REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 759 OF 2003

KEBENGO M. KUZI………………………….....…………..….PLAINTIFF

V E R S U S

LEONARD NJOROGE MBUGUA…………………...1ST DEFENDANT

GAKUO GICHERE……………………………………2ND DEFENDANT

R U L I N G

This Notice of Motion, under Order 31 Rules 1 (2) and 2 (1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, Cap. 21, Laws of Kenya seeks the following orders:

1. That the suit herein be dismissed and/or the plaint dated 14/7/97 be struck out.

2. Costs of this application be provided for. Dated and file on 26/6/06 and 13/7/06 respectively, the application is on the grounds, inter alia, that

a. The mandatory provisions of Order 31 Rules 1 (2) of the Civil Procedure Rules were not complied with at the time this suit was commenced and have not been complied with to date.

b. The court has no jurisdiction to hear and determine this suit the same having been initially filed in court without jurisdiction.

The application is supported by an Affidavit by Leonard Njoroge Mbugua.

In opposition, the Respondent avers that the application is bad in law, unsustainable; it is without merit, misconceived and a gross abuse of the court process as the Plaintiff cannot move the court to grant an order to discharge a next friend who did not have authority to act ab initio.

The facts in the case are that on 14/7/97, the Plaintiff herein filed a suit against the 1st and 2nd Defendants. The Plaintiff (actually the beneficiary) Kebongo M. Kuzi; was suing through next friend, her mother, Lubov Kuzi, as he was a minor aged 8 years at the time the suit was filed.

The Plaintiffs next friend in this suit did not sign and file in court a written authority to the Advocate on record for the purpose of identifying themselves as the next friend. Hence the court file confirmed that the said consent was not filed hence the suit was instituted by or on behalf of a minor without the next friend being validly appointed.

It is (on the above basis) the applicants case that the suit ought to be dismissed for failing to comply with

mandatory provisions of the law that is Order 31 Rules1 (7) and 2 (1) of the Civil Procedure Rules.

Order 31 rule 1(1) provides:

"Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Sub rule (2) is as follows:

"Before the name of any person shall be used in any action as next friend of an infant where the suit is instituted by an advocate, such person shall sign a written authority to the Advocate for that purpose, and the authority shall be filed."

I have carefully studied the pleadings and considered the submissions by Learned Counsel for both sides and have reached the following findings and conclusions. Both the next friend and the Advocate badly failed the Plaintiff – the minor – who badly needed, and still needs, every protection of this court. The suit should have been prosecuted with all due speed and diligence by both the next friend and the Advocate. That was not done.

To dismiss the suit for failure or negligence of the Advocate and the next friend would be an act of umitigated injustice on the minor – the Plaintiff – who did not know what was happening. I find and hold that the provisions of Order 31 rules 1(2) and 2(1) are inconsistent with the basic tenets of both the substantive law on capacity and the interests of justice promulgated in Section 3A of Cap. 21, Laws of Kenya, which this court is empowered to revert to to avoid injustice.

To begin with, a minor sues through the next friend because he/she lacks capacity to sue on his/her own right. A minor has no capacity to either contract or consent to any transaction, except in cases of necessities, within the law of contract. It is thus a fundamental contradiction to hold that the minor has no capacity to sue on his/her own, yet he/she should have capacity to authorise the next friend to sue on his/her behalf. Such contradiction is not sustainable in law and those provisions of Order 31 rule 1(2) and 2(1) are long overdue for Review.

Unfortunately, they have not been reviewed, and they are still the law.

However, my hands are not tied in search of justice for the parties who move this court. Section 3A of Cap. 21, Laws of Kenya, which is superior to any order or Rule under the same Act provides:

"Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

To dismiss the suit herein, or grant the prayers in this application, would inflict untold justice on the Plaintiff – the minor – and all in the name of complying with the provisions of an order and rule, which, in my view are manifestly inconsistent with the substantive law on capacity.

In any case, in my humble view, the consent/authority referred to in order 31 rules 1(2) and 2(1) would be invalid in itself as coming and signed by a person – the minor/Plaintiff, who lacks capacity to give any valid consent.

Accordingly, the application herein, is hereby dismissed with costs to the respondent and against the applicant.

To grant such an application is not only unjust but also an indictment on this court on the correct and applicable law in the interest of justice.

DATED and delivered in Nairobi, this 15th Day of May, 2007.

O.K. MUTUNGI

JUDGE