



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. 58 OF 2018

**AN (SUING THROUGH THE NEXT FRIEND
AND REPRESENTATIVE ONE)**

BMB.....APPELLANT

VERSUS

JBM.....RESPONDENT

RULING

1. On the 31/7/2018 Hon. Mutai RM allowed the withdrawal of Children case No. 18 of 2018. Children Case no. 18 of 2018 was filed at Ogembo Court by one BMB who was described as the next friend to the plaintiff AN. The defendant is Julius Bichanga Motiri. The proceedings in the Children case indicate that the plaint was filed by the firm of Muma Nyagaka & company advocates on the 3/7/2018. On the 5/7/2018 the firm of Ombuhi Mogire & Company Advocate filed a memorandum of appearance on behalf of the defendant. On the 11/7/2018 the firm of Bwondika & Company advocates filed a Notice of Change and or Substitution of Next friend by Guardian Ad Litem one BKO who is described as the guardian ad litem of AN. The said firm simultaneously on the 11/7/2018 filed a Notice of Withdrawal of the matter and a Notice of Change of Advocates in place of Muma Nyagaka & Co. advocates. On the 12/7/2018 the trial court declined to withdraw the Children case, the court observed that it had to consider the best interests of the child. The court directed that the children's officer to investigate the matter and to file a report. The report was to be filed within two weeks. After considering the said report the court gave its ruling dated the 31/7/2018.

2. On the 15/8/2018 a Memorandum of Appeal was filed by one BMB in person . His appeal is against the judgment of Hon. Mutai dated the 31/7/2018. He describes himself as the next friend or representative of AN. The respondent is JMB who is represented by the firm of Ombuhi K. Mogire & co. Advocates. On the 1/10/2018 the firm of Migiyo & Co. advocates entered appearance for the appellant. The said firm filed a record of appeal on the 31/10/2018. Ms Sonye Ondari filed a Notice of appointment on the 20/11/2018 he joined Mr Mogire to act for the respondent.

3. On the 1/11/2018 the appeal was admitted for hearing. On the 6/12/2018 the parties argued a Preliminary Objection which was filed in court on the 22nd of November 2018. The points of law raised in the preliminary objection are that; the time element, the locus standi and jurisdiction.

4. Mr. Mogire for the respondent argued as follows; that the appeal was filed out of time as the ruling was delivered on the 31/7/2018 and appeal was filed on the 31/10/2018. That the appeal should have been filed on the 12/8/2018. That the wordings of section 79 (g) are in mandatory terms. On locus standi it was submitted that there was a Notice of Change and Substitution of Next friend filed by BKO replacing BM and until the withdrawal of the case there were no changes and therefore BMB lacks the locus standi to move this court. On jurisdiction it was argued that this court lacks the jurisdiction to entertain the matter as after the trial court allowed the withdrawal of the suit there was no suit pending anywhere. That the matter was withdrawn under Order 25 of Cap 21 Civil Procedure Code. That the appellant's have the option of filing another suit in a court with competent jurisdiction and not the High Court. That this court should make a finding that a fresh suit be filed in the lower court. That the appellant has not appealed against the substitution nor the order of withdrawal. The respondent asked this court to make an interpretation whether a withdrawal is a judgment. That the matter was withdrawn before the hearing. That the appeal is misplaced and is brought by a litigious person as B has not appealed.

5. The appellant in response submitted that the appeal was filed within the requisite time. The ruling was delivered on the 31/7/2018 and the appeal was filed on the 15/8/2018. That at page 4 of the Record of Appeal the appellant is indicated as the plaintiff. That there was scheme made unceremoniously to have the plaintiff replaced by BK who is a wolf in sheep clothing who has come to eat the flock which she did by making an application to withdraw the matter, thus interfering with the cause of justice. That the proper party is the appellant. On jurisdiction it was submitted that the appellant has appealed against the Ruling of Hon. Mutai and as an aggrieved person he has a right to appeal and therefore the court is clothed with the jurisdiction. That the preliminary objection is not sustainable and that it is an attempt to prevent the appellant from pursuing the appeal. That the appellant will be able to demonstrate what he means by a wolf in sheep skin.

6. Mr. Mogire in reply responded that the plaintiff in the lower court is AN and not BMB that if they disown B then the appeal will not stand as the appeal is based on B's action.

7. I have carefully perused the lower court file the Record of Appeal and the submission made on the preliminary objection. Sir Charles Hewbold P. in *Mukhisa Biscuits manufacturing Co. Ltd Vs. West End Distributors* (1969) E. A 696 at page 700 law J.A. stated that **“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...A preliminary objection is in the nature of what used to be a demurrer. It 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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”**.

8. The issues for determination in the preliminary objection are; was the appeal filed out of time, does the appellant have the locus to file this appeal and does this court lack jurisdiction to entertain the appeal .

9. On the first issue the Ruling was delivered on the 31/7/2018. The appeal was filed on the 15/8/2018. The Memorandum of Appeal is dated 13/8/2018 and was filed in court on the 15/8/2018. Section 79 (g) provides that, ***every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against***. The appeal was filed on the 15/8/2018, 30 days had not lapsed. It was therefore filed within time.

10. The 2nd issue is whether the appellant has the locus standi to file the appeal. To determine this issue I have considered the pleadings in the lower court. The plaintiff in the lower court was AN who filed suit through the appellant as next of friend and legal representative. There was a Notice of change and substitution of the next friend by guardian ad litem BKO. This notice was served on the firm of Muma Nyagaka who filed the plaint in the lower. This was not challenged by the appellant's counsel in the lower court nor the appellant himself. The notice of withdrawal which the lower court accepted and marked the suit as withdrawn was filed by BK and not BMB. BMB as per the said Notice of change and substitution was no longer a next friend of the plaintiff. He therefore has no locus to file this appeal. If B was aggrieved she should have filed the appeal. The objection raised has merit as I find that BMB has failed to demonstrate that he the locus standi to file the appeal. The suit was not heard. BM can another suit file suit. This court has the jurisdiction to hear an appeal from the lower court but the objection raised sufficiently challenges the appellant's right to file the appeal or his locus standi. The withdraw of a suit may be challenged even on appeal but the appellant must demonstrate that he has the right to file the appeal.

11. Lastly the court granted the B's plea to withdraw the matter. What the court read was a ruling and not a judgment. A notice to withdraw in my view cannot be a judgment but an order of the court, which allowed the suit to be withdrawn.

12. I find that the preliminary objection has merit the appellant in light of the proceedings in the lower court has no locus standi to file the appeal. He is at liberty to file another suit in the lower court. The appeal filed on the 15/8/2018 is therefore dismissed with costs.

Dated and delivered at Kisii this 15th day of January 2019

R.E.OUGO

JUDGE

In the presence of;

Mr. Migiro For the Appellant

Mr. Mogire For the Respondent

Rael Court Clerk.