone is not reason enough to warrant the dismissal of a suit.
39.In **IVITA Vs KYUMBU [1984] KLR 440;** Chesoni J. *(as he then was)* said;

> ***"So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.***
>
> ***….***
>
> ***The defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff may be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff, before the court will exercise its discretion in his favour and dismiss the action for want of prosecution?.***

40.As long ago as 1968, Lord Denning M.R made the following pertinent statement, in **ALLEN Vs SIR ALFRED MCALPINE [1968] 1 ALL. E.R 543, at page 546;**

> ***"The delay of justice is a denial of justice….***
>
> ***To no one will we deny or delay right or justice. All through the years, men have protested at law's delay and counted it as a grievous wrong, hard to bear?.***

41.Therefore, when the plaintiff is personally responsible for the delay in the prosecution of his case, there can be no injustice to him when the case was dismissed for want of prosecution, as the plaintiff would simply be bearing the consequences of his own fault.
42.The 1st defendant's advocate swore an affidavit, stating that the delay was inordinate and inexcusable.
43.The plaintiff says that the advocate ought not to have sworn the affidavit as the matters of fact, about which he swore on oath, were contentious.
44.In this case, the fact that there had been no steps taken by the plaintiff for 4 years, is not disputed.
45.The period of 4 years cannot be described as anything but inordinate.
46.And, as to whether or not the delay was excusable is an issue to be determined by the court. However, the advocates and their clients were perfectly entitled to express their respective views on the question as to whether or not the delay was excusable. That view is not a matter of fact. It is an opinion, based on the facts.
47.The 1st defendant said that the delay was inordinate and inexcusable. However, he did not tell the court how the delay had caused irredeemable prejudice.
48.Meanwhile, the 2nd defendant told the court that a witness whom she would have liked to call, had passed away. The 2nd defendant did not provide the court with the particulars of the said potential witness. Therefore, this court is unable to make an informed evaluation of the 2nd defendant's contention that she would be prejudiced if the suit was not dismissed for want of prosecution.
49.I have given some consideration to the case. It is a case founded upon a Guarantee. That means that it is based on a document.
50.The parties appear to have contradictory or inconsistent interpretations of the contents of the Guarantee instrument, if the said instrument was indeed executed by them.
51.The plaintiff would need to provide the Guarantee. The court would interprete the Guarantee, so as to determine whether or not it was for a limited sum, and also whether or not the instrument had lapsed.
52.By and large, I think that the case will be determined by court, based on the interpretation of the Guarantee. I cannot therefore see, on a *prima facie* basis, why any of the parties would need to call several witnesses.
53.In effect, even though the delay was inordinate, I find that the court can still do justice to the parties.
54.I therefore decline the defendants' request to dismiss the suit.
55.But the costs of the application shall be borne by each of parties. The plaintiff may have successfully fought-off the applications but it is not deserving of an order that it be paid costs

because the plaintiff has indeed been blameworthy for the delay. If this case moves forward now, the plaintiff should be thanking the defendants for awakening it from its slumber.

56. Finally, I direct that the plaintiff must, within the next 45 days finalise all the pre-trial procedures, so that the case can be set down for trial without any further delay.

57. If the plaintiff will not have finalized the pre-trial procedures within the stipulated period of time, it shall be deemed to have made a conscious decision to not call witnesses or to not produce any documentary evidence.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **22nd day** of **February** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Wananda for Goswami for the Plaintiff

Owiti for the 1st Defendant

Maruti for the 2nd Defendant

Collins Odhiambo – Court clerk.