



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL CASE NO. 7 OF 2019(OS)
IN THE MATTER OF THE ADVOCATES ACT (CAP.16)
AND
IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP.21)
AND
IN THE MATTER OF ROSE KERUBO OBAGA (ADVOCATE)
BETWEEN
PACIFICICA BONARERI NYAKINA.....PLAINTIFF
-VERSUS-
ROSE KERUBO OBAGA T/A OBAGA & CO. ADVOCATES.....DEFENDANT
RULING

1. The defendant/ applicant has raised a preliminary objection as follows;

- i. That the originating summons is made with malice, is incompetent , misconceived and otherwise an abuse of the court process and solely intended to malign and put to ridicule and injure the name and standing of the Advocate in society and the Advocate shall at the first instance apply for its dismissal.
- ii. That the court is not seized with proper jurisdiction to grant the prayers sought herein.
- iii. That there has never existed an advocate client relationship between the Plaintiff and Defendant herein.
- iv. That the capacity and/or legal capacity of the plaintiff, a minor, at the time of the alleged instructions to the advocate, to instruct an advocate.
- v. That the Plaintiff did not follow, and the application is in contravention of the mandatory rules and procedure Order 37 Rule 16 of the Civil Procedure Rules 2010.

2. The background of this matter is that the plaintiff's father Johnson R. K. Nyakina instructed the defendant to file suit for damages for injuries sustained by the plaintiff who was a minor then, in a road traffic accident in Kisii CMCC No 752 of 2005. The plaintiff was awarded Kshs. 1,379.036.00 plus costs of Kshs.208, 500/- in 2007. The said sums have not yet been paid to the plaintiff nor her father to date.

3. I have read the parties written submissions on the preliminary objection. From the annexures attached by the plaintiff, on the 30th October 2018 the Kisii CM's court granted an application by the plaintiff which allowed her having attained the age of majority to act as the plaintiff and to be substituted as the a plaintiff in the matter. Her father who had sued on her behalf as a next friend in the CMCC 752 of 2005 was discharged. This was done in compliance with the provisions of Order 32 Rules 12 (1) & (2) of the Civil Procedure Act. This order was not been challenged by the defendant nor has been set aside. This was the proper thing to do once the plaintiff attained the age of majority.

4. Further there existed an advocate relationship between the plaintiff's father and this relationship was so because the law is clear that a

minor cannot sue a party, but only through a next of friend, see order 32 Rule (1) & (2) of the Civil Procedure Rules. Once a minor becomes an adult the Law allows her/ him to be substituted as the plaintiff in the matter. The defendant's argument that there has never existed an advocate client relationship between the plaintiff and defendant against the background of this case cannot stand and is dismissed. The Originating Summons ('the O.S') is therefore properly before this court and this court has the jurisdiction to hear and determine it.

5. Next the defendant has failed to demonstrate how the application is malicious, incompetent, misconceived and an abuse of the court process. The plaintiff has clearly given a background of her claim against the defendant. She is entitled to pursue what she was awarded for injuries sustained in a road traffic accident which happened in 2005, 17 years ago.

6. Lastly on the issue that the mandatory requirements of Order 37 Rule 16 was not complied , this is my finding; Rule 16 states that, "The registrar shall, within thirty days of filing of the Originating Summons and with notice to the parties list it for directions before a judge in chambers". Is failure to comply with this direction fatal to the Originating Summons? In my view non-compliance does not make the O.S misplaced. It is a Rule which gives direction on the step to be taken once an O. S is filed. I agree with the submission that technicality issues cannot negate any suit (see Article 59 (1) (d) of the Constitution 2010).

7. All in all I find no merit in the preliminary objection and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2022

R. E. OUGO

JUDGE

In the presence of;

Mr. Babu For the Plaintiff

Defendant Absent

Aphline C/A