



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Case 98 of 2007**

**PENINAH SANGANYI (suing through next friend PETER SANGANYI) ..... PLAINTIFF**

**VERSUS**

**RAM HOSPITAL..... 1ST DEFENDANT  
DR. A.M. TAILOR.....2ND DEFENDANT  
DR. JAMES GER.....3RD DEFENDANT**

**RULING**

On 28<sup>th</sup> August 2007 the plaintiff filed this suit and stated in paragraph 1 of the plaint that:

**“The plaintiff is a female adult of sound mind working and  
residing for gain (sic) within Nairobi area.”**

In the suit the plaintiff seeks general and special damages against the defendants jointly and severally on allegation that there was professional negligence on their part when she was admitted to

Ram Hospital on 18<sup>th</sup> July 2006 as a result of which she suffered loss and damage. Despite the fact that the plaintiff was described as an “adult of sound mind”, it is not clear why she brought the suit through **Peter Sanganyi** as her next friend. The verifying affidavit to the plaint was also sworn by the said Peter Sanganyi. Together with the plaint was filed a document entitled **“CONSENT TO USE NAME AS NEXT OF FRIEND.”** The contents thereof were as follows:

**”I Peter Sanganyi, resident of Kisii of P.O. Box 301420-00100,  
Nairobi do consent to appear/represent and/or sue on behalf of  
Peninah Sanganyi as a guardian id litem (sic) or next of friend. I  
also grant authority to Nchogu, Omwanza and Nyasimi  
Advocates to use my name for the aforesaid purpose.  
Signature”**

The defendants filed their respective statements of defence. The 3<sup>rd</sup> defendant through Ms Oguttu-Mboya and Company stated in paragraph 21 of his defence that:

**“21. The 3<sup>rd</sup> defendant shall contend that the instant suit is  
misconceived, mischievous and otherwise bad in law.  
Consequently, the 3<sup>rd</sup> defendant shall raise preliminary  
objections on points of law as hereunder:**

- i. **That the plaintiff is a Major and hence the suit vide next friend is premature, inept and otherwise bad in law.**
- ii. **That the plaintiff, together with the next friend, are non-suited.**
- iii. **That the instant plaint is defective for want of the requisite verifying affidavit.**
- iv. **That the plaint contravenes the mandatory provisions of order VII rule 1 (2) of the Civil Procedure Rules.**
- v. **The attached verifying affidavit contravenes the provisions of section 2 of the Interpretation of the General Statute Act Chapter 2 Laws of Kenya.**
- vi. **The entire suit is void *ab initio*.”**

When the suit came up for hearing on 1<sup>st</sup> March 2010, Mr. Oguttu sought leave to argue the preliminary objection in terms of paragraph 21 of the defence as quoted hereinabove.

He submitted that since the plaintiff is an adult of sound mind, the suit could not be filed and maintained through a next friend. That could only be done if the plaintiff is a minor or of unsound mind. The suit is therefore misconceived and invalid.

Secondly, the plaintiff, being an adult of sound mind, was obliged to swear a verifying affidavit to the plaint. However, the verifying affidavit had been sworn by Peter Sanganyi who is not the plaintiff. As such the plaint is not therefore verified as by law required and ought to be struck out.

Thirdly, if the plaintiff was contending that she suffers from any mental or physical infirmity that prevented her from acting on her own, an application ought to have been filed under **order XXXI rule 15** of the **Civil Procedure Rules**. No application to that effect was filed and there is no court order that allowed the suit to be filed through the next friend.

Furthermore, prior to the filing of this case or immediately thereafter the plaintiff did not invite this court to make any inquiry into her mental status.

Lastly, by dint of the provisions of **section 2** of the **Age of Majority Act**, the plaintiff is deemed to be under no disability on account of age. The institution of the suit through a next friend therefore rendered it void ***ab initio***. Counsel urged the court to strike out the suit with costs to the 3<sup>rd</sup> defendant.

Mr. Odhiambo for the 1<sup>st</sup> and 2<sup>nd</sup> defendants adopted the submissions of Mr. Oguttu.

Mr. Nyasimi for the plaintiff opposed the preliminary objection and asserted that the suit is competent. He said that Peter Sanganyi had consented to act as the next friend to the plaintiff and referred to the consent that was filed

together with the plaintiff. In his view therefore, the next friend was competent to swear the verifying affidavit.

Mr. Nyasimi further submitted that when the plaint was being drafted the plaintiff was under medication and was not able to act on her own. He told the court that the plaintiff is still unwell. Counsel went further to seek leave to file a replying affidavit to the preliminary objection to show that the plaintiff is now of unstable mind and cannot act on her own.

In reply, Mr. Oguttu submitted that he had only argued a preliminary objection and not a substantive application. In that regard the application by Mr. Nyasimi for leave to file a replying affidavit was untenable. In any event, the plaintiff is bound by her pleadings that she is of sound mind, counsel added. He further pointed out that since 7<sup>th</sup> September 2007 when the 3<sup>rd</sup> defendant's statement of defence was filed the plaintiff had neither made any application to amend the plaint nor filed any other application of whatever nature.

In **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED –VS- WEST END DISTRIBUTORS LIMITED** [1969] E.A. 696, it was held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.

It is true that the plaintiff was described as a female adult of sound mind. The preliminary objection was raised in September 2007 and since then there was no attempt to file an amended plaint or an application under **Order XXXI rule 15** of the **Civil Procedure Rules** to have the plaintiff adjudged to be of unsound mind. It must therefore be taken that the plaintiff is of sound mind and is under no disability whatsoever.

If the plaintiff is now of unsound mind as was orally alleged by Mr. Nyasimi, before any person can act as a next friend for her, he has to file the appropriate application in terms of **order XXXI** as aforesaid. A person of sound mind cannot be represented by a next friend without any leave of the court. The verifying affidavit that was sworn by Peter Sanganyi is therefore bad in law. The entire suit is void **ab initio** and is therefore unsustainable. The consent document that was filed together with the plaint cannot assist the plaintiff at all. If the plaintiff was a minor the said consent would have been appropriate, see **order XXXI rule 1 (2)** of the **Civil Procedure Rules**.

I am aware that in **D.T. DOBIE & COMPANY (KENYA) LTD. –VS- MUCHINA**[1982] KLR 1, it was held that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as it can be injected with life by amendment, it should not be struck out. These were the views of Madan JA.

I have anxiously considered whether an amendment to the plaint can cure the defect in this suit but I have come to the conclusion that it cannot. A plaint has to be verified by an affidavit but the latter cannot be amended.

It is regrettable that I have to strike out the suit with costs to the defendants which I hereby do.

**DATED, SIGNED AND DELIVERED AT KISII THIS 12<sup>TH</sup> DAY OF MARCH, 2010.**

**D. MUSINGA  
JUDGE.**

**12/3/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Omwanza and Mr. Momanyi for the Plaintiff

Mr. Mboya for the 3<sup>rd</sup> Defendant

Mr. Otieno for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

**Court:** Ruling delivered in open court on 12<sup>th</sup> March, 2010.

**D. MUSINGA  
JUDGE.**