PAM & 2 others v Shoprite Checkers Kenya Limited (Civil Case E186 of 2023) [2025] KEHC 5087 (KLR) (Civ) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E186 OF 2023

SN MUTUKU, J

APRIL 30, 2025

BETWEEN

PAM ..... 1ST PLAINTIFF

SMM (MINOR SUING THROUGH THE 1ST PLAINTIFF, HER FATHER AND NEXT FRIEND ..... 2ND PLAINTIFF

JMM (MINOR SUING THROUGH THE 1ST PLAINTIFF, HER FATHER AND NEXT FRIEND ..... 3RD PLAINTIFF

AND

SHOPRITE CHECKERS KENYA LIMITED ..... DEFENDANT

RULING

The Notice of Motion

1. There are two matters for determination in this ruling. The first concerns the Notice of Motion (the Application) dated 2.10.2024 brought by PAMM (the 1st Applicant) on his behalf and on behalf of Minors, SMM and JMM (the 2nd and 3rd Applicants) supported by the grounds found on the face of it and in the Supporting Affidavit. The Application seeks the following orders:

    i. That the directions given by this Honourable Court (Hon Lady Justice C. Meoli) on 16.07.2024 be and are hereby reviewed and set aside or vacated, or in the alternative, the said directions be and are hereby deemed as having lapsed in law;

    ii. That the Plaintiffs be and are hereby excused for their non-compliance with the said directions;

    iii. That if need be, the Plaintiffs be and are hereby discharged from any subsisting obligation in connection with the directions given on 16.07.2024;

iv. That the Plaintiffs be awarded the costs of the application.

2. The grounds in support of the Application, in sum, are that there is an error apparent on the face of the record; namely, that the directions given by Justice Meoli on 16.07.2024 are impossible to comply with since the law on amendments requires the retention of deleted matters and would therefore have the impact of increasing the length of the Applicants' pleadings; that the 1st Applicant being a lay person, is unable to amend the pleadings to the standard of practice required of advocates; that the timelines for filing pleadings have since closed and the matter is pending pre-trial directions. That in view of the foregoing, the aforesaid directions will result in grave prejudice and a miscarriage of justice to the Applicants herein, thereby forcing them to file multiple suits in various courts over the same subject matter and between the same parties.

3. It is stated in the grounds that the directions in question will further give Shoprite Checkers Kenya Ltd (the Respondent) an unfair advantage and opportunity to backtrack on the admissions already made in its pleadings. It is equally stated in the grounds that the causes of action set out in the plaint are properly before this court and that the High Court, Civil Division can similarly entertain constitutional claims.

4. It is stated, further, that the error apparent on the face of the record is further seen in the fact that the aforesaid directions seek to compel the 1st Applicant to act against his conscience by abandoning the pursuit of his constitutional rights which have allegedly been violated. That in making the said directions, the learned Judge appeared to ambush the Applicants herein, since the matter was scheduled to come up in court merely for mention on 16.07.2024 for purposes of obtaining clarifications on the pleadings on record.

5. The applicants likewise challenged the court's directions requiring them to reduce the length of their pleadings to a maximum of eight (8) pages, arguing that the page limit is manifestly discriminative and inconsistent with the rules of natural justice.

6. That in the circumstances, the Applicants are entitled to the orders sought in the instant Application.

7. The second matter under determination is the issue of costs awarded to the Respondent after this Court allowed the Applicants to withdraw their application dated 1.10.2024 seeking an order for recusal of Meoli, J. from handling the present matter. The Applicants opted to withdraw the application on the basis that the same had been overtaken by events, owing to the transfer of the learned Judge to a different court station. The application to withdraw the said application was opposed but this court allowed it nonetheless.

8. The record shows that while the Applicants prayed that the said application be withdrawn on a without prejudice basis and with no order as to costs, the Respondent on its part sought costs thereof. Upon considering the rival arguments, this court whilst allowing the oral application for withdrawal of the said application, awarded costs thereof to the Respondent, vide an order made on 11.02.2025.

9. The Applicants sought, and were granted leave by the court, to present oral arguments in seeking a review of the order made on costs.

The Response

10. The Respondent has opposed the Motion by way of the Replying Affidavit sworn by its advocate, Eddie Omondi, on 28.11.2024 in which it is deposed that vide the directions made on 16.07.2024 the court merely directed the Applicants to amend their pleadings appropriately, given the fact that the said pleadings contain a myriad of constitutional violations which would ordinarily fall within the purview of the Constitutional and Human Rights Division of the High Court and not the Civil Division.

11. The advocate has also stated that pursuant to Order 8, Rule 5 of the Civil Procedure Rules (CPR) the courts have the power to allow the amendment of pleadings at any stage of the proceedings, for the purpose of determining the real issues in controversy between the disputing parties. That furthermore, the courts have discretionary powers to direct parties on the limit of number of pages for filing documents. That in the circumstances, the aforementioned directions are in line with procedure and hence no proper grounds have been laid to warrant the review order sought. Counsel urged this court to dismiss the instant Motion with costs.

Written Submissions

12. The Application was canvassed by way of written submissions. The Applicants have firstly raised a preliminary objection challenging the competency of the Replying Affidavit on record for the reasons that it was sworn by the Respondent's advocate who is not a party to the suit and in respect of manifestly contentious issues, contrary to Rule 8 of the Advocates (Practice) Rules which prohibits an advocate from swearing an affidavit or making a declaration on contentious matters. The Applicants have further objected to the competency of the aforesaid Replying Affidavit on the basis that the same contains facts which constitute a vicious and unsubstantiated attack on the character of the 1st Applicant, by dint of Sections 55 and 58 of the *Evidence Act*.

13. The Applicants have urged this court to strike out and/or expunge the Replying Affidavit of advocate Eddie Omondi from the record, leaving the instant application unopposed and therefore ought to be allowed as prayed.

14. Regarding the merits of the Application, the Applicants have anchored their submissions on Order 45 of the CPR which provides for a review and sets out the instances in which a court may review a decree or order. The Applicants have proceeded to argue that the Motion is brought under the grounds of error apparent on the face of the record and sufficient reason, as set out in the grounds in support of the Application, which grounds they have are reiterated in their submissions.

15. They have argued that the High Court, Civil Division, has jurisdiction to entertain a claim raising constitutional matters, the Applicants have cited the case of Suyianka & 4 others v Kenyatta University & 2 others [2007] KEHC 2288 (KLR) where the court delivered judgment in respect of a constitutional claim. On the basis of the above arguments, the court is urged to allow the Application as prayed.

16. On its part, the Respondent has argued that the preliminary objection raised in the Applicants' submissions is unmerited and does not meet the threshold set in the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 and the case of Dorothy Margare Wanjiku Kung'u v Akash Himatlal Dodhia [2014] KEELC 385 (KLR) on what would constitute a preliminary objection.

17. The Respondent has argued that there is no law barring an advocate from swearing an affidavit in the course of his or her duties and in the discharge of his or her professional mandate on a matter within his or her personal knowledge, citing the decision in Sichuan Huashi Enterprises Corporation East Africa (EA) Limited v Stauslaus Lumwachi Mateya & another [2019] KEHC 6075 (KLR) where the court restated the above position. The Respondent submitted that in the present instance, the facts deposed in the affidavit by the Respondent's advocate constituted matters within his personal knowledge and that the facts therein would in any event not be the subject of cross-examination.

18. Concerning the order for review sought, it is the Respondent's contention that the instant Application has not demonstrated the existence of any error apparent on the face of the record, in line with the

case of National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR) in which the Court of Appeal reasoned that the error referenced hereinabove must be self-evident and should require no elaborate argument.

19. The Respondent has supported the directions made by the Court (Meoli, J.) by arguing that the same resulted from the overly lengthy and ambiguous pleadings filed by the Applicants and were purely intended to assist in streamlining the issues for trial. That, the court is clothed with jurisdiction to order or allow the amendment of pleadings at any stage of the proceedings, under Order 8, Rule 5 of the CPR. That, no sufficient reasons have been given to warrant a review of the aforesaid directions and that in view of the foregoing, the instant Application is devoid of merit and is therefore deserving of a dismissal order, with an award of costs being made in favour of the Respondent.

20. In their rejoinder submissions, the Applicants have argued, inter alia, that the directions for amendment of their pleadings are impractical and cannot be complied with. The Applicants have further reiterated their earlier submissions, that the error in question is self-evident and that it is apparent that the Applicants stand to suffer grave prejudice if the order for review is denied.

21. The Applicants have maintained that their preliminary objection raises genuine points of law, as set out in their earlier submissions, the contents of which were by and large restated in rejoinder, save to add that the Replying Affidavit in question goes a step further in delving into the merits of the suit.

22. In respect to the issue of costs after the withdrawal of the application dated 1.10.2024, the 1st Applicant, argued that there is an error apparent on the face of the record as well as sufficient reasons warranting the review of the order of costs. The 1st Applicant has argued that before the application for recusal dated 1.10.2024 could be heard, Meoli, J. was transferred and the file was therefore placed before this court, thereby rendering the aforesaid application an academic exercise. That in the circumstances, the award made on costs is punitive and unfair to the Applicants, since the circumstances leading up to its withdrawal were beyond the Applicants' control.

23. On the other hand, the Respondent submitted that the issue of awarding costs is discretionary and that the Applicants have failed to demonstrate that they deserve the order of review or setting aside of the order for costs and that the Application lacks merit and ought to be dismissed.

Analysis and Determination

24. I have considered the Application and the issues raised in this matter, including the orders sought to review the order of this Court awarding costs to the Respondent following withdrawal of the application dated 1.10.2024. I have considered written submissions and oral highlights of the said submissions.

25. I have noted the arguments by the 1st Applicant in support of the two issues raised in this matter. Costs were awarded by this court following the order for withdrawal of the Applicants' application dated 1.10.2025, the record shows that the Applicants herein had previously filed the said application seeking an order for recusal of Meoli, J. from handling the present matter.

26. When this matter was placed before me for determination following the transfer of Meoli J, the Applicants opted to withdraw the said application on the basis that the same had been overtaken by events, owing to that transfer of the learned Judge to a different court station. The record shows that while the Applicants prayed that the said application be withdrawn on a without prejudice basis and with no order as to costs, the Respondent on its part sought costs thereof. Upon considering the rival arguments, this court whilst allowing the oral application for withdrawal of the said application, awarded costs thereof to the Respondent, vide an order made on 11.02.2025.

27. The central issue that presents itself for determination is whether the Applicants have met the threshold for grant of orders of review in the two matters raised before this court. There is also the issue of the objection raised by the Applicant questioning the competency of Mr. Eddie Omondi, learned counsel, to swear a Replying Affidavit, which this Court will first address.

28. I have considered the grounds raised by the Applicants in regard to the Replying Affidavit that the same contains averments in respect of contentious matters for which an advocate is prohibited from giving evidence on behalf of his or her client, and that the contents thereof are intended to malign and discredit the character of the 1st Applicant, contrary to Sections 55 and 58 of the *Evidence Act*, Cap. 80 Laws of Kenya.

29. Does this issue fit the definition of a preliminary objection as contained in the case of Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696 that:

> " 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."

30. The above definition was advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR as follows:

> " 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."

31. A preliminary Objection must meet certain parameters as enunciated in Mukisa Biscuits case and other leading authorities, that:

    a. It must raise a pure point of law which has been pleaded, or which arises by clear implication out of pleadings.

    b. The PO, if argued as a preliminary point may, dispose of the suit.

    c. The PO is argued on the assumption that all facts pleaded by the other side are correct.

    d. The PO cannot be raised if any fact must be ascertained or if what is sought is the exercise of judicial discretion.

32. I have considered this issue. On the question whether the replying affidavit speaks to contentious matters, Rule 8 of the Advocate (Practice) Rules which provides that:

> " No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:
>
> Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

33. Upon considering the contents of the replying affidavit on record, the court cannot find any matter in respect of which counsel was precluded from deposing since the same constitute matters within his personal knowledge as counsel acting in the suit. It is apparent therefrom that the matters deposed to by and large relate to the directions whose review is presently sought and the application for review. In my considered view, the matters deposed in the Replying Affidavit touch on law and procedure and are within the knowledge of counsel in his capacity as the legal representative of the Respondent.

34. The above position was reaffirmed by the Court of Appeal in Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR citing its decision in Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015 thus:

> " As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

35. I find the objection without merit as it fails to meet the threshold for preliminary objections. It is hereby dismissed.

36. On the issue of review sought in the Application dated 2.10.2024 and the oral application for review of the order for costs, I have read Section 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya and Order 45 of the CPR. The legal provisions governing review are as follows:

> " Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

37. Any party seeking review must demonstrate discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or any other sufficient reason to persuade the court to rule in his favour. The Applicant relies on an 'error apparent on the face of the record' and 'sufficient reasons' as the grounds for seeking review in both applications.

38. In the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243, the Court of Appeal rendered itself in the following manner:

> " In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

39. To my mind, it is clear from the authorities that 'an error apparent on the face of the record' must be self-evident in nature. It does not require elaborate arguments to support it or to prove it.

40. Upon considering rival arguments of both parties, it is my considered view that no error apparent on the face of the record has been established. From a reading of the directions in question, it is my view that the court exercised its discretion in a matter that, in the mind of the learned judge, required amendments to clarify the Applicants claim and bring it within the jurisdiction of the Civil Division of the High Court.

41. To my mind, the directions given by Justice Meoli were prompted by the fact that the Applicants' plaint was not only lengthy but constituted a mix of causes of action that fall under both the Constitutional and Human Rights Division of the High Court and matters falling within the Civil Division. The learned Judge further directed the Applicants to limit the number of pages of the amended plaint to no more than eight (8) pages and set timelines for filing and service thereof.

42. Order 8 (5)(1) of the Civil Procedure Rules empowers the Court to order amendments of any proceedings either on its own motion or on application by any party. The order provides as follows:

> 5. General power to amend [Order 8, rule 5.] (1)
>
> For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

43. It is my considered view that the directions of the court were not meant to prejudice any party. Instead, they were meant to clarify the cause of action and make the pleadings short and precise as anticipated under Order 2 of the Civil Procedure Rules.

44. Specifically, Order 2 Rule 3 (1) of the Civil Procedure Rules provides as follows in respect to the contents of pleadings:

> Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party

pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

45. As earlier mentioned, an error apparent on the face of the record ought to be self-evident. In the present instance, there is nothing to indicate the presence of a self-evident error apparent on the face of the record to necessitate a review of the aforesaid directions.

46. Similarly, this court, upon considering the rival arguments of both parties, did not come across any credible material to indicate that there is sufficient reason to grant the Applicants the orders of review or to set aside the directions of the court issued on 16.07.2024. In the court's view, the averments being made by the Applicants would essentially be calling upon this court to sit on appeal against the directions by the learned Judge, which jurisdiction this court does not possess.

47. On the issue of the award of costs made by this court on 11.02.2025 in respect of the withdrawal of the application dated 1.10.2024, I have considered the same. The Applicants argued that issue basing it on similar grounds of 'error apparent on the face of the record' and 'sufficient reasons.'

48. Upon considering the averments made by the Applicants as well as the opposing averments by the Respondent, the court is of the view that the Applicants have similarly not met the threshold for review on the issue of costs. To award or to decline awarding costs rests with the discretion of the court based on the unique circumstances of each case. This position was reaffirmed by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR cited in oral submissions by the 1st Applicant, where the Court stated that:

> "It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant."

49. In the present instance, while it is not in dispute that the Applicants' recusal application was withdrawn, this court in the exercise of its discretion, ordered that the costs thereof be awarded to the Respondent upon considering both the submissions by the Applicants and the opposing submissions by the Respondent on the subject.

50. In view of all the foregoing reasoning, this court declines to grant the respective orders for review sought by the Applicants.

51. The upshot of the above order is that the Notice of Motion dated October 2, 2024 is hereby dismissed for want of merit. Further, the oral application for review of the orders of this court awarding costs to the Respondent in respect of the Notice of Motion dated October 1, 2024 is similarly dismissed. I award costs of the Application dated October 2, 2024 to the Respondent.

52. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 30TH APRIL 2025.

S. N. MUTUKU

JUDGE

In the presence of:

1. Mr. PM the Plaintiff

2. Mr. Omondi for the Defendant