



**Patrick Alouis Macharia Maina & 3 others v Shoprite Checkers
Kenya Limited (Petition E004 of 2021) [2021] KEHC 8936 (KLR)
(Constitutional and Human Rights) (1 March 2021) (Ruling)**

Patrick Alouis Macharia Maina & 3 others v Shoprite Checkers Kenya Limited [2021] eKLR

Neutral citation: [2021] KEHC 8936 (KLR)

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

PETITION E004 OF 2021

AC MRIMA, J

MARCH 1, 2021

BETWEEN

PAMM & 3 OTHERS PETITIONER

AND

SHOPRITE CHECKERS KENYA LIMITED RESPONDENT

RULING

Introduction:

1. This is a composite ruling in respect of three applications and a Preliminary Objection.
2. Two of the applications were filed by the Petitioners. They are the Notice of Motion dated 6th January, 2021 and a Notice of Motion dated 21st January, 2021. The third application is by the Respondent. It is by way of a Notice of Motion and it is dated 1st February, 2021. The Preliminary Objection, as well, is filed by the Respondent and is dated 21st January, 2021.

The Applications and the Preliminary Objection:

3. The Notice of Motion dated 6th January, 2021 was filed together with the Petition. It seeks, inter alia, for conservatory orders against the Respondent. I will, henceforth, refer to it as ‘the conservatory application’.
4. The conservatory application seeks the following 6 orders: -
 1. This Application be certified urgent and heard ex parte in the first instance;



2. Pursuant to Articles 22(2a), 258(2a), 31(c), 50(7, 8), 53(1e) of the Constitution and Sections 19 and 4(2, 3a-b) of the Children's Act, as read together with Articles 21(3) and 53(2) of the Constitution:
 - 2.1. the 1st Petitioner be, and is hereby, granted leave by the court to be Next Friend for the 3rd and 4th Petitioners who are minors of tender years, and the 3rd and 4th Petitioners shall not be required to attend court except in instances where their attendance is specifically requested for, by the court, in the interests of justice;
 - 2.2. the 3rd and 4th Petitioners be, and are hereby, granted leave to prosecute this application, the substantive Petition, and all related applications, using their initials instead of their full names and their identities shall be concealed by all parties, and by the court, in all pleadings, rulings, judgments, court processes, notices as well as in open Court, until the substantive Petition is heard and fully disposed of;
3. Pursuant to Article 159(2d) of the Constitution, Order 3, Rule 2 of the Civil Procedure Rules, and Rule 6(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Petitioners be, and are hereby, granted leave to defer, until at least fifteen days prior to the trial conference, the production of:
 - 3.1. written statements signed by the witnesses;
 - 3.2. expert witness and "friend of the court" particulars in the list of witnesses;
 - 3.3. electronic evidence and other documents that the Petitioners wish to rely on, which they have not concluded preparing or analyzing at the time of filing;
4. Pursuant to Article 23(3c) of the Constitution and Order 40, rule 1 of the Civil Procedure Rules 2010, a conservancy order be, and is hereby issued:
 - 4.1. restraining Shoprite until the substantive Petition is fully heard and determined, from performing any acts or omissions that would have the effect of threatening, denying, violating or infringing on the rights of any of the Petitioners under Articles 50(1), 46(1d) and 23(3d) as read together with Article 22(1), including — inter alia:
 - 4.1.1 removing itself, or any of its assets from the Jurisdiction of the court;
 - 4.1.2 selling, transferring, encumbering or disposing of any of its assets located within the Kenya territory;
 - 4.1.3 withdrawing or transferring any funds, held — directly or indirectly, in any bank or any financial institution registered in Kenya;
 - 4.1.4 selling, transferring, or concluding any sale or transfer of, its business as a going concern;
 - 4.1.5 causing or allowing the spoliation of any evidence in its possession or power, that may be relevant to this Petition or any related civil case;
 - 4.2. temporarily freezing, until the substantive Petition is fully heard and determined, the withdrawal or transfer of funds, out of any account held by, or in favor of Shoprite in any bank, or in any organization offering financial services, within the territory of Kenya;



5. Pursuant to Articles 35(1b) of the Constitution, Section 22(a) of the Civil Procedure Act, and all other enabling provisions of law, an order be, and is hereby issued to Shoprite compelling it to produce to the court, and to the Petitioners, within 3 working days, certified copies, or where permitted by law - certified extracts without any material omissions, of the following documents - which are required by the Petitioners for the exercise and protection of their rights under Articles 50(11), 46(1d), and Article 23(1) as read together with 22(1):
 - 5.1. documents that containing specific details about Shoprite's exit:
 - 5.1.1. all relevant board resolutions or relevant certified extracts; and all relevant circulars, notices, announcements and updates issued to: employees; workers unions; suppliers; and landlords or their agents;
 - 5.1.2. any communication, letter or notice issued to anyone since 1st August, 2020, concerning the disposal or transfer of any assets owned by Shoprite;
 - 5.2. documents that disclose whether Shoprite has adequate insurance cover:
 - 5.2.1. a letter issued by Shoprite on its official letterhead:
 - a. stating whether Shoprite is insured against all potential liability arising from the Petitioners' constitutional and civil claims;
 - b. containing a list all relevant insurance policies and for each policy, disclosing the policy number, type of insurance, maximum limit of cover, and the name and address of the underwriting company;
 - 5.2.2. A written undertaking by each relevant insurance underwriter to indemnify Shoprite against any court awards related to this Petition, and disclosing the maximum limit of such indemnity Pursuant to the relevant insurance policy;
 - 5.2.3. Copy of each relevant insurance policy;
 - 5.3. a letter, issued by Shoprite on its official letterhead, containing information in Shoprite's possession or power that discloses, without any misrepresentation or material omission, whether Shoprite's assets are being disposed of, in the form of a statement tabulating - as at 31st August 2020, 30th September 2020, 31st October 2020, 30th November 2020, 31st December 2020, respectively, information about the value of:
 - 5.3.1. Shoprite's current assets in Kenya, showing the total value of each category of current assets (be it cash, bank balance, inventory and so on);
 - 5.3.2. Shoprite's procurement orders for its Kenyan and foreign suppliers;
 - 5.3.3. Shoprite's fixed assets in Kenya, showing the total value of each category of fixed assets and whether encumbered or not;
 - 5.3.4. Shoprite's liabilities in Kenya, being the total value of each category of liabilities (current liabilities, non-current liabilities) — and showing what percentage of each type of liability is secured against Shoprite assets;
 - 5.4. Documents that disclose Shoprite's precise exit plans:
 - 5.4.1. if selling its business as a going concern:



- (a) a letter issued by Shoprite on its official letterhead, stating:
 - i. the name and address of each and every acquiring company;
 - ii. whether the acquiring company is aware of the Petitioner's claims against Shoprite;
 - iii. whether it has accepted, or is willing, to be held jointly and severally liable together with Shoprite;
 - (b) a written undertaking by the acquiring company confirming the above;
- 5.4.2. if liquidating the company:
- a. evidence of public-interest compliance with statutory requirements for closure of business, including, inter alia requirements under the Insolvency Act 2015 and Companies Act 2015;
 - b. Shoprite's most recent financial statements including income statement, balance sheet and cash flow statement;
 - c. an inventory, in PDF file format, of all of Shoprite's unencumbered assets in Kenya and their location;
- 5.5. affidavit certifying that each of the aforementioned disclosures has been provided in good faith, and that the information is a fair reflection of the relevant records, which have been properly maintained by, or for, Shoprite, and that it has not been not been manipulated in bad faith to mislead the court or the Petitioners;
- 5.5. I sworn by a senior Shoprite director;
- 5.5.2 sworn by each and every person involved in the preparation and production of the abovementioned information;
6. Pursuant to the national values of transparency and accountability in Article 10(2c), which bind all persons — including private persons, and pursuant to the overriding public interest objectives of the Insolvency Act 2015, the Companies Act 2015 and Article 46(1d), as read together with Article 10(1b) and 259(1a), an order be, and is hereby issued to Shoprite compelling it to:
- 6.1 publish a public notice of its detailed exit plans;
 - 6.1. 1. as a prominent on the homepage of its local website www.shopritekenya.co.ke such that the notice is visible without the need to scroll or search for it;
 - 6.1.2. as a prominent pinned post on its social media pages including:
 - a. Facebook: www.facebook.com/ShopriteKE/
 - b. Twitter: www.twitter.com/shopritekenya
 - 6.1.3. in the Kenya Gazette; and
 - 6.1.4 prominently affix the notice at the entrance of any place in Kenya that it still conducts business;



- 6.2 Fully comply with all insolvency and company dissolution laws of Kenya, and if already complied, to produce evidence of such compliance to the court.
5. The conservatory application is supported by the affidavits sworn by Patrick Alouis Macharia Maina and Ann Malinda Toma on 6th January, 2021. The deponents are the first and second Petitioners.
 6. The application is opposed. To that end, the Respondent filed a Replying Affidavit sworn by Anton Wagenar, a Director of the Respondent, on 21st January, 2021. The Respondent also filed the Preliminary Objection.
 7. The Petitioners' application dated 21st January, 2021 is a response to the Respondent's Replying Affidavit sworn by Anton Wagenar on 21st January, 2021 and the Preliminary Objection. I will, therefore, consider it as part of the conservatory application.
 8. It is of essence to note that on 26th January, 2021, vide Ruling No. 1, this Court issued some conservatory orders. The orders are still in force.
 9. The application by the Respondent is an attempt to, among others, review and/or set-aside the conservatory orders. It is tailored as follows: -
 1. The matter be certified as urgent, to be heard ex parte in the first instance, service dispensed with and the orders sought herein be granted on priority basis.
 2. Pending hearing and determination of this application inter partes, this Honourable court do issue an interim order staying the Conservatory Orders of Hon. Justice A. C. Mrima of 26th January, 2021 in Milimani Constitutional petition No. E004 of 2021.
 3. This Honourable Court be pleased to review and/or set aside the conservatory orders of Hon. Justice A. C. Mrima of 26th January, 2021 in Milimani constitutional Petition No. E004 of 2021.
 4. The Respondent do deposit Ksh.3 million in court as security for judgment.
 5. In the alternative, should this Honourable Court find Ksh.3 Million insufficient, it does direct the Respondent to deposit in court an amount it deems reasonable in the circumstances.
 6. The Costs of this Application to be provided for.
 10. The Respondent's application dated 1st February, 2021 shall be referred to as 'the review application' in this ruling.
 11. The review application is supported by the affidavit of Anton Wagenar sworn on 1st February, 2021.
 12. The application is opposed by the Petitioners. Patrick Alouis Macharia Maina, the 1st Petitioner, who swore a Replying Affidavit on 9th February, 2021 to that end.
 13. The Preliminary Objection provides as follows: -
 1. This honourable court does not have jurisdiction to hear and/or determine this matter.
 2. There is no established locus for the 2nd — 4th Petitioners to institute a suit against the Respondent.
 3. The Petition as filed does not raise any cause of action.



14. Both parties filed written submissions on the foregoing applications and objection. They also variously referred to decisions.

Issues for Determination:

15. On careful reading of the material presented before Court by the parties including the submissions and the decisions referred to, I hereby discern the following issues for determination: -
- a. Whether this Court has the jurisdiction to deal with this matter;
 - b. If the answer to (a) above is in the affirmative, whether the Petition is a public interest litigation and if the 2nd to 4th Petitioners have locus standi in the matter;
 - c. Whether any of the orders sought be granted;
16. I will deal with the issues as under.
- a. Whether this Court has the jurisdiction to deal with this matter:
17. The gist of this issue, according to the Respondent, is that the matter before Court is only guised as a constitutional petition, but it fits perfectly into a tort of negligence claim capable of being handled by the Magistrates Courts. As such, this Court is not seized of any jurisdiction.
18. In buttressing the submission, the Respondent referred to the decisions in Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696, Owners of the Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd (1989) eKLR and Anarita Karimi Njeri vs. Republic (1976-1980) KLR 1272.
19. The Petitioners are of the contrary position. They first, challenge the manner of raising the issues of jurisdiction and locus standi by way of a preliminary objection. They contend that issues are factual-based and as such they do not fit within the ambit of a preliminary objection. The decision in County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR is referred to in support of the submission.
20. The Petitioners further submit that the Petition raises serious constitutional issues and that the issues are not limited to the injuries sustained by the Petitioner as alleged. The Petitioners enumerated several issues as arising from, and pending determination in the Petition.
21. Law, J.A. in Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696 had the following to say on preliminary objections: -
- So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
22. Differently put, the High Court in John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR held that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial.



If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

23. Before I leave this discourse, my attention has been drawn to the words of Ojwang, J (as he then was) in *Oraro -vs- Mbaja* (2005) KLR 141 where after quoting the statement of Law, JA. in the *Mukisa Biscuits* case (*supra*) went on to state that: -

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

24. By juxtaposing the preliminary objection and the contents of the Petition with the law, I find that the objection fall short of standing as such. I say so because the issues before Court are highly contested and largely depend on evidence. In other words, the objections 'derive their foundations from unsettled factual information which must be tested in accordance with the normal rules of evidence.'

25. Demonstrating the above further, for the objection on jurisdiction to hold, the Respondent ought to demonstrate that a party who suffers an injury can only institute a compensatory claim and is barred from raising constitutional issues from the circumstances surrounding the injury. That has not been done. There is, in essence, no such law or legal doctrine which has been referred to by the Respondent in support of the claim. Therefore, the issue is rendered into the realm of evidence. As such, the issue of jurisdiction as raised, cannot be a basis of a preliminary objection.

26. The objection has a second and a third limb. They are on the issues of locus standi and whether the Petition discloses a cause of action. Going further, I will, first, albeit briefly, render myself on the aspect of jurisdiction generally.

27. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

28. In *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



29. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

30. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

31. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

32. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -

29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent

33. Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -

A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for



the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

34. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the Court of Appeal further stated: -

(44) ... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

35. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or a settled judicial precedent.

36. The jurisdiction of the High Court is donated by Article 165 of the Constitution. Under sub-article 3, the High Court has jurisdiction: -

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.

37. I have carefully perused the 59-page Petition. It begins with an exposure of the overview of the Petition. It then moves to the precise objectives. On that scene, the Petition raises seven constitutional issues for interpretation. The various provisions of the Constitution relative to each of the seven issues are clearly stated as well as the manner of alleged violation.



38. Under the rubric, CONSIDERATION OF NON-CONSTITUTIONAL AVENUES FOR REDRESS, the Petitioners contend that they are aware of their right to institute proceedings under the law of torts or any other laws, but aver that the issues raised in the Petition can only be dealt with through a constitutional Petition and that the determination of the Petition has a bearing on the civil suits which the Petitioners shall sustain thereafter.
39. The Petition goes further to raise other issues for interpretation in paragraph 42 and covers the violations, threats and causes of action under paragraphs 109 to 124 thereof.
40. In the end, the Petition prays as follows: -
- 129.7.1.Shoprite's abuse of the ADR process to delay the petitioners court action, in light of Shoprite's impending closure or sale;
- 129.7.2.Shoprite's deceptive posturing that projects the appearance of normalcy to the public and consumers, whereas it is secretly disposing of its assets;
- 129.7.3.unjust ratio decidendi in personal injury jurisprudence, that has been tainted by Kenya's history of institutionalized injustices, which entrenched absurdly low compensation amounts for personal injury victims;
- 129.7. the unconstitutional loophole in Section 3(4b) of the Occupiers' Liability Act; 129.7.5 The manner in which Shoprite has structured its business and assets in Kenya; 129.7.6 The unsecured loan that Shoprite took from Stanbic Bank; and
4. 129.7.7.Shoprite's failure to provide information requested by the Petitioners pursuant to their rights under Article 35(1b).
- 129.8.7. Shoprite's secretiveness about the precise method it is using to dispose of its business and/or assets, and the relevant specific deadlines and milestones, which is a contravention of Shoprite's duty under Article 10(c) to demonstrate the national values of transparency and accountability in the public interest.
- 129.8 . A declaration be, and is hereby issued, that Shoprite's failure or refusal to provide appropriate emergency assistance including physiological and psychological first aid to Patrick, Ann, SMM and JMM, pursuant to its obligations under Article 43(1a, 2), as read together with Article 46(1c), having regard to Articles 19(2, 3a, 3c), 20(2, 3b, 4), 24(1, 2b, 2c, 3), 25(a), 29(c, d, f) and 259(1):
- 129.8.1.needlessly subjected Patrick to an unnecessarily extended duration of unmitigated pain; avoidable suffering; avoidable psychological distress; and avoidable socioeconomic injuries;
- 129.8.2.needlessly subjected Ann, SMM and JMM to an unnecessarily extended duration of psychological distress, anxiety, avoidable suffering; and avoidable socioeconomic injuries;
- 129.8.3.violated each Petitioner's consumer rights under Article 46(1c);
- 129.8. violated each Petitioner's social and economic rights under Article 43(1a, 2);
4. 129.8.5 violated each Petitioner's right to Human Dignity — which is guaranteed under Article 28;
- 129..8.6was an act of discrimination, which violated each Petitioner's rights under Article 27(2, 5);
- 129.7.7.was an act of psychological violence, which violated each Petitioner's rights under Article 29(c), and under Article 53(1d) for SMM and JMM;



- 129.8.8. was an act of physiological and psychological torture, which violated each Petitioner's rights under Article 29(d)
- 129.8.9. violated each Petitioner's rights under Article 29(f), and under Article 53(1d) for SMM and JMM, because it was an act of cruelty; was inhuman; and was degrading;
- 129.8.10. threatened each Petitioner's right to life, contrary to Article 26(1, 3) as read together with Articles 19(2), 20(2, 3b, 4), 24(1, 3) and 259(1);
- 129.9. A declaration be, and is hereby issued, that in the context of Articles 19(3c), 20(2), 24(1, 3) and 25(c), Shoprite failure, or refusal, to provide information requested by Patrick, Ann, SMM and JMM respectively, violated each Petitioner's respective rights under Article 35(1 b);
- 129.10. A declaration be, and is hereby issued, that Shoprite violated SMM's and JMM's right to enjoy parental care as guaranteed by Article 53(1e) when read together with Article 20(2), and failed or refused to uphold the best interests of a child, thereby violating SMM's and JMM's right to recognition and protection pursuant to Article 53(2);
- 129.11. A declaration be, and is hereby issued, that Shoprite's actions and omissions violated and needlessly disrupted the Petitioner's collective harmony as a family unit, contrary to the spirit, purport and object of Article 45(1) — as read together with Articles 20(2, 3b, 4b) and 259(1a) thereby disrupting and threatening the long-term stability and security of their family unit, which this court, being an organ of the State, is obliged to recognize and protect;
- 129.12. An Order for compensation, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, pursuant to the State's duty under Article 45(1), in favor of the Petitioners collectively as a family unit, for the disruption and threatening of the harmony, stability and security of their family unit;
- 129.13. An Order for compensation, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, in favor of Patrick, Ann, SMM and JMM respectively, comprising of distinct compensation to be paid to each Petitioner for each distinct violation of the Petitioner's constitutional rights - as listed below:
- 129.13.1. threatening the Petitioner's right to:
- a. compensation under Article 46(1d);
 - b. a fair trial under Article 50(1);
- 129.13.2. violating the Petitioner's consumer rights under Article 46(1c);
- 129.13.3. violating the Petitioner's social and economic rights under Article 43(1a, 2);
- 129.13.4. violating the Petitioner's right to human dignity, as guaranteed by Article 28;
- 129.13.5. discriminating against the Petitioner, in violation of Article 27(2, 5);
- 129.13.6. subjecting the Petitioner to Psychological violence, in violation of Article 29(c);
- 129.13.7. subjecting the Petitioner to psychological torture, in violation of Article 29(d);
- 129.13.8. subjecting Patrick to physiological torture, in violation of Article 29(d);
- 129.13.9. subjecting the Petitioner to cruelty; inhuman treatment; and degrading treatment in violation of Article 29(f);



- 129.13. ~~Th~~reatening the Petitioner's right to life, in violation of Article 26(1, 3) as read together with Articles 19(2), 20(2, 3b, 4), 24(1, 3) and 259(1);
- 129.13. ~~The~~ violation of the Petitioner's rights under Article 35(1b);
- 129.14. An Order for general damages, pursuant to Article 46(1d), comprising of distinct compensation to be paid to each Petitioner under each distinct head below, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, in favor of Patrick, Ann, SMM and JMM respectively, for needlessly subjecting each Petitioner to an unnecessarily extended duration of:
- 129.14. ~~Un~~mitigated pain and avoidable suffering;
- 129.14. ~~A~~voidable psychological distress;
- 129.15. An Order for general damages, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, in favor of SMM and JMM respectively, for each distinct violation below:
- 129.15. ~~Viol~~ating her right to enjoy parental care under Article 53(1e);
- 129.15. ~~F~~ailing to uphold the best interests of a child, thereby violating her right to recognition and protection pursuant to Article 53(2);
- 129.16. An Order for compensation, pursuant to Article 46(1d), comprising of distinct compensation to be paid to each of the Petitioners under each distinct head below, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, in favor of Patrick, Ann, SMM and JMM respectively, for the following losses attributed to the socioeconomic harm of the aforementioned constitutional violations:
- 129.16. ~~Loss~~ of amenity; 129.16.2 loss of consortium;
- 129.16. ~~For~~ loss of faculty;
- 129.16. ~~For~~ loss of earning expectation;
- 129.16. ~~Un~~foreseeable future healthcare expenses due to the nature of injury;
- 129.17. An Order for aggravated damages, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite:
- 129.17. ~~In~~ favor of Patrick, for Shoprite's unwarranted cruelty in failing or refusing to offer physical and psychological First Aid; and for Shoprite's conduct that demonstrated contempt of Patrick's constitutional rights;
- 129.17. ~~In~~ favor of Ann, SMM and JMM respectively, for Shoprite's unwarranted cruelty in failing or refusing to offer psychological First Aid to each of them — notwithstanding their status as vulnerable and marginalised classes of persons as defined in Articles 21(3) and 260; and for Shoprite's conduct that demonstrated contempt of each of the aforementioned Petitioner's constitutional rights;
- 129.18. An Order for Exemplary damages, the quantum of which shall be as determined by the court, be, and is hereby issued against Shoprite, in favor of the Petitioners collectively, due to Shoprite's egregious conduct in light of the aforementioned constitutional violations, and for Shoprite's continued recklessness even after realizing that their display was threatening



consumer rights under Article 46(1c); the overriding purpose of this order is to deter similar conduct by other members of the business community, in the public interest, and to highlight the important role of private sector's constitutional duty towards attainment of Article 43(1a, 2) as read together with Article 46(1c); and to deter socioeconomically retrogressive attitudes within the business community towards Articles 35(1b), 46(1c) and 46(1d);

129.19. An Order for Costs in favor of the Petitioners on a full indemnity basis, or in the alternative, at the court's discretion, that each party bear its own costs — this being a public interest matter;

129.20. An Order be, and is hereby issued, extending any temporary order issued in favor of the Petitioners, jointly or severally, in order to protect their rights under Article 46(1d) and/or 23(3d), including: any conservancy order; any freezing order; or any temporary injunction; until all orders made by this court have been fully executed and all payments due to each of the Petitioners fully effected — the proof of which shall be furnished to the court before any such order is lifted;

129.21. Any other order(s) as this honorable court shall deem just;

129.22. Interest on each and every award, including interest on any costs awarded.

41. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- 2) The petition shall disclose the following—
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and



(g) the relief sought by the petitioner.

42. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

43. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

44. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following on Constitutional Petitions: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

45. A perusal of the Petition in this case will no doubt reveal that the Petition fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in *Communications Commission case (supra)*. The Petitioner stated with clarity the Articles of the Constitution it alleges to have been violated. It also stated the manner in which the said provisions were violated. Needless to say, most of the remedies sought in the Petition are not within the province of the Magistrate's Court as alleged by the Respondent.

46. It must be clearly understood that the manner in which a Petition is presented or drafted is different from the manner in which such a Petition ought to be proved. Proof of the contents of a Petition is a completely different legal regime.

47. I, therefore, find and hold, which I hereby do, that the submission that the Petition is devoid of any constitutional issues cannot be maintained. The same is for rejection. For clarity, this Court has the jurisdiction to deal with the Petition.

48. The issue is hence answered in the affirmative.

(b) If the answer to (a) above is in the affirmative, whether the Petition is a public interest litigation and if the 2nd to 4th Petitioners have locus standi in the matter:

49. The Respondent takes issue with the manner in which the Petitioners brought the Petition. Whereas the Petitioners contend that the Petition has a public interest litigation element, the Respondent vehemently opposes.

50. Deriving from the *Black's Law Dictionary*, the Court of Appeal in *Kenya Human Rights Commission & Another vs. Attorney General & 6 Others* (2019) eKLR and this Court in *Brian Asin & 2 Others vs. Wafula Chebukati & 9 Others* (2017) eKLR, the Respondent contends that the Petition is purely



based on a personal benefit and has no element of public interest. It is further submitted that none of the reliefs sought are beneficial to the public.

51. The Petitioners are of the converse view. They contend that the issues raised in the Petition are of immense public nature and transforms the Petition as such.

52. 'Public interest' is defined by the Black's Law Dictionary 10th Edition at page 1425 as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

53. 'Public interest litigation' was described by the Court of Appeal in Nairobi Civil Appeal No. 364 of 2017 Tom Mboya Odege vs. Edick Peter Omondi Anyanga & 2 Others (2018) eKLR as follows: -

A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

54. The Court further held that: -

.... The best examples are in Articles 22(2)(a) and 258 of the Constitution which grant every person the right to move to court in 'public interest' where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution.

55. The nature of public interest litigation was discussed in Brian Asin's case (supra). The Court distinguished real public interest litigation from litigation which were disguised as such. The Court referred to Supreme Court of India decision in Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 280 where the Supreme Court held that: -

.... Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

56. There is no doubt that the Petition arises from the injuries which the Petitioner sustained while shopping in one of the Respondent's outlets in Nairobi. That was on 27th September, 2019 at 5:30pm.

57. Arising from the above, the Petition raises pertinent issues which have a public-nature bearing. They include the following: -



- i. Whether Article 46(1) as read with Articles 43(1)(a) and (2) of the Constitution imposes a duty upon businesses to provide for First Aid and to organise for emergency interventions for persons who are injured inside such business premises;
 - ii. Whether failure to comply with (i) above constitutes a violation of Articles 26(1), (3), Article 28 and Article 29(c), (d) and (f) of the Constitution;
 - iii. Whether the Constitution places the duty to mitigate any resultant socio-economic burdens arising from accidents within a business premises upon the owners of such businesses;
 - iv. The constitutionality of various provisions of the Occupiers' Liability Act;
 - v. Whether the doctrine of stare decisis has protected and preserved common law arguments which are inconsistent with the current constitutional dispensation;
 - vi. Whether Article 46 as read in the context of Articles 20, 24 and 259 of the Constitution requires that assessment of quantum of damages for personal injuries be determined by its forward-looking deterrent effect instead of the application of the current doctrines of ratio decidendi and stare decisis;
58. Without much ado, the Petition transcends the realm of a private law claim right into the ambit of public law litigation. For instance, the Petition affects all business owners as well customers or those who find themselves lawfully within business premises; the issue raised in 57(iv) above has the potential of completely changing the manner in which Courts have been dealing with the issue of assessment of quantum of damages, if sustained; among several other issues.
59. This Court now finds and hold that the Petition is in the nature of a public interest litigation.
60. As to whether the 2nd to 4th Petitioners have a locus standi in the matter, I will not say much in view of the finding that the Petition is a public interest litigation. There is, therefore, no doubt that the Petitioners are in one way or the other affected by the Petition. They, hence, fall under the category of those contemplated under Articles 22(2)(a) and 258 of the Constitution.
61. In the end, I find that the Petition is a public interest litigation and that all the Petitioners have locus standi in the matter.

c. Whether any of the orders sought be granted:

62. This Court must take a holistic approach in this matter. It must not be lost, on one hand, that the Petition raises various and serious constitutional issues. On the other hand, those issues are yet to be determined. Any presumptions made on the basis that the Petition will succeed must be dealt with so cautiously.
63. The Petitioners are well aware that the outcome of this Petition may have a bearing in the manner in which the assessment of quantum of damages is undertaken. They are also well aware that the 1st Petitioner has a right to file a civil claim for compensation arising from the injuries occasioned and any resultant effects arising therefrom.
64. In their own words in paragraph 9.3 of the Petition, the Petitioners, rightly so, plead as follows: -
The Petitioners reserve their rights to seek additional remedies on the basis of the facts or applicable matters contained herein, or facts emerging from this case, by suing under the law of torts, or under any other enabling laws or statutes, whose remedy has not been exhausted, once the constitutional



issues raised in the Petition – which may have a bearing on the civil suit(s) – have been determined and resolved. For avoidance of doubt, the Petitioners have not waived any right or remedy whatsoever.

65. Therefore, a remedy in this Petition on any compensatory damages must be on the basis of the infringement of the rights or fundamental freedoms, but not on what the Petitioners ought to be awarded through the civil claims. An approach to secure any contemplated awards in the civil claims will be highly presumptive and speculative; an act which this Court ought to decline its invitation. Those are issues which evidence ought to be adduced and a Court must express its legal mind over the same. It will be wrong, at such an interlocutory stage, for this Court to make orders which will have a bearing in the manner in which the Petition will be determined. It is that restraint which this Court must carry along.
66. The Petitioners have prayed for the confirmation of the conservatory orders. In the alternative, the Petitioners seek security for judgment between USD \$1.9 Million and \$2.8 Million. The Petitioners have attempted to substantiate how those sums are arrived at. The sums derive from loss of expected earnings, damages for psychological sufferance, among others.
67. The Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR was very categorical on how Courts ought to approach the aspect of award of damages in constitutional petitions. In affirming the position that indeed damages are awardable in constitutional petitions, the Court called for care and caution in doing so.
68. The Court of Appeal undertook an in-depth comparative analysis of the issue and in the end, rendered itself as follows: -

... It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.

It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

... In *Peters v. Marksman & Another* [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in *Fuller v A-G of Jamaica* (Civil Appeal 91/1995, unreported), where the Court held that:

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.



The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will:

- (1) meaningfully vindicate the rights and freedoms of the claimants;
- (2) employ means that are legitimate within the framework of our constitutional democracy;
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
- (4) be fair to the party against whom the order is made.

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

(emphasis added).

69. The above discussion leads to the position that in the event the Petitioners wishes to secure any possible awards in respect of the injuries the 1st Petitioner suffered and the resultant effect thereof on the other Petitioners, then that falls within the province of private law and not before this Court. Likewise, issues as to whether the Respondent has complied with the law relating to liquidation among other related issues do not fall within the confines of a constitutional Court even when they raise constitutional issues. Such issues can be properly so, determined by the other Divisions of the High Court, which also have the jurisdiction to interpret the Constitution.
70. The Court in this Petition will, principally, undertake the journey to determine whether or not the Constitution is violated as alleged by the Petitioners. Damages, if any, will be limited to ‘... vindicate the rights violated and to prevent or deter any future infringements...’
71. The confirmation of the conservatory orders in this matter, must then, be in consonance with the foregoing discussions. The Petitioners have presented their case as well as the Respondent. There is evidence that the Respondent is exiting the local Kenyan market. It has, since, entered into various contracts on termination of leases and discharging its other legal obligations.
72. At the moment, the Respondent is not carrying out the supermarket business it used to. In the event it does not surrender the leases then it means that the Respondent must live to the terms of the leases even in instances when it is not carrying any business. The Respondent has sufficiently demonstrated the loss it stands to suffer if the conservatory orders remain in force.



10. I have carefully considered the aspect of interlocutory orders. I am duly guided by various binding decisions including the Supreme Court in Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR. There is no doubt that the Petition raises fundamental constitutional issues. Some of them are novel.
 11. In consideration of the aspect of public interest, the duty of this Court is to weigh the interests of the Petitioners in this matter against those of the Respondent. Given that the Respondent is exiting the jurisdiction of this Court, I believe it is in order for this Court to call upon the Respondent to deposit into Court some sums of money as security for any possible determination. Had it not been for the fact that the Respondent is leaving the jurisdiction of this Court, I would, instead, fast track the determination of the Petition.
 12. Therefore, whereas this may not be a matter befitting the grant or confirmation of the interim orders, there is a good basis for security for judgment to be furnished.
73. I believe I have said enough to be able to safely come to the conclusion of the matter.

Disposition:

74. On the basis of the foregoing findings and conclusions, the Notice of Motion dated 6th January, 2021, the Notice of Motion dated 21st January, 2021, the Notice of Motion dated 1st January, 2021 and the Preliminary Objection dated 21st January, 2021 stand determined in the following manner: -
- a. The Preliminary Objection dated 21st January, 2021 be and is hereby dismissed;
 - b. The Respondent shall deposit in this Court the sum of Kshs. 3,000,000/= (Kenya Shillings Three Million Only) as security for judgment within 14 days of this ruling.
 - c. Upon compliance with order (b) above, the conservatory orders issued by this Court on 26th January, 2021 shall stand discharged.
 - d. Prayer 2 of the Notice of Motion dated 6th January, 2021 was allowed on 20th January, 2021.
 - e. Given the public nature of the Petition, prayer 3 of the Notice of Motion dated 6th January, 2021 is disallowed.
 - f. On the basis of orders (b) and (c) above, prayer 4 of the Notice of Motion dated 6th January, 2021 shall stand issued until the determination of the Petition if the Respondent fails to comply with order (b) of this ruling.
 - g. Prayers 5 and 6 of the Notice of Motion dated 6th January, 2021 are hereby declined.
 - h. In view of the public nature of these proceedings, the Honourable Attorney General is hereby enjoined as an Interested Party. The Petitioners shall effect service thereof within 7 days of this ruling.
 - i. Directions in respect of the Petitioners' Notice of Motion dated 1st February, 2021 shall be taken on 24/03/2021.
 - j. As each party has partly succeeded, there shall be no order as to costs.
 - k. Leave is hereby granted to any party intending to appeal against this ruling.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2021



A. C. MRIMA

JUDGE

Ruling No. 2 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 Wamboi – Court Assistant

