



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 333 OF 2009

UCHI MWARUA MWADZAME (A minor suing through

MWIDHIN MWARUWA TINGA MWADZAME (Father and next friend).....PLAINTIFF

VERSUS

PANDYA MEMORIAL SOCIETY REGISTERED TRUSTEES & 2 OTHERS.....RESPONDENTS

RULING

1. This suit was brought by Uchi Mwarua Mwadzame a minor suing through his father and next friend Mwarua Tinga Mwadzame. The events leading to the suit as averred in the plaint were as follows: On 7th August, 2008 the minor plaintiff was admitted at a private hospital ran by Pandya Memorial Society Registered Trustees (herein referred to as 1st respondent). The minor had been referred to the hospital from the Kenya Ports Authority clinic where the minor had been admitted for a complaint involving the left arm. While in the 1st respondent's hospital the minor was attended by Dr. Awadh Hemed and Dr. R. M. Karega (hereinafter referred to as the 2nd and 3rd respondents). The two were medical doctors/consultants engaged by the 1st respondent. An intravenous antibiotic which was administered on the minor's right arm resulted in complications which the doctors were unable to arrest. As a result of the complications, the minor had to be transferred to Kenyatta National Hospital where it was confirmed that she had developed severe gangrene below the right forearm. Consequently, the minor's right forearm had to be amputated.

2. Subsequently, the minor plaintiff sued the respondents for general and special damages claiming that the loss of her arm was due to the respondents' negligence, recklessness and or breach of duty of care. The 1st and 3rd respondents each filed a defence denying the minor plaintiff's claim. The 3rd respondent admitted having examined the minor plaintiff on 7th August, 2008 but denied having administered an intravenous antibiotic. The 3rd respondent also denied all the allegations of negligence attributed to him. Further, and without prejudice to his denial, the 3rd respondent stated that by an agreement dated 30th March, 2009 the plaintiff exonerated the 3rd respondent from any wrong doing in relation to the treatment of the minor plaintiff and the injuries complained of in the plaint.

3. The 3rd respondent has now moved this court by way of a notice of motion brought under Order 2 Rule 15 of the Civil Procedure Rules, sections 1A and 3A of the Civil Procedure Act, seeking to have the plaintiff's suit against him struck out, for being scandalous, frivolous and or vexatious, or otherwise an abuse of the court process.

4. In his affidavit sworn in support of the application, the 3rd respondent stated that he attended to the minor plaintiff and prescribed treatment which in his opinion befitted the minor plaintiff's condition. Sometime in or around March, 2009, the minor plaintiff's guardian and father approached the 3rd respondent and explained to him that on the advice of an advocate he intended to take legal action against all persons who attended the minor plaintiff. The guardian indicated that he believed that the 3rd respondent was not to blame for the minor's plight, and undertook not to proceed with the action against the 3rd respondent, if the 3rd respondent made an ex-gratia payment of Kshs. 500,000/= to him. The 3rd respondent took the minor plaintiff's guardian and next friend to the 3rd respondent's advocates where an agreement and indemnity was prepared. The agreement and indemnity which was duly signed before an advocate by the minor's father (referred to in the agreement as guardian), and the 3rd respondent (referred to in the agreement as pediatrician). The agreement and indemnity (which was annexed to the affidavit) states in part as follows:

***“WHEREAS the guardian caused Uchi Mwaruwa Mwadzame “the minor” to be admitted to the Pandya Memorial Hospital on 6th August, 2008 for treatment and was placed under the care of the pediatrician. AND WHEREAS the minor developed complications while undergoing treatment in the hospital that resulted in the amputation of her right forearm at the Kenyatta National Hospital, AND WHEREAS the guardian has demanded compensation on behalf of the minor from the Pandya Memorial hospital, AND whereas the guardian confirms and declares that the pediatrician is not to blame for the said complications of the minor and the consequent amputation and holds him free from any liability in respect thereof NOW THIS AGREEMENT WITNESSETH as follows:
IN CONSIDERATION of the pediatrician making an ex gratia payment of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) only to the guardian AND IN THE PREMISES the guardian:***

1. *hereby confirms and declares that the pediatrician was not to blame for the complications of the minor that resulted in amputation of the right forearm;*
2. *the guardian binds himself not to initiate, assert, maintain or prosecute any legal action against the pediatrician to seek to enforce any right or claim arising from the performance of his duties in relation to the said treatment and/or complications and to hold the pediatrician free from any claim, blame, criticism, legal suits demand and or any other liability of whatever nature in relation to the said complications of the minor and the resultant amputation AND SHALL FULLY INDEMNIFY the pediatrician for all and any such claim, demand, suits, blame and/or criticism that may be made against the pediatrician in relation to the aforesaid complications and consequent amputation of the minor;*
3. *the guardian further binds himself not to initiate, assert, maintain or prosecute any claim or join the paediatrician to any such claim released by the forgoing clauses, seek to enforce any such right or claim including by action, motion, appeal or any other manner or attempt to establish a right not to be bound by the covenants herein and hereby waives and relinquish any right under any applicable law not to be bound by the Agreement herein;*
4. *the guardian shall indemnify and hold harmless the pediatrician from and against any claims, suits or demands asserted by any party arising out of or relating to the treatment of the minor while at Pandya Memorial Hospital as aforesaid and in particular the complications arising out of such treatment and the resultant amputation;*
5. *the guardian and the Pediatrician hereby confirm and declare that they have carefully read this agreement and indemnity and have understood the terms of the same and agree to be bound by it;*
6. *the pediatrician hereby confirms, undertakes and binds himself not to demand the refund of the sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) paid in respect of this Agreement or any sum at all and shall not make any demand claim or assert any right to the same against the guardian."*

5. It is the 3rd respondent's contention that the minor plaintiff through the guardian exonerated the 3rd respondent from blame; freed the 3rd respondent from liability; bound himself not to prosecute any legal action or enforce any right or claim arising from the 3rd respondent's performance in relation to the treatment of the minor plaintiff; and bound himself to indemnify the 3rd respondent. Therefore the suit against the 3rd respondent is embarrassing, frivolous, vexatious or otherwise an abuse of the court process as it is contrary to the express terms of the agreement made between the guardian and the 3rd respondent.

6. In response to the application, Dismas Ooko Wambola who is an advocate from the firm of Lumumba and Lumumba Advocates representing the minor plaintiff, depones that the 3rd respondent is a necessary party to the suit as the minor plaintiff's cause of action is anchored on vicarious liability. The advocate further depones that the suit raises many triable issues which can only be determined at a full trial. He states that the agreement relied upon by the 3rd respondent is unconscionable, illegal and against public policy as it seeks to compromise the rights of a minor, and infringes on the constitution to the extent that it ousts the jurisdiction of the court and purports to stop the minor from accessing justice.

7. Both parties counsel made oral submissions each urging the court to find in favour of his client. I have given careful consideration to this application and the contending arguments. The agreement alleged to have been entered between the 3rd respondent and the guardian which is the basis of the 3rd respondent's application purports to compromise the rights of the minor to maintain a suit against the 3rd respondent. It is trite law that under normal circumstances, a minor has no capacity to enter into a contract, and any contract entered into by a minor except a contract for necessity is voidable at the minor's option. Therefore, assuming for the sake of argument that the guardian did sign the agreement in issue, a question arises as to whether the minor plaintiff is bound by such an agreement. This is an arguable issue which arises from the pleadings and which ought to be determined at the trial.

8. Secondly, Order 32 Rule 7 of the Civil Procedure Rules states as follows:

(1) No next friend or guardian ad litem shall, without the leave of the court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the court so recorded shall be voidable against all parties other than the minor".

9. In my view, the rationale of the above provision is for the court to oversee all suits involving minors so as to ensure that any compromise entered into involving a minor's interest, is in the best interest of the minor. This is notwithstanding the fact that the minor is represented by a next friend or guardian who has the benefit of counsel. Thus, although in this case the agreement is alleged to have been entered into before this suit was filed, this court has a responsibility as a protector of the interest of the vulnerable minor, to inquire into the circumstances in which the agreement was made, the propriety of the agreement, and whether the agreement provides appropriate compensation for the minor's loss.

10. Needless to state that the minor plaintiff's suit against the 3rd respondent is not for striking out, as it is neither frivolous nor vexatious, nor an abuse of the court process. The notice of motion dated 6th April, 2011 is accordingly dismissed.

Dated, signed and delivered this 26th day of October, 2011.

H. M. OKWENGU
JUDGE

In the presence of:

Advocate for the Plaintiff absent
Olwande H/B for Nabwana for the Respondents
Kiponda Court Clerk