



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 72 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

ENERGY AND PETROLEUM REGULATORY AUTHORITY.....2<sup>ND</sup> RESPONDENT

HON. JUDE NJOMO AND ANTHONY KURIA

SUING AS OFFICIALS OF KENAPEDE ASSOCIATION

RULING

### Introduction

1. The *ex parte* Applicants herein, Hon. Jude Njomo and Anthony Kuria suing as Officials of Kenapede Association, filed a Notice of Motion Application dated 15<sup>th</sup> May, 2020, in which they are seeking the following orders:-

**a. THAT this Honourable Court be pleased to issue an Order of Mandamus compelling the 2<sup>nd</sup> Respondent as a regulator in the Petroleum industry to carry out its statutory mandate by imposing measures, penalties and or fines against the Oil Marketing Companies for non-compliance with the 2<sup>nd</sup> Respondent's prescribed petroleum products price margin regulations published on 14<sup>th</sup> November, 2019 and all other subsequent publications.**

**b. THAT this Honourable Court be pleased to issue an order of Mandamus compelling the 2<sup>nd</sup> Respondent herein to carry out its statutory mandate as a regulator of the petroleum industry and to impose the necessary measures to protect the Ex Parte Applicant's rights and interests which are being violated by the Oil Marketing Companies.**

**c. Costs of the application be awarded to the Ex Parte Applicant.**

2. The grounds for the application are stated in a Statutory Statement dated 17<sup>th</sup> March 2020, and a verifying affidavit and supporting affidavit sworn by Jude Njomo, the *ex parte* Applicant's Chairman on 17<sup>th</sup> March, 2020 and 15<sup>th</sup> May, 2020. The *ex parte* Applicant contends that it is an Association comprising of retailers and dealers of petroleum products within the Republic of Kenya with an objective of supporting its members on all issues concerning the industry, and it exhibited a copy of its certificate of registration. Further, that Energy and Petroleum Regulatory Authority, which it has sued as the 2<sup>nd</sup> Respondent herein, is an administrative body tasked with the supervision, management and regulation of the petroleum industry, including the imposition of the necessary sanctions and measures against stakeholders who refuse to comply with the regulations and guidelines pertaining thereto.

3. The *ex parte* Applicant further averred that it is part of the Respondent's statutory mandate pursuant to the Petroleum Act 2019 and the Energy Act 2019 to prescribe the oil and petroleum prices and margins that the stakeholders must adhere to, and that on 14<sup>th</sup> November 2019, the Respondent through a press release, issued and published the fuel pricing regulations indicating the maximum wholesale and retail petroleum prices in Kenya for the period 15<sup>th</sup> November, 2019 to 14<sup>th</sup> December, 2019. Furthermore, that according to the press release, the said regulations introduced a new formula where the retail margin was split into two categories being the Retail Investment Margin and the

Retail Operations Margin, and that the Retail Operations Margin which relates and is applicable to the members of the *ex parte* Applicant had been prescribed by the Respondent as Kshs. 4.14 per litre.

4. The gist of the *ex parte* Applicant's grievance is that subsequent to the prescribed new formula and margins, the Oil Marketing Companies have developed schemes to unfairly profit through imposition of illegal charges on the invoice statements they have been issuing to the members of the *ex parte* Applicant. Further that it had informed the 2<sup>nd</sup> Respondent on the violations of the regulations by the Oil Marketing Companies which were failing to remit the prescribed margin of Kshs. 4.14 per litre to the dealers and were forcing the dealers to sign new agreements to justify the reduction in the margins to the dealers. However, that despite various letters sent to it, the 2<sup>nd</sup> Respondent had refused, failed and or neglected to intervene as a regulator to resolve the *ex parte* Applicant's grievances.

5. The 2<sup>nd</sup> Respondent thereupon filed a Notice of Preliminary Objection dated 8<sup>th</sup> June, 2020 on a point of law, seeking dismissal of the *ex parte* Applicant's application with costs to the 2<sup>nd</sup> Respondent on the grounds that this Court lacks jurisdiction to entertain, hear or determine the issues raised in these proceedings. This Court directed that the said Preliminary Objection be heard and determined first, by way of written submissions. Njoroge Regeru and Company Advocates, the advocates for the 2<sup>nd</sup> Respondent filed submissions dated 2<sup>nd</sup> July 2020; while the *ex parte* Applicant's submissions dated 13<sup>th</sup> July 2020 were filed by Mwamuye, Kimathi and Kimani Advocates. This ruling is on the said preliminary objection. The arguments thereon by the respective parties and determination by this Court are presented in the following sections.

### **The Preliminary Objection**

6. The grounds raised by the 2<sup>nd</sup> Respondent in its Preliminary Objection are that this Court has no jurisdiction to entertain, hear or determine the Notice of Motion dated 15<sup>th</sup> May, 2020, since from the facts pleaded in the *ex parte* Applicant's pleadings, it is patently clear that the dispute herein is in fact and in substance a dispute between licensees under the Petroleum Act Number 2 of 2019. In the alternative, and at best, that the said dispute is an "appeal" against alleged refusal by the 2<sup>nd</sup> Respondent to resolve a complaint by some licensees against other licensees.

7. The 2<sup>nd</sup> Respondent stated that in the premises, the issues raised in these proceedings ought to first be dealt with in the dispute resolution mechanisms mandatorily prescribed under the following laws:-

- a. Sections 23 (5) and 36 (1), (3) & (4) of the Energy Act Number 1 of 2019
- b. Section 117 (5) & (6) of the Petroleum Act Number 2 of 2019
- c. Section 9 (2) of the Fair Administrative Act Number 4 of 2015

Further, that under Sections 23 (5), and 36 (1), (3) & (4) of the Energy Act Number 1 of 2019, and section 117 (5) & (6) of the Petroleum Act Number 2 of 2019, any dispute of the nature raised in the subject Notice of Motion herein must first be lodged before the Energy and Petroleum Tribunal established under section 25 of the Energy Act. In addition, that judicial proceedings would be instituted only as the last resort after exhaustion of the remedies provided for in the said statutes.

8. The counsel for The 2<sup>nd</sup> Respondent in his submissions contended that the crux of the dispute herein is a commercial and contractual relationship between members of the *ex parte* Applicant and certain Oil Marketing Companies, and that even though the Oil Marketing Companies had not been joined to the proceedings as Interested Parties, such Oil Marketing Companies are also licensees under the Petroleum Act and specifically section 74 (1) (a), (b), (c) and (d) of the Act. He averred that as a matter of law, such members of the *ex parte* Applicant and such Oil Marketing Companies are licensees under the Petroleum Act., and the dispute before the Court is a commercial dispute between licensees under the Petroleum Act.

9. He further contended that the second limb of the dispute is that the Applicant had lodged a complaint with the 2<sup>nd</sup> Respondent in relation to the alleged conduct of the unnamed Oil Marketing Companies and that the 2<sup>nd</sup> Respondent had failed to act on the Complaint.

10. On the contention that the Court has no jurisdiction to hear the dispute herein, the 2<sup>nd</sup> Respondent cited the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, and submitted that section 25 of the Energy Act establishes the Energy and Petroleum Tribunal to hear and determine disputes of the nature now before the Court. Further, that section 117 (5) & (6) of the Petroleum Act provides for the appellate and the original civil jurisdiction of the Tribunal, in similar terms as section 36 (1), (3) & (4) of the Energy Act. It was also contended that section 23 (5) of the Energy Act provides for the jurisdiction of the Tribunal to not only hear appeals from decisions of the 2<sup>nd</sup> Respondent but also to hear appeals in respect of omission by the 2<sup>nd</sup> Respondent to make a decision, within the stipulated timeframe. Counsel averred that it was the *ex parte* Applicant's own contention that it had raised the matters in dispute herein with the 2<sup>nd</sup> Respondent but that the 2<sup>nd</sup> Respondent had failed to take action as per the *ex parte* Applicant's request. He added that assuming that to be the case, the recourse would not be to file these proceedings before the High Court but rather the proper recourse would be to lodge an Appeal before the Tribunal as required in law.

11. Counsel for the 2<sup>nd</sup> Respondent submitted that it is trite law that where a statute specifically provides for an alternative dispute resolution mechanism, a party will be required to strictly confine himself to such mechanism. He stated that in this case, such mechanism exists as shown herein-above and there was no reason why these proceedings should be maintained before the High Court and the same ought to be struck out with costs to the 2<sup>nd</sup> Respondent. Reliance was placed on decisions to this effect in the cases of **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR**, **Jennifer Shamalla vs Law Society of Kenya & 15 Others (2017) eKLR**, **Council of County Governors v Attorney General & 12 Others [2018] eKLR**, **Isiolo County Assembly Service Board & another v Principal Secretary Ministry of Devolution and Planning [2016] eKLR**, **Republic -vs- Energy Regulatory Commission & 2 others [2018]**

**eKLR, and Okiya Omtatah Okoiti VS Kenya Power and Lighting Company & 10 others [2018] eKLR**, Counsel further submitted on the rationale for pursuing alternative dispute resolution mechanisms, including the fact that the membership of the Tribunal in this case has better knowledge and expertise compared to this Court to enable it to resolve critical and technical details of the dispute herein.

12. On the issue of costs, counsel submitted that the 2<sup>nd</sup> Respondent is entitled to costs as against the *ex parte* Applicant if the Preliminary Objection herein is upheld, and as the dispute herein is a commercial dispute between members of the *ex parte* Applicant and Oil Marketing Companies but disguised as judicial review proceedings, and as such is an abuse of the Court process. Therefore that the 2<sup>nd</sup> Respondent has incurred costs in defending premature, mischievous and vexatious proceedings including external Counsel to defend the proceedings.

### **The ex parte Applicant's Reply**

13. The *ex parte* Applicant's counsel relied on the decision by the Supreme Court in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** on the requisite threshold for a preliminary objection, to submit that the court should only consider matters of law and not matters of fact in such an objection. He averred that in the present case, the preliminary objection raised by the 2<sup>nd</sup> Respondent is not on a pure point of law, as it refers to facts pleaded by the *ex-parte* Applicant, and incorrectly interprets the said facts to mean that the *ex-parte* Applicant's claim was purely a dispute relating to commercial and contractual relationship between its members and certain Oil Marketing Companies. The *ex-parte* Applicant invited the Court to note that its grievance was grounded on the fact that the 2<sup>nd</sup> Respondent had failed to exercise a statutory duty vested on it as a regulator in the petroleum industry, and that the disputed facts in this respect needed to be determined by the Court.

14. The disputed facts were identified by the *ex-parte* Applicant to include the facts whether the dispute relates to commercial and contractual relationship between its members and certain Oil Marketing Companies; whether the 2<sup>nd</sup> Respondent as an administrative body tasked with supervision, management and regulation of the Petroleum Industry including the imposition of the necessary sanctions against stakeholders who had refused to comply with the regulations and guidelines pertaining thereto; and whether the 2<sup>nd</sup> Respondent had enforced its regulations on the retail margins and/or taken any stern action against the Oil Marketing Companies that were non-compliant with the said regulations among others facts and issues. Reliance was placed on the case of **Winnie Juliet Wairimu Macharia vs Peter George Heinrich Koenecke [2018] eKLR**, where a Preliminary Objection was dismissed on the grounds that the court had to reconcile the evidence in order to reach a conclusion.

15. Counsel for the *ex-parte* Applicant contended that to that end, no point of law arises in the 2<sup>nd</sup> Respondent's preliminary objection, and that the determination of the same would require the Court to examine the facts pleaded by the *ex parte* Applicant. Further, that what was being sought by the 2<sup>nd</sup> Respondent was for the Court to exercise its judicial discretion, and the *ex parte* Applicant cited the decision in **Mukisa Biscuit Company vs Westend Distributors Limited (supra)** in support of its submissions.

16. Counsel also submitted that the above canvassed issue notwithstanding, the High Court is established under Article 165(1) of the Constitution of Kenya, 2010 which has elaborately set out the jurisdiction of the High Court in Article 165(3). Counsel relied on the case of **Hezekiel Oira v Ethics and Anti-Corruption Commission & another [2016] eKLR** and the Court of Appeal case of **Peter Nganga Muiruri vs Credit Bank Limited & Another, Civil Appeal No. 203 of 2006** that the Constitution of Kenya, 2010 does not create any exception to the High Court's unlimited original jurisdiction in any way, expressly or implicitly. Therefore, that any attempt to oust the High Court's universal jurisdiction has to be preceded by a constitutional amendment of Article 165(3)(a) and (e), and consequently, all the statutes cited by the 2<sup>nd</sup> Respondent are subject to the overriding constitutional powers vested in the High Court. The counsel further submitted that the effect of upholding a Preliminary Objection is to summarily dispose of an entire case without giving a party its day in court, which is a draconian action that must be exercised with caution and as a last resort.

17. Lastly, the *ex parte* Applicant's Counsel relied on the ruling in the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR**, that the principle that costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. He submitted that in the premises, the *ex-parte* Applicant should be awarded cost.as it had unnecessarily incurred incidental costs and miscellaneous charges in defending the instant Preliminary Objection, that is seemingly frivolous and vexatious.

### **The Determination**

18. I have carefully considered the arguments made by the 2<sup>nd</sup> Respondent and the *ex parte* Applicant. The first question that this Court needs to answer is whether the grounds raised in the 2<sup>nd</sup> Respondent's preliminary objection raise pure points of law. It is only after determining this question, that this Court can proceed to answer the secondary question as to whether the said preliminary objection has merit and should be upheld.

19. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

**“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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

20. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and 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. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary

objection cannot be raised if what is sought is the exercise of judicial discretion.

21. It is in this respect evident that from the submissions made by the parties that the main ground raised by the 2<sup>nd</sup> Respondent is that this Court is divested of jurisdiction by the provisions on alternative dispute resolution in the Energy Act and Petroleum Act. I am guided by the decision in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** when dealing with the issue raised about this Court's jurisdiction. Nyarangi JA (as he then was) held as follows in this regard:

**"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

22. The Court of Appeal proceeded to define jurisdiction and its source as follows:

**"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"**

23. As to whether a jurisdictional objection raises a pure point of law, the relevant consideration as stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** is whether that objections can be answered by applying relevant law and legal principles, as opposed to being answered by reference to facts and evidence as well as inferences arising from those facts. To the extent that a Court's jurisdiction flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent and can only be determined in reference thereto, it is thus clearly a pure question of law.

24. Pleadings only become relevant at the stage of determining whether the preliminary objection that is raised on the ground of jurisdiction is merited, to the extent that they disclose the claim that is the subject of the court's determination. An examination of the pleadings in this respect is not for purposes of making any findings of fact as alleged by the *ex parte* Applicant, but for the purpose of identifying and clarifying the nature of the dispute that is before the Court, and whether the Court has or does not have jurisdiction in relation thereto. This distinction was explained in the **Republic vs The Chief Land Registrar and Another (2019) e KLR** as follows:

**"Jurisdiction is determined on the basis of the pleadings, ... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. ..."**

25. Therefore, in essence it is the dispute that is before the Court that will determine whether a Court does or does not have jurisdiction, and whether a preliminary objection on this ground has merit. It is not in dispute in this regard that the *ex parte* Applicant has commenced judicial review proceedings to compel the 2<sup>nd</sup> Respondent to perform its statutory duties. The judicial review jurisdiction of this Court is in this respect is granted by Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

26. It is notable that in the present proceedings, this Court is being asked in exercise its supervisory jurisdiction, to review the lawfulness of the proceedings and actions of the 2<sup>nd</sup> Respondent, a statutory established under the Energy Act, which is therefore amenable to this Court's supervisory jurisdiction. On the arguments made by the 2<sup>nd</sup> Respondent that this Court's jurisdiction is curtailed by statutory provisions providing for other methods of resolving the dispute herein, this Court indeed has unlimited original jurisdiction under Article 165(3) of the Constitution as stated by the *ex parte* Applicant, and the availability of an adequate alternative remedy does not affect the Court's jurisdiction to entertain a claim for judicial review. However, an available adequate alternative remedy is a material consideration in the exercise of the Court's discretion to grant the relief sought, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body.

27. In addition, the exhaustion of alternative remedies is now both a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and as exemplified by emerging jurisprudence on the subject. Article 159(2)(c) of the Constitution obliges this Court to observe the principle of alternative dispute resolution.

28. Specifically, with respect to the exercise of the judicial review jurisdiction of this Court, sections 9(2) (3) and (4) of the Fair Administrative Action Act state as follows:

**"2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

29. The Court of Appeal first embodied the doctrine of exhaustion in Speaker of National Assembly vs Karume (1992) KLR 21, and further clarified the doctrine under the current constitutional dispensation in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

30. Coming to the present application, Section 25 of the Energy Act establishes the Energy and Petroleum Tribunal, and section 36 provides for the said Tribunal’s jurisdiction as follows:

1.The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.

2. The jurisdiction of the Tribunal shall not include the trial of any criminal offence.

3. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.

(4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

5. The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

6. The Tribunal shall hear and determine matters referred to it expeditiously.

31. The Authority referred to in section 36 is the 2<sup>nd</sup> Respondent. Section 117 of the Petroleum Act likewise provides as follows:

1. All disputes between parties to a petroleum Dispute agreement arising from upstream petroleum operations shall be resolved through alternative dispute resolution mechanisms in the first instance as may be provided for in by the petroleum agreement.

2. Any other disputes arising from an upstream regulated function under this Act shall be referred to the Authority for determination in the first instance.

3. Any person who is dissatisfied with the decision of the Authority under subsection (2) may appeal to the Tribunal.

4. Despite the provisions of sub-sections (1) and (2), the Tribunal shall have original civil jurisdiction on any dispute arising out of the bidding rounds carried out under this Act.

5. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees in midstream and downstream petroleum operations.

6. The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority in midstream and downstream petroleum operations and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.

32. “The Tribunal” is defined in the Petroleum Act of 2019 to mean the Energy and Petroleum Tribunal established under the Energy Act, 2006. The ex parte Applicant in its pleadings has stated that its grievance arises from activities of other entities that are regulated by the 2<sup>nd</sup> Respondent. Section 36(5) specifically provides in this respect that the Tribunal has powers to grant the appropriate equitable reliefs in relation to the actions of these entities as well as any actions by the 2<sup>nd</sup> Respondent. The alternative remedy of a reference or appeal to the Energy and Petroleum Tribunal is therefore not only available, but also adequate to address the *ex parte* Applicant grievances, who still has recourse to this Court in the event it is not satisfied. This Court will therefore defer to the constitutional and statutory prescriptions on the exercise of its judicial review jurisdiction arising from the circumstances of the instant application.

### The Orders

33. Arising from the foregoing reasons, this Court finds that the 2<sup>nd</sup> Respondent's Notice of preliminary objection dated 8<sup>th</sup> June 2020 has merit, and the *ex parte* Applicant's Notice of Motion application dated 15<sup>th</sup> May, 2020 is hereby struck out. In addition, arising from the explanation given in this ruling regarding this Court's jurisdiction in this matter, each party shall bear its own costs of the said Preliminary Objection.

34. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.**

**P. NYAMWEYA**

**JUDGE**