



REPUBLIC OF KENYA



**KENYA LAW**  
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**PAMM & 3 others v Shoprite Checkers Kenya Ltd; Attorney General  
(Interested Party) (Petition E004 of 2021) [2023] KEHC 3472 (KLR)  
(Constitutional and Human Rights) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3472 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E004 OF 2021**

**JK SERGON, J**

**APRIL 24, 2023**

**IN THE MATTER OF: ARTICLES 22(1, 2A, B, C), 258(1, 2A, B, C), 159(2D),  
50(7, 8), 165(3A, B, D-I, D-II), 2(3, 4, 5, 6), 3(1), 10(1A, B), 19, 20(1, 2,  
3, 4), 21(2, 3), 23(3), 24(1, 2, 3), 25(A, C), 27(6, 7), 53(2), 260, 1(1),  
4(1), 3(1), 232(B) AND 259(1) OF THE CONSTITUTION OF KENYA 2010; THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013; SECTIONS 19, 6(1) AND  
4(2, 3A, B) OF THE CHILDREN'S ACT; AND ALL OTHER ENABLING PROVISIONS OF  
LAW;**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 46(1C), 43(1A, 2), 35(1B), 26(1, 3), 27(1, 2,  
4, 5), 28, 29(C, D, F), 45(1) AND 53(1D, E).**

**IN THE MATTER OF: ALLEGED THREAT TO RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 46(1D), 50(1), 26(1, 3) AND 23(3E) AS READ  
TOGETHER WITH ARTICLE 22(1);**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION UNDER  
ARTICLES 10(2B, C);**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTIONS 17(1), 77(4),  
82(3), 95 AND 3(2B) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT;**

**IN THE MATTER OF: CONSTITUTIONALITY OF SECTION 3(4B) OF THE  
OCCUPIERS' LIABILITY ACT;**



**BETWEEN**

**PAMM ..... 1<sup>ST</sup> PETITIONER**

**ANN MALINDA TOMA ..... 2<sup>ND</sup> PETITIONER**

**SMM (MINOR SUING THROUGH THE 1ST PETITIONER, HER FATHER  
AND NEXT FRIEND) ..... 3<sup>RD</sup> PETITIONER**

**JMM (MINOR SUING THROUGH THE 1ST PETITIONER, HER FATHER AND  
NEXT FRIEND) ..... 4<sup>TH</sup> PETITIONER**

**AND**

**SHOPRITE CHECKERS KENYA LTD ..... RESPONDENT**

**AND**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners herein took out the Notice of Motion dated March 25, 2022 and sought for the following orders hereunder:
  - i. Spent.
  - ii. Spent.
  - iii. The petitioners be and are hereby granted leave to appeal the decision of this Honorable Court (Honorable Lady Justice Hedwig I. Ong’udi) given on March 23, 2022;
  - iv. To facilitate a fair appeal by the petitioners, this honorable court be pleased to stay the execution – pending appeal of part of the order given on March 23, 2022 as decides: That the petitioner to serve the Attorney General as directed on December 1, 2021;
  - v. The proceedings of this matter in this honorable court be and are hereby temporarily stayed pending the hearing and determination of the petitioners’ intended appeal in the court of appeal, or until the further direction of this honorable court;
  - vi. Parties be at liberty to apply.
2. The Motion is supported by the grounds set out on its body.
3. To oppose the Motion, the respondent’s divisional manager, Anton Andrew Wagenaar, swore a Replying Affidavit on October 28, 2022.
4. In rejoinder, the petitioners filed the Notice of Preliminary Objection dated January 26, 2023 through the 1<sup>st</sup> petitioner and containing the following grounds:
  - a. That the respondent’s affidavit constitutes an abuse of the process of this honorable court as further particularized below:



- i. That the respondent had already acquiesced to the petitioners' application and was estopped from filing a response to it. As a matter of law, the petitioner's application stands wholly unopposed; and
  - ii. That the Respondent's Affidavit is a false affidavit that contains patently obvious falsehoods of a material and prejudicial nature. A false affidavit is a non-affidavit; and
  - iii. That the Respondent's Affidavit is substantially scandalous, abusive, vexatious and oppressive. It is an obvious candidate for striking out under Order 19, rule 6, because its plain and obvious purpose is to unfairly attack, injure and besmirch the petitioners' character with a view of interfering with, and/or obstructing, the fair and expeditious hearing of the petitioners' application; and
  - iv. That vide section 58 of the [evidence Act](#), character evidence must be constrained to general disposition and general reputation. It cannot be based on specific cherry-picked incidences; and
  - v. That vide section 55(1) of the [evidence Act](#), character evidence is generally inadmissible in civil proceedings; and
  - vi. That the Respondent's Affidavit is plainly and manifestly calculated to confuse the real issues before this honorable court and is likely to delay and/or prejudice the fair hearing of the application and of the main petition because: under the pretext of responding to an obviously simple and straightforward application, the respondent has introduced an avalanche of numerous irrelevant matters, attempted to prejudice several unheard applications, attempted to prejudice the main petition, attempted to prejudice the court's mind and has attempted to overwhelm the court by annexing over 100 pages of patently irrelevant and unnecessary annexures; and
  - vii. That the respondent's affidavit is plainly and obviously not a bona fide response to the petitioners' application. It was clearly filed in bad faith to achieve ulterior and patently malicious objectives and its needlessly voluminous contents are so disproportionately prejudicial that no good whatsoever can come out of it;
- b. The respondent's written submissions lack the necessary legal foundation as they are grounded on a fatally defective and hopelessly incompetent affidavit. Without a legal foundation, the said submissions are worthless, incompetent, time-wasting, resource-wasting, and a clear abuse of the process of the court.
5. The Motion was canvassed through written submissions. The interested party did not file any documents in response to the Motion and did not participate at the hearing of the aforesaid Motion.
  6. I have considered the grounds laid out on the body of the Motion; the replying affidavit; the preliminary objection and the contending submissions plus the authorities cited therein.
  7. I will first dispense with the preliminary objection. Reference is made to the notorious case of *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696 which defined the term 'preliminary objection' in part as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The above definition was further advanced by the Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR whereof it held inter alia that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

9. Upon my consideration of the grounds laid out therein, I am not satisfied that the preliminary objection here raises pure points of law on the basis of undisputed facts which do not require further examination or investigation, in order to constitute a preliminary objection within the true definition of the term. I am therefore inclined to strike out the notice of preliminary objection dated January 26, 2023 with costs abiding the outcome of the Petition.
10. Turning to the Motion, it is clear that the orders sought therein are three (3)-fold in nature. I will begin with the order for leave to lodge an appeal against the decision delivered by the Honourable Lady Justice Ong’udi on March 23, 2022.
11. From the record, it is apparent that upon recusing herself from hearing this matter, the abovementioned judge issued orders and directed the petitioners to serve the interested party as directed on 1<sup>st</sup> December, 2021 and further directed that the file be placed before the Principal Judge to facilitate the appointment of a judge to take over the matter. Following the directives by the Honourable Chief Justice Martha Koome, this court was on April 5, 2022 appointed to handle the petition henceforth.
12. To support the abovementioned order sought, the petitioners argue that unless leave to file an appeal is granted to them, they will not be able to file a notice of appeal and pursue their appeal, thereby causing them to run the risk of being condemned unheard and infringing on their constitutional rights.
13. The petitioners further argue that the provisions of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (“the Mutunga Rules”) do not expressly set out the matters from which appeals lie as of right versus those for which leave must be sought and granted before an appeal is filed.
14. It is the submission by the petitioners that in view of a lacunae on the above subject, the provisions of the *Civil Procedure Act* and Rules become applicable, borrowing from the case of *Kooba Kenya Limited v County Government of Mombasa* [2020] eKLR where the court held thus:
- “The Civil Procedure Rules still remain the parent rules in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules must apply.”
15. It is also the submission by the petitioners that their intended appeal raises arguable constitutional and legal issues for determination and that it would be in the interest of justice for leave to be granted to them for the filing of their appeal with the Court of Appeal.
16. On the part of the respondent, it is stated and submitted that while the *Mutunga Rules 2013* are silent on the subject of appeals by right versus appeals by way of leave of the court, the grant of leave is discretionary and the burden lies with a party to provide sufficient reasons to support the grant of the order for leave to appeal sought.



17. To buttress its argument here, the respondent quotes the case of *Showcase Property Limited v Mugambi & Company Advocates* [2020] eKLR in which the court reasoned that:

In *Machira T/A Machira & Company Advocates v Mwangi & Another* [2002] 2 KLR 391, the Court of Appeal stated that:

“The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word “realistic” makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should be in the public interest, be examined by this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law is clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration.”

18. The respondent is of the view that the petitioners’ grounds for seeking leave to challenge the decision made on March 23, 2022 on the basis that the orders made therein are prejudicial and accusatory, and unmerited. The respondent therefore urges this court to decline to grant the order sought for leave to appeal.
19. Upon my consideration of the record, it is not in dispute that the matter currently before me is a Constitutional Petition for which the *Mutunga Rules 2013* would apply.
20. Nevertheless, upon my further consideration of the record, it is apparent that the *Mutunga Rules 2013* are silent on the subject of appeals. Consequently, I concur with the reasoning advanced by the parties that the provisions of the Civil Procedure Act and Rules would become applicable in the circumstances.
21. Section 75(1) of the *Civil Procedure Act* which is cited in the petitioners’ submissions, provides that:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under section 64;



- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.”

22. Order 43 of the *Civil Procedure Rules* goes on to express thus:

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

- (a) Order 1 (parties to suits);
- (b) Order 2 (pleadings generally);
- (c) Order 3 (frame and institution of suit);
- (d) Order 4, rule 9 (return of plaint);
- (e) Order 7, rule 12 (exclusion of counterclaim);
- (f) Order 8 (amendment of pleadings);
- (g) Order 10, rule 11 (setting aside judgment in default of appearance);
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- (j) Order 19 (affidavits);
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);



- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).”

23. Upon my study of the relevant legal provisions cited hereinabove, I am of the view that the nature of the intended appeal seems not to fall within any of the instances in which an appeal would lie as of right. I am therefore persuaded by the averments being made by the petitioners in this respect.
24. Upon taking into account the fact that the grant of leave to appeal lies with the court’s discretion, I would like to mention here that the question as to whether the intended appeal is arguable cannot be determined by this court since it would be the preserve of the Court of Appeal.
25. It has already been alluded hereinabove that the Court has a discretionary power in determining an Application for leave to appeal. In my view, an Applicant must show sufficient cause for the Court to grant the Order: In the instant application, the Applicant has put forward the following ground:- That imminent prejudice will be suffered by the applicants as a result of the disparaging wording of the decision of the Judge. That said words is likely to influence the mind of any other incoming Judge. That applicants will be unable to appeal if leave is not granted. That the petitioners were condemned unheard and thus in the interest of Justice should be accorded an opportunity to appeal.
26. It is apparent from the grounds advanced by the Applicants that they are basically attacking the reasons, the Hon. Lady Justice Ong’udi stated to have prompted her to recuse herself from further dealing with this Petition. It is not clear whether the Applicants are going to seek for the recusal order to be set aside.
27. It would appear that the Applicants intend to re-open the matter to contest the Judge’s observation on Applicant’s conduct before the Court. In my view, that is not permissible in law. If the forum is opened, it is a kin to permitting a litigant to drag the Judge from the seat of Judgment into the arena of the dispute itself. I find that the applicants have not shown sufficient cause to justify the grant of leave to appeal. I decline to grant leave.
28. The second order sought is for a stay of execution of part of the order made by the court on March 23, 2022 namely, the order directing the petitioners to serve the interested party herein as directed on December 1, 2021.
29. On their part, the petitioners argue that it would be in the public interest for the order for stay sought to be granted, adding that the interested party; who has not been an active participant in the petition for over one (1) year now, does not stand to be prejudiced.
30. The petitioner further argue that their constitutional rights and freedoms; including the right to equality and freedom from discrimination provided under for Article 27 of the [Constitution of Kenya, 2010](#); ought to be protected.
31. The respondent on its part contends that the conditions for granting an order for stay of execution have not been satisfied by the petitioners and that the reasons provided by the petitioners are insufficient in the circumstances.
32. The guiding provision on Applications for stay of execution are set out in Order 42, Rule 6(2) of the [Civil Procedure Rules](#).
33. The first condition is that the application must have been brought without unreasonable delay. Upon my consideration of the fact that the Motion was brought within days of delivery of the impugned ruling, I am satisfied that the Motion was timeously filed.



34. The second condition is that an Applicant must show the substantial loss to be suffered if the order is denied. The order sought to be stayed is on service of pleadings/documents upon the interested party, pursuant to orders issued earlier to the petitioners. Upon taking into account these factors, I have not come across any credible evidence by the petitioners to demonstrate the manner in which they stand to suffer substantial loss if the order for a stay of execution is denied. Similarly, the provision of security would not arise here, in the absence of any such relevant order.
35. In view of all the foregoing circumstances, I decline to grant the order for a stay of execution sought.
36. The remaining order sought is for stay of proceedings. However, without going into the merits thereof, I note from the record that the petitioners had previously sought for a similar order before the Court of Appeal vide Civil Application No. E385 of 2021 and which application was said to be pending at the time of writing this ruling. Consequently, I decline to entertain the Application.
37. The upshot therefore, is that the Notice of Motion dated 25<sup>th</sup> March, 2022 is found to be without merit. It is dismissed with costs abiding the outcome of the Petition.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF APRIL, 2023.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

Mr. Patrick Macharia for the 1<sup>st</sup> petitioner

Miss Juma holding brief for Mumia for respondent

