



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 102 OF 2011

J N (Minor suing through her mother

and next friend R N M).....APPELLANT

=VERSUS=

FRANCIS GITHINJI.....1ST RESPONDENT

PAUL MAINA.....2ND RESPONDENT

(Being an appeal against the Judgment of Hon. F. Kombo, Senior Principal Magistrate, delivered on the 11th July, 2014 in MOLO SRMCC No.239 of 2006)

JUDGMENT

INTRODUCTION

1. This appeal arise from ruling on preliminary objection delivered on 7th June 2011. The respondents sought dismissal of the suit for failing to comply with **Order 31 Rule 2** of the **Civil Procedure Rules** (now revoked and provided under **Order 32 rule 1 and 2**) which require plaintiff filed by a minor through through next friend to be accompanied by consent. The trial magistrate upheld the preliminary objection and struck out the plaintiff filed on 29th November 2006.

2. The plaintiff/appellant being dissatisfied with the said ruling filed this appeal on the following grounds:-

1. **THAT** the learned Magistrate erred in law and in fact and misdirected himself in sustaining the preliminary objection on a technicality raised by the respondents.
2. **THAT** the learned Magistrate erred in law and in fact in failing to appreciate that the defect in the pleading had been cured by the amendments made thereto.
3. **THAT** the learned Magistrate erred in law and in fact and misdirected himself in holding that the failure to file a plaintiff together with the consent renders the pleadings incurably defective.
4. **THAT** the learned Magistrate erred in law and in fact and misdirected himself in failing to consider the best interest of the parties concerned, a guiding principle in dispensation of justice by dint of Section 1A and 1B of the Civil Procedure Rules.
5. **THAT** the learned Magistrate erred in law and misdirected himself in relying on the wrong principles to arrive to his decision.
6. **THAT** the learned Magistrate erred in both law and fact in discrediting the submissions tendered on behalf of the appellant.

3. Parties herein agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

4. The appellant in brief facts submitted that the plaintiff instituted **Molo SRMCC No. 239 of 2006** against the defendant seeking general and special damages as a result of road accident which occurred on 16th March, 2005 along Njoro Elburgon road in which the defendants motor vehicle registration number KAB 058Y causing severe injuries.

5. That in response the defendant denied ownership of the vehicle, occurrence of the accident and particulars of negligence.
6. The appellant submitted that in the ruling, the trial court acknowledged that the amended plaintiff had been filed with the required authority but stated that the initial plaintiff was a nullity and be amendment could not cure it.
7. He further submitted that the provision require filing of suit in the minors name and where he/she is represented by an advocate, the person shall sign written authority to the advocate which shall be filed with the plaintiff.
8. Among authorities referred to by counsel is **Peris Onduso Omondi Vs Tecura International Ltd & Another** which referred to **Ugandan Case Bagyenga & Another Vs Loyce Kikunja Bagyenda** where the court considered retired to file suit in the name of minor through next friend and filing of authority signed by next friend by Advocate.
9. He submitted in the above case the court held that failure to file authority is a mistake of law, which can be amended. He further submitted that whereas the court has power to dismiss the suit, it should treat it as abortive and afford the plaintiff an opportunity to constitute a suit in a manner required by law.
10. Further the Advocate having discovered the defect took the requisite steps by filing amended plaintiff, which included authority of next friend. Counsel submitted that the appellants arguments in respect of preliminary objection were not considered and that the trial magistrate only noted that appellant never disputed failing to file authority and to appreciate that the defect in the pleadings had been cured by amendment.
11. He concluded that courts should look at substance and be hesitant to drive away litigants away from from seat of justice on account of procedural technicalities.

RESPONDENTS SUBMISSIONS

12. Respondent submitted that after plaintiff filing of plaintiff on 29th November 2006 where R N was named as plaintiff, the defendant filed defence and later on 12th February 2007 plaintiff filed amended plaintiff. Defendant filed amended defence on 20th February 2007.
13. Counsel for defendant submitted that the requirement is mandatory as the word “shall” is used and that plaintiff failed to comply with mandatory requirement; that the plaintiff’s way of approaching the court was incurably defective.
14. He submitted that the trial magistrate exercised discretion judiciously by upholding the preliminary objection; respondent further submitted that amendment was done on pleading which was already a nullity; that the lack of consent /authority from next friend make the plaintiff loose locus.
15. On the submission that the trial magistrate failed to consider interest of parties, respondent submitted that the oxygen principles are a creation of **Civil Procedure Act** which never existed at the time of making the decision; he submitted that the defect was not only procedural but also substantive as due to the defect the respondent was denied right to sufficient notice of the plaintiff.

ANALYSIS AND DETERMINATION

16. I have considered arguments by parties’ herein. I have also perused and considered authorities cited. It is not disputed that it was and is still a requirement for a minor who intends to file suit to sue in his or her name as plaintiff through next friend. In other words, the minor is the plaintiff suing through next friend. The provision require consent signed by next friend to be filed together with the plaintiff in a situation where an advocate represents the minor.
17. It is not disputed that the authority by next friend was not filed in this case; from respondents submissions the next friend was initially named as plaintiff. This was however remedied by amended defence. The defendant also filed amended defence. At time of hearing of preliminary objection, the plaintiff had been amended and amended defence filed.
18. Respondent’s argument is that amendment was done on pleading which was a nullity and defect could not be cured.
19. The issue herein was discussed In the **Ugandan case of Loi Bagyenda & Another Vs. Loyce Kikunja Bagyenda Kampala Hccs No. 424 of 1989** dealing with a similar situation, where the High Court of Uganda stated as follows:

“Order 29 rule 11 of the Civil Procedure Rules provides that every suit by a minor shall be instituted in his name by a person who in such a suit shall be called the next friend of the minor and goes on to say that where a suit is filed by an advocate he shall at the time of filing the plaintiff file an authority of the next friend of the minor. Such was not the case here since there was no next friend of the minor and consequently no authority from him was filed with the plaintiff. This was a mistake of law, which can be amended...The court has the power to dismiss an action brought by a minor in his own names or to allow proceedings to be amended by adding the next friend for the fact that there has been non-joinder of necessary parties does not mean that the plaintiff discloses no cause of action. Procedural rules are intended to serve as handmaidens of justice, not to defeat it...Proceedings instituted by a minor and not by a minor’s next friend in his names are not void. The policy of the legislature in enacting the Order was that where a minor had instituted a suit in his own name the proceedings in normal cases should be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner. The rule is intended for the benefit of the defendant for it has been held that when a defendant waives his benefit and protection the suit may proceed without a next friend. Whereas rules and regulations are necessary, and useful when

sensibly applied, let there too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance, to the detriment of justice, and the consternation of litigants and that ought not to be..The reason why no proceedings can be taken by an infant without the assistance of next friend is on a account of the infant's discretion and his inability to bind himself and make himself liable for costs. The laws and customs of every country have fixed upon particular period, at which persons are presumed to be capable of acting within reason and discretion...Whereas Order 29 makes it quite clear that the written authority of next friend must be signed and filed together with the plaint, however what is lacking here is not that the said plaintiff has no next friend”.

20. The Ugandan provision is similar to the then **Order 31 Rule 1** and **2** now **Order 32 Rule 1** and **2**. What is expressed in the above judgment accord with overriding objective provided **sections 1A** and **1B** of the **Civil Procedure Act** and **Section 3A** and **3B** of **Appellate Jurisdiction Act**; the provisions provide what is commonly known as oxygen principles and **Article 159** of the **Constitution**.

21. I do agree with respondent's counsel that the provisions never existed at the time of the ruling herein as they come into force on **23rd July, 2009**. I am however, of the view that despite the absence of the above provision, discretion was not taken away from judicial officer to either dismiss the suit or adopt amended pleadings and allow the suit to proceed for hearing on merit.

22. Further, it is important to look at the intention of the legislature. As expressed in the above case, the reason for the law to make it a requirement for a minor to act through next friend, is minor's incapacity to bind himself to be liable for costs or any other legal responsibility as the court may direct.

23. It is trite law that a minor has no capacity to enter into legal transactions. I believe that legal position may have informed the legislature in coming up with the legal provision. The provision ensures that a person capable of taking up responsibility is involved from the onset in the suit. The requirement of the person's consent/authority is intended to rule out situations where a party's name is dragged in a suit without his/her authority. This addresses the issue of likelihood of denial of responsibility/liability arising in the event adverse orders are made by court against a minor.

24. In this case, the person who was initially named plaintiff is next friend. Her authority to act as next friend was filed at the earliest opportunity. From record, it comes out clearly as unintended mistake on procedure, which was corrected without delay.

25. Whereas I do agree that laws and procedural rules are not made in vain, my view is that, they are not cast in stone either; more especially in situation where the resulting effect is denial justice at the expense of technicalities. My finding is that the trial magistrate erred in striking out the plaintiff's plaint.

FINAL ORDERS:-

1. Appeal is hereby allowed.
2. Plaintiff's suit is reinstated.
3. The suit having been filed in the year 2006,it be set down for hearing on priority basis
4. Each party to bear own costs of the appeal.

Judgment Dated, signed and delivered at Nakuru this 25th day of April, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

SCHOLA/JARED COURT ASSISTANT

KIMANI HOLDING BRIEF FOR KISILA COUNSEL FOR APPELLANT

N/A COUNSEL FOR RESPONDENT