



REPUBLIC OF KENYA

IN THE HIGH COURT

OF NAIROBI

CIVIL CASE NO. 2609 OF 1992

J.M (SUING BY AND THROUGH HIS NEXT FRIEND)

**M.M.N.....PLAINT
IFF**

VERSUS

**KILIMANI JUNIOR ACADEMY
DEFENDANT**

JUDGEMENT

Before I deal with the pleadings and evidence led in this matter, I shall deal with the issue in law as to the competence of the Plaintiff, which has been raised by the learned counsel for the Defendant. Although, the said issue has neither been pleaded nor included in the Statement of Agreed issues both counsel submitted thereon for the court's determination.

The submissions on the filing of written authority as required by Order 32 Rule 1 (2) of the Civil Procedure Rules (formerly Order XXXI Rule 1 (2) of Civil Procedure Rules) cannot be upheld as the written authority has been shown to have been filed.

However, the second limb of preliminary point of law needs the consideration and determination of this court. It is not disputed that when the plaintiff was filed the Plaintiff was a minor and thus he was being sued by the next friend, who is his mother, but the minor has attained the majority. The Plaintiff's title still is, which it was, on the date of filing the suit on 16th May, 1992. The Plaintiff is still shown to be suing through his next friend. What the Plaintiff has produced is a special power of Attorney executed by John S. Mutero Kanyotu on 13th February, 1999. The name of the minor as shown in the Plaintiff is J.M. The special Power of Attorney in clauses (b) and (c) stipulated that when the suit was instituted he was a minor and that he was now an adult (has attained age of majority) and that he would be out of country during continuation of the said case.

The Defence counsel simply relied on the provisions of Order 32 Rule 12 which stipulate:-

“12. (1) A minor Plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus –

“A.B. late a minor by CD his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application he shall, if a sole Plaintiff or sole applicant apply for an order to dismiss the suit or application on repayment of the costs incurred by the Defendant or opposite party, or which may have been paid by his next friend.

(5) Any application under this rule may be made ex parte by chamber summons; but no order discharging a next friend and permitting a minor Plaintiff to proceed in his own name shall be made without notice to the next friend.”

It is also very pertinent to note that the relevant provisions of Order 32 Rule 12 are worded in mandatory terms and were similarly worded even in earlier order XXXI of the previous Civil Procedure Rules. None of the requirements or the steps stipulated in the aforesaid provisions are complied with or taken by the Plaintiff on attaining majority.

I cannot be thus, persuaded that the production of the Power of Attorney executed on 13th February, 1999 has averted the defect. The Plaint as it is before the court is fatally incompetent and has to be struck out.

I thus order that the Plaint be struck out with its proceedings. As the issue was raised by the Defendant at the vague end during submissions, I do not make any order on cost.

Orders accordingly.

Dated, signed and delivered at Nairobi this 16th day of **February, 2011**

**K. H. RAWAL
JUDGE
16.02.2011**