



**EE (Child Suing Through Father and Next Friend MEO) v Marula Estates Ltd (Civil Appeal E055 of 2022) [2023] KEHC 26216 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E055 OF 2022  
GL NZIOKA, J  
NOVEMBER 27, 2023**

**BETWEEN**

**EE ..... APPELLANT**

**CHILD SUING THROUGH FATHER AND NEXT FRIEND MEO**

**AND**

**MARULA ESTATES LTD ..... RESPONDENT**

*(Being an appeal against the decision of Hon. Esther K. Kimilu  
Principal Magistrate (PM) delivered on the 16th June, 2022 vide  
Naivasha Chief Magistrate Civil Case Number 509 of 20142)*

**JUDGMENT**

1. By a plaint dated 15<sup>th</sup> September 2014, the plaintiff (herein “the appellant) minor suing through the father and next friend MEO sued the defendant (herein “the respondent) seeking for judgment for the following:
  - a. Special damages aforesaid of Kshs 5,000
  - b. General damages for pain, suffering and loss of amenities
  - c. Costs of this suit
  - d. Interest on (a) (b) and (c) above at court rate
  - e. Any other or further relief that this Honourable Court may deem fit to grant.
2. It is the appellant’s case, that on the 5<sup>th</sup> day of April 2014, he was going to school when he was stepped on by a buffalo. As a result he sustained injuries of a fracture of left tibia and severe soft tissue injuries on the left leg.



3. The appellant attributes the cause of the accident on the negligence of the respondent, on the ground that the respondent had employed the father as a general worker. That, the respondent Further, the appellant was residing with the father and was going to school at [Particulars withheld] Primary School within the respondent premises.
4. That, the respondent failed to take any or adequate precautions to ensure the appellant's safety while in premises or while going to school. Further, the respondent failed to ensure that the path way used by the appellant to go to school was fenced or surrounded by armed wardens or escorted to school by wardens, or failed to protect the minors from attack.
5. Furthermore, the respondent failed to establish a system of "walking to and from school" and instruct the minor appellant and next of friend to follow the system, and/or failed to team up with other Agencies that would offer adequate protection to the minor appellant.
6. However, the respondent denied liability vide a statement of defence dated 14<sup>th</sup> January 2015, in which it averred that, it had no control, contractual or legal obligation in respect to [Particulars withheld] Primary School, which is a public school. Further, it and is not privy to its administration in respect of students and/or teachers. That, the subject buffalo, is a wild animal under the [Wildlife Conservation and Management Act](#) 2013, and the respondent issued a third party notice to Kenya Wildlife Services Authority. Subsequently Kenya Wildlife Services was enjoined in the suit as a third party.
7. The respondent averred that the appellant's next of friend was negligent by failing to escort the minor appellant to school, or leaving him alone in a bushy area, known to host wild animals, and/or failed to be cautious, or safeguard the minor appellant.
8. Similarly, the third party vide a statement of defence dated 23<sup>rd</sup> June 2015, denied liability and blamed both the appellant and respondent for the accident. It averred that, the respondent allowed the buffalo to stray outside its premises, and failed to fence its premises to prevent entry of the wild animals, or report to KWS the presence of the wildlife animals within its premises.
9. The third party further pleaded that the appellant and next of friend were negligent by allowing the appellant to walk in the area which he knew or ought to have known is surrounded by wild animals including the buffalo. Further, the minor appellant failed to observe or avoid the path of the buffalo, recklessly provoked the buffalo, or attempted to hunt it. That, he also failed to take adequate care of himself.
10. The case proceeded to full hearing whereupon the trial court vide a judgment dated 14<sup>th</sup> January 2020, held that both the appellant and respondent were liable for the accident and apportioned liability in the ratio of 60:40 in favour of the minor appellant as against the respondent. The case against the third party was dismissed with costs,
11. Subsequently the court entered judgment as follows
  - i) Liability: 60:40%
  - ii) General damages.....Kshs. 300,000/=
  - iii) Special damages.....Kshs. 5,000/=
  - Sub total.....Ksh 305,000/=
  - (less 40%).....Kshs 122,000/=
  - Total award.....Kshs. 183,000/=



- iv) Costs and interest thereon
12. It is against that decision the appellant appeals based on the following grounds: -
- a. That the Learned Magistrate erred in law and in fact by proceeding to apportion liability against the appellant's father and next friend notwithstanding that he had not been in the suit and he had only testified in his capacity as a next friend;
  - b. That the Learned Magistrate erred in law and in fact by proceeding to award minimal damages which were not commensurate to the injuries sustained by the appellant the fact that the latter had never recovered to date.
13. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated; 10<sup>th</sup> December, 2022. The respondent's submissions are dated 22<sup>nd</sup> December, 2022.
14. Be that as it may, the first issue to determine is whether, the Learned Trial Magistrate erred in law and in fact by apportioning liability against the appellant's father and next friend notwithstanding that he had not been enjoined in the suit and he had only testified in his capacity as a next friend. In that regard, the appellant argued that, he instituted the suit through his father and next friend in accordance with Order 32 Rule 1(1) of the *Civil Procedure Rules*, 2010. However, the trial court erred in apportioning liability against his father and next friend who was not enjoined in the suit as a party, as required by Order 1 Rule 15 of the *Civil Procedure Rules*.
15. He relied on the case of *Kubai Kitthinji Kaiga (suing as the legal representative of the Estate of John Kaiga) vs Kenya Wildlife Services* (2021) eKLR where the court held that, where the respondent had raised the issue of the negligence of the rider he had a duty to enjoin him as a third party, and that a person who is not a party to a suit cannot and should not be affected by the decision of the court.
16. However, the respondent argued that, Order 32 of the *Civil Procedure Rules*, sets out the requirement of a minor to institute a suit through a next friend and is based on the fact that, a minor has no capacity to bind himself to be liable for costs or any other legal responsibility the court may issue. The respondent relied on the decision High Court of Uganda in the case of; *Loi Bayenda & another vs Loice Kikunja Bagyenda* Kampala HCCS No. 424 of 1989.
17. The respondent further submitted that, the requirement to enjoin a third party under Order 1 Rule 15 of the *Civil Procedure Rules*, is to ensure that the third party who has no notice of the proceedings and/or allegations against him is accorded an opportunity to take part in the hearing to avoid adverse orders being issued against him. But next friend herein was a party in the suit as he was representing the minor and fully participated in the proceedings.
18. Further, the next friend herein is the father and/or guardian of the minor and bears the great responsibility for his safety and well-being. Further, he was a herder and aware of wild animals on the ranch that the appellant could encounter. As such, the trial court was right in its finding that, the next friend was negligent in releasing the appellant to walk to school unaccompanied by an adult.
19. Having considered the arguments of the parties on the first ground of appeal, I note that the subject provision of Order 1 Rule 15(1) of the *Civil Proceedings Rules* states as follows: -

“ 15.

- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —
  - (a) that he is entitled to contribution or indemnity; or



- (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit”

20. Pursuant to aforesaid, a defendant can only enjoin another person to a suit as a third party where that person is not already a party to that suit. This is because a third party proceedings are where a defendant in an action has a claim for indemnity or contribution from a third party. The claim is separate from the main claim but has links and/or is connected to the plaintiff's claim against the defendant.
21. In that respect the High Court the case of; *Kenya Commercial Bank vs Suntra Investment Bank Ltd* (2015) eKLR, stated that;

“In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.
22. It is noteworthy that, the respondent relied on the subject provisions and enjoined the Kenya Wildlife Services as a third party. However, the appellant sued the respondent through the father and next of friend, as he is a minor and could not sue in his own name. Therefore, the father and next friend was already party to the suit and could not be enjoined as a third party. As such I find that, his argument that he should have been enjoined an afterthought and not tenable.
23. As regards liability against him, I note that the statement of defense implicated him through the particulars of negligence attributed to him. Having been aware of the same, he should have moved the court at that, stage to determine his right to defend the subject allegations. He did not do so instead he testified as a key witness for the minor and did not raise any objection to the allegation of negligence against him or defended against the same. As such, I concur with the argument of the respondent that he was aware of the allegations of negligence.
24. Furthermore, I find that, first and foremost, the appellant's father confirmed that he was aware of the wild animals within the respondent's premises. Secondly, and more importantly he has sued the respondent previously through several suits over loss to his property arising from damage by the wild



- animals on the respondent's premises, and thirdly as a herder, an adult of sound mind, a person with parental responsibility over the minor he was aware the minor required protection against the wild animals' on the premises or on his way to school, yet he took no steps to protect him.
25. In the given circumstances he cannot escape liability and in my considered opinion, the apportionment of 60:40% herein is reasonable and find no reason to interfere with it.
  26. As regards quantum, the appellant submitted that the award of Kshs. 300,000 is not consummate with the injuries he sustained. That, he had proposed an award of; Kshs. 900,000 and relied on the case of; *Titus Nganga & Another vs Samuel Muiruri Mbugua* (2018) eKLR where the court award Kshs. 600,000 for pain and suffering and loss of amenities and commuted fracture of the left tibia and fibula. That the amount awarded is minimal and be enhanced to Kshs 900,000.
  27. However, the respondent submitted that, the appellant had already received the decretal amount and yet still filed the appeal. Further, the trial court did not err in awarding Kshs. 300,000 as general damages which is not minimal but fair and reasonable.
  28. The respondent relied on the cases of; *Shabani vs City Council of Nairobi* (1985) KLR 516 and *Dickson Kariuki Nyaga & Another vs Emma Mbandi Nyaga* (2015) eKLR where the court held that the appellate court will only interfere with an award of damages where, the damages are inordinately too high or low to represent an entirely erroneous amount, or the judge proceeded on the wrong principles, or he misapprehended the evidence in some material respect.
  29. The respondent further argued that, comparable injuries should be as far as possible be compensated by comparable awards. That, the authorities relied on by the appellant did not have comparable injuries to those he sustained in the present case. That, the awards in cases of *Garton Limited vs Nancy njeri Nyoike* (2016) eKLR where the High Court upheld the award of damages awarded by the trial court was comparable with the award herein.
  30. I have considered the ground of appeal on quantum and I find that, the medical evidence produced through the medical report of Dr Obed Omuyoma revealed that the appellant sustained a fracture of the left fibula and severe soft tissue injuries. However the severe soft tissue injuries were not tabulated or explained. The doctor classified degree of injuries as harm. However, P3 form indicated soft tissue injury to the left lower limb and again classified them as harm.
  31. The appellant sought for Kshs 900,000 and relied on the case of *Titus Nganga & Another vs Samuel Muiruri Mbugua* (2018) eKLR, where evidently the injuries sustained by the plaintiff therein were multiple fractures that were more serious than the appellant's injuries herein.
  32. To the contrary, the respondent suggested a rather too low figure of Kshs 50,000, for consideration, but again the injuries therein were minor injuries compared to the injuries herein.
  33. Having considered the basis upon which the court awarded Kshs 300,000 as general damages basically relying on the principle of proportionality and nature of injuries, I hold that the sum awarded is reasonable and adequate in the circumstances herein.
  34. Finally, it is not contested that the appellant has already been paid the decretal sum. By receipt thereof he has endorsed the judgment of the trial court and caught up by the doctrine of estoppel. I am inclined to uphold the trial court's finding on quantum.
  35. The upshot of the aforesaid is that, the appeal is dismissed with costs to the respondent.
  36. It is so ordered



**DATED, DELIVERED AND SIGNED ON THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023**

**GRACE L NZIOKA**

**JUDGE**

In the presence of;

Ms. Amboko for the appellant

Ms. Orau for the respondent

Ms. Ogutu court assistant

