



REPUBLIC OF KENYA



**Ndirang'u & another v Kandie (Civil Appeal E108 of 2021)
[2025] KEHC 13211 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E108 OF 2021
RN NYAKUNDI, J
SEPTEMBER 25, 2025**

BETWEEN

JOHN NDIRANG'U 1ST APPELLANT

JOHN KABUE 2ND APPELLANT

AND

SHARON JEMUTAI KANDIE RESPONDENT

*(Being an Appeal from the Ruling delivered by the Honorable D, Milimu
RM on 3rd September, 2021 in Eldoret CMCC NO. 413 of 2019)*

JUDGMENT

Representation

M/s Kimondo Gachoka & Co. Advocates

M/s GK Okara & Co. Advocates

Background

1. The background of the instant appeal is anchored on the Respondent's claim vide a plaint dated 2nd June, 2020 resulting from road traffic accident which occurred on 12th April, 2020 at Ngeria along the Eldoret-Nakuru Road wherein the Plaintiff was allegedly a lawful passenger aboard motor vehicle registration number KCR 920Z when, the said motor vehicle was involved in an accident and as consequence thereof, the Respondent sustained injuries. The appellants entered appearance and filed their statement of defence dated 6th July, 2020 denying all material allegations pleaded against them. The appellant averred that if at all any accident occurred, the same was caused due to the omission on the part of the Plaintiff.



2. The Respondent was referred for a re-examination vide letters dated 7/7/2020, 5/11/2021 and 9/11/2021 and it was the appellants' contention that the Respondent never attended the said re-examination appointments on 15/11/2021 and 29/11/2021, leading to the application dated 10th March, 2021 that sought orders as follows:
 - a. That this honorable court be pleased to stay any further proceedings in this matter pending the hearing and determination of this application.
 - b. That this honorable court be pleased to compel the Plaintiff/Respondent in this suit to attend medical re-examination by the defendants'/applicants doctor and to bring with her the requisite documentation necessary for the same.
 - c. That the matter is soon to be set down for hearing and further proceedings in this matter be stayed pending the foregoing re-examination.
 - d. That the costs of this application be in the cause.

3. The trial court considered the application together with the response as filed by the Respondent herein and stated as follows:

“The attached email communications between the defendant’s advocate and the doctor where counsel is inquiring whether the Plaintiff was re-examined are dated 11th March 2021 and 13th March, 2021 and this application was made on 10th March, 2021 and one wonders whether this application was speculative.

For all the reasons above, I find that the defendant’s applicant application dated 10th March, 2021 is not merited and the same is hereby dismissed with costs.”

4. Aggrieved with the said decision, the appellants filed the instant appeal vide a Memorandum of Appeal dated 9th September, 2021 with the principal grounds as follows:
 - a. The learned Magistrate erred in law and misdirected herself on both points of law and facts when she failed and/or denied the Appellant prayer in the application dated 10th March, 2021 seeking to compel the Respondent to submit to a second medical examination.
 - b. The learned magistrate erred in Law and misdirected herself on both pints of law and fact when she failed to consider appellants’ evidence that the Plaintiff was yet to undergo a second medical examination of which re-examination is crucial to the defendant in conjuring a proper defence strategy.
 - c. The learned Magistrate erred in law and misdirected herself on both points of law and fact when she failed to consider the appellants’ evidence that the Plaintiff was yet to undergo a second medical examination of which re-examination is mandatory before the Appellants’ insurer is obligated to meet the judgment appellants and their insurer pursuant to S3 (A) of the Insurance (Motor Vehicle Third Party risks) (Amended) Act.
 - d. That the learned magistrate’s decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
 - e. The learned magistrate misapprehended and misunderstood the extent and severity of locking out defendant’s counsel’s submissions with regard to the reasons adduced on the issue of



a second medical examination or lack of thereof thereby resulting in the Honorable Court misdirecting itself and occasioning a miscarriage of justice.

5. The Appellants sought reliefs as hereunder:
 - a. That this appeal be allowed.
 - b. That the entire Ruling of the Honorable D. Milimu, RM delivered on 3rd September, 2021 sitting at Eldoret in Civil Suit No. 413 of 2020 be set aside in its entirety and the Honorable Court directs the Plaintiff to undergo a second medical examination.
 - c. That in the alternative to prayer (b) herein above, the court declares that the Appellants' Insurer is not bound to realize any judgment sum arising out of Eldoret CMCC 413 of 2020 if indeed a second medical examination was not conducted.
 - d. That the costs of this Appeal be awarded to the Appellant.
6. At the time of writing this judgment, I perused through the record together with the Court Tracking System and I could not find anything filed by the Respondent towards the appeal. However, I take note of the fact that there has been representation all along. Nonetheless I shall proceed to consider the appeal on merit.

Appellants' written submissions

7. In support of the Appellants filed written submissions which can be summarized as hereunder:
8. The appellants through learned counsel Mr. Amihanda started by reminding the court of its duty as the appellate court. Counsel submitted that this being a first appeal, this court is duty bound to re-evaluate, re-assess and re-consider the evidence adduced and come up with its own conclusions bearing in mind that the appellate court did not have the opportunity to hear the witnesses testify in the first instance before the subordinate court. on this he cited the decision in *Selle & Another vs. Associated Motor Boat Co. Ltd & others* (1968(EA 123)).
9. Mr. Amihanda couched the following issues for determination.
 - a. Whether re-examination was actually done as alleged by the Respondent.
 - b. Whether compelling the appellants to proceed without re-examination seriously prejudiced the defence.
 - c. Whether the appellants in view of the provisions of S3 (A) of the Insurance (Motor Vehicle Third Party Risks) (Amended) Act CAP 405 Lok are obligated to meet the potential judgment in the event the Respondent declines and/or neglects to attend re-examination.
10. On the first two issues, it is submitted for the appellants that the Respondent was referred for medical re-examination by way of a referral letter dated 7th July, 2020 and in line with S3 (A) of the Insurance (Motor Vehicle Third Party Risks) (Amended) Act. That the Respondent was booked for an appointment on 5th October, 2020 but was not re-examined as she did not comply with the requirements of the referral letter, that is to avail documents that would guide the doctor on the nature of injuries, and in this case. This is a reasonable request based on the fact that the suit is a claim for compensation for injuries and/or loss suffered due to a road traffic accident. The Respondent was therefore rescheduled for re-examination on 29th October, 2020. A rescheduling appointment list was dully issued.



11. Counsel submitted that this was clear evidence that the re-examination was not done. That in an effort for an amicable solution to the issue now before court, the appellants' counsels engaged their client's doctors for a date for re-examination on two occasions, on 15th November, 2021 and 29th November, 2021.
12. Mr. Amihanda submitted that if the Respondent approached the subordinate court by way of CAP 405 LoK, then it is only fair upon the appellants that the said provisions be complied with which will uphold the tenets of *the Constitution* of Kenya, 2010 more so Art. 50. That this court has a unique chance to right an injustice and/or an unfairness in that the trial court sought to proceed to compel the appellants to meet the judgment without granting the appellants a chance to verify the alleged injuries.
13. On the third issue, learned counsel submitted that having approached the court seeking compensation under CAP 405 LoK, then it is only fair and just that the Respondent complies with the provisions of the said Act, more so subject herself to a second medical examination.
14. In concluding, it was submitted by counsel that this court has the jurisdiction to interpret a Law and/or issue directions to the subordinate court in exercise of its supervisory jurisdiction over the subordinate courts. That noting that judgment was yet to issue in the trial court, the Appellants prayers are that:
 - a. The court herein issues an order directing the Respondent to honour her appointment with regards to a second medical examination.
 - b. If the Respondent fails or disregards such order, then an order do issue that the appellants and/or their insurers are not obligated to meet the resultant judgment in line with S3 (A) of the Insurance are not obligated to meet the resultant judgment.

Analysis and determination

15. This is a first appeal and this court is mindful of its duty as an appellate court. As correctly submitted by counsel for the appellants, this court is duty bound to re-evaluate, re-assess and re-consider the evidence adduced and come up with its own conclusions. The case of *Selle & Another vs. Associated Motor Boat Co. Ltd & others* (1968) EA 123 is instructive on this point.
16. The court has carefully considered the three issues framed by counsel for the appellants and proceeds to determine them seriatim:

Whether re-examination was actually done as alleged by the Respondent

17. From the evidence on record, it is clear that the Respondent was referred for medical re-examination vide letters dated 7th July 2020, 5th November 2021 and 9th November 2021. The appellants contend that the Respondent failed to attend the scheduled appointments on 15th November 2021 and 29th November 2021.
18. The court notes that the initial appointment was scheduled for 5th October 2020 but the Respondent allegedly did not comply with the requirements of the referral letter, specifically failing to avail documents that would guide the doctor on the nature of injuries. This is a reasonable request considering that the suit is a claim for compensation for injuries arising from a road traffic accident.
19. The evidence before this court demonstrates that despite multiple opportunities and rescheduled appointments, the Respondent has not undergone the requisite second medical examination as contemplated under the Insurance (Motor Vehicle Third Party Risks) (Amended) Act.



Whether compelling the appellants to proceed without re-examination seriously prejudiced the defence.

20. I take the view that denying the appellants the opportunity to have the Respondent undergo a second medical examination seriously prejudices their defence. In personal injury claims arising from motor vehicle accidents, the defendants have a legitimate right to verify the extent and nature of alleged injuries through independent medical examination.
21. This right is not merely procedural but substantive, as it largely informs the defendants' defence and their insurers to assess their potential liability accurately. *The Constitution* of Kenya, 2010, particularly Article 50, guarantees fair hearing, which includes the right of parties to present their case adequately.

Whether the appellants are obligated to meet potential judgment without re-examination under Section 3(A) of CAP 405

20. Section 3(A) of the Insurance (Motor Vehicle Third Party Risks) (Amended) Act provides as follows:

“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.”
21. The said provision contemplates that proper procedures, including medical re-examination, should be followed before insurers are obligated to meet judgment sums. The appellants and their insurers should not be compelled to meet a judgment where the statutory requirements have not been fulfilled. The court notes that the Respondent approached the court seeking compensation under CAP 405 of the Laws of Kenya. Having chosen this legal framework, it is only fair and just that the Respondent complies with all provisions of the said Act, including subjecting herself to a second medical examination.
22. Looking at the trial court decision, I take the view that the trial court erred in dismissing the application based on what it perceived as speculative timing. The court noted that the application was made on 10th March 2021, while email communications between the defendant's advocate and doctor were dated 11th and 13th March 2021. However, this observation misses the substance of the application.
23. The trial court failed to consider the overriding objective enshrined in Section 1A of the *Civil Procedure Act*, which requires courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
24. Drawing wisdom from the decision in *Johana Kipkemei Too –vs- Hellen Turi* [2004] eKLR, an application to introduce evidence after close of the Plaintiff's case was declined. This is bearing in mind the prejudice a party would bear, as the Plaintiff proceeded on the basis of a case and set of evidence placed before the Court. Production of fresh evidence would lock out the Plaintiff from challenging it. Nevertheless Hon. Justice Munyao Sila stated the following:

“This is however not to say that the Court can never under any circumstance, permit a party to adduce additional evidence that was not furnished to the other party as provided under the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be strictly bound by procedural technicalities. This flows from Article 159 (2) of *the Constitution*, where evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including



but not restricted to, the earlier availability of the witnesses, the discovery of a new document and the stage of the proceedings at which the additional evidence is sought to be adduced if for example the trial has not started, little prejudice may be caused to either party if she is permitted to introduce additional evidence. The prejudice to the other party increases as the trial progresses. But it is up to each Court to weigh the surrounding circumstances of each case and determine whether it will be in the intents of justice to allow such evidence to be tendered though outside the time frame provided by the Rules.”

25. The decision of the trial court called for the exercise of discretion. This court reminds itself that it should not interfere with the exercise of discretion unless the exercise is clearly wrong because the trial court misdirected itself and acted on matters it should not have acted upon, or failed to consider matters that ought to have been considered. See *Mbogo & Another vs Shah* [1968] EA 93.
26. In the case at bar, I am of the considered view that the trial court failed to consider: The appellants' constitutional right to a fair hearing; the statutory requirements under CAP 405; the legitimate need for proper medical examination in personal injury claims and the overriding objective of the *Civil Procedure Act*.
27. As a result, the following orders do abide:
 - a. The appeal is hereby allowed;
 - b. The ruling of Hon. D. Milimu, RM delivered on 3rd September 2021 in Eldoret CMCC No. 413 of 2020 is set aside in its entirety;
 - c. The Respondent is hereby directed to attend and undergo a second medical examination by the appellants' doctor within 30 days of this judgment;
 - d. The Respondent shall avail all requisite medical documentation necessary for the examination including X-ray results and any other relevant medical records;
 - e. Should the Respondent fail or refuse to attend the said medical examination within the stipulated time, the appellants and their insurers shall not be obligated to meet any judgment sum that may be awarded in the suit;
 - f. The matter is remitted to the trial court for expeditious hearing and determination;
 - g. I make no orders as to costs.
28. Orders accordingly.

SIGNED, DATE AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 25TH DAY OF SEPTEMBER, 2025.

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R. NYAKUNDI
JUDGE

