REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 258 OF 2009

(An Appeal from the Judgment of D.K Mikoyan SRM delivered on 16th November, 2009 Nakuru CMCCC NO. 1508 OF 2007)

STEPHEN MBUGUA IKIGU (suing through his father as next friend DOUGLAS K. IKIGU .....APPELLANT

VERSUS

PETER M. MBUGUA .....1ST RESPONDENT

MUTONYA KAMAU.....2ND RESPONDENT

MAGIC SUPER STORE.....3RD RESPONDENT

JUDGMENT

The Appellant instituted a suit in the lower court seeking general and special damages for injuries he allegedly suffered following a road accident caused by the negligence of the respondent and/or their authorized driver, servant or agent.

The suit was instituted and conducted by the Appellant's father, Douglas Kinyanjui Ikigu, as a next friend of the Appellant who was allegedly a person of unsound mind.

In the statement of defence filed by the respondents the respondents denied the allegation that the Appellant was of unsound mind and contended that the suit was misconceived, incompetent, bad in law and an abuse of the process of the court. The respondents also intimated their intention to challenge the propriety of the suit on an alleged defect on the verifying affidavit and on the capacity of the Appellant's father to institute the suit on behalf of the Appellant.

Despite the Respondents having intimated their intention to challenge the propriety of the suit on the above grounds they did not raise those concerns during trial of the suit. Nevertheless, they did so in their submissions.

The evidence adduced during trial was to the effect that the appellant was of sound mind before the accident. After the accident his mental status changed. This notwithstanding, he was neither treated as a mental case nor confirmed as such.

A day after the accident occurred, Corporal Ronald Nyongesa, the investigating officer, visited the Appellant to interview him but got nothing helpful from him because he (the Appellant) could not express

what had happened during the accident. Later on, the investigating officer visited the Appellant in hospital but failed to get any information from him as he could not recall what had happened.

The investigating officer also interviewed the driver of the motor vehicle involved in the accident, Peter Mwangi Mbugua, who alleged that the Appellant was driving in a zig zag manner.

P.W3, Zachariah Kanji, who claimed to have been at the scene of the accident when the accident occurred, led evidence to the effect that the accident occurred as the driver of the motor cycle was avoiding a pothole on the road.

In his testimony before the trial court, the driver (DW1), stated that on the fateful day he left Mau Narok for Njoro. At Dam he saw a cyclist at the left. It was about 7.30 p.m. He hooted and upon realizing that the cyclist was leaning on top of the bicycle, he swerved to the right. Unfortunately the cyclist went in the same direction and got knocked down at the middle of the road.

He maintained that he was watchful and driving at a speed of 50kmph The accident occurred at a corner and away from the pothole. He maintained that the accident was unavoidable because by the time he saw the cyclist he was just about 10 metres away.

The trial magistrate upon considering the submissions of the respondents on the issues arising from the suit, and in particular on the issue of the capacity of the Appellant's father to institute the suit on behalf of the Appellant held:-

"**The law in respect of suits for persons of unsound mind is well stated in Grace Wanjiru & other v. Gedion Waweru & 5 others. Kimaru judge did go at length and the very jurisprudence expressed therein apply squarely here. This suit must fail for non-compliance with section 26 and 27 of the Mental Health Act (Cap 248 of the Laws of Kenya).**

On the second issue there is no doubt that Stephen was involved in the accident and suffered injuries therein. Liability would be at 50% to 50% and basing on the nature of injuries sustained an award of Kshs. 250,000/= would be adequate.

The upshot of my judgment is that the suit is dismissed with costs to the defendant."

Being disatisfied with the decision of the lower court, the appellant filed this appeal challenging the said decision on six (6) grounds which can be summarized as follows:-

1. That the trial magistrate did not give a concise statement of the case, the points of determination, the decision thereon and reasons of his judgment.

2. That the learned trial magistrate erred in law by basing his decision on a point of law raised in written submissions but not raised at trial;

3. That the learned trial magistrate erred in law and in fact in dismissing the suit on account of section 26 and 27 of the Mental Health Act;

4. That the learned trial magistrate erred in law and in fact in dismissing the suit when the evidence sufficed to prove the Appellant's claim against the respondents;

5. That the learnt trial magistrate erred by dismissing the suit on account of a purported technicality; and

6. That the trial magistrate failed to appreciate that it was not proper to dismiss the suit in the circumstances.

This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented

before the lower court in order to arrive at its own independent conclusion bearing in mind that it neither heard nor saw the witnesses.

It is common ground that the Appellant was involved in the accident which was the subject matter of the suit in the lower court. The Appellant contribution to the occurrence of the accident and I note that the apportionment of liability at **50:50** has not been challenged. The proposed award of Kshs. 250,000/= as general damages has also not been specifically challenged. I say specifically challenged because ground one of the Appeal alleges that no reasons were given for the judgment. The only contentious issue that fell for consideration before the court below, and which is the crux of this appeal is whether the trial magistrate erred or misdirected himself in holding that the suit was fatally defective for failure to comply with mandatory requirements of the law.

In the submissions filed in support of the appeal, it is submitted that the provisions of the Mental Health Act which the trial magistrate relied on to dismiss the suit, is intended for individuals who want to sue on behalf of persons of unsound mind. The matter herein is said to have been filed under order 31 rule 15 of the Civil Procedure Rules (repealed CPR) which provides that minors and persons of unsound mind can sue through a next friend.

Further that the trial magistrate erred by failing to give a concise statement contrary to Order XX Rule 4 of the repealed CPR. It pointed out that, the trial magistrate just stated in four sentences how the authority relied on applied to the suit without giving any reasons why the authority cited applied to the suit.

As regards the capacity of the next friend, it is pointed out that the issue was raised in the submissions only when it ought to have been raised first at the hearing. Reliance is made on an observation in **Ibrahim Haron Ochigo** v. **Mary Kerubo & Another Kisumu** C.A NO. 93 OF 1997 to the effect that the proper way of raising an important point of law is by raising a preliminary objection during trial and where a preliminary objection is not raised during the initial stages of hearing, the person seeking to rely on the point of law is deemed to have waived his/her right to rely on it.

It submitted that the respondent had an obligation to raise the issue of the capacity of the next friend to sue on behalf of the Appellant during trial. If this was done, it would have afforded the trial court opportunity to resolve the issue and if need be, to order for amendment of the plaint. That being the case, the respondents squandered their opportunity to rely on the pleaded matter of law. In this regard reference is made to a text from Mulla on Civil Procedure to the effect that:-

"Where a suit is instituted on behalf of a person alleged to be a minor by his next friend it is well settled that the proper order to pass is to return the plaint for amendment and not to dismiss the suit."

The above legal position is said to be applicable to a suit instituted on behalf of a person alleged to be of unsound mind by dint of the provisions of Rule 15 of the Code. The rule provides:-

"Rules 1-14 (except rule 2A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued."

Maintaining that the inquiry into alleged unsoundness of mind required under the Civil Procedure is different from that required under the Mental Health Act, the Appellant has submitted that the trial magistrate misapplied the Mental Health Act to a matter relating to Civil Procedure Act.

Finally, it is submitted that Order XXX1 of the repealed CPR does not confer any legal capacity on a person of unsound mind. What it does is to give the presiding court power to protect such a person.

In a rejoinder, it is submitted that the authority relied on by the Applicant namely **Ibrahim Haron**

Ochigo v. **Mary Kerubo & Another** (supra) is distinguishable and inapplicable as the issues raised therein were jurisdiction, capacity and limitations of actions. The issues had been held back and raised on Appeal. The respondents contend that the holding in that case is inapplicable to the case at hand because the issue of the next friends' capacity was raised in their statement of defence and canvassed at length during trial.

Concerning the text referred to in Mulla's Code, it is submitted that the text has been stretched out of context. Asserting that under Order 32 (formerly 31) of the Civil Procedure Act the court has carry out an assessment to evaluate the suitability of the person alleged to be of unsound mind, the respondents have maintained that the impugned sections of the Mental Health Act are applicable to the suit.

Regarding the contention that the judgment did not meet the legal requirements for writing a judgment, it is submitted that the trial magistrate set down and addressed the issues for determination. Further that the suit was dismissed because the issue of the capacity of the next friend went to the substance of the entire suit. It is submitted that the trial court duly addressed the issue. The court also addressed the issue of liability and damages it would have awarded had the suit been good in law.

From the filed grounds of appeal and the submissions by the respective parties, the issues for consideration are:-

1. Whether the judgmemt of the trial court met the standard of writing a judgment; and if not, whether the failure occasined any prejudice to the Appellant?

2. What does the law say about institution of suit by or against persons of unsound mind and/or persons alleged to be of unsound mind?

3. Did the trial magistrate misapply the law in 2 above?

4. What orders should the court make?

There is really no ideal manner of writing a judgment, it is basically a skill that can be learned, practised, improved and refined. What is important is that a judgment must be clear and demonstrate a reaqsoned thought process. It must at least set out the nature of the claim, the defence, the arguments, and the issues for determination, the reasons for the decision and the decision.

In a publication by the Judicial Commission of New South Wales, an article by Hon. Justice Linda Dessall of the Family Court of Australia, and Judge Tom Wodak, discuss seven steps to clearer judgment writing, to include:-

a. Dealing with the history and facts.
b. Time, place or order of events.
c. Identify issues for determination.
d. Issues of fact.
e. Set out the law, the legal principles applied, analyse these in relation to the facts of the case.

f. Conclude by resolving each issue, giving reasons for the conclusion.

The trial magistrate did set out the history and facts, giving time, place and order of events. He also set out the issues for determination and even analysed the facts **BUT** abruptly made a conclusion regarding what the law is, without setting it out, nor did he even state what it was that Kimaru J discussed in the cited decision, and how it resounded with the case he was handling. The trial magistrate simply concluded that the suit had to fail for failing to comply with section 26 and section 27 of the Mental Health Act.

Section **26** of the **Mental Health Act** (Cap 248) provides as follows:-

1. **The court may make orders:-**

a. **For the management of the estate of any person suffering from mental disorder, and**

b. **For the guardship of any person suffering from from mental disorder by any near relative or by any other suitable person.**

Section **27** of the same Act provides that:-

1. **Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper.**

The affected individual's mental status must be determined by a medical Dr. or by the court upon inquiry. The plaintiff was never presented to the court for inquiry into his mental status nor was any evidence presented to demonstrate that the plaintiff had been adjudged to be of unsound mind and incapable of protecting his own interests.

The upshot is that the failure by the trial magistrate to analyse and set out the law and give reasons for his conclusion, may offend the sensibilities of proper judgment writing, but it would not have changed the outcome of the matter. Consequently no prejudice was occassioned to the appellant.

What is the position regarding filing of suits by persons of unsound mind?

Where the plaintiff is the person of unsound mind, then the suit must be brought on his behalf by a next friend, where the defendant is of unsound mind, then the suit must be defended by a guardian *ad litem*. The omission here is that the plaintiff's mental status had not been determined as required; and the provisions of **section 26** and **27** of the **Mental Health Act** had not been adhered to.

I hold that the trial magistrate properly found that the suit was not properly instituted.

Consequently, the appeal has no merit and is dismissed with costs to the respondent.

Delivered and dated this 19th day of May 2014 at Nakuru.

Dated, Signed and Delivered at Nakuru this 19th day of May 2014.

H.A OMONDI

JUDGE