



**AA1 ((Suing through AA2 as the Father and Next Friend of Minor AA1)) v Nderu
(Civil Case 129 of 2013) [2023] KEHC 2907 (KLR) (Civ) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 129 OF 2013
JK SERGON, J
MARCH 31, 2023**

BETWEEN

**AA1 PLAINTIFF
(SUING THROUGH AA2 AS THE FATHER AND NEXT FRIEND OF MINOR
AA1)**

AND

LOISE WANJIRU NDERU DEFENDANT

RULING

1. Before this court for resolution is the Notice of Motion dated 5th August, 2022 brought by the plaintiff/applicant and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The following are the substantive orders being sought in the Motion:
 - i. Spent.
 - ii. That the Schedule for specific damages dated 11th March, 2022 and further supplementary plaintiff's list of documents dated 11th March, 2022 filed by the plaintiff be deemed as properly and duly filed thus part of the record.
 - iii. That the court file germane be placed under lock and key in Chambers.
 - iv. That Summons be issued to the Executive Officer-Kibera Law Courts to produce the court file for Traffic Case No. 1772 of 2010: Republic v Nderu Loise Wanjiru.
 - v. That Summons be issued to the D.T.O Traffic Officer Muthangari Police Station, I.P. Sang to produce the OB Number 10/21/4/2010 and Police File which has the details of the accident.



- vi. That Summons be issued to the Medical Doctor, Dr. Oluoch Olunya to produce the Minor’s medical report.
 - vii. That the costs of the application be provided for.
2. The defendant/respondent resisted the Motion through her replying affidavit sworn on 16th September, 2022 to which the applicant swore a further affidavit on 3rd October, 2022 in rejoinder.
 3. The Motion was dispensed with through the filing of written submissions.
 4. I have considered the grounds as presented in the Motion, the facts deponed to in the affidavits supporting and opposing the Motion and the rival written submissions and authorities relied upon.
 5. The Motion itself sought for various substantive orders. I will first determine the order touching on the admission of the Schedule for specific damages dated 11th March, 2022 and further supplementary plaintiff’s list of documents dated 11th March, 2022 as having been duly filed.
 6. To support the above order sought, the applicant states and submits that following the accident which forms the subject matter of the suit, AA1 (“the minor”) has had to undergo several medical procedures and continues to receive medical treatment, and hence the need for filing additional documents to support the claim for special damages.
 7. The applicant further states and submits that at the onset, he had mentioned in his original list and bundle of documents that he would be filing additional documents during the course of the trial and that it would only be in the interest of justice for the requisite documents to be admitted, citing among others, the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR where the court held that:

“Furthermore, even under Order 18 Rule 10 of the *Civil Procedure Rules*, the court may allow a party to recall any witness at any stage of the proceedings. In addition, Section 146 of the *Evidence Act* provides that the court may permit a witness to be recalled either for further evidence - in chief or for further cross examination and if it does so, the parties have the right of further cross examination respectively.

Under Order 11 of the Civil Procedure Rules, even after the pretrial conference and the matter is set down for hearing, nothing prevents the court from exercising discretion and allowing parties to call further witnesses or filing further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act*, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in Article 50(1) of the *Constitution* and an opportunity to present or defend their cases fairly.”
 8. In retort, the respondent states and submits that the provisions of Order 11 of the Civil Procedure Rules, 2010 set out the timelines for filing pre-trial documents and that in the present instance, pre-trial directions were taken on 15th June, 2015 and the matter was certified ready for hearing.
 9. The respondent therefore states and submits that the applicant ought to have filed his relevant documents in good time and hence the documents filed out of time should be rendered inadmissible, citing among others, the case of *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR in which the court dismissed an application seeking leave to file an appeal out of time in the absence of a reasonable explanation for the delay.



10. In rejoinder, the applicant states that the further list and bundle of documents are necessary in supporting the claim for special damages sought as a result of the material accident since the applicant has continued to incur medical expenses in seeking treatment for the minor.
11. The applicant further states that some of the medical receipts that he had submitted to his former advocate were not filed and hence his current advocate wishes to file them as part and parcel of the further documents.
12. Upon my study of the record, it is apparent that pre-trial directions were taken by the parties herein and the suit was certified as ready for hearing.
13. Upon my further study of the record, I note that the Schedule for specific damages dated 11th March, 2022 and further supplementary plaintiff's list of documents dated 11th March, 2022 support the averments being made by the applicant that the documents in question constitute additional medical expenses which were incurred in respect to the minor who continues to receive medical treatment and attention.
14. Moreover, Order 11 of the Civil Procedure Rules, 2010 grants the courts discretionary power to allow parties to put in additional documents or call further evidence even after the close of pre-trials.
15. In finding so, I am persuaded by the following reasoning rendered by the court in the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR cited in the submissions by the applicant, thus:

“...Under Order 11 of the Civil Procedure Rules, even after the pretrial conference and the matter is set down for hearing, nothing prevents the court from exercising discretion and allowing parties to call further witnesses or filing further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the Evidence Act, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed in Article 50(1) of the Constitution and an opportunity to present or defend their cases fairly.”
16. In view of all the foregoing circumstances and in the absence of any credible evidence to indicate that the respondent; who will have an opportunity to rebut the evidence presented by the applicant at the trial; will be prejudiced, I am satisfied that the explanation given by the applicant is reasonable and that it would be in the interest of substantive justice for me to grant the order sought in this respect.
17. The second substantive order sought in the Motion is for the placing of the court file germane under lock and key in Chambers.
18. To support this order, the applicant states and argues that on several occasions previously, the court file has disappeared from the registry and that this has hindered the progress of the suit.
19. In reply, the respondent states that the applicant has not brought before this court any evidence to support the averments mentioned hereinabove.
20. Upon my study of the record and my consideration of the rival positions taken by the parties, I have not come across anything to indicate that the court file had previously gone missing from the registry or that the applicant had made any correspondences in that respect. I am therefore not satisfied to grant this order.
21. I will address the third, fourth and fifth substantive orders simultaneously since they are related; seeking the issuance of summons to the Executive Officer-Kibera Law Courts to produce the court file for Traffic Case No. 1772 of 2010: Republic v Nderu Loise Wanjiru; the issuance of summons to the



- D.T.O Traffic Officer Muthangari Police Station, I.P. Sang to produce the OB Number 10/21/4/2010 and Police File which has the details of the accident; and seeking the issuance of summons to the Medical Doctor, Dr. Oluoch Olunya to produce the Minor's medical report, respectively.
22. The applicant on his part states that the abovementioned documents are necessary in assisting this court in arriving at a proper decision.
 23. The applicant further states and submits that the summons pertaining to the medical doctor are necessary since he is the maker of the medical report for the minor herein and an expert witness whose evidence will shed light on the contents thereof, and give an opportunity for cross-examination.
 24. To buttress his arguments above, the applicant has drawn reference from the following finding made by the High Court in case of *Dahir Sadik AUSAAD v Modogashe Construction Ltd & 3 others* [2016] eKLR:

“This court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing.”
 25. The respondent on her part states and contends that the documents referenced above form part of the documents filed by the applicant and hence it is not necessary for this court to grant the two (2) orders mentioned hereinabove.
 26. The respondent further states and contends that order for issuance of summons to the medical doctor is a mere afterthought.
 27. From my study of the record and as pertains to the order for issuance of summons to the Executive Officer, I observed that the criminal proceedings in Kibera Traffic Case No. 1772 of 2010 (Republic v Nderu Loise Wanjiru) form part of the applicant's original list and bundle of documents.
 28. In view of this, I do not deem it necessary for the Executive Officer to be summoned to produce the court file in the circumstances.
 29. Upon my further study of the record and as pertains to the order for issuance of summons to the Traffic Officer-Muthangari Police Station, I am of the view that notwithstanding the fact that the police abstract was filed under the applicant's original list and bundle of documents, the applicant has satisfied me on the necessity of the police officer's presence in tendering the requisite documents pertaining to the material accident.
 30. Concerning the order for summons to the medical doctor, I am satisfied that the applicant has reasonably shown that given his position as an expert witness, his attendance would be necessary for purposes of producing the medical report as its maker and ascertaining the nature and extent of the minor's injuries.
 31. In the end therefore, the Notice of Motion dated 5th August, 2022 is allowed in respect to prayers (ii), (v) and (vi) and the following orders are made consequently:
 - i. The Schedule for specific damages dated 11th March, 2022 and further supplementary plaintiff's list of documents dated 11th March, 2022 filed by the plaintiff are hereby admitted as part of the record upon payment of the requisite court filing fees.
 - ii. Summons be and are hereby issued to the D.T.O Traffic Officer Muthangari Police Station, I. P. Sang to produce the OB Number 10/21/4/2010 and Police File detailing the accident.
 - iii. Summons be and are hereby issued to the Medical Doctor, Dr. Oluoch Olunya to produce the Minor's medical report.



iv. Costs of the application to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31ST DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent

