REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1156 OF 2000

SURGIPHARM LIMITED …… PLAINTIFF

VERSUS

CHRISTOPHER NDARATHI MURUNGARU)

JOSEPHINE MUMBI NDARATHI) …….. DEFENDANTS

R U L I N G

On 26th September 2001, application dated 30.7.2001 came up before me for hearing. The Plaintiff/Respondent appeared before me through its learned counsel Mr. Gitonga. The Defendants/Applicants did not appear and the application was dismissed for non-attendance of the Applicant. Interim stay of execution was also vacated.

This application dated 6th December 2001 is seeking that the order dismissing the application dated 30th July 2001 for non attendance be set aside and the application dated 30.7.2001 be reinstated for hearing and determination on its merits. There are two grounds for the same application namely that the absence of the counsel in court on the date of the application was as a consequence of a genuine and excusable mistake on the part of the counsel which in the interest of justice should not be visited upon the Applicants and that the Applicant has a good case with chances of success and as such ought to be allowed to prosecute it.

In the Supporting affidavit sworn by the same advocate, he says that the entire mistake resulting into the Applicant not being represented on 26th September 2001 was his own as he attended court on 13.8.2001 when the application dated 30th July 2001 was stood over to 26th September 2001. He was in company of one of his pupils, one Kelly Oduor whom he asked to enter the date 26.9.2001 in his (Advocates) personal diary but who failed to do so resulting in his failure to attend court on 26.9.2001. He only came to realise this mistake on 26th November 2001 when his client called. Immediately he realised the same mistake he perused the court file and thereafter filed this application.

The Respondent opposed the application and filed four grounds of opposition which were that there has been considerable delay in making the application, that there are no proper reasons given for the setting aside of the order made on 26th September 2001; that litigation ought to be allowed to proceed to its conclusion, and that it is for the Respondent to constantly check what the position is on the court proceedings in which they are involved and a delay of four months from August to November before making an enquiry is unacceptable. In its Replying affidavit sworn by Kiragu Kimani, the Respondent states that it was for the Applicants advocates to ensure attendance in court when the matter was coming up for hearing and more especially when it was where orders sought were to set aside a regular judgment; that pursuant to the entry of judgment, the Respondent had issued two Bankruptcy notices sent upon the Applicants on 23rd July 2001 and Bankruptcy cause Nos. 73 and 74 were filed and served against the two debtors and that it is clear that the Applicants have been content to let the matter lie dormant and only moved when the Respondent attempts to enforce its rights in the matter.

I do agree that there were serious lapses on the Defendants and particularly their counsel Mr. Okwach. He had no business trusting a pupil whom he was actually training to know how to conduct legal practice including entering hearing dates in the diary. Further, it was his duty to ensure that his instructions were carried out even by contacting his chambers immediately after the instructions. Further, and I do agree with the Respondents, it was his duty to ensure that as this was a sensitive matter, a matter in which judgment had been entered and the application dated 30th July 2001 was to set aside that

judgment be had to nurse it as his baby and ensure nothing went wrong during its infancy. He did not do so apparently and that cannot be considered proper.

However, I have considered the points raised in opposition. There is none disputing what Mr. Okwach says did happen. Most of the Respondents points are points that would go towards opposing the application dated 30th July 2001 seeking to set aside the orders of Hon. Justice Hewett, as he then was. The application before me would in my humble opinion depend on whether or not I am satisfied that what Mr. Okwach says, which is not rebutted, is genuine or not. If it is genuine then his clients should not suffer because of his mistakes. If, on the other hand it is not genuine then that is the end of the matter for his client.

I have no reasons to find what Mr. Okwach says is not genuine much as it reveals serious weakness in the manner he handled this matter after 13th August 2001. The delay the Respondent is complaining about resulted from their (Affidavits) weakness for it was not until his clients called him that he remembered the file. Once he did remember the file, he acted within about eleven days and this application was filed.

I will reluctantly allow this application. I do set aside my orders of 26th September 2001. The Applicant will pay all costs thrown away from 26th September 2001 to 11th February 2002. Application dated 30.7.2001 is reinstated for hearing. Orders accordingly.

Dated at Nairobi this 14th day of February 2001.

ONYANGO OTIENO

JUDGE