



**PAMM & 2 others v Shoprite Checkers Kenya Ltd; Attorney General (Interested Party)
(Civil Appeal (Application) E019 of 2022) [2024] KECA 246 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 246 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E019 OF 2022**

F TUIYOTT, JA

MARCH 8, 2024

BETWEEN

PAMM 1ST APPLICANT

**SMM (MINOR SUING THROUGH THE 1ST APPELLANT, HER FATHER AND
NEXT OF FRIEND) 2ND APPLICANT**

**JMM (MINOR SUING THROUGH THE 1ST APPELLANT, HER FATHER AND
NEXT OF FRIEND) 3RD APPLICANT**

AND

SHOPRITE CHECKERS KENYA LTD RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

*(Being an application for leave to amend memorandum of appeal against
the judgment of the High Court of Kenya at Nairobi (A.C. Mrima J.)
dated 21st October, 2021 in Constitutional Petition No E004 of 2021)*

RULING

1. Before me is a notice of motion dated August 1, 2023 brought by the 1st applicant representing himself and his two children, the 2nd and 3rd applicants. He seeks leave of this Court to amend their memorandum of appeal dated January 17, 2022 in this Civil Appeal. In the alternative, he seeks consolidation of the appeal herein with Civil Appeal No. E525 of 2023 and that the same be the lead file or that there be stay of Civil Appeal No. E019 of 2022 pending the hearing and determination of Civil Appeal No. E525 of 2023.



2. The application is supported by his affidavit sworn on even date where he deposes that being an unrepresented litigant and appearing in person, his drafting skills as a lay person were very poor when drafting the initial memorandum of appeal. He adds that his health caused a challenge in his concentration which also undermined his drafting efforts. Over time during the last 2 years, he has garnered some experience which led him to the realization that the memorandum of appeal was poorly drafted. He contends that the memorandum of appeal as it currently stands is likely to obfuscate the substantive merits of the appeal, prejudice its fair hearing and possibly lead to inadvertent miscarriage of justice. On the alternative prayer for consolidation, he asserts that, he instituted Civil Appeal No. E525 of 2023 and made efforts to stay the hearing in view of the pending matters before this court however those efforts did not bear fruit. He asserts that both Civil Appeal No. E525 of 2023 and Civil Appeal No. E019 of 2022 are related to the same suit and also have the same parties.
3. The application was opposed by the respondent but only by way written submissions. In them, Counsel acting for the respondent argues that there being judgment already rendered in the High Court Constitutional Petition No. E004 of 2021 on 27th July, 2023, the substratum of the two appeals have been rendered moot as they cease to present a justifiable dispute and any decision rendered by this court will be of no practical value or use. Any procedures in the form of amendments, consolidation or stay of proceedings of the two appeals would in the long run amount to an academic exercise and waste judicial time and resources.
4. No submissions have been filed by the applicants.
5. Rule 46 of the Court of Appeal Rules reads:

“46. Applications for leave to amend

1. Whenever a formal application is made to the court for leave to amend a document, the amendment for which leave is sought shall be set out in writing and—
 - a. if practicable, lodged with the registrar and served on the respondent before the hearing of the application; or
 - b. if it is not practicable to lodge the document with the Registrar, handed to the court and to the respondent at the time of the hearing.
 2. Where the court gives leave for the amendment of a document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the court when giving leave may specify and if no time is so specified, then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this subrule, the leave so given shall determine.”
6. The principles to be taken into account when considering whether to allow an amendment of a memorandum of appeal were discussed by this Court in [Kenya Hotels Limited v Oriental Commercial Bank Limited](#) [2018] eKLR as follows: -

“It is trite that the power reserved for the court by rule 44(1) of the [Court of Appeal Rules](#) to amend any document is a discretionary power. Like all judicial discretion however, it



must be exercised judiciously and upon reason, rather arbitrarily, on humour, or fancy. (See *Kanawal Sarjit Singh Dhim Keshavji Jivraj Shah* [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is rightly amenable to amendment. (See *Uhuru Highway Development Ltd v Central Bank of Kenya* [2002] 1 EA 314).

Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court.”

7. Suffice to say, the Court will ultimately allow an amendment of unless it is not made in good faith or it is done with the sole purpose of prejudicing the other party or would cause an injustice to the other party should it be allowed.
8. The impugned decision of October 21, 2021 that is the subject of Civil Appeal No. E019 of 2022 was a ruling, titled ruling no.3, made on application by the applicants herein seeking recusal of the learned Judge Mrima. This came after the court had rendered a previous ruling no. 2 which the applicants were clearly displeased with. From that ruling no.2, the applicants filed numerous applications and complaints. The court in the impugned decision was of the opinion that the several interlocutory applications were unnecessary and were eating into judicial time and instead encouraged parties to focus on the dealing with the main Petition. In the end, the learned judge thought it best to recuse himself. The main Petition itself, it seems, was fully determined on 27th July, 2023, a fact the applicants do not dispute. While it may well be that determination of the petition renders this appeal moot, that is a call to be made by the Bench that will hear the appeal.
9. On the other hand it is not controverted that to grant the leave sought will allow the applicants to trim their appeal into 3 concise grounds as opposed to the current prolix, and in some instances argumentative, 29 grounds. As this has the effect of bringing clarity to matters already raised in the grounds, I will exercise my discretion in favour of the applicant.
10. The Notice of Motion dated 1st August, 2023 is hereby allowed.

The amended memorandum of appeal shall be lodged and served within 14 days. Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

