Okaka & another v Wesonga (Civil Appeal E003 of 2022)
[2022] KEHC 9804 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 9804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E003 OF 2022

RE ABURILI, J

JUNE 30, 2022

BETWEEN

NICHOLAS STEPHEN OKAKA ..... 1ST APPELLANT

CHARITY NJOKI MUIGAI ..... 2ND APPELLANT

AND

ALFRED WAGA WESONGA ..... RESPONDENT

(An appeal arising out of the ruling and order of the Honourable J.P. Nandi in the Principal's Magistrate's Court at Bondo delivered on the 21st January 2022 in Bondo PMCC No. 45 of 2020)

JUDGMENT

Introduction

1. The history of this appeal is necessary. That history also applies to HCCA No. E002 of 2022 Nicholas Stephen Okaka and Charity Njoki Muigai versus Aggrey Odhiambo Odundo. The appellants herein and in the latter appeal were the Defendants in Bondo PMCC Nos. 45 and 46 of 2020. In the instant appeal, the Respondent Alfred Waga Wesonga in the lower court sought for damages arising from a road traffic accident involving the appellants' motor vehicle registration number KCH 446R which was allegedly negligently driven by the appellant's driver/agent or servant and that as a result, it allegedly knocked the respondent/plaintiff as he lawfully walked along Owimbi Luanda K'otieno road thereby occasioning him injuries. The claim was vide plaint dated 22nd May 2020.

2. The appellants entered an appearance on 5/8/2020 and filed their defence dated 6/10/2020 ON 15/10/2020 denying the plaintiff's claim against them and pleading that the plaintiff/respondent herein was to blame for the material accident.

3. On 19/10/2020, the plaintiff filed a reply to defence, pre-trial questionnaire and list of issues. The matter was then fixed for directions on 26/10/2020 and rescheduled for 13/11/2020 and 18/12/2020

with neither party appearing until 5/2/2021 when only the plaintiff's counsel appeared and intimated to court that they had complied and sought for a hearing date which was fixed for 15/4/2021.The same directions were to apply to PMCC 46 of 2020, 94 of 2019 and 95 of 2019.

4. On 15th April 2021, both parties' counsel were present and that is when the plaintiff's counsel informed the court that they had received an email from the defence counsel requesting that their client goes for a second medical examination but that they were not served with a date for the said examination. Ms Turgut counsel for the appellant herein confirmed the position and the trial court directed that the plaintiff/ respondent herein could still be examined after he had testified and that the second medical examination could have been done long before the case was fixed for hearing the matter was certified as ready for trial. The trial court directed that the case would proceed to hearing at 2pm. Later that afternoon at 4.30 pm, both parties were present save that Ms Omollo now held brief for Ms Turgut for the defendant and sought for an adjournment on account that she had just delivered and it was observed that the plaintiff who had been in court in the morning had also left the court premises. The court then granted a last adjournment and set the hearing for 12/5/2021.On the latter date, Ms Cherangate held brief for Ms Bii and sought an adjournment on account that the defence counsel was unwell. The plaintiff's counsel intimated that as the defence counsel had written to them indicating that the plaintiff goes for a second medical examination on the first week of July. The court reluctantly granted a final adjournment to both parties and fixed the matter for hearing on 8/7/2021. on the latter date, Ms Abir held brief for Ms Turgut while Ms Nanungi for the plaintiff sought an adjournment on account that her client was attending examinations and Ms Abir agreed that they could proceed for hearing on another date. The court adjourned the hearing to 5/8/2021,

5. On 5/8/2021, Ms Oyoko advocate appeared for the plaintiff while Ms Ogalo held brief for Ms Turgut. Ms Turgut requested for the file to be placed aside which request was accepted by the trial court and later, the record shows that Ms Turgut appeared and stated that she was not ready to proceed as the plaintiff had not gone for a second medical examination and that he could go at the end of September. Further, that in CC 46 of 2020, the plaintiff did not have the national identification card and that they should be ordered to attend the second medical examination.

6. The plaintiff's counsel submitted before the trial court that the two plaintiffs in the respective suits had not been examined by the defendants' doctor because they had been turned away because they did not have national identity cards but birth certificates. It was asserted that the plaintiff in PMCC 45 of 2020 had no identification card and that in CC 46 of 2020 the plaintiff had a waiting card.

7. The defendant's counsel Ms Turgut also informed the trial court that the plaintiff had not been examined and that counsel herself had just resumed work. The court then briefly made a ruling reiterating the ruling of 15/4/2021 where it had ordered the plaintiff to go for a second medical examination and marked the adjournment as last, with the same issue arising on 12/5/2021 where a final adjournment was granted, the trial magistrate therefore directed that the case was to proceed to hearing.

8. Ms Turgut sought leave to appeal that ruling that denied her an adjournment and the trial court granted leave to appeal but directed that the hearing would nonetheless proceed and the hearing proceeded with Ms Turgut leaving the court session without informing the court. The plaintiff testified, closed his case and the court closed the defence case and set it for mention to confirm filing of submissions on 20/8/2021. On the latter date, Ms Abir advocate held brief for Ms Turgut for the defendant and sought for one week to file submissions, which request was granted by the court with a judgment date being set for 17/9/2021. No submissions were filed by the defendants' counsel. That Judgment was delivered as scheduled on 17/9/2021.

9. This court also observes that much earlier, on the 27/4/2021, the defence counsel filed Notice of motion seeking for stay of proceedings for the plaintiff to submit himself for a second medical examination by a doctor of the defendants' choice. That application was considered alongside the application for adjournment which was initially declined but because the defence counsel was reported to have just delivered and the plaintiff had also left court when the file was placed aside to 2pm, and recalled later at 4.30pm, the trial court adjourned the matter.

10. Vide a Notice of motion dated 30th September, 2021, the defendant's counsel filed a Notice of motion on 22nd October 2021, over 21 days after the judgment was delivered, seeking for an order to set aside the exparte judgment plus all proceedings emanating from therein and that the case be reopened for participation by both parties and for stay of execution of the said exparte judgment dated 17/9/2021 and proceedings emanating therefrom. They also urged the court to order that the matter be fixed for hearing and the plaintiff be recalled for cross examination. Further, that the plaintiff attends a second medical examination at a date to be agreed by the parties before hearing. That application was heard and in vide a ruling delivered on 21st January, 2022, the application was dismissed with costs to the plaintiff.

11. Opposing that application dated 30th September 2021, the respondent through his advocate filed a replying affidavit deposing and contending that when the suit had come up for hearing on the 15/4/2021, the appellants sought an adjournment on the grounds that the respondent had not gone for a second medical examination and yet from counsel's depositions, when the plaintiff/ client went for a second medical examination, he was turned away on account of lacking an Identity Card despite him presenting a birth certificate and further that when the matter came up for hearing on the 5/8/2021, the appellants' advocate agreed to proceed but later chose not to take part in the hearing without notifying the court.

12. In his ruling, which is impugned herein, the trial magistrate agreed with the plaintiff's counsel's contention and held that the appellants were using delaying tactics. He therefore declined to grant the orders sought in the application and dismissed it with costs, thus necessitating this appeal.

13. Vide a memorandum of appeal dated 22nd January 2022 and filed on the 27th January 2022, the appellants raised three grounds of appeal against the trial magistrate's ruling as follows:

    a) That the learned trial magistrate erred in law and in fact in holding that the plaintiff had undergone 2nd medical examination and ruling that the matter to proceed for hearing without considering the rules of natural justice and the harm that would befall the appellants noting the serious injuries alleged to have been sustained by the respondent have never been confirmed.

    b) That the learned trial magistrate erred in law and in fact in denying the appellants their right to a fair hearing by denying the appellants application for an adjournment in order to address issues of 2nd medical examination which was pending.

    c) That the learned trial magistrate erred in law and in fact in that the appellant's application to set aside the ex-parte judgement dated 17/9/2021 lacks merit and that it was a delaying tactic on the part of the appellant.

14. The appellant urged this court to allow the appeal and make the following orders:

    (a) .....

    (b) set aside the exparte proceedings of 5/08/2021 together with all the consequential orders thereafter;

(c) set aside the exparte judgment dated 17/9/2021 together with all consequential orders thereafter

(d) order that the matter to start denovo

(e) order that the plaintiff do submit to medical re-examination by a doctor of the defendants' choice together with the national identity card and all his treatment notes within 30 days from the date the appeal is allowed.

15. The parties filed submissions to canvass this appeal.

The Appellants' Submissions

16. The appellant's counsel opened the submissions by giving some factual background to this matter, with some facts which are inaccurate. For example, the facts relating to Bondo PMCC No. 46 OF 2020 Aggrey Odhiambo Odundo versus Nicholas Stephen Okaka & Another relate to Civil Appeal No E002 of 2022. In addition, facts relating to circumstances leading to the withdrawal of Civil Appeal No. E30 of 2021 are inaccurate because to the best of my knowledge, no matter was ever brought to my attention in time for action under a certificate of urgency and was ignored or delayed to be overtaken by events as alleged by counsel for the appellants.

17. Counsel for the appellant framed three issues for determination namely:

a) proviso(sic) of the law on setting aside proceedings of 5/08/2021 and exparte judgment of 17/09/2021

b) whether the appellant has demonstrated a sufficient cause to warrant setting aside of the exparte decision or proceedings

c. whether the respondent shall suffer any prejudice if the appeal fails.

18. On the first issue, and relying on Order 12 Rule 7 of the Civil Procedure Rules, the appellants' counsel submitted that where judgement is entered for the plaintiff in the absence of the defendant, the defendant may apply for setting aside of the ex-parte judgement. Further reliance was placed on Order 10 Rule 11 of the Civil Procedure Rules which is similar to Order 12 Rule 7 of the Civil Procedure Rules.

19. The appellants' counsel further submitted that setting aside an exparte judgement or proceedings was a matter of the discretion of the court as was held in the case of Esther Wamaitha Njihia & 2 Others v Safaricom Ltd and also relied on the case of Shah v Mbogo & Ongoma v Owota where the court held that for such orders to issue, the court must be satisfied that either the defendant was not properly served with summons and or that the defendant failed to appear in court at the hearing due to sufficient cause.

20. On the second issue, it was submitted on behalf of the appellants that they had raised sufficient and reasonable cause and/or grounds as to why their counsel failed to proceed for hearing being that she did not have instructions to proceed as the injuries sustained by the respondent were not confirmed to be true by their own doctor, as required under section 10(3A) of the Insurance Motor Vehicles Third Party Risks (Amendment) Act.

21. The appellants' counsel submitted that an adjournment on the material date would not have been prejudicial to the plaintiff as the circumstances under which an adjournment was sought and the reasons advanced were sufficient enough for the trial court to consider and/or accommodate the appellant's counsel, considering that the respondent was born on 8/1/1999 as per his birth certificate

hence he ought to have had a national identity card. Reliance was placed on the Ugandan Case of *Famous Cycle Agencies Ltd & 4 Others v Masukhalal Ramji Karia* SCCA No. 16 of 1994 (1995) IV KALR 100 as well as that of *H.K. Shah & Another v Osman Allo* [1946] 14 EACA 45 where both courts laid down the principles to be applied for granting or refusal of applications for adjournments.

22. It was the appellants' submission that by being denied an adjournment, they were condemned unheard contrary to Article 50 (1) of *the Constitution* and Article 25 (c) which provides that the right to a fair hearing cannot limited. Reliance was placed on the cases of H.K.Shah & another v Osman Allo and of *Lawrence Muturi Mburu v Dalago Tours Ltd* [2019] eKLR.

23. It was submitted that the trial court ought to have found a balance with regard to the scales of justice between the expedient disposal of suits vis a vis the locking out of a litigant from trial as was held by the Court of Appeal in the case of *Japheth Pasi Kilonga & 8 Others v Mombasa Autocare Ltd* [2015] eKLR.

24. The appellants further submitted that they were condemned unheard, even after raising triable issues for the court to consider in its statement of defence and further that the respondent had since got an ex-parte judgement contrary to the provisions of Article 50 of *the Constitution* as espoused in the cases of HCCA 125 of 2018 – *SM v HGE* and *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR.

25. The appellants further submitted that they gave sufficient grounds for the adjournment and further that they had filed a defence that raised triable issues and as such failure to set aside the proceedings and judgement of the trial court will expose them to more loss should the respondent proceed to enjoy the fruits of the said irregular judgement.

26. It was submitted by the appellants' counsel that the court should have heard the suit on merits and parties allowed to canvass their cases fully prior to the trial court's determination as was held in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 and further the case of *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR where the court observed that it must not only consider why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which raises triable issues.

27. On interference with the discretion of the trial magistrate, the appellants' counsel submitted that the Court consider the case of *Savannah Development Company Ltd v Merchantile Company Limited* CA No. 120 of 1992 where the court held interalia that it won't hesitate to interfere with the trial court's decision if the result of the adjournment was to defeat the rights of the parties or cause injustice to one or other of the parties.

The Respondent's Submissions

28. The respondent's counsel framed two issues for determination and submitted on the same namely:

    a) whether failure to undergo a second medical examination bars prosecution of a suit

    b) whether the appellants are causing unnecessary delays

29. On the first issue, it was submitted that on several occasions when the matter was fixed for hearing by consent of both parties, the appellants sought adjournment on the grounds that the respondent had not undergone a second medical examination but that when the respondent availed himself for the 2nd medical examination, at a time when he was a form 3 student and thus had a birth certificate and not an identity card, he was turned away by the appellants' doctor.

30. The respondent's counsel submitted that a second medical examination was not a requirement for compliance under Order 11 of the *Civil Procedure Rules* 2010 as well as Section 10 (3A) of

the Insurance (Motor Vehicle Third Party Risks (Amendment) Act and that as such, it could be undertaken at any time before the case was closed.

31. It was submitted that the applicant's advocate decided not to take part in the proceedings even after the trial court directed that the plaintiff shall attend the second medical examination after the first hearing. The respondent relied on the case of HCCA No. 10 of 2019, Gulf Fabricators v County Government of Siaya where this court held interalia that justice is better served when both parties to a dispute are accorded an opportunity to be heard on merit to enable each of the party validate their issues, unless it is shown that the party in question has sought to merely delay the course of justice.

32. On the second issue, the respondent's counsel submitted that the appellants were causing unnecessary delays as they had the opportunity to cross-examine the respondent but deliberately chose not to and as such, there were no compelling reasons why the case should be reopened after judgement had been delivered as the appellants had not met the requirements for setting aside judgment. Counsel relied on the case of Pithon Waweru Maina v Thuka Mugiria.

Analysis and Determination

33. I have considered the grounds of appeal, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof. I have also considered the material before the trial court, giving rise to this appeal, observing and in compliance with and being cognizant of the role of this court as a first appellate court as stipulated in section 78 of the *Civil Procedure Act* and as interpreted in many decisions among them, the locus classicus case of *Selle v. Associated Motor Boat Company Ltd* [1968] E.A 123 which is, among others, to review the evidence and to draw our own conclusions. I am alive to the fact that the application leading to the impugned ruling was prosecuted by affidavit evidence which I have considered together with the facts leading to the judgment of 17/9/2021.

34. I find the main issue for determination arising from the submissions of the parties' advocates which can be summarised into one namely: whether the trial court should have allowed the application for the setting aside of the exparte judgement rendered on 17/9/2021 and all the consequential orders. There are other ancillary questions that I will endeavour to resolve.

35. The decision whether or not to set aside ex parte judgement is discretionary which discretion is intended to be exercised to avoid injustice and 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. This is what the Court of Appeal held in the case of *Shah v Mbogo & Another* [1967] EA 116.

36. In this case, the grounds upon which the application to set aside the judgement were predicated were that the appellant contended that they were unjustly and prejudicially denied an adjournment during which they wanted the respondent to proceed on a 2nd medical examination and as a result of being denied an adjournment, they were denied a right to a fair hearing as guaranteed in Article 50(1) of *the Constitution*, considering that the right to a fair trial cannot be limited as stated in Article 25 of *the Constitution*.

37. The circumstances under which an application for adjournment would be granted was considered by the Supreme Court of Uganda in Famous Cycle Agencies Ltd supra as reiterated in the case of *Mbithuka Titus v Jackline Mutindi* [2020] eKLR where it was held interalia that in granting an adjournment, the court must be satisfied that a sufficient cause has been shown.

38. In this case, the reason for the appellants' counsel seeking an adjournment was because the appellants wanted the respondent to proceed for a second medical examination. In their submissions, the

appellant's counsel submitted that the respondent was born on 8/1/1999 as per his birth certificate hence he ought to have obtained a national identity card. The respondent contended in the lower court that he only had a birth certificate and that he was a form three student and from the trial court record, his treatment notes show that he was between 18 and 19 years old. On one of the occasions when the case was adjourned, he was said to be attending to examinations. It was his contention that he had not obtained an identity card and that when he went for the second medical examination as directed, he was turned away by the defendant's doctor on account that he did not have an identity card, although he had carried a birth certificate. This was not controverted by the appellants.

39. Section 10 (3A) of the Insurance (Motor Vehicles Third Party Risks) (Amendment) Act provides that: "No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.)

40. From the wording of section 10 (3A) above it is clear that the second medical examination is prior to the determination of liability which determination can only be reached when the court retires to consider the evidence adduced by both parties, in its judgement or by consent of both parties. The appellant herein asked the respondent to go for a second medical examination and which the respondent complied by presenting himself for such examination but was turned away on account that the respondent had no identity card. The respondent did not refuse to be subjected to a second medical examination. Instead, from the trial court record, the appellant's doctor of choice could only be visited by the respondent on prior appointment and the dates given were being suggested in court, yet according to the trial magistrate, the respondent could have been examined way before the suit was certified for hearing or even after the plaintiff had testified but before the case was closed.

41. Having read the above provisions, Iam satisfied that the 2nd medical examination can be and could still have been carried out even after the claimant had testified on the injuries that he sustained and not necessarily/mandatorily prior to the commencement of the hearing of the case. This is so because the appellants could still have called their doctor to testify in defence and produce the second medical examination report now that the case had already been certified ready for trial without them having filed all their documents intended to be relied on at the hearing as required under Order 11 of the Civil Procedure Rules.

42. I observe that before the trial court, the appellants' advocate sought adjournment prior to the start of the hearing, to enable the respondent go for a second medical examination, something that the trial magistrate had ruled that the second medical examination could be done prior to the close of the case.

43. Further, it was uncontroverted that the respondent presented himself before the appellants' doctor but was turned away on grounds that he did not have an identity card despite the fact that he was a Form 3 student and had not taken out his identity card and despite the fact that he had his birth certificate with him.

44. It is also worth noting that prior to closing the plaintiff's and defence cases, the trial magistrate noted that the appellants' advocate left the session without informing the court despite being seized of the hearing. The question is whether in the circumstances described herein, the appellants were denied an opportunity and right to be heard and whether the trial court in declining to grant an adjournment exercised that discretion injudiciously.

45. Having outlined and considered all the circumstances of this case as they unfolded in the trial court, in my view, the case before the trial court was not one in which the Appellants can be said to have been denied an opportunity to be heard but one in which such an opportunity was available and was not utilized. The appellant's counsel in my humble view was hell bent to demand for an adjournment

despite the court's guidance that the plaintiff testifies upon which he could still go for a second medical examination before the case for the defence was closed.

46. That being the case, the appellants cannot be heard to complain that they were denied an opportunity to be heard in the matter. This is simply a case where a party who was given an opportunity to be heard decided, through counsel, to obstinately demand from the court to exercise discretion to adjourn the hearing at all costs on their own terms and convenience, with the advocate who is an officer of the court and who was before the court, unceremoniously abandoning the court without leave of court simply because she had her client's instructions not to proceed with the case. Such a party only has themselves to blame if the Court, in the exercise of its discretion, decides to, as was in the instant case proceed, their absence notwithstanding. I say so because adjournment can only be granted on sound reasons being given, not for the sake of it.

47. In the instant case, it is clear that the trial court had granted an adjournment on several occasions and even directed that the plaintiff's testimony be taken and that the plaintiff could still undergo a second medical examination after he had testified. That in my view, cannot be said to have been unreasonable on the part of the trial court or prejudicial to the appellants. The alleged prejudice in my view, has not been demonstrated.

48. To emphasize this point, the material before the trial court is worth repeating here. The trial court record shows that the matter was certified as ready for hearing and a hearing date given on 5/2/2021 for 15/4/2021 two months away. On the latter date, all the parties' counsel were present and the Respondent's counsel Ms Oyoko informed the court that she had received an email from the appellant's counsel asking the plaintiff to go for a second medical examination but with no appointment date. The court ordered the case to proceed at 2pm on the basis that the second medical examination could be done even after the plaintiff had testified. The appellant's counsel Ms Turgut then left the court and Ms Nanungi held her brief at 2pm saying that she was seeking an adjournment because she, Ms Turgut had just delivered. It is nonetheless not clear whether Ms Turgut had delivered that very day which in my view, she did not have to attend court. It would have sufficed for another counsel to hold her brief and inform the court of her situation. Further, it had become late in the day, after 4.30pm and it was observed that the plaintiff had left the court. The court granted a last adjournment and fixed the case for hearing on 12/5/2021.

49. On the latter date, Ms Cherangate held brief for Ms Bii and sought an adjournment on account that Ms Bii was unwell and the plaintiff's counsel Ms Oyoko submitted that the defence had requested that their client goes for a second medical examination in the first week of July. The court reluctantly granted an adjournment and made it a final adjournment and fixed the hearing for 8/7/2021 again nearly two months away.

50. All the above orders were to apply to a similar matter in PMCC No. 46 of 2020 which is CA No. E002 of 2022 in this court. On the latter date of 8/7/2021, the court adjourned the hearing on account that the plaintiff was sitting for examinations, which was understandable. The court fixed the case for hearing for 5/8/2021.

51. On the latter date, the defence counsel Ms Ogalo stated that she was not ready to proceed because the plaintiff had not gone for a second medical examination and requested that he goes for the same in the second week of September and that in CC 46 of 2020, the plaintiff did not have an identity card. The appellant's counsel did not say that the respondent had refused to submit himself for a second medical examination as requested that he goes in the second week of July. Ms Oyoko submitted that the plaintiffs had not been re-examined because they were turned away for not having their national

identification cards and that they had their birth certificates. That in CC 45 of 2020, the plaintiff had no identity card and in CC 46 of 2020 the plaintiff had a waiting card.

52. Ms Turgut appeared later the same day and submitted that the plaintiff had not been re-examined and that she had just resumed work. The court directed that the hearing proceeds and Ms Turgut sought leave to appeal, which leave was granted with an order that the hearing would nonetheless proceed and the hearing proceeded.

53. I observe that after that order for the matter to proceed to hearing was made by the trial court, Ms Turgut left the court session without leave of court and hence the plaintiff after testifying, closed his case and the court closed the defence case as the defendants were not present, and set the date for mention on 20/8/2021 for submissions. On the latter date, Ms Abir held brief for Ms Turgut and sought leave of one week to file submissions, which leave the court granted her. The defendant's counsel never filed any submissions despite being granted leave to file the same long after the time for filing had lapsed.

54. The appellants' counsel filed an appeal before this court vide HCCA E030 of 2021 challenging the order refusing to grant the appellants an adjournment which appeal she withdrew after it was allegedly been overtaken by events as judgment had been delivered in the matter appealed from. She then went back to the trial court seeking to set aside that judgment which application was dismissed. After that ruling was delivered on 21st January 2022, this appeal was filed which also seeks to set aside the judgment delivered on 17/9/2021 and orders of 5/8/2021 declining to grant the appellants an adjournment.

55. I find this appeal is quite convoluted. In Ground 1 of the memorandum of appeal, the appellant laments that the trial court erred in law and fact when it held that the plaintiff had undergone a second medical examination. This ground is contrary to that ruling which is clear. The trial magistrate found that the plaintiff had presented himself for medical examination in September 2020 but was turned away for the reason that he did not have a national identity card. It is worth noting that the appellant's counsel only kept waiting until the hearing dates to ask that the respondent goes for a second medical examination instead of making such arrangements with the respondent's counsel and in the event that there was any difficulty, she could still approach the court for compliance.

56. Furthermore, the appellant having filed an appeal before this Court vide HCCA No. E030 of 2021 challenging the order of refusal to grant them an adjournment on 5/8/2021, which appeal was withdrawn on 23rd September 2021 on account that judgment in the lower court had been delivered hence the appeal had been overtaken by events, the appellants cannot purport to impugn that ruling of 5/8/2021 vide this appeal filed in January 2022. In my humble view, the appellants already challenged the orders of 5/8/2021 vide an appeal which they withdrew without any merit decision. That matter rested.

57. In addition, the appellants cannot purport to impugn the judgment of 17/9/2021 by way of this appeal, which judgment was not appealed against, the appellant having chosen to apply to set aside that judgment instead of appealing against it. For avoidance of doubt, the appellants can only challenge the orders of 21/1/2022 declining to set aside the judgment of 17/9/2021 upon which this court would determine the merits thereof and make appropriate orders.

58. Turning back to the issue of setting aside proceedings which were conducted after the defendants were denied an adjournment and only the plaintiff testified and judgment delivered, it is clear that a decision whether or not to set aside judgment or proceedings is an exercise of discretion. In *Mbogo & Another v Shah* (1968) EA 93 at 96, the Court of Appeal stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon

or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

59. In this case, as it emerges from the evidence in the trial court record, I am not persuaded that trial magistrate misdirected himself or that he acted in a manner that was wrong so as to arrive at a wrong conclusion in dismissing the appellants' application. The appellants belaboured this point by citing several decisions on the same. However, Iam satisfied that the trial court had properly guided the parties on how to proceed, to avoid adjourning the case from time to time. Courts of law exist to hear and determine disputes filed before them. They are not archives for proceedings. The courts also have a duty to administer justice without delay as espoused in Article 159(2) (b) of *the Constitution*.

60. Individual Judges and Magistrates also sign performance management understandings on an annual basis to hear and determine cases within set timelines in order to eliminate backlogs in our court and that is what the people of Kenya demand us to do. In doing so, we do our very best to balance the scales of justice between expedition and justice. In the instant case, I find that the trial court had made that balance by adjourning the case from time to time on a need basis, while warning the parties of the need to have the case heard and even giving them last and final adjournments on both sides.

61. From the address by counsel for the appellants in the lower court, which I have restated in this appeal, I find that indeed, the appellants, whose counsel claimed had not given her instructions to proceed with the hearing of the case until and unless the plaintiff had undergone a second medical examination at their own doctor of choice's convenient time, were not interested in expeditious disposal of the suit. This is so because I observe that counsel for the appellants was suggesting far off dates for a second medical examination of the plaintiff without giving any reasons why the same could not be done at a nearer date, and or even after the plaintiff had testified so that the case does not stay in court forever for the same reasons.

62. The Court of Appeal at Malindi in the case of *Japheth Pasi Kilonga & 8 others v Mombasa Autocare Limited* [2015] eKLR powerfully and authoritatively had this to say concerning adjournment of cases:

> " The single most drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this. Lord Denning, MR in the oft-cited case of *Fitzpatrick v Batger & Co. Ltd* (1967) 2 A11 ER 657 warned that;
>
> > "Public policy demands that the business of the courts should be conducted with expedition."
>
> Like never before today this policy is emphasized more as it is underpinned in *the Constitution*. Article 159(2) (b) & (d) enjoins courts to ensure justice is not delayed and is administered without undue regard to procedural technicalities. Sections 14(5) of the *Supreme Court Act*, 3A and 3B of the *Appellate Jurisdiction Act* and 1A and 1B of the *Civil Procedure Act* have also enacted the overriding objective which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes. Order 17 rule 1 of the Civil Procedure Rules requires, as a general rule, that hearing of suits once commenced continue from day to day. It stipulates;
>
> "(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.

(2) When the court grants an adjournment it shall give a date for further hearing or directions."

It is therefore possible for the court to demand expedition in the disposal of cases and do justice at the same time; balancing the scales of justice. [emphasis added].

63. The Court of Appeal further stated that:

> " Whether the learned Judge properly or improperly declined to grant the appellants' application for adjournment is a matter that goes to question the exercise of judicial discretion. That discretion is now firmly settled, should be exercised in a judicial and reasonable manner, upon proper material, after the court has considered in addition, the party's overall conduct in the case and the sufficiency of the reasons for seeking adjournment.

64. It was submitted on behalf of the appellants that their right to a fair hearing was prejudiced by their denial of an adjournment. However, from my analysis of the material on record as set out above, I find that the appellants were never denied any right to be heard. That right as stipulated in Article 50(1) of *the Constitution* is different from the right to a fair hearing guaranteed o accused persons in Article 50(2) of *the Constitution*. Further, it is my humble view that a party ought not to hold a court of law at ransom by refusing to proceed with hearing only for them to claim that their rights to be heard were denied or violated.

65. Courts of law exist to protect and promote all rights of all persons without distinction. No party has any superior rights before a court of law. No party should be allowed to be so domineering to the court as was the case in the instant appeal where the appellants were demanding that the court could not hear the case before the respondent was re-examined by a doctor of their choice despite the court guiding that that could still be done after the plaintiff had testified.

66. Order 11 of the Civil Procedure Rules on pre-trial requirements are clear that parties ought to file and exchange all documents that they intend to rely on during the hearing, during the pre-trials. The respondent complied before the suit was set down for hearing whereas the appellants absconded court pre-trials and despite the court's willingness to accord them an opportunity to file the said documents by way of a second medical examination report during the hearing, they remained stubborn and wanted the court to act on their terms. The Court of Appeal in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, observed thus and I concur because these principles are echoed in sections 1A and 1B of the Civil Procedure Rules and Article 159(2) (b) of *the Constitution* on expeditious disposal of cases that:

> " The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another vs. Greenlands Limited*[1916] 2 AC 15 at 38."

67. This position is supported by the holding in *Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others* [2004] eKLR where Ojwang J he held that:

> " The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On

the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

68. In the instant case, I find that the appellants were not denied the opportunity to be heard. The appellants were not even in court on that day when the plaintiff testified and his case was closed. The appellant's counsel stormed out of the court session in protest. The appellants, from the address by their counsel, strictly instructed their advocate not to proceed until with the hearing of the case until the plaintiff was subjected to a second medical examination on their terms even when it was clear that the plaintiff had submitted himself on 3/9/2020 as deposed by his counsel and that he had been turned away for not possessing a national identity card, and that situation of the plaintiff not possessing the national identity card had not changed.

69. In this appeal, the appellants submitted that the plaintiff was, according to his birth certificate, born on 8/1/1999 hence he was aged 21 years old. That is not true. It is the plaintiff in HCCA E002 of 2022 who produced a birth certificate showing his date of birth to be 8/1/1999.

70. Nonetheless, the plaintiff/respondent herein had explained himself out that he was a Form three student and had not yet obtained a national identity card but that he had presented his birth certificate. I find that explanation plausible.

71. Furthermore, from the supporting affidavit of Joan Turgut advocate sworn on 30th September 2021, annexture 2a dated 2/11/2020 compared to her submissions subsequently on the days that she applied for adjournments, it is clear that the policy of submitting for second medical examination accompanied by the identity card had not changed. Further, albeit in that annexture, it had been indicated that the doctor was avaible for examination on every Monday and Thursday of the week, counsel was telling the court different positions giving two months away, not as earlier communicated in writing to the plaintiff's counsel. Annexture 2b thereof did not mention on which date the plaintiff was rescheduled for examination.

72. In this case, Iam satisfied that the appellants were too overbearing in their demands for adjournment and that the trial court correctly exercised its discretion in declining to grant the orders sought for setting aside of the judgment delivered on 17/9/2021 which I find that the proceedings leading to entry of that judgment were properly conducted.

73. Accordingly, I find that no prejudice could have been occasioned if the plaintiff was allowed to testify and proceeded for a second medical examination with his birth certificate. Further, I find that it was uncalled for, for counsel for the appellants to leave the courtroom unceremoniously after the court had directed that the case proceeds to hearing. Further, there is no reason why the appellant's counsel declined to file submissions even after she was given a second chance to file the same.

74. Based on the aforementioned, I find that the appellants have failed to prove before this court that the trial magistrate exercised his discretion in a wrong, unjustified and prejudicial manner, in declining the application to set aside judgment which was delivered after giving both parties an opportunity to be heard, but with the appellants opting not to participate in the proceedings.

75. The Upshot of the above is that I find that this appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF JUNE, 2022 VIRTUALLY VIA MICROSOFT TEAMS.

R.E. ABURILI

JUDGE