



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA **

AT NAIROBI

CIVIL APPEAL NO. 655 OF 2013

DN (Suing as Father and next friend of SA).....APPELLANT

-VERSUS-

NDIRANGU LYDIA.....1ST RESPONDENT

CFC BANK LIMITED.....2ND RESPONDENT

ALBANUS KIOKO NDUU.....3RD RESPONDENT

(An appeal from the ruling delivered by Honourable I. Gichobi (Ms.) (Resident Magistrate) on 22nd November, 2013 in CMCC NO. 7877 Of 2009)

JUDGMENT

1. The appellant was the plaintiff in *CMCC NO. 7877 OF 2009* while the respondents were the defendants therein. The appellant filed a suit against the respondents on behalf of a minor, namely Sandra Anyango, seeking general and special damages for injuries sustained by the said minor as a result of an accident alleged to have been caused by the 3rd respondent. The 1st and 2nd respondents were sued as the owners of the subject motor vehicle registration number KBB 855T.
2. The respondents soon thereafter raised a Notice of Preliminary Objection, indicating that the suit is fatally defective on the ground that the same was filed without compliance with the provisions set out under Order 32, Rule 1 (2) of the Civil Procedure Rules.
3. The parties filed written submissions on the aforementioned Preliminary Objection and vide her ruling delivered on 22nd November, 2013, the learned trial magistrate allowed the same and struck out the appellant's suit, albeit granting the appellant an opportunity to file a fresh suit in compliance with the relevant Order.
4. Being aggrieved by the aforesaid ruling, the appellant has appealed to this court. The memorandum of appeal dated 17th December, 2013 is founded on five (5) grounds namely:

1. THAT the learned trial magistrate erred in law and in fact in upholding the Notice of Preliminary Objection dated 5th August, 2013 in light of the legal provisions, authorities and submissions placed before her by the appellant.

2. THAT the learned trial magistrate erred in law and in fact in failing to appreciate that it was not in the interest of justice and fairness to uphold the Preliminary Objection where curative measures could have been undertaken to remedy the situation.

3. THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the court had the authority and jurisdiction to determine the case on merit despite the obvious error, omissions or otherwise.

4. THAT the learned trial magistrate erred in law and in fact in upholding the Preliminary Objection when the Constitution requires her to administer justice without undue regard to procedural technicalities.

5. THAT the learned trial magistrate erred in law and in fact and perpetuated a complete and total miscarriage of justice in terminating the suit rather than sustaining it.

5. The appeal was disposed of through written submissions, with the appellant largely submitting that whereas Order 32, Rule 1 (2) of the Civil Procedure Rules requires the execution and filing of a written authority prior to instituting a suit on behalf of a minor, no provision is made for the striking out or dismissal of a suit in the absence of such authority, unless it has not been disclosed that the suit is brought on behalf of the minor as the next friend. The appellant also submitted that the abovementioned provision is premised on a procedural technicality and it is the court's duty to uphold substantive justice, adding that in line with the rendition in *D.T. Dobie Company Limited v Joseph Mbaria Macharia & Another [1980] eKLR*, a suit should only be struck out where the same is so weak that it is beyond redemption and is incurable by amendment.

6. The respondents, in supporting the trial court's ruling, argued that the learned trial magistrate took into account the appellant's submissions and correctly applied herself to the law and facts before her. The respondents' position is that the relevant statutory provisions are mandatory in nature, thus leaving no room for the exercise of discretion by the learned trial magistrate.

7. It is also the respondents' argument that the appellant was not left without a remedy but was given the option of filing another suit.

8. I have considered the grounds set out in the memorandum of appeal together with the rival submissions. That being the case, I will begin by addressing the first ground of appeal.

9. I have studied the impugned ruling and established that the submissions referenced by the appellant were well considered and in fact applied by the learned trial magistrate. Further to this, the said magistrate analyzed the wording of the relevant statutory provision in arriving at her decision. In the premises, I have no reason to doubt that she applied herself to the law, authorities and submissions cited by the appellant. Ground 1) of the appeal consequently fails.

10. Having determined the above, I take the view that the remaining grounds of appeal are correlated and will therefore address them concurrently. It has already been established that the Preliminary Objection raised was in reference to **Order 32, Rule 1 of the Civil Procedure Rules**. Sub-rule 1 of the same expresses as follows:

“Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.”

Sub-rule 2 goes ahead to stipulate that:

“Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed.”

11. From the foregoing, it is my understanding that the above provisions apply in mandatory terms, as was rightly held by the learned trial magistrate. In the present instance, the appellant instituted the suit through an advocate hence he ought to have executed and filed a written authority as required, but did not. This has not been refuted by the appellant.

12. It is on this basis that the Preliminary Objection was raised. The interpretation of this particular term was well set out in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* as hereunder:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. A reading of the above reveals that the Objection was raised on a matter of law and/or procedure as opposed to facts. Consequently, my humble view is that the learned trial magistrate rightly considered and applied the legal procedure as stipulated in the Rules. In fact, the Honourable Justice Havelock in *Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR* had the following to say on the subject:

“...In my view, all 5 grounds of the Defendant's Preliminary Objection relate to matters of procedure and have nothing to do with the facts of the case.”

14. I must reiterate that the procedure presented in Order 32, Rule 1 of the Civil Procedure Rules is mandatory in nature. In view of the fact that the appellant had not complied with the said procedure, he had no legal authority to file the suit to begin with and the learned trial magistrate was not compelled to proceed with the same in the absence of a written, signed and filed authority to act.

15. Might I add that whereas I am alive to the Constitutional principle of substantive justice, this in no way diminishes the responsibility of parties to comply with relevant legal procedures. The absence of an authority to institute the suit rendered the same improperly before the trial court as it were. While I appreciate the court's reasoning in *D.T. Dobie Company Limited* (supra) that a suit should only be struck out if it is beyond redemption and is incurable by way of amendment, it would appear to my mind that the terms 'struck out' and 'dismissed' were applied interchangeably.

16. Having rendered so, I did note the appellant's sentiments that the learned trial magistrate did not consider the curative measures that could have been undertaken. In response, I once again turn my attention to the trial court's finding. It is important to appreciate that the learned trial magistrate struck out the suit and granted the appellant the opportunity of filing a fresh suit if he so wished.

17. In my opinion, the appellant's suit was improper from the very start for want of compliance. That notwithstanding, the mere fact that the

suit was struck out, as opposed to being dismissed or terminated, offered a way out for the appellant to ensure compliance with the relevant statutory provisions and file a fresh suit. In this sense, the appellant was at liberty to remedy the situation. It cannot therefore be said that the trial court failed to recognize the availability of curative measures.

18. My reasoning above is made in due regard to the analysis given in **Ole Unua Ole Konkei & others v Sukei Ole Nkoyiei & 3 others [2005] eKLR** cited by the appellant, though I deem it crucial to clarify that in the mentioned case, what was in issue was the authority to swear a verifying affidavit on behalf of other plaintiffs. As such, the circumstances therein differ from those in the current instance in the sense that the Appellant herein had instituted the suit in total disregard of the law.

19. As I pen off, it is worth pointing out the authority quoted by the appellant, namely **FKN, Minor (Suing through his mother and next friend FNK v Simon Ng'ang'a Njoroge [2017] eKLR** wherein the High Court allowed an appeal seeking to set aside an order dismissing the appellant's suit for want of filing a written authority. It is noteworthy that in that particular instance, the court observed that the issue of want of compliance was only raised during final submissions upon hearing of the suit and which suit was eventually dismissed.

20. The turn of events in the mentioned case are different in that the suit was dismissed and not struck out as was the case here. In the premises, I opine that the learned trial magistrate arrived at a reasoned finding and I see no need to interfere with the same.

21. The upshot is that the appeal is dismissed with no order as to costs.

Dated, signed and delivered at NAIROBI this 28th day of March, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents