



REPUBLIC OF KENYA



**NJWW (A minor suing through the next friend & father GWW) v Ngugi & another  
(Civil Appeal E010 of 2023) [2025] KEHC 16116 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E010 OF 2023  
PJO OTIENO, J  
NOVEMBER 7, 2025**

**BETWEEN**

**NJWW (A MINOR SUING THROUGH THE NEXT FRIEND & FATHER  
GWW) ..... APPELLANT**

**AND**

**SAMSON NJIHIA NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**VINCENT MARUTI KHATETE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon.S.N. Makila  
(PM) in Kitale CMCC No. 83 of 2020 delivered on 1st March, 2023)*

**JUDGMENT**

**Background of the Appeal**

1. By a plaint dated 17<sup>th</sup> April 2020, the appellant instituted a suit against the respondents seeking general damages for pain, suffering, and loss of amenities; special damages in the sum of Kshs. 8,065; costs of the suit; and interest on damages and costs.
2. The appellant's case was that on or about 8<sup>th</sup> January 2020 at around 4:00 p.m., she was a lawful fare-paying passenger aboard motor vehicle registration number KBD 548T, a Toyota Townace, when upon reaching the Endebess–Suan area, the driver of the said vehicle negligently drove, managed, and/or controlled it, causing it to veer off the road, cross into the opposite lane, and collide with an oncoming motor vehicle registration number KCT 397K, a Howo lorry. As a result of the said collision, the appellant sustained serious bodily injuries. The particulars of negligence were duly pleaded just as those of special damages.
3. In their statement of defense dated 15<sup>th</sup> July 2020, the respondents denied ownership of motor vehicle registration number KBD 548T and all allegations of negligence contained in the plaint. They further



contended that if any accident did occur, the same was caused or substantially contributed to by the negligence of the appellant herself and/or the driver and/or owner of motor vehicle registration number KCT 397K.

4. By its judgment delivered on 1<sup>st</sup> March 2023, the learned trial magistrate struck out the appellant's suit, with no order as to costs, for failure to comply with the provisions of Order 32 Rule 12 of the Civil Procedure Rules, that is, for failure by the appellant to discharge her next friend upon attaining the age of majority.
5. Aggrieved by the said decision, the appellant preferred the present appeal vide a Memorandum of Appeal dated 30<sup>th</sup> March 2023, seeking orders that the judgment and decree of the learned magistrate be set aside and substituted with an appropriate finding on liability and quantum of damages. The appellant also prays for the costs of this appeal as well as the costs of the suit in the lower court. The appeal is anchored on the following grounds: -
  - a. That the learned magistrate erred both in law and fact by striking out the suit by failing to consider the evidence adduced in support of the claim.
  - b. That the learned magistrate erred both in law and fact by striking out the suit based on procedural technicality and without considering the evidence on record.
  - c. That the learned magistrate erred both in law and fact in dismissing the appellant's suit by failing to consider article 159(2)(d) of *the Constitution*.
  - d. That the learned magistrate erred both in law and fact in failing to give reasons and basis in her judgment and striking out the appellant's suit without considering the oxygen principle on administration of justice without due regard to procedural technicalities.
  - e. That the judgment and decree of the learned magistrate is in the circumstances unfair, unjust and irregular and should not be allowed to stand.
6. The court directed that the appeal be canvassed by way of written submissions pursuant to which direction the parties have filed respective written submissions now summarised below.

### **Appellant's Submissions**

7. The appellant contends that failure to comply with Order 32 Rule 12 of the Civil Procedure Rules is not fatal to a suit. In support of this position, she refers the court to the decision in *J.N. & Others v Board of Management St. G School Nairobi & Another* [2017] eKLR, where the court observed:

“Striking out a court proceeding is a drastic and draconian step that amounts to shutting out the door for a litigant and it ought to be exercised carefully, with a lot of caution, and ought to be used as a tool of last resort and in extremely deserving cases where the case in question is hopelessly bad, unsustainable and the defect in question must be incurable... Our judicial system would never permit a party to be driven from the judgment seat without any court having considered his right to be heard, except in cases where the cause of action is obviously and almost incontestably bad... The fundamental duty of the court is to do justice between the parties.”



8. The appellant further relies on the case of *D.T. Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1, where the court held:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

9. In light of the foregoing authorities, the appellant urges this Honourable Court to find that the trial magistrate erred in striking out the suit, and prays that the appeal be allowed as prayed.

### **Respondents’ Submissions**

10. The respondents contend that the present appeal was filed outside the thirty-day period prescribed under section 79G of the *Civil Procedure Act*, arguing that the memorandum of appeal was filed on 31<sup>st</sup> March 2023, which was the 31<sup>st</sup> day after delivery of judgment on 1<sup>st</sup> March 2023. They therefore submit that the appeal was lodged out of time and is consequently incompetent, urging the court to strike it out with costs.

11. The respondents further support the finding of the trial court, asserting that the provisions of Order 32 Rule 12 of the Civil Procedure Rules are couched in mandatory terms, and that non-compliance therewith renders the proceedings a nullity.

12. In support of this argument, they rely on the decision in *MMN v Kilimani Junior Academy* [2011] eKLR, where the court held:

“It is also very pertinent to note that the relevant provisions of Order 32 Rule 12 are worded in mandatory terms and were similarly worded even in the earlier Order XXXI of the previous Civil Procedure Rules. None of the requirements or the steps stipulated in the aforesaid provisions were complied with or taken by the Plaintiff on attaining majority... I thus order that the plaint be struck out together with all its proceedings.”

13. The respondents therefore urge this Honourable Court to find the appeal devoid of merit and to dismiss it with costs.

### **Issues for Analysis and Determination thereof.**

14. Being a first appeal, the court has given due consideration to the pleadings filed at trial, the judgment of the trial court, the memorandum of appeal and the submissions by both parties, in discharge of its duty to reassess, reevaluate and reexamine the entire record afresh with a view to coming to own conclusions. Having done so, the court appreciates the appeal to only challenge apportionment of liability as applied to damages and costs and thus isolates the following three issues to stand out for its determination;
- a. Whether the appeal was filed within the time prescribed under section 79G of the *Civil Procedure Act*?
  - b. Whether the appellant’s failure to comply with Order 32 Rule 12 of the Civil Procedure Rules was fatal to the suit?
  - c. What is the appropriate order on costs?



**Whether the appeal was filed within the time prescribed under section 79G of the Civil Procedure Act?**

15. Section 79G of the Civil Procedure Act provides that every appeal from a subordinate court to the High Court shall be filed within thirty (30) days from the date of the decree or order appealed against, excluding any time certified by the lower court as having been required to prepare and deliver a copy of the decree or order.
16. The record shows that the judgment of the trial court was delivered on 1<sup>st</sup> March 2023, while the Memorandum of Appeal was filed on 31<sup>st</sup> March 2023. The law on computation of time under 50 Rule 8 is that in computing time, the first day is excluded. Applying that provision to the facts revealed in the record, the date of delivery of the decision is excluded with the effect that when computation begins on the 2<sup>nd</sup>, the appeal was filed on the thirtieth day, thus within the statutory timelines.
17. The Court is therefore satisfied that the appeal was lodged within the statutory period, and the objection on that ground is without merit.

**Whether the appellant's failure to comply with Order 32 Rule 12 of the Civil Procedure Rules was fatal to the suit**

18. Order 32 Rule 12 of the Civil Procedure Rules provides that where a minor plaintiff attains the age of majority during the pendency of a suit, such plaintiff must, within a reasonable time, elect either to proceed with or to abandon the suit. Where the plaintiff elects to proceed, the law obligates him to apply for an order discharging the next friend and to obtain leave to continue the proceedings in their own name. The provision is couched in mandatory terms, underscoring the importance of procedural compliance in such circumstances.
19. The respondents contended that the appellant's failure to comply with the above provision rendered the proceedings incompetent and that the trial court was correct in striking out the suit. They relied on the decision in *MMN v Kilimani Junior Academy* [2011] eKLR, which emphasized the mandatory nature of the rule and the consequence of non-compliance.
20. While I am in agreement that the rule is expressed in mandatory terms, I am equally guided by well-established jurisprudence that the power to strike out pleadings must be exercised with great caution and only in the clearest of cases where the defect is incurable. See *DT Dobie & Company (Kenya) Ltd v uchina* (supra) and *JN & Others v Board of Management St. G School Nairobi & Another* (supra), in which the court were cautioned against shutting out litigants from the seat of justice on purely procedural grounds.
21. In the present appeal, it is not disputed that by the time the suit was heard and determined, the appellant had attained the age of majority. There has not been demonstration or indeed any allegations that the lapse has visited any prejudice against the appellant. If anything, any prejudice could only portend against the next friend in personal liability in the event the suit was dismissed with costs against him.
22. More importantly, legal disputes in common law and the adversarial litigation are determined on the basis of fact alleged as supported by the evidence adduced. In this matter the question of whether or not the next friend had been discharged was never pleaded anywhere nor was it raised even in the cross examination by the respondent, as defendant at the trial. It is a matter that was only raised in the submissions and well after the appellant had filed own submissions. If the trial court was to be minded to determine the suit on that single technical issue, then, the rules of natural justice demanded that the



appellant be called to make a comment of the legal issue. The record shows that the appellant was never granted that natural right with the consequence that she was denied the right to a hearing on the issue. It was thus an error on the part of the trial court to proceed as he did in striking out the suit on an issue the parties had never pleaded, given evidence on or given the chance to address the court on. That error must be corrected by an order for setting aside the judgment.

23. To this court, the omission to move the court for the discharge of the next friend was therefore a procedural lapse that never went to the root and merit of the dispute before the court. It equally did not occasion any prejudice to the respondents who was at all time notified and kept aware that he was defending a cause of action, arising from a road traffic accident.
24. The court in so holding follows the spirit of Article 159(2)(d) of *the Constitution*, which enjoins courts to administer justice without undue regard to procedural technicalities. The duty of the court is to do substantive justice between the parties and not to elevate procedural missteps to the level of substance of the case. It was therefore incumbent upon the trial magistrate to consider whether the omission could have been regularized by amendment or other curative measures before resorting to the drastic step of striking out the suit.
25. In light of the foregoing, I find and hold that although the provisions of Order 32 Rule 12 are couched in mandatory terms, non-compliance therewith is not necessarily fatal to a suit. It amounts to a procedural irregularity that is curable and should not have led to the striking out of the entire proceedings. The trial court's decision to do so amounted to a misdirection in law and an improper exercise of judicial discretion. For that error, the judgment of the trial court striking out the suit is set aside.
26. Having been set aside, the striking out order, the suit thus stands as it were before it was struck out. The court notes that having struck out the suit, the trial court did the expected lawful action of determining liability and assessing damages it would have awarded had the suit not been struck out. That aspect of the judgement has not been challenged and thus not available for the court's consideration in this appeal.
27. The effect of setting aside the striking out order is therefore that judgment is entered for the appellant on liability at 100% and general damages assessed at Kshs 120,000/=.
28. In addition, there was specific pleading and prayer for special damages in the sum of Kshs 8,065 which was sufficiently proved by way of receipts. The trial court made no mention of that claim despite the pleadings and evidence recorded. That was equally an error which the court corrects by awarding to the appellant the due sum.
29. In summary, the judgment of the trial court is set aside and, in its place, substituted a judgment in favour of the appellant/ plaintiff in the sum of Kshs 120,000 for general damages and kshs 8,065 in special damages.
30. Having succeeded the appellant is awarded the costs of the appeal as well as the costs before the trial court.
31. The appellant equally gets interests on special damages from the date of the suit and on general damages from the date of the judgment before the trial court.

**DATED, SIGNED AND DELIVERED VIRTUALLY, AT LODWAR THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2025**

**PATRICK J O OTIENO**



**JUDGE**

