

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 4826 OF 1990

DUNSON NJOROGE PLAINTIFF
VERSUS
PETER KINGORI MBACHO DEFENDANT

R U L I N G

The application dated 19th March, 2001 seeks permission of the court for the plaintiff to act in person in this matter because he is no longer a minor to require the services of a next friend or guardian, or that, in any case, the next friend died sometime in 1997. The same came up for hearing on 8th May, 2001 when counsel for the respondent raised a preliminary objection; that the suit did not comply with Order XXXI rules 1 and 2 of the Civil Procedure Rules; that the suit was frivolous, vexetious and an abuse of the court process for offending the provisions of order XXIII rules 3(1) and (2) and 8 of the same code, that the court cannot discharge a deceased next friend and that the names of the plaintiff in the plaint and in the identity card differ.

Counsel for the parties appeared in court on 8th May, 2001 to urge or oppose the application.

Counsel for the applicant referred this court to decisions in Civil Appeal Numbers 8 of 1989 and 167 of 1993 to urge that in an application of this nature a court should exercise its discretion and apply substantial justice rather than decide the same on precedural irregularities.

Much as this court agrees with those sentiments, reaching through order XXXI rules 1 and 2 and Order XXIII rules 1, 2 and 8 of the Civil Procedure Rules, it becomes clear that a deceased next friend cannot be discharged. The court can only discharge an existing person and though the plaintiff is still alive and of mature age – hence the suit cannot abate as provided in Order XXIII rules 3(1), (2) and (8) of the Civil Procedure Rules something will need to be done in compliance with Order XXXI rule 10 of the same code before the present application can make sense.

Otherwise for now the present application is incompetent and should be and is hereby struck out with costs. Delivered and dated this 15th day of May, 2001.

D.K.S AGANYANYA

JUDGE