



PAMM & another (Minor suing through the 1st appellant her father & next friend) v Shoprite Checkers Kenya Limited; Attorney General (Interested Party) (Civil Appeal (Application) E817 of 2023) [2024] KECA 1143 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1143 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E817 OF 2023
SG KAIRU, JA
SEPTEMBER 20, 2024**

BETWEEN

PAMM 1ST APPLICANT

SMM 2ND APPLICANT

MINOR SUING THROUGH THE 1ST APPELLANT HER FATHER & NEXT FRIEND

AND

SHOPRITE CHECKERS KENYA LIMITED RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

(An appeal from the Judgment of the High Court of Kenya at Kericho (Sergon, J.) dated 27th July 2023 in HC. Petition No. E004 of 2021)

RULING

1. For consideration before me is what the appellants/applicants have title “reference to a single Judge from the decision of the Hon. Deputy Registrar (Hon. J. Wambilyanga) dated 20th March 2024”.
2. The background, in brief, is that in a petition before the High Court, the applicants averred that on 27th September 2019, an accident occurred while shopping at the respondent’s premises at Garden City Mall, Nairobi resulting in injuries. They sought declaratory and compensatory orders including general, aggravated and exemplary damages on the basis of violation of constitutional fundamental rights. That petition was dismissed by the High Court (J. K. Sergon, J.) in a judgment delivered on 27th July 2023. Aggrieved, the applicants filed the present appeal.



3. In an Amended Notice of Motion dated 1st November 2023, that was heard before the Deputy Registrar of the Court, the applicants sought, among others, orders directing the Deputy Registrar of the High Court: to endorse the applicant’s letter bespeaking proceedings; and to comply with Section 80 of the *Evidence Act*. Prayer 4 of that application sought an order that “the applicant be and is hereby granted leave to file a supplementary record of appeal, within 60 days of this order...”
4. Having heard the parties, the Deputy Registrar of this Court delivered a Ruling on 20th March 2024 (the subject of the present reference) and ordered as follows:
 - “9. I have considered prayer No. 4 of the application before me, I find that the same merits, I allow prayer 4 of the application dated 1st November 2023 in the following terms:
 1. That the 1st applicant/appellant is granted leave to file the Supplementary Record of Appeal as per the list of omitted documents dated 5th March 2024.
 2. That the said supplementary Record of Appeal be filed and served within thirty (30) days from the date of this Ruling.”
5. Those are the orders that aggrieved the applicants and hence the present “reference”. During the hearing before me on 14th May 2024, PAMM appeared in person on behalf of the applicants. Mr. Nyanjwa, learned counsel, appeared for the respondent. In support of the reference, the applicants filed written submissions which Mr. Maina orally highlighted. In opposition, Mr. Nyanjwa filed a replying affidavit as well as a Notice of Preliminary Objection which was countered by the applicants’ Notice of Preliminary Objection as well as submissions on the same.
6. The applicants’ complaints against the decision of the Deputy Registrar included complaints that the Deputy Registrar: assumed nonexistent jurisdiction by allowing the respondent to respond to the application out of time; was biased in favour of the respondent; refused to consider that prayer 4 depended on the other prayers in the application; arbitrarily limited the period for filing the supplementary record to 30 days as opposed to the 60 days that had been sought. Accordingly, it was submitted that the ruling is tainted with illegalities, procedural and substantive unfairness in violation of the applicants’ constitutional rights. It was urged that the applicants’ application was wholly unopposed as the respondent did not comply with directions and had no standing to oppose it; that the replying affidavit was unfairly allowed when the Deputy Registrar had no mandate to extend time.
7. Counsel for the respondent urged that “reference” is incompetent as there is no provision in the Court of Appeal Rules for a reference to a single judge of the discretionary power of the Deputy Registrar and neither is there power to review the decision of the Deputy Registrar. The decision of this Court in *Zachariah Okoth Obado vs Edward Akong’o Oyugi & 2 others* [2014] eKLR was cited.
8. In rejoinder, the applicants maintain that the Deputy Registrar’s powers are not absolute; that the Court has overriding powers in circumstances such as the present where the Deputy Registrar failed to observe rules of natural justice.
9. I have considered the matter, the affidavits and the rival submissions. It appears odd that the applicants are aggrieved by a ruling of the Deputy Registrar that is patently favourable to them as their request in prayer 4 of the Amended Notice of Motion dated 1st November 2023 to file a supplementary record



of appeal was allowed. The grievance seems to be that whilst they had requested for 60 days to do so, they were given 30 days. Rule 90 of the Court of Appeal Rules, 2022 (the Rules) provides that:

“90. Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application.”

10. The Deputy Registrar is thereby conferred with discretionary power to grant or decline leave. There is no provision under Rule 90 for a person who is dissatisfied with the decision made thereunder to require the decision to be referred to a Judge as is the case, for example, under Rule 14(4) of the Rules. The circumstances in this case are not dissimilar to those in Zachariah Okoth Obado vs. Edward Akong'o Oyugi & 2 others where this Court stated:

“The Deputy Registrar in exercise of his discretion extended time for lodging the supplementary record. The Rules do not provide for a reference to full Court of the discretionary order of the deputy registrar nor empower the full Court to review such a decision.”

11. Even if I was to consider the “reference”, the decision of the Deputy Registrar involved, as already stated, exercise of judicial discretion.

The circumstances in which the Court can interfere are limited. See Mbogo & Another vs. Shah [1968] E.A. 93; and United India Insurance Co. Ltd & 2 Others vs. East African Underwriters (Kenya) Ltd [1985] eKLR.

12. It is, with respect, presumptuous for any party to proceed on the basis that leave, when sought must be granted, and be granted on the terms sought by an applicant. As already indicated, the complaint seems to be that the Deputy Registrar granted the applicants 30, as opposed to the 60 days they had sought. It appears to me that the applicants placed themselves in the bind, by seeking leave to file a supplementary record of appeal prematurely before they had possession of some of the documents they sought to include in the supplementary record. The Deputy Registrar cannot in my view be faulted.

13. Overall, I find that “the reference” has no merit. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

