UMM (A minor suing through MMTM – father and next friend) v Pandya Memorial Society Registered Trustees & 2 others (Civil Suit 333 of 2009) [2023] KEHC 3796 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 333 OF 2009

DKN MAGARE, J

APRIL 20, 2023

BETWEEN

UMM (A MINOR SUING THROUGH MMTM – FATHER AND NEXT FRIEND) ..... PLAINTIFF

AND

PANDYA MEMORIAL SOCIETY REGISTERED TRUSTEES ... 1ST DEFENDANT

DR. AWADH HEMED ..... 2ND DEFENDANT

DR. RM KAREGA ..... 3RD DEFENDANT

JUDGMENT

1. When bad things happen, sometimes they happen in a row. A minor VMM was taken to hospital while aged about 6 years or thereabouts. A series of things happened till the suit was filed the third Defendant made an application that exposed the Guardian Ad Litem's soft under belly. Thankfully, Justice H Okwengo as then she was made a ruling preserving the case.

2. The Guardian Ad Litem had been paid Ksh 500,000. Since then he became evasive. The mater was not moving till the court issued a notice to show cause for 8/7/ 2015. There was no cause shown and the case as such dismissed. Had he been dealing with and adult claimant, that would have been the end of the matter. However, we are dealing with matter. Involving a child who was reportedly seriously injured. 8 years later the next friend became wiser and changed Advocates and as usual, blames the former Advocates. No one wants to take personal responsibility for the matter. He now wants to wake up the case.

3. In the meantime, one of the parties was insured by Concord insurance co ltd. By an order in Nairobi Milimani HCC Comm 88 of 2013, all proceedings against Concord Insurance Limited under (statutory management). This order was extended from time to time. It appears parties left court.

4. Before the said order was issued Lumumba and Lumumba advocates, who were on record for the minor invited other parties for fixing the matter for hearing. By a letter dated 8/7/ 2014, the court informed the said firm of advocates that dates were to be taken when the diary for 2015 was opened. The last order was issued on 17/5/ 2013 which stayed the suit pending further orders. No other orders were issued to date lifting those orders. It appears that the notice for dismissal was issued while stay was in situ.

5. On 8/7/Justice P. N. Nyakundi dismissed the matter for want of prosecution.

The notice of motion

6. The application is based on lies. The firm of Ms Lumumba and Lumumba did not misinform the applicant that there was a misinformation. The cord had on 17th May 2013 stayed the matter. The information by Lumumba and Lumumba advocates was thus correct. It is indeed true that the minor was 6 years and was reportedly involved in an accident.

7. The applicant is thus eager to have the matter had and later for bills. I have seriously observed from whether the applicant truly perused the court file as intimated. Had they done so, they will not be casting as persons on their predecessors. It is important that advocates maintain decency and decorum without necessarily painting other advocates in bad light.

8. The court will always exercise its discretion notwithstanding the circumstances. You don't need to play dirt to appear clean. Clients come and go but the profession remains. Anyone who had not perused the file, will not see the former advocates in good light. Perusing the file, things drastically change.

9. I do not thus buy the idea that there was fault on part of counsel then on record for the Plaintiff. There was a duty on all to inform the court of the stay. The next friend also has a duty to prosecute their case. They don't need to wait till the child is sickly to come to court.

10. The Third Defendant relies on various sections of *the Constitution*, that is Article 10, (2) and 25 9 c) 154(2) (b) of *the Constitution*. They also state that the file contains gross negligence of the former advocate hence they need to be liable.

11. They want the firm of M/s Lumumba and Lumumba advocates to indemnify the Applicant. At least they acknowledge that the Applicant will need to be paid. The dispute therefore is who is to pay.

12. They do not address the stay orders given on 17/5/2013. They do not address the issue of Concord insurance.

13. The 1st Respondent reported though the affidavit of Rajesh Shukla, stated that there is an unexplained 5-year gap in the Applicant's explanation. They prayed that we dismiss the Application. Other Respondents did not reply. They opposed the setting aside. They state further that 2nd Defendant is no longer employed at the hospital. He questions whether the 15 years' lapse will help due to lasses in memory.

Analysis

14. I will start with concerns of the First Defendant. The hospital maintains record on treatment. There is to need of the same people to testify. New witness can testify and rely on their file. Any other documents can and shall be admitted under section 35 of the *Evidence Act*. There will thus be no prejudice if the Application is allowed.

15. The lack of witnesses who witnessed does not weaken the defendant's case. In any case, the issue was the stay issued on 17/7/2013, at the behest of the 1st Applicant's insurance. As to whether the same was properly interpreted is another case.

16. The hospital insured using an insurance company that went under resulting in the order of 17/5/2013. This resulted to the disconnect in prosecution of the matter, as it is apparent on the face of the record. The error the advocates committed was to fail to attend and point out the existence of the order of 17/5/2013. If for any reason, this applicant is allowed, it will be because of the said order.

17. The Respondents made a mountain over a mole hill when addressing the age of the minor. The concern is real not much and it not even fair. Whether to date a child who was 6 years in 2008 is over 18 years, is a matter of mathematics. Arithmetic is not the best subject dear to most Kenyans, unless counting money. for most Kenyans.

18. The court will take note that the Plaintiff has now attained 18, and is able to act in her own name. She has a right after the end of her period of minority to proceed and apply to set aside the actions by the next friend. The court will thus retire the next friend if truly the minor is over 18 years.

19. I have seen the delay in this matter, which without doubt is inordinate. However, the matter involves serious injuries to a minor. To make matters worse, the defendants were equally culpable. There insurance declared a moratorium that sent everyone into a lull.

20. The matter also involved an insurance that had stay. No one told me the state of the order. For purposes of these proceedings I will lift the order of 17/5/2013. It will serve no purpose to have the matter pend forever.

21. Therefore, dismissing this application will not serve any useful purpose. Article 153 (2) of *the Constitution* enjoins me in matters concerning a child to have regard to the child's best interest as they are paramount the article provides as doth: -

    (2) A child's best interests are of paramount importance in every matter concerning the child.

22. I note that under Article 53 (1) d the child is entitled to be protected from abuse, neglect, all forms of violence, unfair treatment among others. The suit herein relates to injury to a minor.

23. I am aware that I will be exercising discretion in this matter. In so doing I must be judicious. In the case of Kridha Limited v Peter Salai Kituri [2020] eKLR, the court stated: -

    23. I am reminded of the following rendition by Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A:

    "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

24. I thus need to eservices discretion on basis of evidence before me and not capriciously. As much I may wish to have this matter come to an end, prudence requires that I remember that the suit was dismissed while stay of execution was in situ.

25. The Discretion was discussed in the celebrated case of Shah v Mbogo and another [1967] EA 116, the High Court, Harris, J stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:

> " I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

26. Regarding the next friend, the court rejects any protestation that he was sick hence could do nothing. It is not true as a fact that he was sick. The ruling on 26/10/ 2011 says it all. I don't need to add much. However, I do not think that he has the best interest of the child at heart.

27. The discretion I exercise is not intended to help the next friend or the defendants. It is to correct an injustice, where the same court that stayed a suit, dismisses it for want of prosecution barely a year after declining to grant the plaintiff a date for hearing.

28. Despite the delay in making this application, the course of justice will be served more by allowing and not dismissing the Application. Any loss inflicted on the defendants is not irreparable. In any case, the defendants are not totally innocent in this. It is them that caused stay.

29. The court of appeal in Mbogo and Another v Shah [1968] EA 93 at 96) affirmed the decision of the High Court thus:

> " We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

30. That appears to have been freed over the child. I quote justice Okwengu's sentiments in this very matter as reported in UCHI MWARUA MWADZAME (A minor suing through MWIDHIN MWARUWA TINGA MWADZAME (Father and next friend) v PANDYA MEMORIAL SOCIETY REGISTERED TRUSTEES & 2 others [2011] eKLR as doth: -

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.

31. After the said Ruling, there appears to have been a lull which resulted in the case being dismissed for want of prosecution. I will not be surprised, if it turns out that further payments were made.

32. I am satisfied that the application should be allowed. However, I need to make more drastic orders to safeguard the interests of the child. I am satisfied that Mwidhin Mwaruwa Tinga Mwadzame is not a proper guardian ad litem and or next friend.

33. If the Plaintiff is now over 18, she needs to take over. If she is still under 18, which is doubtful, there needs to be a proper next friend whose interests do not conflict with the minor.

34. I therefore direct that he be removed and in lieu thereof, the advocates for the plaintiff to find a suitable replacement of the guardian ad litem and next friend, preferably the mother of the minor or another family member or a person properly referred by the children's officer, except Mwidhin Mwaruwa Tinga Mwadzame, in order to avoid a scenario where we are being taken round in circles this matter shall be given one hearing date, by which time parties must be ready to proceed.

35. I am tempted to send this matter to the lower court for hearing determination. However, I will not do so. This is a case that ought to be out of our system by now. I therefore allow the application with costs in the cause, Pursuant to Article 53 (2) of *the constitution*. The application is being allowed as exercise of my discretion. I am aware that the discretion must be exercised judiciously.

36. However, in this case, it is not the merit of the application by the demerit of the defence arguments that carried the day. I cannot fathom a scenario where a party stays a suit and when dismissed defends the dismissal. I am in my mind a question, that the defendants refused to answer, how do you prosecute a stayed suit. If the date had been taken, couldn't the parties cited the Applicant for contempt?

37. If the argument is that the order of stay has been lifted, then it is the duty of the party that has that special knowledge, the 1st defendant, as the insured, to bring or the attention of the court and the Plaintiff. I got a feeling from the responses that even the parties were not aware of the dismissal.

38. In order to avoid further prejudice, and delay, this suit shall not be subject to any order f stay hitherto issued. It is lifted and the parties shall be at liberty to proceed. The order of 17/5/2013 is thus meaningless and inoperative. I equally set it aside.

Determination

39. I allow the application dated 1/3/2023 in the following terms: -

a. The order dismissing the suit for want of prosecution give on 8/7/2015 is hereby lifted.

b. The order of 17/5/2013 is hereby lifted. This case shall proceed notwithstanding any other order to the contrary.

c. The plaintiff is to replace the guardian ad litem/ next friend in the next 30 days with a more suitable person, in default of finding a responsible family member, one be chosen by a relevant children's officer, the mother being the most preferred.

d. In the Alternative to C above, if the Plaintiff is now over 18, she takes over the prosecution of the case from the next Friend.

e. The matter shall be heard on 15th June 2023, failing which the case stands dismissed.

f. Parties to file referenced and paginated witness statements within 40 days from today.

g. Costs be in the cause.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF APRIL, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

DENNIS KIZITO MAGARE

JUDGE

In the presence of:

Mr Asena for the Plaintiff

Ms Nasimiyu for the 1st Defendant

Muthuri for Kinyua for 3rd Defendant

No Appearance for 2nd Defendant

Court Assistant - Firdaus

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