IN THE COURT OF

APPEAL AT NAIROBI

(CORAM: GATEMBU, MUMBI NGUGI & NYAMWEYA JJ.

A) CIVIL APPEAL NO. 209 OF 2019

BETWEEN

LITAYASON NEEPE.....................................1ST APPELLANT
LADY LORI KENYA LIMITED .... 2ND APPELLANT
ORYX SAFARI LIMITED .... 3RD APPELLANT

AND

ELIZABETH GUTTMAN.............................1ST RESPONDENT
MATTHEW SHELTON ....2ND RESPONDENT

(Being an appeal from the rulings and orders of the High Court of Kenya at Nairobi (M. Mbogholi J.) delivered on the 8th, 9th, and 10th of May, 2018

in

Nairobi HCCC No. 410 of 2012
****

JUDGMENT OF THE COURT

1. This interlocutory appeal challenges three rulings delivered at the High Court at Nairobi (***A. Mbogholi Msagha, J.,*** - as he then was) on 8th, 9th and 10th May 2018 in **HCCC No. 410 of 2012**. The appellants, **Litayason Neepe** (1st appellant), **Lady Lori (Kenya) Ltd** (2nd appellant), and **Oryx Safari Ltd** (3rd appellant), are the defendants in the suit before the High Court.

2. The respondents, **Elizabeth Guttman** (1st respondent) and **Matthew Shelton** (2nd respondent), a married couple

from the United Kingdom, are the plaintiffs. They filed the suit before

the High Court seeking damages for personal injuries resulting from a helicopter crash that occurred in Kenya on 17th August 2010. The helicopter was piloted by the 1st appellant, while the respondents' tour had been organised by the 2nd and 3rd appellants. It was the respondents' case that the accident occurred as a result of the negligence of the appellants; that as a result, they suffered injuries in respect of which they received treatment at the Nairobi Hospital and later in England.

3. Under rule 31 of this Court's Rules and as was held in ***Selle v. Associated Motor Boat Co***. **[1968] EA 123**, we are under a duty, in this first appeal, to re-appraise the material before the trial court and reach our own conclusion.

4. The record of proceedings indicates that the hearing of the case commenced on 31st March 2016, when the 1st respondent began her testimony, and was then stood down. The trial then resumed on 8th May 2018 when the 1st respondent sought to produce a Discharge Summary and Notes from The Nairobi Hospital dated 25th August 2010. Upon objection by counsel for the appellants and after hearing counsel for both parties thereon, the trial court

rendered the ruling dated 8th May 2018 in which it allowed the production

of the documents, holding that the objection by the appellants should have been raised at the pre-trial conference.

5. On 9th May 2018, in the course of the 2nd respondent's testimony, the appellant's counsel objected to production by the 2nd respondent of a medical report to prove the psychological injuries he had sustained as a result of the accident. The trial judge overruled the objection in the ruling dated 9th May 2018, reiterating his holding in the ruling dated 8th May 2018 in which he had held that the appellants' objections should have been raised in the pre-trial conference. An objection was also raised to the 2nd respondent producing his compensation summary showing the loss he had suffered when caring for the 1st respondent, an objection that was also dismissed in the ruling also made on 9th May 2018.

6. The ruling dated 10th May 2018 pertained to an objection by the appellants to substitution of an expert witness by the respondents. The record shows that the respondents had, in letters dated 30th April and 4th May 2018, indicated their intention to call one Keith Mackey, an expert in aviation and helicopters, in place of one Robert S. Tucker

Jr., who had been identified as the expert witness. They had also filed a witness statement by Mr. Mackey dated 5th May 2028.

7. In its ruling dated 10th May 2018 dismissing the objection, the trial court held that it had compared the witness statements by Mr. Mackey and Mr. Tucker Jr., and had noted that aside from one paragraph, the contents of the statements were the same, word for word, save for paragraph 41 in the statement of Tucker Jr., which had more details; that the documents attached to the statement of Mackey that the appellants were objecting to had been with them since 2017 as they had been in the list of documents filed by the respondents on 2nd March 2017 and had been the subject of a similar ruling on 30th August 2017 following an objection by the appellants; and there was therefore no prejudice to be suffered by the appellants if the documents were admitted.

8. The rulings made on 8th, 9th and 10th May 2018 precipitated the present appeal in which the appellants raise 21 grounds of appeal in their Memorandum of Appeal dated 17th May 2019. The number and content of these grounds show no attempt at adherence to rule 88 of this Court's Rules 2022, which requires that a party shall, in the memorandum of appeal, *'concisely set forth under distinct heads, without argument or narrative, the grounds of*

objection to the decision appealed against'.

9. These grounds can, however, be condensed and conveniently dealt with under five heads. First, that the trial court erred in rendering rulings that had the effect of shutting out the appellants from their right to a fair hearing, against the rules of natural justice; the trial court erred in law and fact in allowing the respondents to produce their medical and employment records in evidence without calling the makers; that the trial court erred in directing that the appellants' objections could have been raised at the pre-trial conference when no pre-trial directions as contemplated under Order 11 of the Civil Procedure Code had been taken; that the trial court erred in allowing the expert testimony of Keith Mackey in place of that of Robert Tucker Jr; and that the trial court was biased against the appellants.

10. We heard the appeal on 20th May 2025. Learned counsel, ***Mr. Kinyanjui***, appeared for the appellants while learned counsel, ***Mr. Mugambi***, appeared for the respondents. The parties relied on their written submissions dated 3rd November 2020 and 7th June 2024 respectively.

11. The appellants contend that by the said rulings, the respondents were allowed to unjustifiably become their

own doctors and produce complex medical reports and other

medical evidence themselves, which ordinarily, by law and practice, should be produced by the examining doctors and authors to facilitate effective cross examination of witnesses; that they were also allowed to unjustifiably become their own employers and their own financial experts and produce unverified and unverifiable alleged documentation to support fabricated colossal claims amounting to hundreds of thousands of US dollars against the appellants and against the rules of evidence, which ordinarily should be produced by the alleged employers or makers of the documents to facilitate effective cross examination; and that the respondents were also unjustifiably allowed to swap and call last minute new witnesses introduced a day before trial to produce last minute documentation filed a day before trial, without leave and against the rules of evidence and procedure.

12. The appellants further contend that the respondents were also allowed to unjustifiably do whatever they wished at trial on the misconception that since a Pre-trial Case Conference under Order 11 of the Civil Procedure Rules had allegedly already been held, the respondents were free to produce any documentation they wished without

calling any makers; and to introduce and call any new evidence and new witnesses

any time they wished, without any regard to the prejudice suffered by the appellants.

13. The appellants submit that it is undisputed that no proper pre-trial case conference under Order 11 rule 3 or a trial conference under Order 11 rule 7 of the Civil Procedure Rules was ever held in the matter; that no Case Conference Order under Order 11, rules 4 and 8 or Memorandum under Order 11 rule 7 (4) was ever issued in the matter as envisaged under Order 11 of the Civil Procedure Rules. The appellants contend that the actions of the trial court during the proceedings effectively took away their right of cross-examination of the proper witnesses; effectively shut them out from the proceedings and from effectively defending themselves, against the rules of natural justice.

14. The appellants invite us to address the issue of pre-trial issues as envisaged under Order 11 of the Civil Procedure Rules with finality in order to guide lower courts with binding precedent. This, the appellants submit, is necessary as many litigants have been shut out of the proceedings and prevented from effectively prosecuting their cases on the pretext that a pre-trial case conference

under Order 11 was already held. The appellants complain that, among other things, in most

cases, no proper Pre-trial Case Conference as envisaged under Order 11 ever occurs; that courts just casually state that parties have 'complied', but the parties and the courts never address, among others, the documentary evidence to be produced; never agree on a bundle of documents, and never address any substantive issues relating to pre-trial preparations to be ventilated before the Deputy Registrar/Case Conference Officer and result in a Case Conference Order under Order 11, rule 4 and 8; and a Memorandum under Order 11 rule 7 (4) of the Civil Procedure Rules.

15. In further submissions in support of their contention that no proper pre-trial conference was ever held, the appellants contend that on the date of the Pre-trial Case Conference, the respondents just casually stated that they had 'complied', but that the respondents and the court never addressed any documentary evidence they wished to produce; whether they intended to produce primary or secondary evidence; the witnesses they intended to call; and whether they intended to call the makers to produce the documentary evidence; and never addressed any substantive issues relating to pre-trial preparations to be

ventilated before the Deputy Registrar

/Case Conference Officer, and result in a Case Conference Order.

16. The appellants submit therefore that the appearance before the Deputy Registrar did not therefore procedurally amount to a proper pre-trial case conference that could assist the smooth and speedy conclusion of the trial. According to the appellants, if a proper pre-trial case conference as envisaged under Order 11 was ever held, a binding Case Conference Order under Order 11 rules 4 and 8 of the Civil Procedure Rules and a Memorandum under Order 11, rule 7 (4) of the Civil Procedure Rules, executed by both parties and the Deputy Registrar/Case Conference Officer outlining the agreements between the parties on how the trial was to proceed, would have resulted, settling all pre-trial issues summarily, to pave way for a smooth trial without objections.

17. The appellants submit that the trial judge erred in law and fact by disregarding the absence of a pre-trial conference order and memorandum and that Order 11 did not amend, repeal or replace the cardinal rules of evidence outlined in the Evidence Act. Further, that in the absence of any pre-trial agreements on production of documentation and

witnesses, they would still have been required to abide by

rules of evidence in the Evidence Act, particularly section 35 thereof, and produce all original documents through their makers.

18. The appellants contend that the respondents were unjustifiably allowed to become their own doctors and produce medical reports and other medical evidence themselves, against the rules of evidence; and that this effectively took away the appellants' right of cross-examination of the proper witnesses as the 1st respondent, a medical lay-person, could not properly and accurately answer medical questions. Similar arguments are made regarding the production by the 2nd respondent of a medical report by Dr. Neil Brener with respect to the psychological trauma he suffered as a result of the accident.

19. The appellants submit that the 2nd respondent, who only sustained minor soft tissue injuries, was basing his outrageous claim for loss of earnings in the sum of US$ 447,576.00 (approximately Kshs.48,338,000 at the then prevailing exchange rate of Kshs. 108 to the dollar) on the medical report by Dr. Neil Brener. According to the appellants, it was only Dr. Neil Brenner who could properly

and accurately answer pertinent medical questions arising

from his medical report. Similar arguments are made with respect to the production by the 1st respondent of documents in support of her claim for loss of earnings; and with respect to the 2nd rrespondent's production of documents in support of his financial claim against the appellants, yet he had only sustained minor soft tissue injuries.

20. The appellants submit, finally, that the respondents were unjustifiably allowed to call last minute 'expert' witnesses to produce last minute new documentation filed a day before trial without leave, against the rules of evidence and procedure. They submit that the incomplete, unlawful and unprocedural 'Pre-trial case conference' that did not address any documentation or witnesses was supposedly held on 24th September 2014; that almost two years later, on 14th March 2016, the respondents filed a statement by one Robert S. Tucker Jr.; and that a day before trial and without leave, when the matter had already proceeded substantially and both respondents had already testified, they swapped Robert S. Tucker Jr. with Keith Mackey, and also swapped the statement by Robert S. Tucker Jr. with one by Keith Mackey, their only excuse, which the

appellants term unlawful and unprocedural, being that the new witness would be giving

similar evidence to the other witness, in total disregard of procedure and the obvious prejudice caused to the appellants.

21. They submit that the trial court erred in law and fact and contradicted itself by holding that their objections had already been dealt with in previous rulings, yet the newly introduced witness and his statement had been filed a day before trial and a day before the appellants' objections; in holding that their objections should have been made at the pre-trial stage yet they were objecting against a newly introduced witness and a newly introduced statement, years after the 'unprocedural' and 'inadequate' pre-trial case conference which was held on 24th September 2014; and in holding that the new irregularly introduced witness would be giving similar evidence to the abandoned witness.

22. In support of their final ground in which they allege bias against them on the part of the trial court, the appellants point at the rulings of the trial court in allowing further evidence to be filed and witnesses to be swapped a day before trial without leave, after delivering multiple rulings against them while citing pre-trial directions allegedly

given years earlier; reasoning that did not, according to the appellants, apply to the respondents when allowing them to file further

evidence and swap witnesses a day before trial, implying that the same rules did not apply to the respondents. It is their case that they were, as a result, effectively shut out from the proceedings and prevented from effectively defending themselves, in breach of the rules of natural justice.

23. In support of their appeal, the appellants rely on the decisions in ***Methuselah Keyah Lubembe v Albina Kipkemoi*** **[2019] KEHC 2804 (KLR)** and **Rufus** ***Kiuna Kungu & another v Francis Njue Nyaga*** **[2016] KEHC 8075 (KLR)**. They ask this Court to allow their appeal, set aside the rulings and orders of the trial court delivered on 8th, 9th and 10th May 2018; an order be issued remitting the suit to the High Court for proper pre-trial procedures to be undertaken under Order 11 of the Civil Procedure Rules, and re-trial afresh on merit in accordance with the rules of evidence outlined in the Evidence Act. They also pray for the costs of the appeal.

24. In their submissions, the respondents, while observing the prolixity of the appellants' grounds of appeal, note that they revolve around three thematic areas: that the rulings by the trial court allowed the respondents to produce

medical ‘reports’ as evidence of their injuries without calling their

makers; produced employment records in support of compensation without calling the makers; and in allowing an expert, one Mr. Keith Mackey, to be a substitute expert witness in place of Mr. Tucker Jr., which the judge should not have done.

25. Building on these areas, the respondents address the appellants' grounds of appeal as summarised earlier in this judgment. With regard to the question whether the impugned rulings had the effect of shutting out the appellants from their right to a fair hearing, the respondents submit that from the typed proceedings, it is apparent that the further hearing of the respondents' case on 8th -10th May 2018 was a continuation of the hearing which began on 31st March 2016 when the 1st respondent's evidence was taken partially, before she was stood down. The respondents submit that in the ruling delivered on 8th May 2018, the trial court dismissed the appellants' objection to the production by the 1st respondent during her testimony of the Discharge Summary and Notes from The Nairobi Hospital, all dated 25th August 2010. The respondents ask this Court to consider that the objections by the appellants were raised during further trial, after the

matter had been set down for further hearing subsequent to the commencement of the trial on 31st March 2016.

26. According to the respondents, these further dates had been settled by consent on 24th January 2018; their counsel had, prior to the trial dates, engaged the appellants' counsel, who knew that both the respondents, their expert witness, Keith Mackey, and their lawyer, Barry Newmann, would be traveling from the United States of America to attend the trial; that flight tickets had been purchased, hotels booked and time taken away from other undertakings to allow them prepare for and attend the trial. This communication is contained in the Further Supplementary Record of Appeal dated 8th October 2020. The respondents submit that the appellants' objections during trial were unfortunate as they meant that the respondents could not proceed to adduce evidence and the travel dates would be foregone and therefore wasted. The respondents' submission is that viewed from this perspective, the trial court's three rulings referring to the pre-trial steps taken by the parties were right, and we should uphold them; and it could not be argued that they had the effect of shutting out the appellants, contrary to

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the rules of natural justice, as they contend.

27. With respect to the question whether pre-trial directions had been taken as contemplated under the law and the effect thereof on the proceedings at the trial, the respondents submit that it is notable that after the suit was lodged in 2012, pre-trial directions were issued in Court on 24th September 2014; 11th August 2015; 14th March 2016 and 11th May 2018. They submit that the appellants, through their advocates, participated in all the pre-trial dates, including engaging on the respondents' application for leave to adduce evidence by video conference, which was eventually not possible for the reasons indicated by the Deputy Registrar. The respondents submit that while the appellants, in their submissions, lay the blame on the respondents for what they allege was a 'casual approach' to the pre-trial directions, the appellants fully participated in taking directions on the basis of which the trial commenced on 31st March 2016 and proceeded further on 8th
-10th May 2018. It is the respondents' submission that having acquiesced to the manner in which pre-trial directions were taken and the matter settled for trial, under the estoppel doctrine, the appellants cannot now

make a complete turn around and blame the pre-trial process.

28. The respondents rely on the case of ***Stephen Makare Mulewa -vs- Linda Newman*** **[2015] eKLR** cited in the case of ***Rufus Kiuna Kungu & Anr v Francis Njue Nyaga*** **[20l6] eKLR** relied on by the appellants for the proposition that a party cannot complain about failure to comply with the pre-trial procedures under Order 11 of the Civil Procedure Rules 2010, not having raised any objection to the hearing of the suit on the ground that pre-trial procedures were yet to be finalized.

29. With regard to the appellants' complaint that the trial court erred in allowing the respondents to produce their medical and employment records into evidence without calling their makers, against the rules of evidence, the respondents submit that it is on record that, as regards the 1st respondent, the appellants objected on 8th May 2018 to the production of her discharge summary and doctor's notes only; that on 9th May 2018, the appellants objected to the production of the 2nd respondent's medical summary and his compensation summary which the 2nd respondent relied on to supplement his oral testimony on the losses he incurred when he took time to attend to the 1st respondent. The respondents submit that the hearing on 8th -11th May

2018 was a continuation of the proceedings which had begun on 31st March 2016; that

during her initial testimony on 31st March 2016, the 1st respondent had testified on her injuries and losses related to her employment and produced a number of exhibits without objection, including the treatment notes the subject of the objection on 8th May 2016. It is submitted for the respondents that when the hearing resumed on 8th May 2018, the 1st respondent was cross-examined in regard to the exhibits which she had produced on 16th March 2016, including the employment records, without any objection being raised to her employment records.

30. Regarding the 2nd respondent, it is submitted that the record indicates that he had testified on 8th and 9th May 2018; that the appellants' counsel objected to the production of a summary of his medical treatment dated 12th January 2012 prepared by Dr. Neil Brenner addressed to Dr. Keith Stoll; that he had given oral testimony that he had suffered only minor cuts and that physically, he had not suffered; but that he had suffered mental trauma as a result of the crash and being left at the scene for 23 hours; and that the medical report and treatment notes were to supplement his evidence. The respondents cite section 35(1)(a)(ii) of the Evidence Act which they submit

recognizes the admissibility

of documents forming part of a continuous record in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters.

31. The respondents further submit that the 2nd respondent had produced, in support of his claim for the losses relating to his employment, his employment contract without objection from the appellants' counsel; that the Employment Letter dated 2nd May 2007 and its amendment dated 2nd March 2010 were filed with a Supplementary List of Documents on 2nd March 2017; and that the objection during trial on 9th May 2018 was thus only against the compensation summaries, which had been filed alongside the plaint on 16th August 2012.

32. The respondents submit that contrary to the appellants' submissions, the rules of evidence do not require that every document be produced by its maker, especially in the instant case, where such a requirement would have led to great expense and/or unnecessary delays. Further, that the 2nd respondent would not have had the capacity to compel his employer, Credit Suisse, to appear before the court in Kenya to testify. The respondents submit that by

dint of sections lA

and 1B of the Civil Procedure Act and Article 159 of the Constitution, the trial Judge was right in making findings whose effect was to have the trial conducted in a manner that is just, efficient, timely and cost effective.

33. Regarding the appellants' contention that the trial court erred in allowing the expert testimony of Keith Mackey in place of Robert Tucker Jr, the respondents submit that the substitute witness was not a surprise to the appellants; that the respondents had, on 14th March 2016, sought leave to file a witness statement of an expert witness, an application that was not opposed by the appellants; that the trial court thereafter allowed the introduction of Mr. Tucker Jr. as an expert witness in a ruling delivered on 30th August 2017. It is the respondents' submission that on the date of the hearing, Robert S. Tucker Jr, was unable to fly in from the United Kingdom and, as a result, they procured the attendance of a substitute witness.

34. The respondents submit that their advocates had engaged counsel for the appellants days prior to the hearing on 8th May 2018 by the letters dated 30th April 2018 and 4th May 2018 to notify them that the witness, Robert S. Tucker Jr. whose statement, filed on 10th February 2017 they had

been served

with a year earlier, would not be available, but would be replaced by Keith Mackey. The respondents note that in its ruling dated 10th May 2018, the trial court had observed that Mackey's statement was near-similar to that of Robert Tucker Jr, whom the appellants had already agreed to the introduction of.

35. In responding to the appellants' grounds alleging bias on the part of the trial court, the respondents observe, first, that the allegation was made casually before the trial judge. They submit that in the event that the complaint was valid, the appellants were under a legal obligation to present a formal application before the trial Judge for adjudication, upon which it would form an issue for determination by the court. It is their submission that the issue of bias is a moot point that does not require adjudication by this Court. They pray that the appeal be dismissed with costs.

36. We have considered the record of appeal, the impugned rulings and the submissions of the parties. The essence of the appellants' case is that by its rulings allowing the production of medical and employment records by the respondents instead of production by the makers of the

said documents; and allowing the substitution of one expert witness for

another, the trial court thereby denied them their right to a fair hearing and the right to confront their accusers in cross- examination.

37. The overarching issue that their appeal raises, however, is whether the trial court erred in ruling that the appellants' objections should have been raised at a pre-trial conference when no such conference as contemplated under Order 11 had been held; and when no pre-trial conference memorandum and order had been issued by the Deputy Registrar. The appellants have also alleged bias on the part of the trial court. However, this not being an issue that had been placed before the trial court for determination, there is no basis for us to address our minds thereon in this appeal.

38. We begin by addressing ourselves to the appellants' contentions regarding pre-trial directions and a pre-trial conference memorandum and order. The appellants centre their arguments against the decisions of the trial court on the basis that there was no pre-trial memorandum or order as required under Order 11 rule 4 of the Civil Procedure Rules. They charge the trial court and the respondents of taking a 'casual approach' to the issue of case conference

as contemplated under order 11 rule 4.

39. As we consider the appellants arguments in this appeal, we recognise, at the outset, that the appellants' complaints regarding a pre-trial conference were not at issue before the trial court. The invitation, therefore, to this Court in this appeal to address the issue of pre-trial proceedings under Order 11 of the Civil Procedure Rules with finality is misplaced. What we can properly address is whether the trial court erred in holding that the appellants' objections to production of documents should have been addressed at the pre-trial conference; and whether a pre-trial conference at which the issue of documents to be produced and witnesses to be called should have been addressed had been held.

40. Order 11 rule 2 provides for a case conference checklist to be prepared by the plaintiff; rule 3 for a case management conference; while rule 4 provides for a case management conference certificate and a case management order at the end of the case management conference. A perusal of the record of proceedings shows that a pre-trial questionnaire dated 26th September 2013 was filed by the respondents on 27th September 2013, while a Statement of Issues, also dated 26th September 2013, was filed on 27th

September 2013.

41. On 24th September 2014, the parties appeared before ***Waweru J.*** (now retired), through the same counsel now appearing for the parties before us, with learned counsel, Mr. Mugambi, appearing for the plaintiffs (the respondents) while Mr. Mr. Kinyanjui appeared for the defendants (appellants). Mr. Mugambi informed the court that the matter was coming up for the pre-trial conference, and that the plaintiff and defendants *"have complied save in respect to statements of issues which is filed by the plaintiff. Suit ready for trial.''* Learned counsel, Mr. Kinyanjui, on behalf of the appellants, stated that *"I agree. We can file a joint statement of issues later."* The court then stated that *"In the circumstances, the suit is certified ready for trial. A hearing may be taken at the registry. Agreed statement of issues may be filed later. Costs in cause."*

42. We note that the trial then commenced on 31st March 2016, with the 1st respondent testifying and producing the documents that the appellants subsequently objected to on 8th May 2018.

43. Given those circumstances, can the appellants be heard to say, eleven years later, that the respondents and the court

‘*casually’* dealt with the issue of a pre-trial conference; that a

pre-trial certificate and a pre-trial order were not issued, and that therefore the matter should be remitted to the High Court for a proper pre-trial conference, and for a certificate and order to be issued? We think not. The lesson for litigants to be gleaned from the decision of this Court in ***Stephen Mkare Mulewa v Linda Newman*** **(supra)** is that parties should raise, at the pre-trial stage, before the commencement of trial, all their concerns with regard to the preparation for trial, including documents to be produced and witnesses to be called. Learned counsel for the appellants participated in the pre-trial conference on the matter on 24th September 2014; confirmed that the matter was ready for trial; and proceeded with the hearing three years later. He did not complain about the manner in which it was held.

44. The documents that the appellants objected to production of in 2018 had been filed in 2012, contained in the Plaintiffs' list and Bundle of Documents dated 15th August 2012; they were in the possession of the appellants in 2014 when they confirmed, at the pre-trial conference, that the matter was ready for trial; and in 2016 when the 1st respondent testified, before she was stood down.

45. It is noteworthy, further, that in a Notice of Preliminary Objection dated 14th March 2017 contained at page 320 of the record, the appellants objected to the respondents' *'Supplementary List of Documents irregularly filed in court without leave on 2nd March 2017 long after pre-trial procedures were concluded and pre-trial directions given and the matter proceeded for hearing…"* The appellants did not include the ruling dated 30th August 2017, which appears to have dealt with their objection, in the record of appeal. It appears from the submissions by the respondents that the Supplementary List of Documents was allowed into the record, by that ruling, which was not appealed from.

46. In the circumstances, we find that the trial court properly held that any objections that the appellants wished to raise with respect to the production of documents should have been raised at the pre-trial conference. The appellants cannot now be heard to complain about the manner in which the pre-trial conference was held, or any shortcomings regarding compliance with the requirements of Order 11 rule 4.

47. The appellants also challenge the ruling dated 10th May

2018 allowing the substitution of Mr. Tucker Jr. with Mr. Mackey. We have considered the ruling and the reasoning of the trial

court in allowing the substitution. We have also considered the contents of the two reports and we have noted, as the trial court did, that the contents of the two reports were essentially the same, save for paragraph 41 in the statement by Mr. Tucker Jr. which goes into considerable detail about the manner in which the helicopter pilot handled the helicopter at the critical time prior to the accident.

48. We further note from the record that on 16th March 2016, the respondent had applied and been allowed, without objection by the appellants, to call an expert witness to testify. The application that was allowed related to calling '*an expert'*, not a specific person. In our view, in the absence of Mr. Tucker Jr., the trial court properly allowed his substitution with Mr. Mackey. From the expert statements on record, we note that the essence of the expert evidence was on the technical aspects of the accident, which the respondents were allowed to present before the Court. In the circumstances, and in light of the explanation given before the trial court before the impugned ruling allowing the statement and testimony of Mr. Mackey, we are satisfied that the trial court properly

directed its mind in disallowing the appellants’ objection.

49. We accordingly find that the present appeal is devoid of merit, and it is hereby dismissed. The trial shall proceed from where it left off prior to the orders of this Court staying the proceedings.

50. We direct that the matter be mentioned before the Principal Judge of the High Court within 30 days from the date hereof for the purpose of giving directions with respect to the further hearing of the matter.

51. The appellants shall bear the costs of the appeal.

Dated and delivered at Nairobi this 6th day of March, 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb

....
JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.