REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC APPEAL NO. 7 OF 2020

BERNARD KAMAU MBUGUA.....APPELLANT

-VERSUS-

KHIMJI KARSHAN CHHABHADIA.....1ST RESPONDENT

NANJI PREMCHAND CHHABADIYA.....2ND RESPONDENT

(ALL T/A SHREEJI SERVICE STATION)..3RD RESPONDENT

CAROLINE WANJIKU WAIYAKI.....4TH RESPONDENT

(Being an Appeal arising out of the Ruling and order of Hon. D. K. Mtai (Senior Resident Magistrate) Kitale in CM Land Case No. 18 of 2018 delivered on 13*th* October 2020*)*

BETWEEN

BERNARD KAMAU MBUGUA.....PLAINTIFF

VERSUS

KHIMJI KARSAHAN CHHABHADIA.....1ST DEFENDANT

NANJI PREMCHAND CHHABADIYA.....2ND DEFENDANT

(ALL T/A SHREEJI SERVICE STATION)....3RD DEFENDANT

CAROLINE WANJIKU WAIYAKI.....4TH DEFENDANT

JUDGMENT

(On denial to grant an adjournment)

1. The Appellant challenged the Ruling and Order of the trial court rendered in **Kitale Chief Magistrate Land Case No. 18** of **2018** on **13/10/2020**. He filed a Memorandum of Appeal dated **24/2/2020**. Then, on **28/10/2020** he filed an amended Memorandum of Appeal dated **22/10/2020**.

In the Amended pleading, he sought the following reliefs:

1. The Appeal be allowed and the trial court Ruling be set aside;

2. The Appellant's case be reopened and the Appellant be allowed to call witnesses;

3. The matter be referred to another court for further hearing;

4. Costs.

2. The Appellant raises issues of both fact and law which according to him the trial Court erred in. This being a first Appeal, this Court is enjoined to evaluate both the facts of the case below and the law applicable in order to arrive at the determination of the Appeal.

3. Section 78 of the **Civil Procedure Act** provides for the powers of an appellate court. The Provision is to the effect that such a court has the duty to **re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions**. This position has been restated by the Court of Appeal in **Peter M. Kariuki v Attorney General [2014] eKLR** where it was held that:

> **"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."**

4. The Appeal is premised on the grounds contained in the Amended Memorandum of Appeal. In summary, the Appellant faults the trial court on the following grounds:

a. That it failed to consider that the Appellant acted with due diligence to have the witnesses attend court;

b. That the learned magistrate ignored the fact that the Appellant's witnesses who were experts, were crucial and were thus uncontrollable;

c. That the learned magistrate closed the Appellant's case *suo motto*.

BRIEF BACKGROUND

5. The Appellant herein was the Plaintiff in **Kitale Chief Magistrate's Court Land Case No. 18 of 2018**. That suit was titled **MCLEE** (handwritten in all the documents I list hereinafter) **Suit No. 18 of 2018**. The handwriting which is part of the 3rd line of documents forming **pages 27-34** of the Record of Appeal appears to be an addition as Amendment thereto but not underlined to denote the Amendment. The documents are the Amended Plaint dated **25/5/2018**, Verifying Affidavit sworn on the same date, the Plaintiff's Statement, the Statement of Jeff Ngilandala, the Plaintiff's List of Witnesses and Plaintiff's List of Documents all dated the same date. By the said documents the Plaintiff sued one Khimji Karshan Chhabhadia (**1st Defendan**t), Nanji Premji Chhabadiya (**2nd Defendant**), one, (All T/A Shreeji Service Station) (**3rd Defendant**) and Carolyne Wanjiku Waiyaki (**4th Defendant**). Whilst not digressing, I wish to point out that the title of the Plaint was drawn in a confusing manner regarding the Third Defendant. It stated, "All T/A Shreej Service Station". First, there are only two individuals named before that Third Defendant. It thus means that if the two were trading as Shreej Service Station, then the title should have read "Both T/A Shreej Service Station." The use of the adjective "all" connotes more than two or the entire quantity. Be that as it may, since the said Defendant is described in **Paragraph 4** of the Plaint and Amended Plaint as a Limited Liability Company, I wonder how the phraseology in the title of the Plaint would fit that description because, as held in ***Salomon v. Salomon and Company Limited [1897] AC 22***, a company once (duly) incorporated is a different entity from the owners or shareholders. It can only carry out business in its own name and is liable to be sued as such: the owners do not "trade as" the company anymore once that occurs. To me there seems to be a problem with the pleadings on that issue. But since that was not the issue before me, I will leave it at that, as the pleadings show, and say no more.

6. Again, while analyzing the issue stated above and trying to understand the response by the 1st, 2nd and 3rd Defendants regarding **Paragraph 4** of the Plaint and the Amended one, I found out that the Appellant omitted the inclusion of crucial documents in the Record of Appeal. He omitted the Notice of Appointment dated **10/4/2018** by the said Defendants, their joint Statement of Defence, List of Witnesses and a Witness Statement by on Khimji Karshan Chhabhadia, an Authority to Plead signed by one Nanji Premji Chhabadiya, an Authority to Swear Affidavit on Oath by one Nanji Premji Chhabadiya and a Replying Affidavit by Khimji Karshan Chhabhadia all dated the same day and filed on **11/04/2018**. The Appellant also omitted a Notice of Change of Advocates dated **7/05/2018** filed by his Advocates who filed this Appeal, which Change was from Khaoya Mitekho & Co. Advocates and a Notice of Appointment to Act alongside for the 4th Defendant, filed by Mukabane Kagunza & Co. Advocates on **20/08/2020**, the Plaintiff's Further List of Witnesses dated **24/08/2020** filed on **26/08/2020**.

7. The omission of some crucial documents from the Record, particularly the 1st, 2nd and 3rd Defendants' pleadings offends **Order 42 Rule 13(4)** of the **Civil Procedure Rules** and **the Proviso** thereto, as discussed in **Paragraphs 25-27** below. This alone makes this Appeal a candidate for automatic dismissal for reason of it being incompetent. However, this issue not having been raised by the 4th Respondent I leave it at this, for later conclusion, after the discussion in the paragraphs below that I have alluded to in this paragraph.

8. A more pertinent issue comes up next. I have stated above the names of the Defendants purposely to point out that the Plaintiff, now Appellant, finally filed this Appeal but while doing so made numerous errors in the names of the parties. On the Amended Memorandum of Appeal, he changed the First Defendant's name to Khimji Karshan Chabadia (but on the Cover Page, the Certificate and Index of the Record the name reads Khimji Karsahan Cabadia), the Second Defendant to Nanji Premchand Chabadia (but on the Cover Page, the Certificate and Index of the Record the name reads Nanji Premchand Chabdia) , the Third Defendant to Shreeji Service Station Ltd and the Fourth Defendant to Carolyene Wanjiku Waiyaki (but on the Cover Page, the Certificate and Index of the Record the name reads Carolyne Wanjiku Waiyaki). Of concern to me particularly are the discrepancies or errors in the Pleadings and Documents relied on by the parties. How I wish that parties to suits or matters before courts were keen on drawing Pleadings so as to avoid such simple mistakes!

9. Having brought out the errors I have noted above, among many others, however minor they may seem to be, I wish to state as follows. First, that the errors seem to be typographical ones, but which can be avoided if parties took drafting of pleadings seriously. Second, that I have carefully read the Plaint and all the accompanying documents as required under **Order 3 Rule 2** of the **Civil Procedure Rules** and

especially the copies thereof that form **pages 218** to **227** of the Record of Appeal to find out what the Record should read. Thus, I have, in the interest of justice, and guided by **Sections 1A (1) & (2), 1B, 3** and **3A** of the **Civil Procedure Act**, given in this Appeal the proper names of the parties herein as they ought to be.

10. I now proceed to discuss the merits or otherwise of the Appeal. The proceedings of the trial court from the date of inception of the suit up to **13/10/2020** are well captured in the recorded proceedings of that Court. They run from **Page 106** to **185** of the Record of Appeal. I will summarize the relevant parts in relation to this appeal thereof as below.

11. After **PW1** concluded his testimony on **20/08/2020**, Counsel for the Appellant sought an adjournment to enable her summon the Registrar and Director of Survey. The adverse parties opposed the application. However, the Court allowed the application, while indicating that the matter was fairly old but it was necessary to expedite its determination in a just and fair manner. It thus granted a last adjournment to the Plaintiff/Appellant. It also ordered that summons do issue to the two witnesses being the Chief Registrar and the Director of Survey. The matter was then fixed for hearing on **24/09/2020**.

12. On that date, (**24/9/2020),** the Appellant, through his Counsel, sought another adjournment on grounds that the witnesses who had been summoned requested to have the matter heard at a later date. The court was aware that it had made final orders on adjournment antecedently. However, it was of the opinion that in order to do substantive justice, it was in the interest of justice that the Appellant be given opportune time to articulate his case. Further, the Court noted that attempts to summon the witnesses had been made. The trial court reviewed its order of last adjournment noting that the delay in prosecuting the matter was not attributable to the Appellant. A further hearing date was given at the convenience of all parties.

13. The matter was listed for further hearing on **13/10/2020.** Notably on the said date, Appellant's counsel requested for an adjournment on the ground that the County Surveyor had given evidence on behalf of the Director of Survey but was not ready to proceed on that day. The court gave the County Surveyor the opportunity to explain the reason why he could not proceed. Upon hearing the County Surveyor, and the parties' submissions on the application for adjournment by the appellants' counsel, the trial Court declined to grant the Application for adjournment. In so doing, the court found the Appellant culpable for failing to exercise due diligence to secure the attendance of the witness. It ordered the Plaintiff to either proceed or close his case. The Court took the evidence of the last available witness and marked the Plaintiff's case closed. It is the orders of this date that the appeal herein is premised on.

PROCEEDINGS OF THE SUBORDINATE COURT

14. On **20/04/2021** when the matter was placed before court, the Appeal was admitted for hearing. The parties agreed to dispose the Appeal by way of written submissions. The Appellant filed his submissions on **3/5/2021.** In them, he stated that according to the Return of Service by one **AMBROSE ONYANCHA** (see **Page 104** of the Record), the witness summons issued on **25/09/2020** were served on **01/10/2020** and **05/10/2020** respectively. On the hearing date, the Appellant sought an adjournment on account of the County Surveyor needed more time to familiarize himself with the matter. The County Surveyor however, testified. The Appellant submitted further that the Director of Land Administration expressed regret for inability to attend court on **13/10/2020**. Since he was absent from court on the said date, his evidence was not taken and the Appellant's case closed by the court *suo motto,* according to the Appellant. The Appellant submitted that the two witnesses' evidence was very critical and no prejudice would be occasioned upon the Respondents if the Chief Registrar and the County Surveyor were allowed to testify. Appellants' Counsel further submitted that the Appellant's right to a fair hearing enshrined in **Article 50 (1)** was interfered with and that the appellant was condemned unheard. Counsel relied on the cases of **Mombasa Court of Appeal Civil Appeal No. 81 of 2018** and **Machakos HC Civil Appeal No. 63 of 2020; Mbithuka Titus -Vs- Jackline Mutindi** in support of the appeal.

15. The 4th Respondent filed her submissions on **30/06/2021**. The 1st - 3rd Respondents adopted the 4th respondents' submissions hence opted not to file any. The Respondents challenge the credibility of the appeal for want of a certified copy of the order appealed against. To them, the absence of the order consequently renders the Appeal incompetent and makes it a non-starter hence the error is fatal. For this proposition, the Respondents cited the cases of **Nyeri Court of Appeal Civil Appeal No. 47 of 1998; Joseph Nderitu Githinji -Vs- Esther Wanjiru Githinji**, **Kitale HC Civil Appeal No. 8 of 2000; Margaret Nafula Wafula -Vs-Wilson Kimutai Sirma & Another** and **Eldoret HC Civil Appeal No. 58 of 2018; Ruth Anyolo -Vs- Agnetta Oiyera Muyeshi**.

16. The Respondents submitted further that the error was not procedural but a statutory disobedience which had no remedy in law. They fortified their submissions with the case of **Eldoret Civil Appeal (Application) No. 154 of 2010; Ramji Devsi Vekaria -Vs- Joseph Oyula** and **Nairobi Court of Appeal Civil Appeal No. 302 of 2008; City Chemist (Nairobi) & Another -Vs- Oriental Commercial Bank**.

17. The Respondents submitted further that a prayer of adjournment should serve the purpose of occasioning justice. It is a matter of discretion and ought to be exercised judiciously. To buttress their argument, they relied on the cases of **Nairobi Court of Appeal Civil Appeal No. 42 of 1981; Thomas Openda -Vs- Peter Martin Ahn** and **Nairobi Court of Appeal Civil Appeal No. 120 of 1992; Savanna Dev. Co. Ltd. -Vs- Mercantile Finance Co. Ltd**. It was the respondents' submission that the trial court cannot be faulted for declining the adjournment. They emphasized that the Appellant had been pardoned earlier on several occasions. According to them, they would have been prejudiced further by another adjournment. This was attributed to the fact that they had construction materials on the subject parcel of land which continue to waste away owing to the pendency of the proceedings herein. They then urged this court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

18. This court has considered the Amended Memorandum of Appeal and the rival submissions filed by parties. The court has also looked at the Record of Appeal together with the cases relied on. This being a first appellate court, it reminds itself that as a matter of law, it will not normally interfere with the exercise of such discretion unless it has been shown that the discretion was not exercised judiciously. The case of **KIRIISA -VS- ATTORNEY GENERAL & ANOTHER [1990-1994] EA 244)** explains this point well. Similarly, an appellate court will not interfere with the exercise of discretion of a court unless it is satisfied that the trial court misdirected itself in some matter and as a result

arrived at a decision that was wrong, or unless it is manifest from the case as a whole that the court was clearly wrong in the exercise of the discretion and that an injustice had been occasioned by that step of the trial Court.

19. In considering whether or not to grant an adjournment, a trial court should take certain elements into consideration.

These include the adequacy of reasons given thereof; how far, if at all, the other party is likely to be prejudiced by the adjournment; and how far such other party can be suitably compensated by an order of payment of costs by the applicant. In so holding, I am guided by the case of **MBOGO & ANOTHER -VS- SHAH [1968] EA 93**.

20. This court has laid the foundation of its duty to this appeal. Therefore, to my mind, the following issues fall for determination which shall be discussed at the length of this judgment as hereunder.

1. Whether the Appeal is incompetent

21. This issue was raised by the Respondents. According to them, the appeal is incompetent and warrants striking out for the reason that the Appellant failed to provide this court with a certified copy of the order appealed against. They relied on the provisions of **Order 42 Rule 13 (4) (f)**. The Appellant went mute on this issue. The absence of response, however, does not enshrine an automatic holding that the same is correct. Thus, this court shall delve into this issue deeper.

22. Decrees and orders are virtually the formal decisions summarized form the judgments and rulings of courts take respectively. Therefore, they are crucial documents of a Court record particularly where an appeal has been preferred against decisions giving rise to them. It is for this reason that the requirement is enviably provided in various provisions.

23. Section 65 (1) (b) of the **Civil Procedure Act** provides:

> **"except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact".**

24. Further, **Section 79G** of the **Civil Procedure Act** states:-

> **"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, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:**
>
> > **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"**

25. It calls for no greater intellectual mind than an ordinary and common reasoning one to infer that a decree or order of the trial court against which an appeal has been preferred is an integral part of the Record of Appeal, howsoever it forms part of it. A decree or order of a court is the final pronouncement of the court. That is the voice of the Court which one appeals against. That is why the **Civil Procedure Act** cares to even make room by way of a **proviso** to **Section 79G** that if there is delay explained delay in obtaining the document from the trial court, the time taken to have it ready shall be excluded from the computation of time for the appeal.

26. The 4th Respondent submitted that the Record of Appeal is defective as it offends **Order 42 Rule 2** of the **Civil Procedure Rules** hence making the Appeal incompetent.

The Appellant did not attempt to submit anything on this.

Under **Order 42 Rule 2** it is provided that:

> **"where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed."**

27. It is this court's understanding that the above provisions indicate that it is critical to file, with the Record of Appeal or so soon thereafter before the Appeal is heard, the certified copy of the decree or order appealed against. As a matter of fact, the court is invited to reject the appeal summarily only after the certified decree or order is filed. Furthermore, the **proviso** to **Order 42 Rule 13 (4) (f)** makes it mandatory for a judge not to exclude the filing of a decree or order appealed from. It states that "***Provided that-***

> **i. a translation into English shall be provided of any document not in that language;**
>
> **ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**" Order **43 Rule 13(4)(a), (b), and (f)** mention the Memorandum of Appeal, Pleadings and Order or Decree respectively. It therefore means that such a document is a determinant in basing the competency of an appeal. What then happens when that is not done, and the Appellant proceeds to prosecute the Appeal? The said Appeal will be baseless and

incompetent.

28. Order 42 Rule 13 (4) (f) of the **Civil Procedure Rules** appears to have an inclusive approach. It provides:

> **"Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say: … the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal."**

29. This means that once the judge is satisfied that the above-mentioned documents are properly filed and served upon the respective parties, the appeal shall be admitted for hearing.

30. While the provision is silent regarding what happens when the Appellant fails "forever" to file the certified decree or order appealed from, one may think that there is a lacuna in the law and that a judge admitting the appeal to hearing has erred and is to be blamed. That is far from the truth in an Adversarial system. Judges shall not and are not supposed to aid the parties in making their cases proper or competent before courts. That would be a slap on the face of their impartiality. Notably, the language herein speaks of admitting an appeal for hearing and nothing further. Thus, where a party moves the court under **Order 42 Rule 11** and Directions are given while the Record of Appeal does not contain the requisite documents and he does not seek leave of the Court for filing of the further documents as contemplated in **Order 42 Rule 2**, the party who is not compliant is blameworthy for non-compliance.

31. How then should this court interpret the above provisions regarding failure to file a decree or order appealed from as a whole? Their juxtaposition with the provisions that call for filing of requisite documents in records of the Supreme Court and how the Supreme Court has interpreted the failure to comply with them will bring to light the answer needed here. In regard to failure to file requisite documents, the Supreme Court, in the case of, **BWANA MOHAMED BWANA -VS- SILVANO BUKO BONAYA & 2 OTHERS [2015] eKLR** held as follows:

> **"Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues."**

32. The Court of Appeal in **CHEGE -VS- SULEIMAN [1988] eKLR** had this to say:

> **"But we concur positively in the submission of Mr. Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal."**

33. From the above decisions of the higher courts, it is evident that a certified copy of a judgment or order forms an essential and integral part of the record. Indeed, the Appellant did not furnish a copy of the same in its record of appeal herein. The wordings of statute are unambiguous. The *stare decisis* thereon remains unchallenged. It is this court's view that the Appellant ought to have filed a certified copy of the order appealed from. In other words, the presence of a certified order on the record is couched in mandatory terms. This is not one of those cases where even **Article 159 (2) (d) of the 2010 Constitution** would come to the aid of the Appellant. It is not a mere technicality because lack of a certified decree or order appealed from on the record takes away from this court jurisdiction to deal with the appeal. And since jurisdiction is everything as has been stated in the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR***, this Court cannot arrogate itself of it where the jurisdiction has been taken away from it. Consequently, the appeal is incompetent for want of a certified copy of the order on record. But before I state what to be done with such an appeal, bearing in mind also what I stated in **Paragraph 7** above, I will say something regarding the merits thereon, just in case I am adjudged to be in error on my finding above. This leads me to the next issue.

2. Whether the trial court exercised discretion judiciously

34. The Appellant faults the trial magistrate for failing to exercise his discretion in a just manner. He submits that he sought an adjournment for the reasons that the two expert witnesses sought more time to familiarize themselves with the file. He posits that as a consequence to the denial of adjournment, a miscarriage of justice was occasioned. It is the Appellant's proposition that the reason for adjournment was one which was not within his power as it was the expert witnesses who sought the adjournment. The Respondents contend that the Appellant is not deserving of any converse orders as the court indulged the Appellant too many times on previous applications for an adjournment.

35. Order 17 Rule 1 of the **Civil Procedure Rules** grants parties the right to apply for an adjournment upon satisfying the court that the occasion fits it. The grant of such orders is discretionary and is made on a case by case basis. How then do courts ascertain whether or not to grant an adjournment?

36. In **BILTA (UK) LTD & ORS -Vs- TRADITION FINANCIAL SERVICES LTD [2021] EWCA CIV 221,** Lord Justice Peter Jackson found that there are two aspects to an application to adjourn: assessing the facts and exercising the discretion. He further stated that in every case, the court will first need to assess the facts behind the application, and where a litigant fails to substantiate the reason for an adjournment, the outcome of the exercise of discretion will scarcely be in doubt.

37. In **GREEN V NORTHERN GENERAL TRANSPORT CO LTD (1970) 115 SJ 59,** Lord Denning MR (with whom Edmund Davies and Megaw LJJ agreed) held:

> **"If by refusing an adjournment an injustice would be done, the judge erred in point of law if his decision was unjustified. If there was a material witness who was not available or whose presence was desirable the judge should grant an adjournment provided that any injustice so caused could be compensated in costs."**

38. In **TEINAZ V WANDSWORTH LONDON BC [2002] EWCA Civ 1040** (***"Teinaz"***), the court held:

> **"A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court or to the other parties. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."**

39. From the foregoing decisions, it is clear that a court ought to favor the grant of an adjournment in the spirit of occasioning justice to the parties to the suit. However, there is no standard rule of thumb. Even where a witness is crucial to a case, the Court must not unnecessarily and unreasonably exercise its discretion to grant an adjournment on account of his absence or 'flash' costs to the party wishing to proceed with his case diligently. There comes a time at the trial where even the award of costs can be an injustice to the party being awarded them. The facts of each case must be regarded in both dissective and deductive manner. This court has looked at the proceedings at trial. It is not its intention to belabor the point. But I shall summarize the relevant proceedings to demonstrate how the trial court exercised its discretion systematically:

a. 18/10/2018 - Adjournment granted on account of the 4th Respondent's indisposition.

b. 09/05/2019 - Adjournment granted on account of the Appellant's indisposition.

c. 01/08/2019 - Adjournment granted on account of the **PW1** (the Appellant) to avail original documents, after he testified in part and was stood down.

d. 29/08/2019 - Adjournment granted on account of the counsel for **4th Respondent** being out of the country.

e. 21/11/2019 - Adjournment granted on account of the Appellant being engaged in Nakuru.

f. 27/02/2020 - Adjournment granted on account of 4th Respondent's intent to seek further instructions.

g. 02/07/2020 - Adjournment granted by reason of consent of the parties.

h. 13/08/2020; Adjournment granted on account of court carrying out exercise of fumigation of the courts.

i. 20/08/2020; Adjournment granted on account of Appellant to summon two witnesses. **Last adjournment.**

j. 24/09/2020; Adjournment granted on account of the Appellant to summon two witness.

k. 13/10/2020; Adjournment on account of the Appellant avail summoned witnesses. **Declined**.

40. It is clear from the record that the Appellant made a number of requests for adjournments antecedent to the one appealed against much more than any other party and the court acceded to them. The one of **13/10/2020** was not the first or indeed a second one. As a fact, on two occasions immediate to it, the Appellant sought adjournments on fairly similar reasons. Whereas the trial court had granted a last adjournment on the second last occasion to the **13/10/2020**, it did its best to stretch the discretion more.

41. It is in this courts' considered opinion that the trial court did the best it could in upholding the provisions of **Article 50** (2) of the **2010 Constitution**. Prejudice should not be mirrored against one side only - the Plaintiff's - but to all.

42. I agree with the Appellants' submissions that indeed the right to fair trial is not to be fettered. However, that the right includes the right to have the trial begin and continue without unreasonable delay as enshrined in **Article 50 (2) (e)** of the **Constitution.** The right applies to all parties in a suit.

43. Moreover, the court takes judicial notice of the fact that there is a huge backlog of cases in Kenya. Judicial officers are duty bound to reduce the backlog. In doing their best they can to achieve this, while ensuring justice is seen to be done to all parties to a suit, the courts should not be unnecessarily pulled back by numerous adjournments by parties to matters. Matters should be adjourned for good reasons to be recorded. Where there appears to be none or that, a party is abusing the court's discretion and process by seeking unnecessary adjournments, the judicial officer is obligated to make orders as will be just in the circumstances. Closing or dismissal party's case is one such just order.

44. The manner in which the Appellant herein conducted his case in totality cannot not be wished away. On several occasions, he sought adjournment and was accommodated. He cannot therefore be held to have been denied his constitutional right to be accorded fair trial. His

conduct can be comparable to the Appellant's in the English decision of **POPINDER KAUR DHILLON -V- YAW ASIEDU [2012] EWCA Civ 1020** (*http://www.bailii.org/ew/cases/EWCA/Civ/2012/1020.html*) In this case, there had been a history of adjournments and extensions of time for the party to serve evidence. The trial was listed for the third time for final disposal. By that stage the defendant was debarred from adducing any further witness evidence at the trial and he had not appealed from that order. The judge refused the application to adjourn, and that was upheld on appeal. It was held pertinently:

> **"a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2) (d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.**
>
> **b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).**
>
> **c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore, a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.**
>
> **d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (*Aldi Stores Limited v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."**

45. In the above matter, the court found that the defendant was largely responsible for any difficulties encountered, having failed to comply with numerous previous orders at a stage which she had capacity and plenty of time to prepare her case. By way of comparison, in this court's view the Appellant herein created his own difficulties in not prosecuting his case properly by trying to occasion another adjournment which was denied. The court is of the opinion that the trial court's denial of the adjournment to the Appellant was exercised judiciously. The Appellant who was represented by able counsel was given ample time to prepare his case but continued to exercise unwarranted dilatory manner. Litigation must come to an end.

FINAL ORDERS AND DISPOSITION

46. In conclusion, the trial court was not in error in the manner it exercised its discretion by denying the Appellant an adjournment on **13/10/2020**. Consequently, its decision is upheld. Further, that for the reasons given above, the instant appeal is not only incompetent as found earlier but unmerited as well. It is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 9TH DAY OF NOVEMBER, 2021.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE