Republic v Mwaito & another; Isaka (Exparte Applicant) (Miscellaneous Judicial Review E002 of 2023) [2024] KEHC 7535 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS JUDICIAL REVIEW E002 OF 2023

OA SEWE, J

JUNE 13, 2024

IN THE MATTER OF ARTICLES 165(6) AND 170(5) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC ..... APPLICANT

AND

HON. SALIM J. MWAITO, PRINCIPAL KADHI, KWALE ..... 1ST RESPONDENT

MISHI KIDZUGA ..... 2ND RESPONDENT

AND

JOSEPHINE KYAVI ISAKA ..... EXPARTE APPLICANT

JUDGMENT

1. By the Notice of Motion dated 15th August 2023, the ex parte applicant,Josephine Kyavi Isaka(hereinafter, the applicant) moved the Court for orders that:

(a) An order of Prohibition does issue prohibiting the 1st respondent, Hon. Salim J. Mwaito, the Principal Kadhi, Kwale, from proceeding in any manner whatsoever with the hearing of Kwale Kadhi's Succession Cause No. E412 of 2022.

(b) An order of Certiorari does issue directing that the proceedings in Kwale Kadhi Succession Cause No. E412 of 2022 be forthwith removed to this Court for purposes of quashing.

(c) Costs of the Judicial Review Proceedings be provided for.

(d) Any other relief that the Court may deem fit and just to grant in the circumstances.

2. The application was amended on 16th October 2023 to include an additional prayer under paragraph 2A that an order of Certiorari does issue directing that the decision of Hon. Salim J. Mwaito,Principal Kadhi, Kwale, delivered on 27th March 2023 in Kwale Kadhi's Succession Cause No. E411 of 2022be forthwith removed to the High Court for purposes of quashing.

3. The application was filed under Articles 165(5)of the *Constitution of Kenya, 2010*, Sections 8 and 9of the *Law Reform Act*, Chapter 26of the Laws of Kenyaand Order 53of the Civil Procedure Rules.It is premised on the grounds set out in the Statutory Statement dated 31st March 2023 and the Verifying Affidavit sworn by the applicant in support of her application for leave.

4. The applicant's contention was that the 1st respondent heard Kwale Succession Cause No. 412 of 2022and fixed the same for Ruling on 18th May 2023; and that on 27th March 2023 the Principal Kadhi delivered his decision in Kwale Succession Cause No. 411 of 2022, yet the deceased and the majority of his beneficiaries are Christians by faith. The applicant was therefore apprehensive that the 1st respondent is intent on proceeding with the hearing and determination of Kwale Succession Cause No. 412 of 2022as well as distribution of the deceased's estate in Kwale Succession Cause No. 411 of 2022, notwithstanding the lack of jurisdiction.

5. The applicant relied on her Verifying Affidavit sworn on 31st March 2023 and the documents annexed thereto; which include copies of her identity card and the Certificate of Death of the deceased, among other documents. She reiterated her assertion that a good number of the beneficiaries of the deceased are Christians and therefore do not fall under the jurisdiction of the 1st respondent. She accordingly urged for the intervention of the Court by way of judicial review.

6. While counsel for the 1st respondent conceded to the application, the 2nd respondent was vehemently opposed thereto. She filed a Replying Affidavit herein sworn on 22nd March 2024, in which she confirmed that she is the petitioner in Succession Causes No. 411 of 2022and E412 of 2022, both of which related to the estate of Crispus M. Isika(deceased). The 2nd respondent averred that she is the widow of the deceased and that the deceased had embraced the Islamic religion on 23rd November 2009 and adopted the name Abdallah Mnamai Isika.

7. The 2nd respondent further averred that the applicant was included as a beneficiary of the deceased in Succession Cause No. E411 of 2022as well as Succession Cause No.E412 of 2022, and that she took part in the proceedings without raising any preliminary objection on jurisdiction. She therefore averred that, by so doing, the applicant submitted to the jurisdiction of the 1st respondent and is now estopped by conduct from claiming that the 1st respondent acted without jurisdiction.

8. In support of her averments, the 2nd respondent annexed copies of their Certificate of Marriage with the deceased, an affidavit sworn by the deceased in proof of change of name from Chrispus M. Isikato Abdallah Mnamai Isikaand the proceedings of Succession Cause No. E411and E412 of 2022.

9. The application was canvassed by way of written submissions, pursuant to the directions given herein on 27th February 2024. Accordingly, the applicant filed written submissions dated 22nd March 2024 and proposed the following issues for determination:

    (a) Whether the 1st respondent acted without jurisdiction by hearing Kwale Kadhi Succession Cause No. E412 of 2022 and by hearing and determining Kwale Kadhi Succession Cause No. 411 of 2022.

    (b) Whether the orders of Prohibition and Certiorari can issue.

10. The applicant reiterated the factual background of her case as set out at paragraphs 2, 3 and 4 of the Verifying Affidavit, to the effect that the deceased was her father, and that other than her stepmother, the 2nd respondent, the rest of the family members profess the Christian faith. She accordingly relied on Article 170(5)of the Constitutionto underscore her assertion that the Kadhi's court only has jurisdiction in matters in which all the parties profess the Muslim religion and submit to the jurisdiction of the court.

11. The applicant relied on Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd[1989] eKLR, Phoenix of E.A. Assurance CompanyLimited v S.M. Thiga t/a Newspaper Service[2019] eKLR and C K C & another (suing through their mother and next friend J W N) v A N C[2019] eKLR to buttress her submission that the 1st respondent lacked the jurisdiction to hear or determine Succession Causes No. E411 of 2022orE412 of 2022. Accordingly, she prayed that the orders of Prohibition and Certiorari be issued. In this regard, the applicant submitted that the orders sought are the most efficacious in the circumstances. She placed reliance on Republic v University of Nairobi, Ex Parte Maxwell Magawi Odhiambo[2019] eKLR and Republic v Kenya National Examination Council, Ex Parte Gathenji & Others,Civil Appeal No. 266 of 1996.

12. On behalf of the 2nd respondent, written submissions were filed herein dated 17th April 2024 in which the following issues, among others, were proposed for consideration:

    (a) Whether the 1st respondent had jurisdiction to hear or determine either Succession Cause No. E411 of 2022 or Succession Cause No. E412 of 2022.

    (b) Whether judicial review is the most efficient remedy in the circumstances of this case.

13. The 2nd respondent submitted that the remedy of Certiorari is discretionary and can be refused even when the requisite grounds for it exist. Accordingly, the Court was urged to rely on Republic v Public Procurement Administrative Review Board & 2 Others, Ex Parte Rongo University[2018] eKLR and consider whether or not the remedy sought is the most efficacious. The 2nd respondent further submitted that the applicant has called upon the Court to make a determination as to whether or not the deceased was a Muslim or Christian; yet this is a question of evidence that ought not to be the subject of the Court's consideration. In this regard, the 2nd respondent relied on Republic v Attorney General & 4 others, Ex Parte Diamond Hashim Lalji and Ahmed Hasham Lalji.

14. The case of Anisminic Ltd v Foreign Compensation Commission[1969] 2 AC 147 was also relied on by the 2nd respondent to augment the submission that the decision of the 1st respondent in Succession Cause No. 411 of 2022was neither irrational nor procedurally flawed; and that having submitted herself to the jurisdiction of the Kadhi's court, the applicant is estopped from claiming lack of jurisdiction, illegality, unreasonableness or procedural impropriety. Thus, the 2nd applicant posited that the best option for the applicant was either to raise her concerns by way of a preliminary objection before the 1st respondent or to appeal the decision of the 1st respondent. She therefore urged for the dismissal of this suit.

15. The supervisory jurisdiction of the Court is derived from Article 165(6)and (7)of *the Constitution*, which provide:

> (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

16. It is therefore surprising that Mr. Omarshould contend, as he did, that by filing the instant matter the applicant set out to disparage the 1st respondent and to pit one court against another. By filing this suit, the applicant was merely exercising her constitutional rights within the framework of our judicial system, a system that was put in place after much forethought and sacrifice. Counsel ought to appreciate therefore that whether a party opts for judicial review or appeal, those options are within the range of options available to parties as provided for in our supreme law. The above provisions unequivocally confer on this court supervisory jurisdiction over subordinate courts and tribunals, including the Kadhi's Courts.

17. Needless to mention that, by dint of Article 47of the Constitution, judicial review as a remedy has been elevated and now has pride of place in *the Constitution*. Accordingly, in *Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), the Supreme Court held:

> "74. It is our considered opinion that the framers of theConstitutionwhen codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions."

18. In exercising itsjudicial review jurisdiction, the Court is not concerned with the merit of the impugned decision. The judicial review process challenges the legality, reasonableness or procedural propriety of the decisions of subordinate courts or tribunals or persons as well as bodies or authorities exercising judicial or quasi-judicial authority. Accordingly, in Municipal Council of Mombasa v Republic & another[2002] eKLR, the Court of Appeal held:

> "... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review..."

19. Similarly, inPastoli v Kabale District Local Government Council and Others[2008] 2 EA 300 it was held:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction orultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision." (also see Zachariah Wagunza & another v Office of the Registrar Academic Kenyatta University & 2 others [2013] eKLR,)

20. The same position was reiterated by the Supreme Court in Saisias hereunder:

> "73 ...The Fair Administrative Actions Act provides the parameters of judicial review to be the power of the court to review any administrative or quasi-judicial act, omission or decision of any person, body or authority that affects the legal rights or interests of an aggrieved person. The judicial review court examines various aspects of an act, omission or decision including whether the body or authority whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required..."

21. I must hasten to add that it is now trite that, in undertaking judicial review, some measure of merit analysis may be apt, especially where the decision in question is impugned on the ground of irrationality. The Supreme Court made this clear inSaisithus:

> "75. In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses..."

22. In the instant matter, the applicant did not allege procedural impropriety or irrationality. Her contention was that the 1st respondent acted ultra vires, in hearing and determining Succession Cause No. E411 of 2022and inhearing Succession Cause No. E412 of 2022,granted that not all the parties therein profess the Islamic faith. Accordingly, the single issue for determination is whether, in the circumstances, the 1st respondent had jurisdiction to entertain and determine the two Succession matters.

23. The primacy of jurisdiction was aptly articulated in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra)thus:

> " ...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."

24. Similarly, inKalpana H Rawal & 2 Others v Judicial Service Commission & 2 Othersthe Supreme Court of Kenya quoted with approval the decision of the Supreme Court of Nigeria inCase No. 11 of 2012: Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Othersthus:

> " ...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost..."

25. That jurisdiction is conferred either by *the Constitution* or a statute was well explicated by the Supreme Court in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others[2012] eKLR. Here is what the Supreme Court had to say:

> " A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

26. The jurisdiction of the Kadhis' Court is provided for under Article 170(5)of *the Constitution* and Section 5of the *Kadhis' Courts Act*. Article 170(5)of *the Constitution* provides:

> (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in

which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts.

27. Section 5of the *Kadhis' Courts Act*, on the other hand, provides:

> " A Kadhi's Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion, but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it."

28. It is plain, then, that the jurisdiction of the Kadhis' Courts is determined not only by the subject matter of the claim or dispute, but also by the faith of the litigants. It is therefore a cardinal requirement that all the parties must profess the Muslim faith before submitting to the jurisdiction of the Kadhis' courts. InGenevieve Bertrand v Mohamed Athman Maawiya & another[2014] eKLR the Court of Appeal made this point as follows:

> 23. In the case of the Kadhi's Court, it is a creature of *the Constitution* (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of *the Constitution* and section 5 of the Kadhi's [Court] Act, as "determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court". Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhis Court.

29. Counsel for the 1st respondent conceded, on the 3rd October 2023, that upon perusing the Kadhi's Courts Act,she was convinced that the 1st respondent had no jurisdiction to handle the two matters. She therefore opted to not defend or file a response to the application. As for the 2nd respondent, while she did not dispute the averment by the applicant that the applicant and other members of the family are Christians, she was of the posturing that the applicant and her siblings voluntarily submitted to the jurisdiction of the Kadhi's Court and therefore are estopped from raising the issue by way of judicial review proceedings.

30. First and foremost, it is trite that, granted the primacy of jurisdiction, it can be challenged at any time in the course of proceedings; including on appeal by a party or suo motu by the Court. Secondly, jurisdiction cannot be conferred by consent or acquiescence; and therefore the question of estoppel cannot arise. The Supreme Court was explicit in this regard in Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries CommissionPetition No. 20 (E023) of 2022 that:

> It is equally now firmly established that a point of jurisdiction can be raised at any time, formally by a notice of preliminary objection, grounds of opposition, viva voce during arguments or by the Court suo motu because challenging the jurisdiction of a Court is a threshold issue. Jurisdiction can only be conferred on a court by either *the Constitution* or statute. A court cannot expand its jurisdiction through judicial craft or innovation...Nor can a party confer on a court power it does not have. Similarly, parties cannot by mutual consent confer jurisdiction when there is none.

31. The Court of Appeal had earlier expressed the same view inJamal Salim v Yusuf Abdulahi Abdi & another[2018] eKLR as follows:

> " 17. Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court inAdero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;
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> "
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> 1) ...
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> 2) The jurisdiction either exists or does not ab initio ...
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> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
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> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."
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> 18. It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity..."

32. Thirdly, and more importantly, in so far as Article 170(5)of the Constitutionuses the conjunctive word "and" it follows that it was not sufficient for the applicant to submit or be presumed to submit to the jurisdiction of the 1st respondent by reason of her failure to raise a preliminary objection on jurisdiction. It is an additional requirement that such a party must profess the Muslim faith. The Court of Appeal had occasion to consider a similar scenario in C K C & another (Suing through their mother and next friend J W N) v A N C (supra).Here is what the Court had to say:

> "...A reading of Article 24(4) together with Article 170(5) of*the Constitution*shows strict conditions that must be satisfied before a person can invoke Islamic law to derogate from or limit the right to equality and freedom from discrimination. First, the derogation must be "only to the extent strictly necessary". Second, the derogation must relate to matters of personal status, marriage, divorce and inheritance. Third, the persons involved must be persons who profess the Muslim faith. Fourth, as regards jurisdiction of the Kadhi's court, all the parties to the dispute must profess the Muslim faith and submit to the jurisdiction of the Kadhi's court...
>
> Professing the Islamic faith and voluntarily submitting to the jurisdiction of the Kadhi's court are absolute preconditions for application of Islamic law to the appellants. If it were otherwise, the words "in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts" in Article 170(5) of*the Constitution*would be utterly meaningless. We cannot adopt an interpretation of*the Constitution*that renders otiose some of its clear provisions. Those preconditions have not been satisfied in this appeal and therefore the principles of Islamic law cannot be applied to the appellants. In addition, we are satisfied that the interpretation that we have adopted in this appeal is the one that most favours the enjoyment of the right to equality and freedom from discrimination by the appellants and also develops the law so as to give effect to that right and fundamental freedom as demanded by*the Constitution*. It is further an interpretation

that promotes the purposes, values and principles of*the Constitution*and advances human rights and fundamental freedoms in the Bill of Rights."

33. Therefore, it is my finding, that by virtue, of Article 170(5)and Section 5of the *Kadhis' Courts Act*, the 1st respondent does not have the requisite jurisdiction to hear or determine the two Succession matters in respect of the estate of Chrispus Munyamai Isikaalias Abdallah Mnamai Isika, and therefore the decision made by the 1st respondent in Succession Cause No. 411 of 2022and the proceedings held by him so far in Succession Cause No. 412 of 2022were entertained, conducted and rendered without jurisdiction. That being the case, the judgment dated 27th March 2023 delivered in Kwale Kadhi's Succession Cause No. 411 of 2022is null and void.

34. InKenya National Examination Council v Republic,Ex ParteGeoffrey Gathenji Njoroge & 9 others(supra) the Court of Appeal held:

> "...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

35. In the result, I find merit in the Amended Notice of Motion dated 16th October 2023. The same is hereby allowed and orders granted as hereunder:

    (a) An order of Certiorari be and is hereby issued directing that the proceedings in Kwale Kadhi's Succession Cause No. E411 of 2022 and Kwale Kadhi's Succession Cause No. E12 of 2022 be forthwith removed to this Court for purposes of quashing, and to quash all the proceedings, judgment and orders made or issued by the Kadhi's Court in Kwale Kadhi's Succession Cause No. 411 of 2022 and Kwale Kadhi's Succession Cause No. 412 of 2022.

    (b) For the avoidance of doubt, it is hereby ordered that the judgment dated 27th March 2023 delivered in Kwale Kadhi's Succession Cause No. 411 of 2022 be and is hereby quashed.

    (c) As the principal parties are related, it is hereby ordered that each party shall bear own costs of the Judicial Review Proceedings.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF JUNE 2024

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OLGA SEWE

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JUDGE