



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 351 OF 2010**

**BO (a minor suing through his next friend DOO.....) PLAINTIFF**

**VERSUS**

**DR. NATHAN KHAMALA.....1<sup>ST</sup> DEFENDANT**

**THE AGA KHAN UNIVERSITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant has moved the court by way of a Notice of Motion dated the 24<sup>th</sup> day of April, 2019 seeking orders to have the suit reinstated and upon reinstatement to grant the minor leave to proceed with the cause in his own name.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of JJ sworn on 24<sup>th</sup> April, 2019.

The summary of the facts as captured in the said affidavit are that: on the 11<sup>th</sup> October 2017, this court ordered that the matter be prosecuted within six months from the date thereof. On the same day, the Plaintiff wrote to the Deputy Registrar requesting for a fresh hearing date which was fixed on 9<sup>th</sup>, April, 2018 but on the said date, the matter could not proceed as the defendant applied for an adjournment and requested that the Plaintiff undergo a second medical examination by Dr. Wambugu.

That thereafter, the court file went missing prompting counsel for the plaintiff to write to the Deputy Registrar on the 21<sup>st</sup> February, 2019 seeking assistance in tracing the same for further action, which file was later traced and the Deputy Registrar advised him to fix the matter for hearing.

He further deponed that on the 11<sup>th</sup> March, 2019 when he appeared in the Registry to pick a hearing date, he was informed that the matter was dismissed for want of prosecution for the plaintiff's failure to comply with the order for prosecution of the matter within six months.

He avers that the minor has now attained the age of the majority and he wishes to proceed with the suit in his own name.

In opposing the application, the 2<sup>nd</sup> defendant filed grounds of opposition dated the 24<sup>th</sup> day of May, 2019. It has opposed the same on the following grounds;

- a. That the Plaintiffs have not disclosed any ground to merit the granting of the orders sought.
- b. The proceedings have been determined by a lawful order.
- c. There has been unreasonable and unexplained delay in filing the application.
- d. The jurisdiction of the court has been properly invoked.
- e. The order of 11<sup>th</sup> October, 2017 did not dismiss the matter and thus the orders sought in the application shall be in vain.
- f. The application is incompetent and an abuse of the court process.

The court has considered the application together with the supporting affidavit and the grounds of opposition. I have also taken note of the submissions that were made by counsels for the respective parties. The reason given for the delay is that the defendants counsel referred the plaintiff for a second medical examination which report, they have not released to the plaintiff's counsel, to date. He has annexed the referral letter dated the 4th day of April 2018 and another dated 6<sup>th</sup> April, 2018 from the Defendant's counsel on record proposing that the matter be taken out of the hearing list for 5<sup>th</sup> April, 2018, when it was scheduled to come up for hearing. For that reason, the case could not proceed on the said date and an order was made that fresh dates be taken at the registry.

That thereafter when the Plaintiff invited the Defendant for fixing on 20<sup>th</sup> November, 2018, he could not secure a date as the court file was missing prompting him to write a letter dated 21<sup>st</sup> February, 2019 to the Deputy Registrar seeking assistance in tracing the court file and on 19<sup>th</sup> March, 2019 when he again went to fix the matter for hearing he was informed that the same had been dismissed for want of prosecution.

The Plaintiff has blamed the defendant for substantially contributing to the delay in prosecuting the matter.

The Defendant has argued that there has been unreasonable delay in bringing the present application and that the same does not disclose any ground to merit the granting of the orders sought.

In this regard the court notes that the order pursuant to which the matter was dismissed was made on 11<sup>th</sup> October, 2017 and the application herein was filed on 26<sup>th</sup> April, 2019 which was one and a half years after. Time within which to prosecute the matter expired on 11<sup>th</sup> February, 2019. The delay in bringing the application was unreasonable though the Applicant has tried to offer an explanation for it.

As rightly submitted by the counsel for the Plaintiff, the Defendant is also to blame to a certain extent for the delay though counsel for the Plaintiff could still have fixed the matter for hearing notwithstanding.

Be that as it may, and in the interest of justice, I will allow the application as prayed. The Plaintiff shall pay costs of Kshs. 10,000 to the defendant within 7 days from the date hereof failing which the orders shall not take effect. The matter to be prosecuted within 90 days from the date of this ruling failing which, it shall stand dismissed.

As for prayer 2 and the procedure adopted by the Plaintiff/Applicant, it is my considered view that the applicant is properly before the court taking into account that the application was brought under order 32 inter alia and that the next of kin is now deceased.

Dated, Signed and Delivered at Nairobi this 25<sup>TH</sup> Day of JULY, 2019.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Plaintiffs/Applicants*

.....*For the Defendant/Respondent*