



**PAMM & 2 others v Shoprite Checkers Kenya Limited; Attorney General (Interested Party)
(Civil Application E385 of 2021) [2022] KECA 966 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 966 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E385 OF 2021
DK MUSINGA, S OLE KANTAI & HA OMONDI, JJA
AUGUST 26, 2022**

BETWEEN

PAMM 1ST APPELLANT

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

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

AND

SHOPRITE CHECKERS KENYA LIMITED RESPONDENT

AND

ATTORNEY GENERAL INTERESTED PARTY

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Mrima, J.) dated 21st October, 2021 in Constitutional Petition No. E004 of 2021)

RULING

1. In the Motion brought under rules 4, 41, 47(1), 49(1), 77(1) and 5 2.(b) of the [Court of Appeal Rules](#), 2010 and various articles of the [Constitution](#) of Kenya, 2010 and the [Appellate Jurisdiction Act](#), Patrick Alouis Macharia Maina on his own behalf that of two of his children asks in the main that we stay execution of the ruling given by the High Court of Kenya at Nairobi (Mrima, J.) on October 21, 2021 in High Court Constitutional Petition No. E004 of 2021 (he calls this the “recusal ruling”); that we stay those proceedings and grant a temporary injunction restraining “... any person acting outside the bounds of the process of a court of law, from publicly commenting or reporting, on:
 - (i) any scandalous, disparaging or prejudicial statement in the recusal ruling.



- (ii) Comments or pleadings that directly or indirectly allude to the merits of the petition at the High Court; or the merits of any application filed by the applicants which has not yet been determined with finality.
2. Prayer 3 of the Motion is spent, while prayer 4 seeks that we be pleased to extend the orders in prayer 2(a), 2(b) and 2 (c) (i) (ii) until the applicant's appeal is lodged, heard and finally determined. The grounds in support of the Motion are divided into 17 paragraphs which contain sub-paragraphs and the applicant's affidavit in support of the Motion contains 24 paragraphs also divided into many paragraphs. We observe here that precis should be observed as it is not necessary to tell a big story in an application of this nature. In sum, the applicant says that his constitutional right to a fair hearing as guaranteed by Articles 25 and 50 of the Constitution has been violated by the High Court and if we do not grant urgent interim reliefs that violation will continue to be visited on him; that the genesis of his application is a ruling of Mrima, J. delivered on October 21, 2021 in the said petition (recusal ruling); the said ruling arose from various allegations made by him; that the recusal ruling:

“...directs that the file in the superior court below be forwarded to the presiding Judge of the division on November 3, 2021 for reallocation to another Judge (hereinafter referred to as the “incoming Judge”)...”

3. Further, that he had asked the High Court to put the matter of the reallocation of the court file to another Judge on hold to await determination of an application he had in this Court but he did not know whether his request at the High Court would be granted; that his matter at the High Court and intended appeal to this Court would be rendered nugatory if the Court file was reallocated to a new Judge and proceedings resumed because, in his own words at paragraph 11 of the affidavit in support:

“ 11.1 the recusal ruling contains – in the last sentence of Paragraph No. 2 of the ruling - a premature definitive finding of fact , that materially touches on my yet unheard petition at the superior court below, using a phrase that originated from the Respondent, and without the benefit of a trial and/or expert evidence. This is extremely prejudicial to me and it will be manifestly unfair and inconsistent with my constitutional rights under Articles 47(1), 48 and 50(1) of the constitution as read with Article 25(c), for proceedings at the superior court below to continue under such circumstances;

11.1.1 The phrase “soft tissue injury” which the learned judge adopted in his premature finding of fact, is contained in Paragraph 4 of the Respondent's replying affidavit dated February 3, 2021 in response to the main petition. It is a mere averment that the Respondent has yet to prove. The said affidavit is in pages 74-79 of the draft Record of Appeal;

11. the recusal ruling is largely comprised of manifestly prejudicial statements
2. in the form of vague accusations, scandalous generalizations, scandalous innuendo, flagrant falsehoods and unfair exaggerations, that collectively constitute a scathing attack against me and my fellow petitioners at the superior court below. Examples include paragraphs 1, 4, 5, 8, 9, 11 and 14 of the impugned ruling. The aforesaid statements:

11.2.1 unfairly disparage me and cast baseless aspersions on my character, motives, and disposition – without a foundation



of fact and/or evidence. This is inconsistent with my rights under Articles 28 and 33(3) of the constitution as read with, inter alia, Articles 19(3), 20(2) and 21(1) of the constitution; 11.2.2 have the multiple effect of condemning me unheard while materially undermining the merits of my ongoing action against the Respondent in the superior court below – which effect is manifestly inconsistent with inter alia, my constitutional rights under Articles 47(1), 48 and 50(1) as read with inter alia, Articles 19(3), 20(2), 21(1) and 25(c) of the constitution;

11.2.3 are likely to influence the mind of the incoming judge to be predisposed to suspicion and hostility towards me – which means a fair hearing of pending proceedings will be impossible under such circumstances. This clearly threatens my non-derogable rights under Articles 47(1), 48 and 50(1) as read with Article 25(c) - hence the extreme urgency of the application;

11.3. In partial support of my aforesaid allegations that the ruling contains flagrant falsehoods and unfair exaggerations, I have annexed herein a document marked as URG-A003, which is a recent decision by the same learned judge in *Johnson Otieno Adera v South Nyanza Sugar Co Ltd* [2020] eKLR where he recused himself after unequivocally admitting that he was associated with Messrs. Madzayo Mrima & Company Advocates when he was practicing as an advocate of the High Court of Kenya. This decision corroborates my allegation in ground 2.3 of the recusal application which allegation is further supported by publicly available information from the Law Society of Kenya (the "LSK") website - a screenshot of which was annexed to my affidavit of support dated May 3, 2021 as part of its 29 uncontroverted annexures. It therefore cannot possibly be true, as the learned judge states in Paragraph 9 of the recusal ruling, in reference to the recusal application, that (emphasis supplied) "The allegations in toto are simply so concocted and far from the truth".

11.3.1 the aforesaid screenshot from LSK website is contained in pages 282-284 of the draft Record of Appeal;

11.3.2. the aforesaid supporting affidavit and its 29 uncontroverted 10 20 30 Page 7 of 12 annexures are in pages 273-386 of the draft Record of Appeal.

11.3.3 Judicial Notice is requested of the facts that: the recusal application was entirely unopposed and, therefore, the uncontroverted allegations of fact – including allegations of judicial bias in favor of the Respondent were, by dint of trite law, admitted and/or acquiesced to by the Respondent; and in light of the general nature of recusal applications, it is trite that the knowledge or opinion of the learned judge of his own internal state of mind was completely irrelevant and ought not to have informed his decision; and that these principles are well settled locally and internationally with concurrence of more than 100 years of case law – as eruditely elucidated in the concurring



decision of M. K. Ibrahim SCJ in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR;

- 11.4. in the recusal ruling, the learned judge indirectly, by way of equivocation and innuendo, accuses me of filing "unnecessary" applications - thereby indirectly accusing and condemning me – without evidence or a hearing - of abusing the process of the superior court below. However:
- 11.4.1 It is plainly evident from the record of the superior court below, that, other than the recusal application - which is the subject of the intended appeal, no other application that I, or my fellow petitioners have filed has been cited, dismissed or struck out for being an abuse of process or for lack of merit. I therefore request for Judicial Notice of the aforementioned fact, which forms part of the record below and is easily and objectively ascertainable – as further proof that the abovementioned accusation is manifestly unfair;
- 11.4.2 On the basis of the foregoing, I have good reason to reasonably apprehend that the purpose of the aforementioned accusations is to tacitly persecute and intimidate me in order to deter me 10 20 30 Page 8 of 12 from exercising my legitimate right to file applications in the superior court below;
- 11.4.3 I also have good reason to be apprehensive that the prejudicial wording of the ruling is intended to lay an unjust foundation for an unfair outcome of the pending proceedings as , inter alia, retaliation for applying for the learned judge's recusal and for lodging a Petition at the JSC for the removal of the learned judge, given that I and my fellow petitioners have been clearly singled out by the learned judge and impliedly branded as frivolous litigants without any basis in fact or law; and
- 11.4.4 for the aforesaid reasons, I verily believe that it will be impossible for proceedings in the superior court below to continue fairly under the aura of fear, suspicion, persecution and intimidation that has been created by the manifestly hostile and prejudicial wording used in the recusal ruling;
- 11.5 the recusal ruling contains sub-judice comments concerning the merits of, and prejudicing:
- 11.5.1 my yet unheard petition together with its unheard applications at the superior court below, which applications the learned judge has tacitly branded as "unnecessary" in his ruling thereby placing the fair hearing and determination of the said applications in jeopardy;
- 11.5.2 my yet unheard intended appeal to the ruling of March 1, 2021 for which the necessary prerequisites – such as a Notice of Appeal dated March 8, 2021 and letters bespeaking proceedings under Rule 82(1) of the Court of Appeal Rules 2010 -, were



timeously filed and served onto the Respondents; (a) The aforesaid Notice of Appeal in pages 474-477 of the draft Record of Appeal and an email message from the Deputy 10 20 30 Page 9 of 12 Registrar acknowledging receipt of letters bespeaking proceedings is in pages 478-486 of the draft; - thereby infringing on, and further threatening, my fundamental rights including my non-derogable constitutional right to a fair hearing.”

4. The applicant also says that the mass media has been covering his case from the beginning; that the press should have known that the recusal ruling had not been concluded and there was thus a breach of the sub-judice rule and need for an injunction to protect violation of his various constitutional rights.
5. When the Motion came up for hearing before us on a virtual platform on May 31, 2022 the applicant appeared in person for himself and the other applicants while learned counsel Mr. Mumia appeared for the 1st respondent. There was no appearance by the Attorney-General who had been served for the hearing. The appellant abandoned prayers 2(a) and 2(b) of the Motion on the basis that they had been compromised and urged us to determine the Motion on the basis of written submissions which we have perused.
6. Mr. Mumia informed us that he had decided not to file any response to the Motion because, firstly, he was unable to understand why the applicant’s had decided to pray for stay of their own petition in the High Court and, secondly, part of the Motion was for prayers against the media who he did not represent.
7. For an applicant to succeed in this Court in an application for stay of execution pending appeal or for injunction against orders of the High Court he must, firstly, establish that the appeal, or intended appeal, is arguable, which is the same as saying that the same is not frivolous. Such an applicant must, in addition, show that the appeal would be rendered nugatory absent stay – *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
8. We note from the record a “Ruling No. 3” by Mrima, J., made on 21st October, 2021. That ruling was a follow up to other rulings the Judge had made in other applications filed before him by the applicant. The final orders made were:
 - (a) The Notice of Motion dated May 3, 2021 be and is hereby, dismissed with no orders as to costs.
 - (b) I hereby recuse myself from hearing this matter.
 - (c) This matter be placed before the Presiding Judge of this Division on November 3, 2021 for further directions.Orders accordingly.”
9. One of the prayers that the applicant had made before the said Judge was a prayer that the Judge recuse himself in the matter. The Judge considered the application and the reasons given, he noted that there was a barrage of attacks made against himself, the Attorney General, the respondent and others by the applicant but upon consideration the Judge recused himself from the matter and referred it for re-allocation to another Judge for hearing.
10. The applicant asked the Judge to recuse himself and he got favourable orders. He now says that the recusal order, which he had asked for himself, be stayed pending appeal as he has many fears that implementation of the recusal order will cause him certain prejudice. We are unable to appreciate this position where the applicant fears that he would not get justice before a Judge; he asked the Judge



to recuse himself from the case and the Judge agreed but the applicant turns around to allege certain prejudice he would suffer if the order he asked for and received is implemented. The other issue that we gag the media from reporting the applicant's case is not a matter for consideration here and we note that the media is not a party in the petition in the High Court or before us; they have no notice that adverse orders against them are being sought.

11. We have not seen any arguable point in the appeal and being of that view we need not consider whether the appeal would be rendered nugatory. The Motion has no merit and we dismiss it. Costs will be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

