



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E004 OF 2021

PATRICK A. M. MAINA & 3 OTHERS PETITIONERS

-VS-

SHOPRITE CHECKERS KENYA LIMITEDRESPONDENT

-AND-

THE HON. ATTORNEY GENERAL INTERESTED PARTY

RULING NO. 3

1. Upon the delivery of Ruling No. 2 in this matter, the Petitioners began a barrage of attacks not only on the Court, but also on the rest of the parties. The Hon. Attorney General who was enjoined as an Interested Party at the Court's own motion and the Hon. Deputy Registrar of this Division were neither spared.
2. In the applications that culminated with the said Ruling No. 2, the Petitioners had prayed for confirmation of some interim conservatory orders or in the alternative, the Petitioners sought security for judgment between USD \$1.9 Million (approximately Kshs. 200 Million) and US \$2.8 Million (approximately Kshs. 300 Million). The gist of the Petition is a soft tissue injury which the 1st Petitioner sustained while shopping within one of the Respondent's outlets in Nairobi.
3. This Court, upon consideration of the matter declined to confirm the conservatory orders it had issued earlier. Instead, the Court directed the Respondent to deposit security for any possible judgment in Court in the sum of Kshs. 3 Million.
4. The Petitioners were obviously displeased with the ruling of the Court. They then filed several applications. One of such applications is the Notice of Motion dated 3rd May, 2021 for the Court's recusal (hereinafter referred to as '*the recusal application*'). That was after the Petitioners had filed an application for the constitution of an expanded Bench to hear and determine the Petition.
5. Given the number of applications currently on record, this ruling is directional in that it seeks to chart the best way forward and in consideration of the calling under Article 159(2)(b) of the Constitution.
6. The parties made submissions on the way forward. Whereas I will consider them in coming up with the way forward, there is no necessity of reproducing the same herein.
7. Once a recusal application is made, the Court is under a duty to, in the first instance, deal with such an application. I have considered the recusal application herein. There is another application by the Respondent to cross-examine the Petitioners on the contents of the recusal application. The Petitioners vehemently posited that the recusal application was unopposed, hence, the Respondent ought not to cross-examine any of them and that the recusal application ought to be allowed as a matter of course.
8. I have carefully considered this matter as a whole. As said, and from the nature of the applications and various complaints raised herein, it is clear that the Petitioners are aggrieved by the Ruling No. 2.
9. The grounds in support of the recusal application, to say the least, are far-fetched, overstretched imaginations and a deliberate attempt to create non-existent and so loose issues. The grounds are not holding at all. The allegations *in toto* are simply so concocted and far from the truth. None of the allegations in that application will persuade me to think twice of the manner in which I have so far conducted myself in this matter. As said, the application is offshoot from the Petitioners who are dissatisfied with the Ruling No. 2. This is an application which

even without any objection filed against it cannot be sustained or at all. I sincerely do not think I should spend more judicial time in dealing with the said application.

10. In fact, the Petitioners had requested this Court to summarily deal with the recusal application in the hope that it will be allowed since, according to them, there was no objection thereto. Whereas the Petitioners are entitled to their understanding of the law and procedure, to me, regardless of whether a matter is opposed or not, a Court must satisfy itself that there is sufficient legal basis to allow it, the failure to oppose the same notwithstanding. I say so on the understanding of the position that even *ex-parte* applications can be disallowed.

11. I must once again state that judicial time is extremely scarce especially in this Division. As a Court, I admit to have so much indulged the Petitioners in the manner in which they have prosecuted this matter. The Respondent has on several occasions raised complaints to that end. The reason for extending such an opportunity to the Petitioners has been the fact that the Petitioners are appearing in person and to me, I was looking forward to dealing with the real issues at hand. Many a times I reminded the Petitioners to keep unto the expected legal lane.

12. In terms of directions on the way forward, I have already stated that I will not allow the recusal application to continue eating into the limited Court's time. It is instructive for the Petitioners to understand that a dissatisfied party still has an opportunity of *inter alia* appealing against the decision or to seek a review thereof.

13. For completeness of the record, I must, point out that the decision to disallow the recusal application is informed on the legal principles on recusal of a Judge which I comprehensively dealt with in Nairobi High Court Constitutional Petition No. E267 of 2020 **Dr. Ekuru Aukot versus Miruru Waweru & 8 Others** (2020) eKLR.

14. Having said so, the best way forward in this matter is to accord the parties an avenue to ventilate on the main issues. Focus ought, henceforth, to be towards the main Petition. I, therefore, call upon the parties to exercise restraint, put-aside any unnecessary interlocutory applications and consider dealing with the main Petition. Needless to say, the Court will definitely have to deal with such applications that are necessary and in preparation of the main trial.

15. Having taken such a position, I would have proceeded to issue further directions herein. However, given the fact that the Petitioners are appearing in person, considering that there are three Judges in the Division and the obvious fact that the Petitioners are likely not to understand the 'insistence' of this Court to deal with the matter further, I hereby opt to accord the Petitioners the opportunity to test the law before another Judge. I will, henceforth, recuse myself.

16. Resulting from the holding, all other and further directions shall be issued by the next trial Court.

17. In the end, I hereby issue the following directions and orders: -

(a) The Notice of Motion dated 3rd May, 2021, be and is hereby, dismissed with no orders as to costs.

(b) I hereby recuse myself from hearing this matter.

(c) This matter be placed before the Presiding Judge of this Division on 03/11/2021 for further directions.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021

A. C. MRIMA

JUDGE

Ruling No. 3 virtually delivered in the presence of:

Patrick Alouis Macharia Maina and Ann Malinda Toma, the 1st and 2nd Petitioners in person.

Mr. Eddie Omondi and Mr. Michael Owano, Counsel for the Respondent.

Elizabeth Wanjohi – Court Assistant