Maina & 3 others v Shoprite Checkers Kenya Ltd; Attorney General (Interested Party) (Petition E004 of 2021) [2025] KEHC 10 (KLR) (Constitutional and Human Rights) (9 January 2025) (Ruling)

Neutral citation: [2025] KEHC 10 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E004 OF 2021

LN MUGAMBI, J

JANUARY 9, 2025

BETWEEN

PATRICK ALOUIS MACHARIA MAINA ..... 1ST PETITIONER

ANN MALINDA TOMA ..... 2ND PETITIONER

SMM (MINOR SUING THROUGH THE 1ST PETITIONER AS NEXT FRIEND AND FATHER) ..... 3RD PETITIONER

JMN (MINOR SUING THROUGH THE 1ST PETITIONER AS NEXT FRIEND AND FATHER) ..... 4TH PETITIONER

AND

SHOPRITE CHECKERS KENYA LTD ..... RESPONDENT

AND

ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

Introduction

1. The 1st Petitioner in the Notice of Motion application dated 8th July 2024, sought orders as hereunder:

    i. Spent.

    ii. This Court be pleased to issue an interim ex parte conservatory order, prohibiting the Hon. Deputy Registrar of this division, and any other officer of the Judiciary, from releasing, or facilitating the release of Ksh. 3,000,000.00 to the Respondent until after the lapse of 14 days

or until the day after this application is mentioned inter partes in court and further orders are given – whichever is later.

iii. In the alternative to 2 above, the order of stay granted by this Court on 24th May 2024 be temporarily extended ex -parte for 14 days or until the day after this application is mentioned inter partes in court and further orders are given –whichever is later.

iv. This Court be pleased to give directions for the inter partes mention / part-hearing of this application for purposes of determining whether prayer No. 5 below ought to be granted.

v. The order granted in 2 or 3 above (as the case may be) be and is hereby further extended and shall remain in force until this application is heard and determined.

vi. The order of stay granted by this Court on 24th May 2024 be reviewed and varied as follows:

a. the duration of stay is extended such that the stay shall remain in force until after the applicants' application in the Court of Appeal – Civil Appeal (Application) No. E424 of 2024, and any subsequent appeals arising therefrom, are heard and determined with finality.

vii. Such further or other orders as this Court may deem necessary for attainment of the ends of justice and/or for protection of the public interest.

viii. The applicants be awarded the costs of this application.

Contextual background

2. The genesis of the matter is the Petition dated 6th January 2021 in which judgment was delivered on 27th July 2023. The Court finding was that the Petition lacked merit and dismissed it with costs to the Respondent.

3. Thereafter, the Respondent in an application dated 17th October 2023 sought an order for the release of the amount of Kshs. 3,000,000 which had been ordered as security for judgment by the Hon. Justice Mrima on 1st March 2021.

4. This Application was subsequently allowed by Hon. Justice Mwita in his Ruling dated 24th May 2024. The instant application is in reaction to this Ruling and the ensuing order dated 3rd June 2024 authorizing release of the security deposit to the Respondent.

Petitioners' Case

5. The Application is supported by the 1st Petitioner's supporting affidavit, of even date sworn on behalf of the other Petitioners and the grounds on the face of the Application. The Application is also supported by a further affidavit sworn on 6th June 2024.

6. The 1st Petitioner depones that following the impugned Ruling dated 24th May 2024, the Court allowed their oral application for an order staying the release of the security deposit pending their Appeal. This was for a period of 45 days. He states that the 45 days granted by the Court were set to expire on 8th July 2024. Subsequently vide Civil Appeal (Application) No.E424 of 2024, he applied for an order of stay which is yet to be heard and determined.

7. The 1st Petitioner is apprehensive that with the lapse of the 45 days, the release order for the security deposit will be implemented. He avers that once these funds are released to the Respondent, a foreign

owned Company with no physical presence or assets in Kenya, the same will be transferred outside Kenya.

8. The 1st Petitioner asserts that this in turn will cause irreversible harm and prejudice to their Appeal which is yet to be heard. It is argued that this will be in violation of their right to be heard.

9. It is further claimed that grant of the 45 days was erroneous thus amounting to an error apparent on the face of the record. The 1st Petitioner posits that the Court failed to consider the sufficiency of the days granted against the numerous applications pending before the Court of Appeal and the period it will take for their application to be heard. The 1st Petitioner went on to detail how the 45 days had been spent up until filing of this application. It is their case therefore that they ought to be granted more time.

Respondent's Case

10. In response, the Respondent through its Divisional Manager, Anton Adrew Wagenaar filed a Replying Affidavit sworn on 16th July 2024. On the onset, he states that the Application is an abuse of the Court process as the Petitioners seek to engage the Respondent and the Court in an endless litigation over issues that have already been determined.

11. Recapping the facts of this case, he avers that the issue of compliance with reference to the Orders issued on 1st March 2021 has already been litigated and dispensed with. He stresses that the cited Order being security for Judgment, was only to subsist for the pendency of the suit until Judgment was rendered.

12. Considering this, he argues that being that the matter has already been finalized, the Respondent is at liberty to pursue release of the security deposit. He points out further that the terms of the cited Order were never challenged by way of an appeal or review by the Petitioners. He claims therefore that this Court ought to uphold the release Order issued by this Court in light of the Ruling delivered on 24th May 2024.

13. He additionally argues that refutation of the release of the security deposit would be prejudicial to the Respondent as consists of its rightful property. In like manner, the same would be a hindrance to the Respondent enjoying the fruits of its Judgment. Similarly, he contends that the sought conservatory order is a non-starter as there is no legal basis for its grant since the Petition has already been determined.

14. In like manner, it is observed that issuance of a review order is predicated on satisfaction that there is new evidence, an error apparent or mistake on the record and other sufficient reasons. In his view, the Petitioners have not established any of these, to warrant grant of the order. In view of the foregoing, he contends that the Application lacks merit and hence should be dismissed.

Interested Party's Submissions

15. This Party's response and submissions are not in the Court file or Court Online Platform (CTS).

Parties Submissions

Petitioner's Submissions

16. The Petitioner filed two sets of submissions dated 26th July 2024 and 29th July 2024 respectively.

17. The Petitioner with regard to the application for review submitted that the Court made an error in allocating 45 days for stay. This is because the same was insufficient in view of the pendency of the numerous suits before the Court of Appeal. In his view, the grant of the 45 days was inconsistent with

Article 21(1), 48 and 159(2) (e) of *the Constitution* and the Court's primary mandate to uphold these rights.

18. It was further asserted that this Court in its discretion and to ensure the orders dated 24th May 2024 were not in vain ought to review this order with an aim of enlarging time. He as well submitted that failure to grant the sought orders would see their appeal be overtaken by irreversible events thus being rendered nugatory.

19. Relying on Hon. Justice Mwita's pronouncement in the cited impugned Ruling, he argued that this Court has jurisdiction to entertain any applications that come after the Judgment as long as does not amount to an appeal of its own decision.

Respondent's Submissions

20. In support of its case, the Respondent through Mwaniki Gachoka and Company Advocates filed submissions dated 29th July 2024 where Counsel stated that the only issue for consideration is whether the instant Application is merited.

21. Relying and reiterating the Respondent's averments, Counsel submitted that the application is unmerited as the Petitioners have not shown any grounds for review to justify review of the impugned orders. It was noted that although there are no provisions upon which constitutional petitions can be reviewed, the provisions of the *Civil Procedure Act* as held in Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others (2016)eKLR were applicable.

22. Counsel submitting that the 45 days were sufficient, went on to state that the Petitioner's actions are geared towards unduly depriving the Respondent an opportunity to access funds that rightfully belongs to it. He added that this was despite the Order dated 1st March 2021 being unequivocal that it was a security for Judgment, which had since been delivered.

23. To support this point, reliance was placed in Eastlands Hotel Limited v Wafula Simiyu & Company Advocates (2015) eKLR where the Court of Appeal held that once a suit (or appeal) is heard and determined, the effect of the Judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. To this end, Counsel stressed that the Application ought to be dismissed.

Analysis and Determination

24. It is my considered view that the issues that arise for determination are:

    i. Whether the Petitioners have met the threshold for grant of conservatory orders.

    ii. Whether the Petitioners have met the threshold for grant of the review order sought.

    Whether the Petitioners have met the threshold for grant of conservatory orders.

25. The law on issuance of conservatory orders in constitutional petitions finds its bearing under Article 23(2) (c) of *the Constitution*. Further Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which reads as follows:

    Conservatory or interim orders.

    i. Despite any provision to the contrary, a Judge before whom a petition under Rule 4 is presented shall hear and determine an application for conservatory or interim orders.

    ii. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

iii. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

26. The Court in Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court (2016)eKLR summarized three main principles for consideration when dealing with such applications as follows:

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order."

27. Likewise, in Board of Management of Uhuru Secondary School v. City County Director of Education & 2 Others [2015] eKLR the Court stated that:

25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

28. Further, on public interest, the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014]eKLR guided as follows:

> "Conservatory orders' bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory

authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes ...."

29. In the present case, the context is that there is no longer a Petition that is pending trial before this Court having been concluded on merits via the Judgment delivered on 27/7/2023 that determined the issues that were in controversy.

30. The essence of a prima facie case which is a cardinal requirement in a conservatory order application is that the applicant has an arguable case that needs preservation pending the full determination of the matter. There is no other determination on merits that is pending before this Court after 27/7/2023. The Petitioners in their application dated 6th January 2021 and 21st January 2021 seeking the order for preservation of security deposit, explicitly sought an order until the final Judgement of this Court, it was not to be based on subsequent mutable outcomes of the decision.

31. A conservatory order cannot therefore issue on a matter that the court is functus officio. The only Court that can assume jurisdiction and grant such an order is the appellate Court or in a very limited scope, if what the Petitioner is seeking was review of this court's judgment, which however is not the case, which means this Court has no jurisdiction whatsoever to reopen or reevaluate this issue.

Whether the Petitioners have met the threshold for grant of the review of the order.

32. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 does not expressly provide for review of this Court's orders.

33. In view of such a lacuna in law, the Court of Appeal in Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR opined as follows:

> "...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*."

34. Likewise, in James Omariba Nyaoga, James Ariga Orina, John Matunda Omwenga, Zachary N. Orina, Margaret Momanyi, Damaris Nyachiro, Dorcas Momanyi, Berina K. Ondiek & Bom, Kenyoro Secondary School v County Education Board-Kisii County, National Education Board & County Director Of Education ; Principal, Kenyoro Secondary School (Interested Parties), Teachers Service Commission, Cabinet Secretary, Ministry Of Education & Attorney General [2021] KEHC 5078 (KLR) it was held that:

> "20. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules does not specifically provide for review. However, as held in the above persuasive decisions of the courts, where there is a lacuna in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, the *Civil Procedure Act* and the Civil Procedure Rules will apply. Moreover, the invocation of the wrong provision of the law will not of itself be fatal to an application. Courts are charged to

do substantive justice to parties and will not pay undue regard to procedural technicalities. The reliance on the *Civil Procedure Act* and the Civil Procedure Rules is therefore not fatal to the application. This position finds support in the case of Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR where the Court of Appeal held thus;

"There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*."

35. The guiding legal principles upon which Kenyan Courts make findings on grant of an order for review is explicitly provided for under Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. These provisions provide as follows:

Section 80 - Review

i. Any person who considers himself aggrieved—

ii. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

iii. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1

i. Any person considering himself aggrieved—

ii. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

iii. by a decree or order from which no appeal is hereby allowed,

iv. and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

36. The Court in the case of Jimi Wanjigi & another v Inspector General of Police & 3 others [2021] eKLR in this matter observed as follows:

37. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, Parliamentary Service Commission -vs- Martin Nyaga Wambora & others [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in Mbogo and Another -vs- Shah [1968] EA, upon establishing the following principles: -

31. Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

> A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
>
> Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
>
> An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
>
> In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
>
> During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
>
> The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

a. as a result, a wrong decision was arrived at; or

b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

38. The Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya vs. Ndungu Njau observed as follows in respect of reviews applications: -

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law."

37. Likewise, the Court of Appeal in Nyamogo & Nyamogo v Kogo 2001 EA 173 as cited with approval in George Gikubu Mbuthia v Kenya Power & Lighting Company Ltd [2004] eKLR underscored as follows:

> " We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which as to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible

one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

38. In this application the Petitioners urge this Court to review the order granting a 45 day stay on account that is an error apparent on the face of the record because the Court erroneously estimated the time that may be required to move to the Court of Appeal and seek a stay given numerous matters before the Court of Appeal.

39. What amounts to an error apparent on the face of record has been judicially considered in various authorities and Courts have held that it is something that does require elaborate argument to be established. Indeed, it should not be one where on consideration a possible a different view could have been taken by the court/tribunal on a point of fact or law. The error must be plainly obvious to require any elaboration. The case of Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte) [2021] KEHC 298 (KLR) is instructive. The Court explained thus:

> " The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/ tribunal on a point of fact or law. In any case, while exercising the power of review, the court/ tribunal concerned cannot sit in appeal over its judgment/decision."

40. The argument that the Court should have considered a longer period in view of the caseload before the Court of Appeal cannot in my view be an error on the face of record going by the meaning of the phrase as to what amounts to an apparent error on the face of the record. The ground raised by the Petitioners' does not amount to an error apparent on the face of the record as emaciated in the authorities. It is purely based on the Petitioner's assessment that the Court should have granted more time to give him enough time to have the application for stay heard by the Court of Appeal before any further action is taken herein. This Court does control what is already before the Court of Appeal and it is up to the Petitioner to persuade that Court to grant more time if he finds what was given by this Court is insufficient. The assessment by the Judge in giving 45 days was discretional.

41. The Petitioner wants this to Court sit on appeal of its discretionary decision that granted 45 days pending appeal. This ground fails the test for grant of an order of review and is rejected. It is my view that there is no valid justification or sufficient cause that has been demonstrated by the Petitioners to warrant granting of the orders sought in this application.

42. The application is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

.....

L N MUGAMBI

JUDGE