**Simiyu & 2 others v Methodist Church in Kenya & another (Constitutional Petition E328 of 2021) [2023] KEHC 22249 (KLR) (Constitutional and Human Rights) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22249 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION E328 OF 2021**

**M THANDE, J**

**SEPTEMBER 15, 2023**

**BETWEEN**

**GODFREY SIMIYU ..... 1ST PETITIONER**

**MATHEW KABURU ..... 2ND PETITIONER**

**KOBIA MICHUBU ..... 3RD PETITIONER**

**AND**

**METHODIST CHURCH IN KENYA ..... 1ST RESPONDENT**

**PRESIDING BISHOP OF THE METHODIST CHURCH IN KENYA ..... 2ND RESPONDENT**

## RULING

1. The Petitioners filed a Petition dated 6.8.21 seeking the following orders:

   I. A Declaration that the Respondents jointly and severally including the organs and offices of the 1st Respondent, are in violation of the Articles 10,19 and 20 of the *Constitution*;

   II. A Declaration that the Respondents jointly and severally including the organs and offices of the 1st Respondent, are in violation of articles 24, 27 and 28 of the *Constitution*;

   III. A Declaration that the Respondents jointly and severally including the organs and offices of the 1st Respondent, are in violation of Articles 32 and 36 of the *Constitution*;

   Iv A Declaration that the Respondents jointly and severally including the organs and offices of the 1st Respondent, are in violation of Article 50 of the *Constitution*;

v A Declaration that the 2nd Respondent Bishop Joseph Ntombura is unfit to hold the office of the Presiding Bishop of the Methodist Church in Kenya;

VI. A Order quashing the decision of the Respondents jointly and severally including the organs and offices of the 1st Respondent, to exclude the Petitioners from the Methodist Church in Kenya;

VII. A Mandatory Injunction compelling the Respondents jointly and severally including the organs and offices of the 1st Respondent, to reinstate the Petitioners' membership and allow them to fully participate in the affairs of the Methodist Church in Kenya;

VIII. A Mandatory Injunction prohibiting the Respondents jointly and severally including the organs and offices of the 1st Respondent, from carrying out any disciplinary actions against the Petitioners based on the facts stated in this Petition;

IX. A Mandatory Injunction restraining the Respondents jointly and severally including the organs and offices of the 1st Respondent, from making public utterances or issuing statements concerning the Petitioners on matters touching on the facts stated in this Petition;

X. Costs of the Petition; and

XI. Any other orders that the Honourable Court may deem just and fit to grant.

2. The Respondents opposed the Petition vide a Preliminary Objection (PO) dated 16.11.21. The objections raised in the PO are:

1. The Petitioners are non-suited in that the Respondents are not liable for the decisions and actions of the Methodist Church Conference and its other organs that have aggrieved them.

2. The First Respondent — Methodist Church in Kenya — is not a legal person in that under the *Constitution* of the Methodist Church in Kenya it is the Methodist Church Trustees Registered that can sue or be sued in respect of the matters of or concerning the Methodist Church in Kenya.

3. This Petition is *res-judicata* and/or *sub-judice* in view of:-

a. The Ruling of this Court in Nairobi High Court Civil Case No. 360 of 2015 *Godfrey Simiyu & 3 others v Rev Joseph Ntombura & another*.

b. The Judgement of the Court of Appeal in Nairobi Civil Appeal No. 361 of 2017 *Rev Joseph Ntombura v Godfrey Simiyu & 4 others*.

c. The High Court Civil Case No. 360 of 2015 aforementioned is still pending hearing and determination.

4. This Honourable Court has no jurisdiction to hear and determine the Petitioners' grievances arising from their excommunication as members of the Methodist Church in Kenya.

5. The Petition herein constitutes a gross abuse of the Court process.

3. It is this PO that is the subject of this ruling.

4. It was submitted for the Respondents that they have raised points of law based on ascertained and/or facts admitted by the Petitioners in paragraphs 21 and 38(a) – (l) of the Petition. Further that the Court lacks the jurisdiction to hear this matter as doing so would be sitting on appeal over similar

issues determined in Nairobi High Court Civil Case No. 360 of 2015 *Godfrey Simiyu & 3 others v Rev Joseph Ntombura & another* (the Civil Suit). The Respondents further contend that the question of the fitness of the 2nd Respondent to hold office as presiding Bishop of the Methodist Church in Kenya (MCK), is in issue in the Civil Suit. The Respondents further argue that the Petitioners volunteer that by a ruling in the Civil Suit, they were found to lack the locus standi to commence and maintain the suit as there was evidence of their excommunication from membership in the MCK. Additionally, the Court of Appeal in Civil Appeal No. 361 of 2017 *Rev Joseph Ntombura v Godfrey Simiyu & 4 others* set aside interlocutory orders obtained by the Petitioners. As such, this Petition is an appeal against the court's finding in the Civil Suit. The civil court further found that the Petitioners had not challenged their excommunication in any court of law or through the church's internal mechanisms. They thus lacked the locus to bring or sustain the application that was before that court. The Respondent's case is that the civil court determined the excommunication of the Petitioners and that there has not been an application for stay, setting aside or appeal against that finding. Accordingly, by seeking that this Court makes a finding on their ex-communication through this Petition, the Petitioners are asking the Court to sit on appeal against a decision of a court of concurrent jurisdiction.

5. The twin issues of the unsuitability of the 2nd Respondent from holding office as the presiding bishop of the MCK and the excommunication/suspension/exclusion of the Petitioners from the MCK is what has provoked the Petition herein and form the subject of the same. Although the plaint in the Civil Suit was not availed to the Court, the documents exhibited by the Petitioners include pleadings and rulings in the Civil Suit and the judgment of the Court of Appeal. A careful perusal of the said pleadings shows that the twin issues were in issue in the Civil Suit and in the civil appeal.

6. The record shows that in the Civil Suit, the Petitioners and one Charles Kinoti had in a plaint dated 14.10.15 challenged the suitability of the 2nd Respondent to hold office. They sought similar orders in the interim, in an application of even date. By a ruling dated 22.6.22, the court granted the orders as sought. The orders were however set aside by the Court of Appeal in its judgment of 7.12.18 following an appeal by the 2nd Respondent. Thereafter the Petitioners filed an application dated 18.7.17 seeking an injunction to suspend the Kenya Methodist Annual Conference Delegates Meeting. The Respondents opposed the application and inter alia contended that the Petitioners lacked locus standi to sue in or agitate the interests of MCK and its institutions, having been excommunicated. In its ruling, the court found inter alia that there was sufficient evidence to make a finding that the Petitioners had been excommunicated as members of MCK and thus lacked the locus to bring the application before court.

7. The Petitioners have in their submissions acknowledged that in the Civil Suit, the court made a finding that they lacked locus standi to commence the proceedings. Their contention is however that the Petition herein concerns violation of national values and principles of governance by the 2nd Respondent and a violation of the Petitioners' right to freedom of conscience, religion thought, belief, opinion and association. As such, the matter herein does not concern the issues raised in the Civil Suit and is not an appeal against the decisions made therein.

8. They have further submitted that the discipline of members of the MCK can only be dealt with by a court of discipline constituted under Standing Order No. 69 of the MCK and that Standing Order No. 106 provides a clear procedure on the discipline of a member of the MCK. It is the Petitioners case that the Respondents did not follow the procedure prescribed and decided to overrun the process because of vendetta the 2nd Respondent has towards the Petitioners. Further that the term excommunication does not exist anywhere in the Standing Orders. Their position therefore is that the issue of their membership in the MCK remains an unanswered question. They further argued that the matter is not sub-judice and that this Court has jurisdiction under Article 165(3)(b) of the *Constitution* to

determine whether a right or fundamental freedom has been denied, violated, infringed or threatened. As such, the issue can only be addressed if this Court were to afford them an opportunity to ventilate the substantive issues in the Petition.

9. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

> 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.

10. And Law, JA stated:

> So far as I'm aware, 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.

11. In the present case, the objection raised by the Respondents is that the Petition is res judicata and sub judice. Further that the Petitioners lack the locus standi to commence and maintain the suit as there was evidence of their excommunication from membership of the MCK. Looking at the Petition, one can readily see that the Petitioners are aggrieved by their purported exclusion/excommunication from the MCK and the purported unfitness of the 2nd Respondent to hold office of the presiding bishop of the MCK.

12. The *Civil Procedure Act* Cap. 21 Laws of Kenya under Section 7 provides for the doctrine of res judicata as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
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> Explanation (1) — The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation (2) — For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
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> Explanation (3) — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
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> Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

13. In the case of *E.T. v Attorney General & another* (2012), eKLR, Majanja, J. highlighted the 3 ingredients of the doctrine of *res judicata* as follows:

> 53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of Karia and another v The Attorney General and others [2005] 1 EA 83, 89).

14. The rationale for this doctrine of res judicata was discussed in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR where the Court f Appeal stated as follows:

> The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

15. The doctrine seeks to protect parties from the filing of multiplicity of suits hoping for a favourable outcome. Litigation must come to an end and the doctrine of *res judicata* safeguards against endless litigation, wastage of judicial and parties' time and resources and brings closure and respite to parties engaged in litigation. and a party should not be vexed twice over the same matter.

16. On the applicability of the doctrine of *res judicata* to Constitutional petition, in *Okiya Omtatah Okoiti & another v Attorney General and another* Petition No. 593 of 2013 [2014] eKLR Lenaola J. (as he then was) held as follows:

> For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of Karia and another v the Attorney General and others (2005) 1EA 83). It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. This was what was held with approval in Omondi v National Bank of Kenya Ltd and others (2001) EA 177.
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> Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in Constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in Constitutional matters in the

clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

17. Further in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR, the Supreme Court held that:

> "(82) If we were to find that the doctrine does not apply to Constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that Constitutional tenets permeate all litigation starting with the application of Article 159 of the *Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes.....
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> (83) However, though the doctrine of res judicata lends itself to promote the orderly administration of justice, it should not be at the cost of real injustice. In the Danyluk Case from Canada the court cited the dissenting opinion of Jackson J.A., in Iron v Saskatchewan (Minister of the Environment & Public Safety), 1993 CanLII 6744 (SK CA), [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21 where he stated:
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> > "The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard."
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> (84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a Constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
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> (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception.

18. In the Civil Suit, issues before the court are the purported unfitness of the 2nd Respondent to hold office as presiding bishop of the MCK and the excommunication of the Petitioners from the MCK. The parties herein are the same as in the Civil Suit. Further, that court is of competent jurisdiction As can be seen from the record, the court in the Civil Suit made a finding and pronounced itself on the excommunication of the Petitioners and their lack of locus to file that suit. This decision has not been reviewed, set aside or overturned. The Petitioners have not demonstrated potential for substantial injustice if this Court does not hear the Petition herein on its merits. They have also not demonstrated the existence of any special circumstances warranting the court to make an exception in the application of the doctrine of *res judicata* in the Petition herein. Accordingly, the Court finds that Respondents

have met the threshold of a plea of *res judicata* in this matter, notwithstanding that the same is a Constitutional petition.

19. I now turn to the issue of *sub judice* raised by the Respondents. It is noted that the Civil Suit is still pending in court and the question of whether the 2nd Respondent is unfit to hold office as presiding bishop of the MCK is yet to be determined. This Petition having been filed during the pendency of the Civil Suit clearly offends the sub judice rule. The rationale behind the sub judice rule is akin to that of res judicata and is to avoid the filing of a multiplicity of suits on the same subject between the same parties which may in turn lead to making conflicting decisions from the same or similar facts.

20. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, the Supreme Court considered the subject of *sub judice* and aptly stated:

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

21. The *sub judice* rule further seeks to protect the Court from abuse of its process. This necessitates that where more than one suit is filed in courts with jurisdiction between the same parties on the same subject matter, then the latter suit ought to be stayed pending the determination of the earlier suit.

22. Similarly, in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, Mativo, J. (as he then was) stated that the basic purpose of the *sub judice* rule was to pin down parties to one litigation to avoid conflicting decisions. The learned Judge stated:

> 24. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

23. And in the case of *Republic v Commissioner of Domestic Taxes; Panalpina Airflo Limited (Ex-parte)* [2019] eKLR, Mativo, J. addressed his mind to the subject of abuse of the court process and stated:

> 50. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
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> (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[34]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. [35]

51. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[36]A litigant has no right to purse paripasua two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/ legal process.[37]

24. Flowing from the cited cases, it is evident that the filing of multiplicity of suits on the same subject matter, against the same opponent, in the same or different courts constitutes abuse of the Court process. A party pursuing the same matter in different court processes is in effect engaging in a gamble, a game of chance seeking to get the best in the judicial process. The Court has inherent jurisdiction to protect itself from this kind of abuse and to see that its process is not abused by the parties that come before it. The filing of this Petition during the pendency of the Civil Suit is an abuse of the court process and the Court must protect itself from such abuse.

25. It is the Petitioners contention that the doctrine of res judicata is not a proper point for a preliminary objection. In the case of *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR, Ringera, J. (as he then was) considered a similar proposition and stated:

> [B]oth the objection as to the legal competence of the plaintiffs to sue and the plea of res judicata are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. In fact I must confess I was taken aback by the plaintiffs' counsel's insistence that the issues of locus standi and res judicata were not proper points for a preliminary objection for in my experience at the bar and on the bench I had not before heard it doubted that they were. And I hasten to add that in determining both points, the Court is perfectly at liberty to look at the pleadings

> and other relevant matters in its records. It is not necessary to file affidavit evidence on those matters as contended by counsel for the plaintiffs. What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of a judicial discretion

26. I associate with the learned Judge and find that the pleas of res judicata and subjudice herein as well as the competence of the Petitioners to sue are pure points of law. And if these are determined in the Respondents' favour, they will conclude the litigation.

27. The jurisdiction of the High Court to enforce the Bill of Rights in the *Constitution* is not in doubt. the *Constitution* allows any person to move to the Court seeking such enforcement. Article 22(1) provides:

> Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

28. It is a well settled principle of law that a court may only exercise that jurisdiction which has been conferred upon it by the *Constitution*, statute or both. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court succinctly stated:

> 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.

29. The issue regarding the suitability of the 2nd Respondent to hold office as presiding bishop of the MCK being a key prayer in the Civil Suit, is subjudice. Further, the court in the Civil Suit pronounced itself on the issue of the excommunication of the Petitioners from the MCK and found that they had no locus to sue or agitate the interests of MCK in the suit. As such, the matter is res judicata. For the Petitioners to seek reinstatement in this Court is in my view a disguised appeal against the decision of a court of concurrent jurisdiction. The Petitioners' remedy lay in an appeal against the said decision by which they are clearly aggrieved. Further, given that the said decision, has never been reviewed, set aside or appealed against, it follows that they cannot have the locus to file the present Petition. Accordingly, this Court lacks the jurisdiction to entertain matters that are both res judicata and subjudice, Further the Court has no jurisdiction to entertain a matter that has been filed by a party lacking the locus to do so.

30. In the end and in view of the foregoing, I uphold the Preliminary Objection dated 16.11.21 with the result that the Petition dated 6.8.21 is hereby dismissed. The Respondents shall have costs.

**DATED AND DELIVERED IN NAIROBI THIS 15TH DAY OF SEPTEMBER 2023**

**M. THANDE**

**JUDGE**