Asif v Director of Public Proseutions & 2 others (Constitutional Petition E054 of 2023) [2024] KEHC 17013 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEHC 17013 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E054 OF 2023

OA SEWE, J

JUNE 5, 2024

IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013ANDIN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA

BETWEEN

SARMAD ASIF ..... PETITIONER

AND

DIRECTOR OF PUBLIC PROSEUTIONS ..... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. The Notice of Motion dated 22nd November 2023 was filed by the Petitioner, Sarmad Asif, under Sections 1A, 1B, 3A and 63(e)of the *Civil Procedure Act*, Chapter 21of the Laws of Kenya, Order 51 Rule 1of the Civil Procedure Rules, 2010,and the inherent jurisdiction of the Court. The petitioner prayed for the following orders:

   (a) Spent

   (b) Spent

   (c) That the Court be pleased to issue an order of injunction prohibiting the respondents, their officers, subordinates, agents, assigns, employees and/or any other person whatsoever from arresting, charging and/or prosecuting the petitioners and any employees of the petitioner's company, Sleek Trading Limited, on any issue in relation to subject matter or complaint by

Kenneth Ali Kibira and Charles Munganyi (hereinafter, the complainants) and any other person pending hearing and determination of the Petition.

(d) That the Court be pleased to direct that the Petition be heard and determined expeditiously.

(e) That the respondents do bear the cost of the application and the suit.

2. The application was premised on the grounds that the petitioner is being harassed, threatened and intimidated through arrests by the respondent on trumped up charges in an orchestrated scheme to unlawfully extort money from him in the guise of enforcing a contract of sale of motor vehicle dated 18th December 2021 between Sleek Trading Limited and one Charles Ovita Munganyi. By that agreement, Sleek Trading Limited sold motor vehicle Registration No. KCZ 942 to the complainant on hire purchase. The motor vehicle was involved in a road traffic accident before the completion of the payment of the hire purchase price.

3. The petitioner averred that the complainant has since been harassing him and the company employees seeking full refund of the instalments paid. He further averred that the complainants filed small claims suits against the company in Mombasa SCCOM/E687/2023: Charles Ovita Munganyi v Sleek Trading Limitedand Mombasa SCCOM/E413/2023: Kenneth Ali Kibira T/a Kentech Communications v Sleek Trading Limited. He further stated that the complainants also filed a complaint of assault at the Central Police Station, Mombasa vide OB No. 87/18/07/2022 which was investigated by the Police and the investigation file forwarded to the Office of the Director of the Public Prosecutions (the 1st respondent herein); but that the 1st respondent declined to prosecute.

4. The petitioner now complains that, due to the persistence by the complainants, a decision to prosecute him has been made in connection with a contract that falls under the realm of civil courts. He contends that the respondents are being used by the complaints to further personal interests; and that they have failed to exercise their autonomy independently, consequently breaching the national values and principles of good governance, transparency and accountability. Accordingly, it is the petitioner's contention that the respondents have acted in bad faith for extraneous considerations. He accordingly prayed for an injunction to restrain his prosecution pending the hearing and determination of this Petition.

5. The grounds set out herein above, were explicated in the petitioner's Supporting Affidavit sworn on 23rd November 2023. He annexed several documents to that affidavit to buttress his assertions. The documents include copies of the Hire Purchase Agreement dated 18th December 2021 and the Inspection Report from Xenon Auto Assessors and Valuers Ltd dated 12th September 2023, vouching for the estimated cost of repairs for the subject motor vehicle. The petitioner also annexed to his affidavit copies of the pleadings filed in the aforementioned Small Claims suits, a letter dated 13th September 2023 from the 1st respondent in connection with the subject matter of this Petition as well as a copy of the OB No. 87/18/07/2022.

6. The Petition was resisted by the respondents. The 2nd and 3rd respondents filed Grounds of Opposition dated 29th November 2023, contending that:

(a) The application and the Petition are misconceived, frivolous and an abuse of the process of the Court.

(b) The 1st and 2nd respondents are empowered by law to investigate and prosecute criminal offences pursuant to the provisions of Section 24 of the *National Police Service Act* and Articles 243 and 245 of *the Constitution*.

(c) The petitioner has not demonstrated how the respondents are not going to respect his constitutional rights.

(d) It is incumbent for the petitioner to demonstrate before the Court that the intended police investigations are hinged on illegality or bad faith.

(e) That even though the dispute herein is one of a civil nature there is no bar to investigation and prosecution of the petitioner by the 1st and 2nd respondents by dint of Section 193A of the *Criminal Procedure Code*.

(f) The petitioner has merely alluded to constitutional provisions and has not shown with exactitude how his rights and fundamental freedoms will be infringed; and therefore has not met the threshold for the Court's intervention.

(g) The 3rd respondent is only responsible for defending the Government in civil litigation and has nothing to do with investigations or prosecution of criminal cases.

(h) That for the Court to intervene, it would have to be satisfied that the criminal process which has been initiated is being used with a view of forcing the petitioner to settle the civil claim; which evidence has not been brought before the Court.

(i) The petitioner has failed to bring forth any scintilla of evidence to show that he will not be accorded fair trial.

(j) The petitioner has failed to identify the police officers and/or police stations he accuses of harassment, threats or intimidation; and is therefore guilty of material non-disclosure.

(k) The Petition offends the doctrine of constitutional avoidance and should therefore not be entertained.

7. In a Further Affidavit sworn by the petitioner on 30th January 2024, he annexed copies of the Judgments rendered in the Small Claims Suits No. E413 and E687of 2023. They prove that the complainants were successful in respect of their claims against the employees of the company for damages for assault.

8. The application was canvassed by way of written submissions. To that end the petitioner filed written submissions dated 30th January 2024 and thereby proposed one issue for determination, namely whether the petitioner's rights as guaranteed by Article 27(1), (2), 28, 29(a) and 50(2)(b), (j) & (n)of the Constitutionstand violated by the 1st respondent's decision to charge the petitioner.

9. The pith of the petitioner's case is that the dispute between the petitioner's company and the complainants is a civil dispute involving breach of contract and does not involve any criminal component. Accordingly, the petitioner submitted that the decision of the 1st respondent to prefer charges against him is not only unreasonable and unjust, but is also a well-coordinated and deliberate effort aimed at harassing, intimidating and victimizing him. He accordingly urged the Court to restrain his prosecution pending the hearing and determination of the Petition.

10. The petitioner relied on Commissioner of Police & the Director of Investigations v Kenya Commercial Bank & 4 Others[2013] eKLR, Peter George Anthony Costa v Attorney General & Another, Nairobi Petition No. 83 of 2010, Rosemary Wanja Mwagiru & 2 Others v Attorney General & 2 Others, Thuita Mwangi & 2 Others v Ethics and Anti-Corruption Commission & 3 OthersandReuben Mwangi v Director of Public Prosecutions & 2 Others; UAP Insurance & Another (Interested Parties)[2021] eKLR, for the proposition that it amounts to abuse of power for the Director of Public Prosecutions and the Police to involve themselves in a purely civil dispute.

11. The petitioner urged the Court to note that no Replying Affidavit was filed by any of the respondents; and therefore that the facts as asserted by him are not controverted. He relied on Gideon Sitelu KOnchellah v Julius Lekateny Ole Sunkuli & 2 Others[2018] eKLR in which the Supreme Court held that, in the absence of a replying affidavit, a party's written submissions are of no effect. The petitioner accordingly prayed that his application be allowed and the orders sought granted.

12. On behalf of the 2nd and 3rd respondents, Ms. Rukiya Ibrahimproposed the following issues for determination:

    (a) Whether the respondents have violated or are likely to violate the petitioner's rights.

    (b) Whether the injunctive orders sought should be granted.

13. Counsel submitted that the 2nd respondent has an obligation to investigate criminal complaints according to Section 24(e)as read with Section 35of the *National Police Service Act*, No. 11A of 2011. In her submission, the 2nd respondent has been acting pursuant to bona fide complaints made by ordinary citizens. She relied on Republic v Commissioner of Police & Another, Ex Parte Michael Monari & Another[2012] eKLR to support her argument that it is the duty of the police to investigate any complaint once made and therefore that the High Court should be reluctant to intervene in that process.

14. On the authority of Anarita Karimi Njeru v Republic[1976-1980] KLR 1272, the 2nd and 3rd respondents also submitted that the petitioner has not pleaded his case with the requisite precision. They asserted that all the petitioner has done is to allege violations of *the Constitution* without stating the exact manner of violation. Hence, they urged for the dismissal of the application dated 22nd November 2023 with costs.

15. I have given careful consideration to the application, and in particular, the grounds relied on by the petitioners as explicated on the face of the application and in the Supporting Affidavit. I have likewise considered the response filed on behalf of the respondents as well as the written submissions filed herein by the parties.

16. Although the application is expressed to have been filed under the provisions of the Civil Procedure Rules, the applicable procedural rules in constitutional petitions and the applications made thereunder are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013(otherwise known as the Mutunga Rules).In this regard, I entirely endorse the position taken by Hon. Musyoka, J.in Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLRthat:

    ...it should be pointed out that the constitutional petitions are governed and regulated by *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 captures the spirit of Article 159(2)(d) of *the Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of *the Constitution*. The focus is trained on substance rather than process. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.

17. Needless to mention that the Court has the jurisdiction to issue an order of injunction as sought by the petitioners should justifiable cause be shown for such an order; for Article 23of the Constitutionis explicit that:

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

18. Hence, in South Imenti Bar Owners S.H.G through its Chairman James Gikunda Ntaragwi v County Government of Meru [2018] eKLR, it was held:

Provision of the relief of an injunction in constitutional petitions is doubtless a development of law... Such development of law on injunctions orchestrated by the new Constitution justifies what Ojwang Ag. J. (as he then was) stated in the case of Suleiman v Amboseli Resort Ltd[2004] eKLR 589 at page 607 that:-

> " ...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago inGiella Vs Cassman Brown, in 1973cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel on that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief [1986] 3 All ER 772at page 780-781:-
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> "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"..."

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella v Cassman Brown the court has had to consider the following questions before granting injunctive relief.

i. Is there a prima facie case...

ii. Does the applicant stand to suffer irreparable harm...

iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the

nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice..."

19. As to whether the a prima facie case has been made out by the applicants, the first question to pose is whether the Petition meets the threshold set in Anarita Karimi Njeru. In this regard, I am in total agreement with the position taken by Hon. Mabeya, J. in Husus Mugiri v Music Copy Right Society of Kenya & another[2018] eKLR,that: -

> "...other than submitting as counsel for the petitioner did, that holding the elections at Machakos was an infringement ofArticles 27, 26 and 47 (1) of *the Constitution*, it was incumbent upon the petitioner to state with precision how the holding of the said elections as aforesaid infringed upon the right to equality, freedom from discrimination, right to life and fair administrative action of the petitioner. It was imperative for the petitioner to plead these matters in the petition and offer evidence through or by way of his verifying affidavit. This he did not."
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> 23. In so far as the petition fell short of the test in the Anarita Karimi's Case, it is doubtful if the first test of Giella v. Cassman Brown can be met."

20. In Anarita Karimi Njeru v Republicit was held:

> "...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

21. The same position was reiterated by the Court of Appeal in the case of Mumo Matemu(supra) thus:

> "...(42) It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth [1876] 3 Ch. D. 637 at 639 holds true today:
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> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

22. Similarly, In the case of Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others[2017] eKLR, the court held: -

> " 63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anarita Karimi Njeru v Republic (supra). In that case, the court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it...
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> 65. Applying the above principles to this case, I have considered the petitioner's pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because although the petitioner has pleaded provisions of *the constitution*, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of *the constitution* for redress..."

23. In the instant matter, the petitioner set out the facts upon which his Petition is founded at paragraphs *1* to17 of the Petition. Then at paragraphs 18 to 24 the petitioner set out the applicable provisions of *the Constitution* underpinning his Petition. He also made reference to certain provisions of international instruments. Since those provisions cannot be read in isolation from the factual basis set out in paragraphs 1 to 17 of the Petition, it is my finding that the Petition is sufficiently compliant. Indeed, in Mumo Matemuthe Court of Appeal pointed out that:

> "...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitudeex anteis to miss the point."

24. Under Rule 23(1)of theMutunga Rules, the Court has powers to grant such interim measures as may be necessary to meet the ends of justice. The provision states:

> "Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders."

25. It is trite that at this stage, the Court need not examine the merits of the case closely. The caution was aptly expressed by Hon. Ibrahim, J.(as he then was) in the Muslim for Human Rights & 2 Others v Attorney General & 2 Others[2011] eKLR as follows:

> "The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either

party. The principle is similar to that in temporary or interlocutory injunctions in civil matters..."

26. Similarly, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, it was held:

> " At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*."

27. As to the nature of a conservatory order, the Supreme Court had the following to say in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others[2014] eKLR:

> " Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as "the prospects of irreparable harm" occurring during the pendency of a case or "high probability of success" in the Applicant's case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases."

28. Hence, it is now settled that an applicant for injunctive or conservatory orders for purposes of Articles 22 and 23(3)(c)of *the Constitution* must satisfy the Court as to the following three elements:

    (a) A prima facie case with a high likelihood of success;

    (b) That the Petition will be rendered nugatory;

    (c) That public interest weighs in the applicant's favour.

29. What amounts to a prima facie case was aptly stated in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] KLR 123 thus:

> " A prima faciecase in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

30. Similar thoughts were expressed in Kevin K Mwiti & others v Kenya School of Law & others[2015] eKLR, it was held that:

> " A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in

determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

31. As pointed out in Muslim for Human Rights & 2 Others v Attorney General & 2 Others(supra) and in Platinum Distillers Limited v Kenya Revenue Authority(supra) the jurisdiction of the Court at this point is limited to determining whether a prima facie case has been made out by the petitioner. There is no gainsaying that it is the duty of the police to investigate the commission of crimes. Accordingly, unless it is demonstrated that there is clear abuse of process for ulterior motives, the Court ought to be reluctant to intervene in the exercise of lawful duty imposed not only by dint of Articles 244 and 245of the Constitutionbut also by Sections 24(e),35 and 51(1)of the *National Police Service Act*.

32. In Republic v Commissioner of Police & Another,Ex ParteMichael Monari & Another(supra), it was emphasized that:

> "The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

33. Similarly, it is the constitutional duty of the 3rd respondent to initiate and maintain criminal prosecutions. It is now trite that the Court can only intervene in circumstances where there is a clear demonstration that the decision to prosecute was not made in the public interest.

34. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner's Notice of Motion, as amended, and its Supporting Affidavit. The petitioner is seeking a temporary injunction to stop his arrest and prosecution in connection with allegations connected with the hire purchase agreement between the Sleek Trading Limited and the complainants. On the other hand, although the respondents maintained that they were discharging their lawful mandate of detecting and investigating crime with a view of prosecution, the factual basis of those assertions have not been disclosed by way of a Replying Affidavit. The basis upon which the decision to prosecute was made is therefore not altogether manifest. It is also significant that the complainants have already received favourable decisions in the cases they filed before the Small Claims Court concerning an aspect of their complaint to the Police.

35. It is now settled that where there is a dispute as to the facts, Grounds of Opposition is not the best response. In Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli(supra), for instance, the Supreme Court pointed out that:

> "A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the written Submissions purportedly filed by the 1st respondent on 17th August, 2018 are of no effect."

36. In those circumstances, I am convinced that a prima facie case has been made out by the petitioner to warrant the intervention of the Court with a view of preserving the status quo pending the hearing and determination of the Petition. I therefore find merit in the application dated 22nd November 2023 the same is hereby allowed and orders granted as hereunder:

(a) That an order of injunction be and is hereby issued prohibiting the respondents, their officers, subordinates, agents, assigns, employees and/or any other person whatsoever from arresting, charging and/or prosecuting the petitioners and any employees of the petitioner's company, Sleek Trading Limited, on any issue in relation to subject matter or complaint by Kenneth Ali Kibira and Charles Munganyi (hereinafter, the complainants) and any other person pending hearing and determination of the Petition.

(b) That the cost of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF JUNE 2024

OLGA SEWE

JUDGE