Chisima & another v Kenya Power & Lighting Company Limited & another; Office of the Attorney General (Interested Party) (Constitutional Petition E023 of 2022) [2023] KEHC 23830 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E023 OF 2022

OA SEWE, J

SEPTEMBER 22, 2023

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 24, 25, 27, 28, 35, 46, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF CONSUMER PROTECTION ACT, 2012,

AND

IN THE MATTER OF KENYA POWER AND LIGHTING COMPANY LIMITED

AND

IN THE MATTER OF SECTIONS 23(1), (3) & (5), SECTION 24(1) & SECTION 40 OF THE ENERGY ACT, 2019

BETWEEN

LEONARD KOTSE CHISIMA ..... 1ST PETITIONER

RUTH NATASHA ..... 2ND PETITIONER

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... 1ST RESPONDENT

ENERGY & PETROLEUM REGULATORY AUTHORITY ..... 2ND RESPONDENT

AND

THE OFFICE OF THE ATTORNEY GENERAL ..... INTERESTED PARTY

RULING

1. The petitioners, Leonard Kotse Chisima and Ruth Natasha, filed this Petition against the Kenya Power, sued as Kenya Power and Lighting Company Limited Co. Ltd (the 1st respondent) and Energy & Petroleum Regulatory Authority (the 2nd respondent), complaining that on 11th May 2022 at around midday, employees of the 1st respondent, namely Mr. A.J. Mganda and Mr. Chege, unlawfully disconnected smart meters for Accounts No. 134026963 and 20586673 through the main power supply belonging to the petitioners, thereby leaving the petitioners without power supply. They added that they run business entities that require consistent power supply, and were therefore exposed to huge irrecoverable losses by reason of the arbitrary disconnection. Accordingly, they instructed their advocates, Makori Omboga & Company Advocates, to write to the respondents seeking the immediate reconnection of power, but the intervention yielded no positive outcome.

2. In the circumstances, the petitioners filed this Petition praying for the following reliefs:

   (a) A declaration that the 1st respondent has violated the petitioners' guaranteed right to goods and services of reasonable quality and the full benefit of the said goods and services as prescribed by Article 46 of the *Constitution* .

   (b) A declaration that the violation of the petitioner's right to goods and services of reasonable quality and the enjoyment of the full benefit thereof has occasioned them loss of money as a resource and the time spent following up on the issues they have been raising with the 1st respondent.

   (c) That the Court be pleased to issue declaratory orders that Sections 23(1) (3) and (5) of the *Energy Act* 2019 is inconsistent with the consumer rights as prescribed under Article 46(1) of the *Constitution* , thus null and void ab initio.

   (d) Exemplary damages.

   (e) Any other relief as provided for under Article 22 of the *Constitution* in support of the petitioners' case.

   (f) The costs of the application.

3. Concomitantly, the petitioners filed a Notice of Motion dated 6th June 2022 seeking the following orders:

   (a) spent

   (b) That the Court be pleased to issue conservatory orders ex parte in the first instance to compel the respondents whether by themselves, their servants, agents or proxies to reconnect the petitioners' power supply in respect to their business premises as prayed pending hearing and determination of the application inter partes.

   (c) That the Court be pleased to issue conservatory orders to restrain the respondents whether by themselves, their servants, agents or proxies from interfering with the petitioners' power supply pending the hearing and determination of the Petition.

   (d) That the costs of the application be borne by the respondents.

4. The petitioners thereafter filed an Amended Notice of Motion dated 17th June 2022 introducing additional Prayers 2(a) and 3(a) for orders to compel the respondents to reconnect power supply to their premises pending the hearing and determination of the application and the Petition. In response to the application as amended, the 2nd respondent filed a Notice of Preliminary Objection dated 22nd June 2022 on the following grounds:

   (a) Pursuant to Section 36 of the *Energy Act*, 2019 this Court lacks jurisdiction to adjudicate over this matter.

   (b) The petitioners have come to this Court without exhausting the alternative remedies available to them as required under Article 159(2)(c) of the *Constitution* of Kenya, 2010 and Regulations 4, 7 and 9 of the *Energy (Complaints & Dispute Resolutions) Regulations, 2012.*

   (c) Pursuant to Order 2 Rule 15(1)(a) of the *Civil Procedure Rules*, the suit is misconceived and discloses no reasonable cause of action against the 2nd respondent thus rendering it fatally and incurably defective.

5 Likewise, the 1st respondent filed a Notice of Preliminary Objection dated 13th July 2022 on 14th July 2022, contending that:

   (a) The Court lacks jurisdiction to hear and determine the suit or the interlocutory application and therefore that the same should be struck out with costs for offending the provisions of Sections 3, 10(e), (f), (i), (k) & (l), 23, 24, 36, 40, 42, 159(3), 160(3) and 224(2)(e) of the *Energy Act*, 2019 as well as Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.

   (b) The Court lacks jurisdiction to hear and determine the dispute as against the 1st respondent as the same offends Sections 3A, 5 and 6 of the *Civil Procedure Act*, and Order 2 Rule 15 of the *Civil Procedure Rules* and should therefore be struck out for abuse of court process with costs to the 1st respondent.

6. Directions were thereafter given for the Preliminary Objections to be urged by way of written submissions. At the same time, the Court granted Prayer 2 of the Amended Notice of Motion to compel the 1st respondent to restore power to the petitioners' business premises pending the Court's ruling on the Preliminary Objections.

7. In her written submissions dated 7th July 2022, Ms. Cheptoo for the 2nd respondent proposed the following issues for determination:

   (a) Whether the Court has jurisdiction to adjudicate over this matter;

   (b) Whether the petitioners have exhausted all the available alternative legal remedies;

   (c) Whether the Petition discloses any reasonable cause of action.

8. Counsel submitted that there is in existence the Energy and Petroleum Tribunal, an independent body duly constituted to handle complaints such as the petitioners'. She added that the tribunal is not only accessible but is also effective in the discharge of its mandate; such that it was unnecessary for the petitioners to resort to the instant Petition for redress. She relied on *Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd* 1989 KLR 1 and *Republic v Energy Regulatory Commission & 2 Others* 2018 eKLR in this connection and urged the Court to find that it lacks the jurisdiction to handle the dispute.

9. Ms. Cheptoo further submitted that the petitioners have come to this Court before exhausting the alternative remedies available to them. She added that exhaustion of remedies is a constitutional

imperative under Article 159(2)(c) of the *Constitution*. To buttress her arguments, counsel relied on *Samuel Kahiu v Muktar Mahat, Deputy Administration Police Commander (D.A.P.C) Athi River & 3 Others* 2018 eKLR and *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others* 2015 eKLR as well as Section 160(3) of the *Energy Act*, 2019 and the Energy (Complaints & Disputes Resolution) Regulations, 2012.

10. Lastly, it was the submission of Ms. Cheptoo that, since the petitioners are aggrieved by the actions of the 1st respondent, the 2nd respondent has been dragged into the proceedings unnecessarily. She therefore submitted that the Petition raises no reasonable cause of action against the 2nd respondent, adding that the 2nd respondent is fully aware of its consumer protection role and seeks to enhance and regulate fair trade practices in the energy sector by way of dispute resolution, including mediation. Counsel urged the Court to note from the Statement of Claim annexed to the petitioner's pleadings that the same was addressed to the Energy Tribunal and not the 2nd respondent as provided for in the Energy (Complaints and Dispute Resolution) Regulations. Accordingly, Ms. Cheptoo concluded her submissions by stating that any orders against the 2nd respondent would be prejudicial since the 2nd respondent was not granted an opportunity to mediate or determine the dispute between the petitioner and the 1st respondent. She prayed for the dismissal of the petition with costs.

11. The 1st respondent opted not to file submissions to support his assertions that the court lacks jurisdiction. The Petitioners on their part, relied on their written submissions filed herein on 30th June 2022; which submissions addressed their interlocutory application as well as the 2nd respondent's Preliminary Objection. Thus, Mr. Egesa for the petitioner proposed the following issues for determination:

    (a) Whether the 2nd respondent's Preliminary Objection dated 22nd June 2022 is meritorious;

    (b) Whether the 1st respondent breached or contravened the petitioners' rights to goods and services of reasonable quality contrary to Article 46 of the *Constitution* .

    (c) Whether the petitioners are entitled to the prayer of mandatory injunction as prayed in the Notice of Motion dated 17th June 2022.

12. Thus, in respect of the 2nd respondent's Preliminary Objection, Mr. Egesa submitted that this court has the requisite jurisdiction to determine this Petition. He pointed out that the petitioners had approached the 2nd respondent as is required under Section 11 (1) (i) as read with Section 23 of the *Energy Act*, No. 1 of 2019 vide a Statement of Claim dated the 13th May, 2022 which they stated was never heard or determined. In his view, the assertion by the 2nd Respondent that they ought to have approached the tribunal first is misguided as Section 36 of the *Energy Act*, No. 1 of 2019 is clear that the tribunal can only be approached by the parties after going before the Authority. He further submitted that the tribunal, under Section 23 (5) of the *Energy Act*, can only be approached if the Authority fails to make a decision within sixty (60) days.

13. Mr. Egesa further submitted that, while Section 23 of the *Energy Act*, is specific that the decision of the 2nd respondent be made within 60 days of a complaint, it is silent on the waiting period before a complainant can approach the Tribunal and thus Section 36 of the *Energy Act*, No. 1 of 2019 is not applicable to the instant circumstances where the petitioners are challenging the timelines under Section 23 for not being effective and for being inconsistent with the *Constitution* . He added that the 2nd respondent cannot grant mandatory injunctions or handle questions around the interpretation of the *Constitution* , noting that the Petition is premised on allegations of constitutional violations under Articles 23, 27, 35, 46 and 47 (1) and (2) of the Constitution.

14. It bears repeating that a preliminary objection ought to be based on a pure point of law that has the potential of disposing of the entire suit. Thus, in *Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors* 1969 EA 696 it was held:

> "...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...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..."

15. Similarly, in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* 2015 eKLR the Supreme Court emphasized the point that:

> "...a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record..."

16. In the premises, the only issue arising for determination in respect of the Preliminary Objections raised by the respondents is whether, in the circumstances, this Court has the requisite jurisdiction to hear, not only the pending application for conservatory orders, but also the Petition itself. It is trite that the jurisdiction is everything and without it, a court or tribunal has no power proceed with a matter in which its jurisdiction is in question. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* 1989 eKLR, it was held:

> "...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 that it is without jurisdiction..."

17. Moreover, jurisdiction is donated either by the *Constitution* or Statute and is therefore not left to conjecture. The Supreme Court made this clear in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* 2012 eKLR, thus:

> "...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 upon it 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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 upon 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..."

18. The petitioners have, in the main, alleged violations or threatened violations of their rights under the Bill of Rights. In particular, they cited Articles 27 and 46 of the Constitution and has accordingly prayed for declaratory and other reliefs from the Court in that regard pursuant to Articles 22 and 23 of the *Constitution* . Looked at from that perspective, there can be no doubt that this Court has jurisdiction to hear and determine both the Petition and the interlocutory application. This is because Article 165(3)(b) of the Constitution is explicit that:

> Subject to clause (5), the High Court shall have—
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;"

19. Correspondingly, Sub-article (3)(d) clothes the High Court with jurisdiction:

> (d) ...to hear any question respecting the interpretation of this Constitution including the determination of—
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> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
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> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191; and *Constitution of Kenya, 2010*

20. It is equally true that, by dint of Sections 11(i) and 23 of the *Energy Act*, Parliament donated powers to the 2nd Respondent to investigate and determine complaints or disputes pertaining to the Energy Sector. Moreover, by Section 25 of the Act, Parliament established the Energy & Petroleum Tribunal whose jurisdiction, per Section 36 of the *Energy Act*, is set out thus:

> (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.
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> (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.

21. It is evident that the 2nd Respondent and Energy & Petroleum Tribunal have the jurisdiction to determine disputes arising from the *Energy Act*; and that to some extent there appears to be an overlap of jurisdiction in connection with the Petition because, as crafted, it raises issues that would otherwise fall within the mandate of the 2nd respondent and the Energy & Petroleum Tribunal. Indeed, the contention of the 2nd respondent is that the Petitioners' complaint was wrongly filed before it and that it ought to have been filed at the Energy & Petroleum Tribunal. Consequently, the question to pose is whether the jurisdiction of the Court is entirely ousted.

22. the *Constitution* champions alternative dispute resolution; for which reason Article 159(2)(c) dictates that:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

23. To my mind, this provision cannot be interpreted to mean complete ouster of jurisdiction as was argued by learned counsel for the 2nd respondent, but a postponement of approach to the Court in the interest of expediency by pursuing alternative dispute resolution mechanisms available; hence the doctrines of exhaustion and avoidance. Thus, in Speaker of National Assembly v Karume 1992 KLR 21 it was held that:

> Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

24. Likewise, in *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* 2015 eKLR, the Court of Appeal restated its position thus:

> "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."

25. Moreover, Section 9 of the *Fair Administrative Action Act*, which counsel for the respondents resorted to, provides that:

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution* .

(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 the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

26. In *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others* (*supra*) it was held that:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* ."

27. It is manifest therefore that where an alternative dispute resolution mechanism is provided for, the same be followed first; and that the court's jurisdiction be invoked only as a last resort. However, where, as in this case, the petitioners have raised pertinent issues to do with violation or threatened violation of fundamental rights, and have approached the Court for redress, the Court cannot be said to be powerless. Indeed, in *Kenya Ports Authority Act*, the Court of Appeal held that:

> "We also bear in mind that access to justice as enshrined in Article 48 of the *Constitution* is a fundamental right, that cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice."

28. Moreover, in the case of *Mohamed Ali Baadi and others v Attorney General & 11 others* 2018 eKLR, the court held:

> "While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly v James Njenga Karume {1992} KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara v Gambia it was held that:
>
> > "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint in its totality...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

29. The same posturing was articulated in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* 2017 eKLR, thus:

> 46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the

ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake..."

30. As has been noted herein above, the matter before this court is a hybrid case that involves a dispute between parties governed by the *Energy Act*, No. 1 of 2019 as well alleged human rights violations. The High Court, Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal, all have the jurisdiction to hear and determine the issues in the petition. The High Court has jurisdiction to determine the question of violations of constitutional rights as well as inconsistencies of statute law with the *Constitution* , while the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal have jurisdiction to determine matters that are pertinent to the *Energy Act*.

31. Besides, the petitioners have claimed that they had filed a Statement of Claim dated the 13th May, 2022 before the 2nd Respondent which was ignored. They further contended that their rights under Articles 23, 27, 35, 46 and 47 (1) and (2) of the *Constitution* have been violated and that Section 23(1), (3) and (5) of the *Energy Act*, No. 1 of 2019 is inconsistent with Article 46 (1) of the Constitution; and therefore is null and void *ab initio*. It is plain then that the available alternative dispute resolution mechanism would not have exhausted the cardinal issues that have been raised in this Petition, particularly the issues related to violation of human rights as well the claims of Section 23 (1), (3) and (5) of the *Energy Act*. I am therefore persuaded that, in the circumstances of this case, the exhaustion doctrine would not result in the enhancement of the values enshrined in the *Constitution* . Indeed, in *Fleur Investments Limited v Commissioner of Domestic Taxes & Another* 2018 eKLR it was held:

> "Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

32. I am further convinced that the 2nd Respondent is a vital party to suit herein, granted the assertion of the petitioners in connection with Section 23 of the *Energy Act*.

33. The upshot, is that I find the Notices of Preliminary Objection dated 22nd June, 2022 and 13th July, 2022 by the 2nd and 1st Respondents respectively, lacking in merit and they are hereby dismissed with costs. The interim orders issued on the 3rd August 2022 are hereby confirmed pending the hearing and determination of this Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE