



**Benjamin v Cabinet Secretary, National Treasury & Economic Planning & 5 others;
Council of Governors & 7 others (Interested Parties) (Petition E059 of 2024)
[2025] KEHC 4405 (KLR) (Constitutional and Human Rights) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E059 OF 2024

EC MWITA, J

APRIL 1, 2025

BETWEEN

DR. MAGARE GIKENYI J. BENJAMIN PETITIONER

AND

**CABINET SECRETARY, NATIONAL TREASURY & ECONOMIC
PLANNING 1ST RESPONDENT**

**CABINET SECRETARY, INTERIOR & NATIONAL ADMINISTRATION 2ND
RESPONDENT**

**CABINET SECRETARY, INFORMATION, COMMUNICATION & DIGITAL
ECONOMY 3RD RESPONDENT**

CABINET SECRETARY, EDUCATION 4TH RESPONDENT

KENYA REVENUE AUTHORITY 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

AND

COUNCIL OF GOVERNORS INTERESTED PARTY

**KENYA SECONDARY SCHOOLS HEADS ASSOCIATION INTERESTED
PARTY**

KENYA PRIMARY SCHOOLS HEADS ASSOCIATION INTERESTED PARTY

KENYA PARENTS ASSOCIATION INTERESTED PARTY

CONSUMER FEDERATION OF KENYA INTERESTED PARTY



**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS
(KUPPET) INTERESTED PARTY**
THE LAW SOCIETY OF KENYA INTERESTED PARTY
OPERATION LINDA JAMII INTERESTED PARTY

JUDGMENT

Petition

1. On 31st January 2024, the Principal Secretary, Ministry of Education issued a circular directing national schools principals to ensure that parents pay school fees through the e-citizen payment platform. The issue raised immediate concerns throughout the country, leading to the filing of this petition challenging the propriety and legality of the directive.
2. In the petition dated 6th February 2024 supported by an affidavit of the same date and a further affidavit, the petitioner argued that forcing parents to pay school fees through e-citizen without public participation is irrational; will lock out parents and guardians who pay fees in kind; the decision did not consider parents and guardians living in areas where digital services are not available and that there is no enabling legislation giving guidelines on the end user and how the money is utilized.
3. The petitioner stated that although the 5th respondent is the only body mandated to collect money on behalf of the national government, it has abdicated its role despite the respondents continuing to implement the e-citizen payment policy without any legislative support.
4. The petitioner again challenged the legality of paying convenience fee of Kshs. 50 introduced by the 1st respondent on 23rd January 2023, through Gazette Notice No. 1350 of 2023, for every transaction paid through the e-citizen platform. According to the petitioner, there is no rationale for charging Kshs. 50 per transaction when people still incur transaction costs payable to the mobile service providers. The money received as convenience fee is not budgeted for and or appropriated by Parliament. The petitioner averred that imposition of the convenience fee was introduced arbitrarily without public participation and is irrational.
5. The petitioner asserted that it is not clear how the respondents arrived at using M-pesa as the payment system for government services since there are other mobile money service providers and other payment channels thus, contravened the Competition Act.
6. The petitioner further asserted that on 15th January 2024, the government announced plans to have one account for both national and county governments through implementation of a Treasury Single Account System for government banking. The decision contravenes Articles 6(2), 10(1) & (2) (a), 189 (1)(a) and 201 (a) of the Constitution as read with section 29 of the Public Finance Management Act (PFM Act).
7. The petitioner maintained that forced payment through e-citizen and the convenience fee even for children in the villages will derail their education and lock out parents who cannot access mobile money transfers services and those who pay school fees in kind in violation of Article 53 of the Constitution.
8. The petitioner took the view, payment through e-citizen as well as the convenience fee is illegal, irregular and irrational; amounts to abuse of public office and violates people's legitimate expectations.



9. According to the petitioner, the 1st respondent's letter dated 25th September 2019 addressed to information officer at the Commission of Administrative of Justice (CAJ) confirmed that convenience fee charges on the e-citizen platform was not based on any law. The petitioner also referred to the Auditor General's report for the year ended 2022 to Parliament which had questioned the ownership and control of the e-citizen platform.
10. The petitioner asserted that the respondents' actions have violated Articles 10, 27, 28, 43 (1)(f), 46(1) (c), 53, 73, 75, 109,189 (1) (a) 232, 201 (b) (1) & (d) of *the Constitution*. Based on the above arguments, the petitioner sought declarations that he actions are unconstitutional and illegal and orders of certiorari and prohibition.

1st, 3rd, 4th and 6th respondents' response

11. The 1st, 3rd, 4th and 6th respondents opposed the petition through a replying affidavit sworn by Dr. Chris K. Kiptoo, Principal Secretary, National Treasury and Planning. It was contended that the petition is based on misconception and misinformation regarding the development and operation of the e-citizen Payment platform; the Treasury Single Account; the County Single Account and the Paybill Number 222222 (Government Digital Payment System).
12. Dr. Kiptoo stated that the Government Digital Payment System is anchored on Article 201 of *the Constitution* and section 12 (1)(e) and (2) of *Public Finance Management Act* (PFM Act). The e-citizen platform is managed under a coordinated multi-agency approach with the National Treasury in charge of the operation of the system, including payments; the State Department of Immigration and Citizen Services is in charge of coordinating and onboarding of institutions and users into the system while Information, Communication and Technology Authority is in charge of providing technical support to the operation of the system.
13. The Principal Secretary stated that functions of these institutions are coordinated by a committee chaired by the Secretary to the Cabinet which carries out its mandate under Executive *Order No. 1 of 2023*. Dr. Kiptoo asserted that e-citizen payment platform was introduced in 2014 following a study which highlighted the limitations of the then means of paying for government services, such as delays and lack of accountability in the revenue collection and service delivery.
14. The government constituted a multi-agency steering committee comprising of the Ministries of Information Communication and Technology; the National Treasury and the Central Bank to come up with a system to provide digitization and online processing of applications and payments for government services. The scope and complexity of the system lead the government through the International Finance Corporation to contract Webmasters Kenya Limited (Webmasters) to develop an end-to-end system to provide a concept for government digital payment system for initially ten government services on a pilot study basis. This led to the development of the e-Citizen.go.ke Digital Payments Platform. The operationalization of government services under the platform was done through Gazette Notice No. 9290 dated 23rd December 2014. The intention was to enhance openness, accountability and provision of widest possible access to government services.
15. Safaricom PLC which has been providing hosting services was competitively procured and remains engaged under a contractual arrangement. The e-citizen payment platform is wholly owned by the government based on the agreement between Webmasters and the 2nd respondent.
16. According to Dr. Kiptoo, on 20th December 2022 the 1st respondent gazetted Paybill No. 222222 through Gazette Notice No. 16008 as the official Government paybill number. This was to ensure



- that citizens and businesses are able to make payments for government services electronically; facilitate revenue feasibility and accountability.
17. He contended that under Gazette Notice Nos. 9290 and 16008, the e-citizen payment platform is integrated with all available electronic payment platforms in Kenya, including mobile telephone payment services. The Paybill is applicable to all mobile network operators.
 18. In line with the requirements of public participation and access to public services and opportunities, he asserted that the government notified the public to visit www.eCitizen.go.ke to view the listed services for which payment can be made digitally. The government also undertook to disseminate information through electronic and print media. The onboarding of government services was preceded by sensitization involving various government agencies, users and administrators of the system. The government has put in place robust mechanisms to ensure continuous system availability.
 19. Dr. Kiptoo asserted that the department of e-citizen has continuously adopted a collaborative framework with Ministries, Corporations, Departments and Agencies to manage changes, improvements sensitization and capacity building on the use of the platform for operations and reporting is done on a regular basis. Upon onboarding, the relevant government institution is required to notify its customers through diverse communication channels.
 20. It was contended that pursuant to Article 209(4) of *the Constitution*, the government through Gazette Notice No. 9290 expressed the intention to charge a nominal administrative fee for each transaction which was a prorated percentage of the payments made. Further, through Gazette No. 17422 dated 14th December, 2023, the 1st respondent prorated charges. Convenience fee was to be charged according to identified bands. The 1st respondent retained discretion to waive fees and the government has waived convenience fee payable for transactions involving universities and public hospitals.
 21. According to Dr. Kiptoo, convenience fee is to cover administrative costs relating to maintenance of the e-citizen payment platform. It is informed by the need to make the system self-sustaining and economically viable.
 22. On the single treasury account, it was contended it is anchored under section 28 (2) and (3) of the PFM Act. Under section 11 (2) of the PFM Act and Regulations 95 and 96 of the Public Finance Management (County Governments) Regulations, 2015, every county is expected to operationalize the County Single Account. Section 28(2) relates to a single account into which revenues collected/ received by a national entity is deposited. Under section 28(3), the treasury single account should not be operated in a prejudicial manner to the entity for which the funds have been deposited. This section relates to national government entities and not county governments.
 23. In terms of cash flow, Dr. Kiptoo stated that funds received are first settled in government resource revenue account and thereafter settled in the respective ministry, department or agency's approved accounts for their Appropriation in Aid or Exchequer on a T+2 basis.
 24. Regarding the impugned circular/directive, it was argued that the circular requested for bank account particulars to facilitate preparations for the launch. The government is yet to onboard basic education institutions into the e-citizen payment platform.
 25. It was Dr. Kiptoo's position that convenience fee will be subject to Gazette Notice 17422 prorated charges and the waiver provision. The management of e-citizen payment platform has put in place various safeguards to protect personal data acquired in the course of registration, access and use of the platform.



2nd respondent's response

26. The 2nd respondent filed a replying affidavit sworn on by Amb. (Prof.) Julius K. Bitok, the Principal Secretary, Ministry of Interior and National Administration. He stated that the e-citizen payment platform was developed to ensure efficiency in accessing and delivering government services and aid in the realization of constitutional principles, including access to information. It was later developed into a payment gateway and integrated with electronic payments platforms, including mobile telephone payment services to enhance service delivery and increase revenue collection.
27. According to Amb. Prof. Bitok, under Article 209(4) of *the Constitution*, the government can introduce charges, such as convenient fees for various transactions, including those in the e-citizen platform. He maintained that meaningful public participation was conducted in respect to onboarding of services to e-citizen. The public was also given adequate opportunity to submit memoranda.
28. The circular dated 31st January 2024 to national school principals was preceded by a directive by the Cabinet Secretary, Treasury that all government services be onboarded on the e-citizen payment platform with effect from 14th December 2023. He denied that there was violation of Articles 10, 201 (a) and 232 of *the Constitution* and the PFM Act. He asserted that the impugned directive came after a long process of stakeholder engagement and public sensitization by the government.
29. On the convenience fee, Amb. Prof Bitok maintained that the 1st respondent exercised his powers to impose charges within the meaning of Article 209 of *the Constitution*. Convenience fee is neither a tax, fee nor a levy within the meaning of Articles 209 (1)(2) (3) and (5) and 210 of *the Constitution*. It is a charge within the meaning of Article 209(4) which does not require public participation.
30. He asserted that Article 209 authorizes the national government to impose charges for provision of services. Imposition of minimal access fee for government services offered through e-citizen payment platform was therefore lawful. Article 209 is also self-executing and does not require specific legislation to implement it.
31. According to Amb. Prof Bitok, the petition offends the doctrines of justiciability; separation of powers and does not fall for this court's determination. The petition challenges a policy decision which is the exclusive mandate of the political branch of government. He denied that imposition of convenience fee of Kshs. 50 is irrational or impedes access to government services. He maintained that transaction costs were informed by the increase in the cost of provision of services over the years and the need to make the cost of services as convenient and accessible as possible while ensuring that it is self-sustaining.
32. Amb. (Prof) Bitok took the position that the e-citizen platform tracks schools fees collection which is then channeled to the schools. The system-to system payment model adopted through e-citizen allows the government and the respective schools to monitor payment of school fees real-time using students' registration numbers. The National Treasury would also know the number of accounts each school has and the amount of money collected by each school, making it easier to know the number of students within the education system which will help in determining school capitation.
33. Regarding centralization of national and county payments systems, the he asserted that section 29 of the PFM Act gives the National Treasury powers to establish a framework within which the national government should manage its cash transactions. The section permits the National Treasury to come up with innovative frameworks for management of cash transactions.
34. Amb. (Prof) Bitok that the PFM Act obligates the Cabinet Secretary to establish a framework within which the national government should manage its cash transactions without defining the framework.



- In that regard, regulations 4, 80, 81, 83, 86,88, 90 and Part VIII of the Public Finance Management (National Government) Regulations, 2015, provide sufficient framework for the management of public finance which would include establishing the Single Digital Payment platform.
35. He maintained that by virtue of Articles 6, 189 and 209(4) of *the Constitution* and section 12(1) (e) of the PFM Act, the import of the impugned directive to have all payments for government services in a single payment platform is authorized by law. The directive does not interfere with the county government mandate to impose charges for their services or takes away functions and powers of county governments.
 36. He posited that Article 207 of *the Constitution* and section 109 of the PFM Act establish county revenue fund for each county government into which all money raised by or on behalf of the county government is paid. The county treasury of each county government is required to ensure that all money raised or received by or on behalf of the county government is paid into that fund. There is therefore a system which records all monies collected through the Single Digital Payment Platform to the credit of the relevant county government department so that the money collected is paid to the relevant county government.
 37. He contended that Kenya Revenue Authority (KRA) does not have mandate under section 2 of the *Kenya Revenue Authority Act* (KRA Act) to collect or administer the convenience fee not being a tax. The issue of double taxation does not also arise. There is no violation of *the Constitution*; the PFM Act; *Intergovernmental Relations Act*; the Public Finance Management Regulations 2015, or legitimate expectation. The impugned directive was lawfully issued.
 38. He maintained that the petition violates the doctrine of ripeness for not exhausting alternative dispute resolution mechanism under the *Competition Act* and the *Consumer Protection Act*.

5th respondent's response

39. KRA filed a replying affidavit sworn by Josephine Mugure in opposing the petition. Ms. Mugure stated that convenience fee is not a tax and does not fall within its mandate under section 2 and Part I & II of the First Schedule to the KRA Act. The issue of double taxation does not also arise.
40. According to Ms. Mugure, e-citizen is a digital payment platform that facilitates payments for various government services. Payment of school fees through this platform is aimed at addressing governance challenges within the education system. It was developed pursuant to Articles 6(3) and 201 (a) of *the Constitution*. Convenience fee is paid as an administrative fee for the use and maintenance of the platform. The intention to roll the out e-citizen platform was made in public interest and there is a general presumption of lawfulness of government's ministerial action which attaches to the directives relating to payment through e-citizen.
41. The 1st, 2nd, 3rd, 4th, 5th and 8th interested parties did not take part in these proceedings.

6th interested party's response

42. The 6th interested party (KUPPET) supported the petition and filed an affidavit sworn by Akelo Misori (Mr. Misori). Mr. Misori asserted that the proposed policy shift will affect institutions led by members of KUPPET. He took the position, the proposed payment of school fees through the e-citizen payment platform lacks a framework and there was no public participation. The circular or directive did not specify which accounts will be served by the e-citizen pool and if several, to what ratio; it is only applicable to national schools and does not take into account other forms of paying fees such as payment of fees in kind. This is discriminatory and a violation of Article 27 of *the Constitution*.



43. Mr. Misori maintained that Gazette Notice No. 17422 of 14th December 2023 which revoked Gazette Notice No. 1350 of 2023 did not comply with [the Constitution](#).

7th interested party's response

44. The Law Society of Kenya (LSK) supported the petition through a replying affidavit sworn by Florence W. Muturi, the Chief Executive Officer. Ms. Muturi stated that the directive contravenes [the Constitution](#) and the law. There was no public participation as required by Articles 10 and 232 of [the Constitution](#) and it is not based on any law.
45. It was Ms. Muturi's case, that on 5th February 2024, the 3rd respondent's principal secretary issued a statement purporting to clarify the circular, which communication was procedurally flawed. It was issued after the impugned decision by the 4th respondent had been made and it did not reveal the payment collection process put in place by the respondents.
46. Ms Muturi stated that although Gazette Notice No. 17422 dated 14th December 2023 revoked Gazette Notice No. 1350 of 2023 and pegged e-citizen charges to the particular transaction, the Gazette Notice is unconstitutional for violating Articles 6(3), 27, 46(1) (b) & (c) 201, 210 (1) & (3) of [the Constitution](#) and section 8 of the [Consumer Protection Act](#).
47. Ms. Muturi pointed out that on 23rd February 2023, the Auditor General published a report on "E-Citizen Revenue Accountability Statements" for the year ended 30th June 2022 revealing that the e-citizen platform had loopholes. The platform lacks an approved information technology policy; steering committee and an approved business continuity plan and secondary site back up. The revenue statements were not a fair representation of the financial position of the e-citizen revenue accountability statement as at 30 June 2022, and of its revenue performance for that year and also did not comply with the PFM Act.
48. Ms. Muturi contended that in the Report on the National Government Ministries, Departments and Agencies for the Year 2022/2023), the Auditor General reported that a Preliminary review of operations of the E-Citizen Government Digital Payments (GDP) platform indicates that the government does not have full control of the system and relies significantly on the vendor for some critical functions. This makes it difficult for the Government Digital Payments Unit (GDPU) to perform critical system configurations and changes to support growth, including on-boarding of new government services.
49. According to Ms. Muturi, the report raised concerns that lack of full control over the system exposes the government to the risk of revenue leakage, lack of full accountability, system unavailability or downtime, security vulnerabilities and threats, including lack of business continuity. The adequacy and effectiveness of the current IT controls on e-citizen may not guarantee integrity of the data processed through the system.

Petitioner's submissions

50. The petitioner relied on Article 1 of [the Constitution](#) on the peoples' delegated power to the judiciary to protect their interests. The petitioner submitted that the State and every State organ are obligated to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
51. The petitioner argued that it is important to maintain the rule of law and interpret [the Constitution](#) as demanded by Article 259. He relied on the decision in *Institution of Social Accountability & Another v National Assembly & 4 others* [2015] KEHC 6975 (KLR) in that regard.



52. The petitioner asserted that the respondents acted contrary to the principle established in *Entick v Carrington* [1965] EWHC KB J98 and *Hardware & Ironmongery (K) Ltd v Attorney General* [1972] 1 EA 275(CAM). He maintained that the respondents acted outside the law, and relied on Article 23 of *the Constitution* and the decision in *Salaries and Remuneration Commission & Another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested parties)* [2020] eKLR in urging the court to grant an appropriate relief.
53. The petitioner again relied on the decisions in *Republic v Vice Chancellor Moi University, Moi University & Dean, School of Medicine Moi University Ex parte Benjamin J. Gikenyi Magare* [2019] KEHC 8774 (KLR); *Council of Civil Unions Service Unions v Minister for the Civil Service* [1985] A.C. 374 (22 November 1984) 1 and *Re Application by Bukoba Gymkhana Club* [1963] EA 478 that respondents' actions are illegal.
54. The petitioner again argued that the convenience fee is unconstitutional and illegal as it is not based on any law and was imposed without public participation. He relied on the decisions in *Salaries and Remuneration Commission & Another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested parties)* [2020] eKLR and *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another* (CCT51/05).
55. The petitioner disagreed with the respondents' argument that gazetting operationalization of e-citizen and asking the public to visit e-citizen website amounted to public participation. He maintained that the decision to introduce the use of e-citizen platform did not comply with the threshold for a meaningful public participation envisaged in Articles 10 and 232 of *the Constitution*. The petitioner relied on *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) on public participation.
56. The petitioner contended that the respondents have forced everyone to use e-citizen platform regardless of their circumstances, in violation of Articles 10, 73, 75, 201, 209(4) and 232 of *the Constitution*. The petitioner further contended that failure to deposit the funds into the Consolidated Fund or any fund specifically meant for that money violates Article 206 and amounts to improper exercise of power under Article 209(4) and Article 10(2).
57. The petitioner again relied on Articles 6(2) and 189(1) (a) of *the Constitution* to argue that operationalizing of the county single account system and adopting one government approach as sanctioned by the cabinet to the extent that it includes the operations of the county governments is unconstitutional and illegal. He relied on the decision in *Oindi Zaippeline & 39 another v Katarina University & another* [2015]eKLR, that the directive and the respondents' actions violate legitimate expectation

1st, 3rd, 4th and 6th respondents' submissions

58. Mr. Kaumba, learned counsel for the 1st, 3rd, 4th and 6th respondents, argued that imposition of the convenience fee is lawful and does not require legislation. The government digital payment system was operationalized through both contractual arrangement with the developers; circulars and Gazette Notice Nos. 9290 dated 23rd December 2014; 16008 dated 20th December 2022 and 17422 dated December 2023. The system is being managed and operated under a clear institutional framework.
59. Learned counsel relied on Articles 209 and 210 of *the Constitution*; section 12(1) (e) and (2) of the PFM Act and the decisions in *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* [2022] KESC 56 (KLR); *Robert N. Gakuru & Others v Governor Kiambu County*



& 3 others [2014] eKLR and Base Titanium Limited v County Government of Mombasa & another [2021] KESC 33 (KLR).

60. Mr. Kaumba maintained that public participation was complied with; convenience fee is incidental to use of the e-citizen payment platform and is anchored on section 12 (1)(f) of the PFM Act which is presumed to be constitutional. The development of e-citizen payment platform involved a technical and multiagency approach guided by the need for an end-to-end self-sustaining system. Gazette Notices were issued and specific information was disseminated to the public prior to on boarding a given institution into the platform.
61. Counsel asserted that the Department of e-citizen has continuously adopted a collaborative framework with Ministries, Corporations, Departments and Agencies for the management of charges and improvements, sensitization and capacity building on the use of the platform for operations and reporting is done on a regular basis. On being onboarded, the relevant government institutions are expected to notify their clients on the use of the system through various communication channels.
62. Learned counsel maintained that convenience fee is rational; was informed by the need to make e-citizen self-sustaining and economically viable without causing a strain to the exchequer. It is proportional because the 1st respondent prorated the charging of convenience fee in accordance with defined bands in the Gazette Notice No 17422 dated 14th December 2023.
63. According to Mr. Kaumba, Annexure MG-11 in the petitioner's affidavit, a Notice on payment by students of University of Nairobi for food through e-citizen) has no evidential value. He further argued that it is the mandate of the executive to determine the amount of convenient fee to be charged and not the court. He relied on State of MP v Rakesh Kohli & another AIR 2012 SCC 2351 (11 May 2012) and Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021]] KEHC 9748 (KLR). According to counsel, convenience is not a tax to amount to double taxation.
64. Mr. Kaumba asserted that the e-citizen Pay bill is integrated with all available electronic payment platforms and not M-PESA system only. He argued that the system does not impede the realization of Article 53 (1) (b) of *the Constitution*. The system seeks to offer convenience and access towards payment of charges allowable under section 29 of the *Basic Education Act*.
65. Mr. Kaumba further argued that the legal and operational framework of the county single account is in accord with the principles of devolution. He relied on Articles 6(2) and 189 of *the Constitution* and Re interim Independent Electoral Commission [2011] eKLR.

2nd respondent's submissions

66. Mr. Omiti, learned counsel for the 2nd respondent, argued that there was sufficient public participation before implementation of the e-citizen payment system. The impugned directive did not derogate from the provisions of *the Constitution* and the PFM Act. The system does not impede realization of Article 53 (1) (b), but is to offer convenience for paying fees allowable under section 29 of the *Basic Education Act*. He relied on the decision in British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & Another (Interested party) (supra) that there was public participation.
67. Learned counsel again relied on Article 209(4) of *the Constitution* to argue that convenience fee is anchored in law. He urged the court to purposively interpretate the statutes and relied on Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR and Base Titanium Ltd v County Government of Mombasa and Another (supra).



68. Counsel contended that even though the petitioner alleged that the directive to charge a nominal transaction fee violates constitutional rights, he failed to draw the nexus between implementation of the impugned directive and the alleged violations. Reliance was placed on *Anarita Karimi Njeru v Republic* [1979] eKLR and *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR.
69. Mr. Omiti maintained that convenient fees is not tax within the meaning of Articles 209 and 210 of *the Constitution* and section 2 of the KRA Act and is not double taxation. He cited the decision in *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR to support the position that the imposition of charges did not require legislation.
70. Counsel further relied on Articles 1(4), 6 (2), 10(2) (a), 174 and 189(1) (a) of *the Constitution* and section 12(1)(e) of the PFM Act for the position that the purpose of implementing the Single Account is to provide an efficient, transparent and accountable system for collection and administration of public finance. Operating the single account does not compromise the distinct character of the county governments.
71. Learned counsel maintained that the petitioner did not demonstrate how the respondents usurped the mandate of the county treasuries set up under section 104 of the PFM Act or how the Single Digital Payment Platform has done so. He relied sections 9(1) (a)&(b), 31 and 36 *Competition Act* and decisions in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR and *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* [2014] eKLR to reiterate that the petition offends the doctrine of ripeness because the alternative dispute resolution mechanisms under the *Competition Act* and the *Consumer protection Act* were not exhausted.

5th respondent's submissions

72. Mr. Ngetich, learned counsel for KRA submitted that the petitioner's pleadings do not disclose any cause of action against KRA. Nonetheless, counsel maintained that convenience fee does not fall under any of the laws KRA administers or enforces as mandated by sections 2 and 5 (1) of the Kenya Revenue Act (KRA Act) and section 78 of the PFM Act.
73. Mr. Ngetich supported the position taken by the other respondents that the case against onboarding of schools and institutional payments through e-citizen payment platform is premature thus, violates the doctrine of ripeness. According to counsel, it has been demonstrated that convenience fee does not apply on payments to learning institution.

KUPPET's submissions

74. Miss Akello, learned counsel representing KUPPET relied on Article 227 of *the Constitution* to argue that there was no open and transparent procurement process involving the designating of e-citizen as a payment platform for government services. Due process was not followed and the policy change did not have sufficient notice and stakeholders' engagement. Learned counsel relied on the decisions *Republic v Public Procurement Administrative Review Board & Anther exp SGS Kenya Ltd* [2017] eKLR and *Republic v Independent Electoral and Boundaries Commission, Public Procurement Administrative Review Board, Al Ghurair Printing and Publishing Company Limited & Paarl Media (Pty) Limited Ex-Parte Coalition for Reform and Democracy* [2017] KEHC 8439 (KLR).
75. According to Miss Akello, use of e-citizen as the payment platform is discriminative against persons with meagre resources contrary to Article 27 of *the Constitution*. This makes education inaccessible to



those living in disadvantaged economic conditions, a violation of their right to access education thus, amounts to indirect discrimination.

76. Miss Akello cited Articles 20 (5); 21; 43 (f) and 53(2) on the right to education. She also relied on Articles 10 and 232 of *the Constitution* and the decision in Peter Makau Musyoka and Award of Mining Concessionary Right to Mui Coal Basin Deposits [2015] eKLR for the position that the respondents did not satisfy the constitutional requirements for public participation.
77. Miss Akello again relied on Article 47 of *the Constitution*; sections 2 and 4 of the *Fair Administrative Action Act* and the decision in Kenya Union of Post Primary Education Teachers (KUPPET) v the Teachers Service Commission & 2 others Petition No. 97 of 2018 for the argument that the respondents' decision amounted to an administrative action which was made without consultation with stakeholders.

LSK's submissions

78. Mr. Bosire, learned counsel for LSK argued that the directive did not meet the constitutional muster on public participation. He relied on Moses Munyendo & 908 others v Attorney General & another [2013] eKLR; Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR and British American Tobacco Kenya, (PLC) (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) (supra).
79. Learned counsel submitted that the directive was arbitrary and not based on any law. According to counsel, the respondents have no strategy to assess or control the technology and risks that may confront the system. He relied on sections 4 (1) (2) and (3) and 7(2) (a) (i) (ii) and (iii) of the *Fair Administrative Action Act* that no reasons were given for the directive.
80. Mr. Bosire again relied on section 8 of *Consumer Protection Act* to argue that convenience fee could only be imposed after consumers had agreed to it. He relied on Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300.
81. It was Mr. Bosire's position, that the process leading to the directive was unconstitutional and was marred with procedural flaws; is ultra vires; was made without stakeholders' engagement in the education sector. He relied on Keroche Breweries Limited & 6 others v Attorney General & 10 others [2006] eKLR.
82. Learned counsel maintained that convenience fee is not based on any law; there is no justification for it; it violates Articles 6(3), 27, 46 (1) (b) and (c), 201 and 210 (3) of *the Constitution* and is therefore, unconstitutional. He relied on the decision in Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR that the directive does not consider all the relevant factors; it was based on the assumption that all parents understand e-citizen platform and failed to factor in parents who pay school fees in kind.
83. Mr. Bosire again relied on the decisions in Republic v Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] KEHC 7742 (KLR); R. (Bibi) v Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR and Biowatch Trust v Registrar Genetic Resources [2009] ZACC 14, that the decision violates legitimate expectation.

Determination

84. Upon considering the petition, responses and arguments on behalf of the parties, I have distilled the following issues for determination. First, whether the directive to pay fees through e-citizen is lawful



and discriminatory; whether convenience (administrative) fee is lawful and whether single payment for the counties is lawful.

Directive

85. The legality of the directive that parents pay school fees through the e-citizen payment platform has been challenged. The petition was prompted by the circular dated 31st January 2024 to National school principals directing that school fees be paid through the e-citizen payment platform. The principals were also directed to submit school accounts to the ministry in preparations for the launch. The petitioner, supported by the 6th and 7th interested parties, argued that the directive was arbitrary; was irrational, capricious and was made without public participation. On boarding of schools to e-citizen will discriminate against other parents, including those from areas where there is no network coverage; those paying school fees in kind and payment of convenience fee will be a burden to parents and is a double charge.
86. The respondents argued in favour of the system. They contended that that e-citizen payment platform is a government payment portal that enables people to access and pay for government services electronically on a 24-hour basis and from wherever they may be. They argued that e-citizen.go.ke as a digital payment platform was established through Gazette Notice No. 9290 dated 23rd December 2014. It was intended to enhance openness and accountability in providing government services. According to the respondents, by virtue of that Gazette notice, the government owns the e-citizen platform.
87. I have considered arguments of parties on this issue and perused the Gazette Notice as well as other documents filed in this petition. Before making a determination on this issue, it is important to make the following observation based on the documents filed in this petition.
88. First, the issue of ownership of the e-citizen payment platform does not seem to be clear. Whereas Gazette Notice No. 9290 of 23rd December 2014 stated that the ecitizen.go.ke Digital Payment Platform was a wholly owned Domain and portal of the Government, the handing over agreement signed with Webmasters on 13th January 2023, shows that Webmasters agreed to hand over the e-citizen platform government Digital Payment System to the government.
89. The handing over agreement does not indicate the date it was made, but was executed on 13th January 2023 by Eng. John Tanui and Amb. Prof. Julius Bitok, while Dr. Chris Kiptoo executed his part on 16th January 2023. The three signed on behalf of the government (Ministry of Information Communication and Digital Economy). James Ayugi executed the agreement on behalf of Webmasters (the vendor) on 13th January 2023 in the presence of Evid Sibi of Pesaflo and James Kabiru of Olive Tree Media Limited. It is not clear who Pesaflo and Olive Tree Media Limited are in so far as the e-citizen Platform Digital Payment System is concerned.
90. The respondents again attached minutes of a meeting that was held between government officials and Webmasters on 30th November 2022 to discuss, among others, Webmasters' claim over the convenience fee and modalities of surrendering control of e-citizen portal platform by Webmasters to the government and ensuring that the government has all the rights both from the front and back end of the system.
91. It is worth noting that even though the Gazette Notice was dated 23rd December 2014 introducing the e-citizen Digital Payment Platform which was said to be wholly owned by the government, there was no mention at the time or any other time thereafter, that the e-citizen payment platform was being operated by someone else other than the government of Kenya.



92. The respondents again attached a document inviting a tender for procurement of co-location and support services for e-citizen platform for 3 years for the years 2019/2020. The respondents did not indicate whether a tender was ever awarded; to who for what period.
93. It was the handing over agreement that for the first time disclosed that the e-citizen payment platform was under the control of Webmasters rather than the government of Kenya. It is also not clear why Webmasters was described as “vendor” and that it was to surrender and hand over the e-citizen Platform (Government Digital Payments Platform), yet the Gazette Notice issued in 2014 stated that the system was wholly owned by the government, a fact that was reiterated in the replying affidavits. The respondents did not indicate whether as “vendor”, Webmasters was to be paid any consideration, how much and when.
94. The minutes of the meeting alluded to above, (held on 30th November 2022) also referred to Webmasters as “vendor” which means it was the seller, without disclosing any consideration. The minutes further referred to an earlier agreement in which Webmasters and partners, who were not disclosed, were to vacate their claim over the convenience fee.
95. The minutes contain some resolutions reached: Webmasters (vendor) was to facilitate proper hand over and ensure the government had full control of the e-citizen platform and its ecosystems; the Ministry of ICT and Digital Economy would identify technical officers to be facilitated to take over the front-end rights of the e-citizen portal platform in order for the government to have full control of the system, without interfering with Webmasters’ intellectual property rights.
96. Relevant government officials would be facilitated by the vendors (Webmasters) and trained on the front and back-end operations of the e-citizen platform and the name of the gateway was to be changed to a government name to be agreed later. The government was to get a license for the payment system platform ecosystem.
97. It is plain from those documents that the e-citizen payment platform has been under the control and management of a private entity or entities and not the government, even as the respondents maintained that the platform was owned by the government and was founded under *the Constitution* and PFM Act.
98. According to the documentary evidence, it is again not clear who has been collecting and/or still collects the convenience fee from those paying for government services through e-citizen, even as the respondents maintained that e-citizen payment system was intended to comply with the principle of openness and accountability in public finance.
99. The facts as revealed from the documents, confirm that there has not been open, transparent and accountability in the operations of the e-citizen payment platform. By demanding that Webmasters and partners vacate their claim over the convenience fee, can only mean that those entities were either receiving convenience fee or were being paid from the convenience fee otherwise there would be no reason for requiring them to abandon their claim over convenience fee.
100. With the above background information, we turn to consider the first issue on the directive to pay fees through e-citizen.

Legality of the directive to schools.

101. The petitioner, supported by the 6th and 7th interested parties impugned the circular issued by the Principal Secretary Ministry of Education on 31st January 2024, directing National school principals to ensure that parents and guardians pay fee for their learners through the e-citizen payment platform. In preparation for the launch, school principals were directed to provide their schools bank account



- details, including, name of the bank, account number, bank code and branch code. The information was to be received not later than 6th February 2024.
102. They argued that the directive was not based on any law; was arbitrary; ultra vires and was made without stakeholders' engagement in the education sector thus, is unlawful and unconstitutional.
 103. The petitioner, the 6th and 7th interested parties further argued that the decision to onboard schools to e-citizen payment platform would affect parents in remote areas where mobile networks are unavailable; parents who pay school fees in kind and will lead to disproportionality and discrimination. It will also be a burden to parents and students who will be required to pay convenience fee. The requirement will impede the Article 53(1)(b) right to education.
 104. The respondents defended the directive, arguing that e-citizen payment platform was well intended and would not cause any disproportionality or discrimination. According to the respondents, the intention is to ensure that the government is aware of the number of accounts each school has; how much fees each school collects and how many students each school has for purposes of capitation. They argued that section 29(1) of the PFM Act allows National Treasury to establish a framework within which the national government should manage its cash transactions.
 105. The respondents again contended that convenience fee does not apply where payment is to learning and health institutions. According to the respondents, the system does not impede realization of Article 53 (1) (b) rights, but will offer convenience to parents when paying school fees.
 106. I have perused the circular dated 31st January 2024. School principals were directed to ensure that parents and guardians pay school fees for their learners through e-citizen payment platform. The circular further directed principals to provide bank account details for their institutions, such as name of bank, account number, bank code and branch code in preparation for the launch of the exercise. That information was to be submitted to the Director General, State Department of Basic Education and was to be received not later than 6th February 2024. The directive was issued on 31st January 2024 just after schools had opened for the term.
 107. The petitioner, the 6th and 7th interested parties challenged the lawfulness and propriety of the directive, arguing that it was issued without stakeholders' engagement in the education sector. Although the respondents argued that the circular was properly issued and was well intended, they did not respond to the issue of public or stakeholders' engagement. Secondary Schools, whether national or not, serve parents from diverse backgrounds and areas across the country. The respondents did not also provide evidence that they had engaged school principals and other stakeholders in the education sector on the issue despite the fact that this was a major policy shift.
 108. The respondents argued that on being onboarded, the relevant government institutions are expected to notify their clients on the use of the system through various communication channels. This is a clear admission that there was no engagement with stakeholders in the sector. Further, information and notification if any would be done after and not before the decision. This is not the public participation or stakeholders' engagement contemplated by *the Constitution*.
 109. Article 10 of *the Constitution* has made public participation and stakeholders' engagement a founding value on governance and related matters. Policy makers have an obligation to engage stakeholders on legislative and or policy matters that affect the people. Article 10(1) (c) states in plain language that national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions. Article 232(1) (d) also requires involvement of the people in policy formulation. That is; public participation and



stakeholders' engagement is an obligation placed on those involved in making or implementing public policy decisions.

110. In *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR, the Court of Appeal observed that:

[20]...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.

111. Payment of fees through e-citizen platform was a policy decision implementation which required stakeholders' engagement and validation. Payment of fees to schools is not, strictly speaking, payment for government services since services offered by schools are a shared responsibility between parents and the government. Parents and guardians are responsible in paying fees while the government caters for other services including teachers. Parents still employ some teachers due to shortage. School principals are accountable for fees paid on behalf of learners in their institutions. A parent or guardian may delay to pay fees for one reason or another which he/she explains to the school and may ask for time to settle the fee. Such flexibility allows such parent or guardian sort out the issue since he/she understands his or her obligation towards fees payment for the learner.
112. The decision to pay fees through e-citizen platform was such a critical issue that stakeholders in the education sector should have been engaged to understand the policy shift and give their views on it. The directive was however issued arbitrarily and without the stakeholders' input in violation of Article 10 of *the constitution*. The directive further violated Article 232(1)(d) which requires involvement of the people in policy formulation.
113. In this era, the 2010 Constitution introduced a culture of justification of governmental actions, a culture in which every exercise of power is to be justified. The government is called upon to defend its decisions and that can only happen when people are at the forefront by participating and playing a role in governance matters, including those with financial implications in their lives so that they seek justification of the administrative actions.
114. The directive was issued at a time when the propriety of e-citizen payment platform is in question thus, putting in doubt the lawfulness of the directive that parents pay school fees through that same platform. That e-citizen payment platform is not anchored on a law cannot be in doubt. The respondent relied on a Gazette Notice to argue that it was anchored in law.
115. Gazette Notice No. 9290 was said to have been issued pursuant to the principles of openness and accountability guiding public finance management under Articles 201 (1) (a) and 6(3) of *the Constitution* to provide the widest possible access to government services. The Gazette Notice notified the general public that the government had developed e-citizen.go.ke Digital Payment Platform through which people would access government services and was integrated with all available electronic payment platforms, including mobile telephone money payment services.
116. The gazette notice stated that e-citizen.go.ke was a wholly owned domain and portal of the Government of Kenya and the official government Digital Payment Platform. According to the Gazette Notice, ecitizen.go.ke shall charge a nominal administrative fee per transaction, which shall be a prorated percentage of the payment made.



117. Article 201 is on the principles of finance. Article 201 (a) requires that there be openness and accountability, including public participation in financial matters. Under Article 201(b), the public finance system should, among others, promote an equitable society.
118. On the other hand, Article 6(3) states that a national State organ should ensure reasonable access to its services in all parts of the Republic so far as it is appropriate to do so, having regard to the nature of the service.
119. The Gazette Notice merely notified the general public regarding the action taken or being taken. The fact that the Gazette Notice mentioned *the Constitution* and the PFM Act did not make it a law.
120. Of more importance, is the concern raised in the affidavit filed by LSK. LSK's affidavit attached the Audit Report by the Auditor General on the e-citizen payment platform for the year ended 30th June 2022. The report indicts the integrity of the e-citizen payment platform on a number of areas. Some of these include; revenue accountability; inaccurate transfers and unsupported cash and cash equivalent balance. The report gave an example of Kisumu County which received less money than what was collected on its behalf. The report found that public resources were not applied in a lawful and effective manner.
121. The reasons the respondents advanced in defending the directive that school fees be paid through e-citizen, included openness and transparency in the use of public resources as required by Article 210(a) of *the constitution* and the PFM Act. The respondents justified the directive arguing that paying fees through e-citizen platform would enable the government to know how much fees each school collects; the number of learners in each school for purposes of capitation and prevent unlawful charges and leakages.
122. However, if openness and transparency in collection and use of school fees was the concern, the Auditor General's Report raised the same issue of openness, transparency and accountability of public finances collected through the e-citizen platform since the amount could not be accounted for. In that respect, there would be no guarantee that payment of school fees through e-citizen platform would be treated any better given the fact that principals run schools using fees paid by parents for their children.
123. There is also doubt if school fee is really payment for government services. School fee is paid as tuition and boarding fees. Boarding fee is parents' money paid to schools to cater for learners boarding facilities so that schools are able to keep learners on board. Boarding fees is not government money for any service it offers to be collected by the National government. This is because the reason given for introducing e-citizen was that it was to be a platform through which people would pay for government services. Charges for government services are different from school fees.
124. Furthermore, any delay in payment of boarding fee, disbursing or remitting less than that collected would unnecessarily disrupt learning putting school managers in a difficult position to keep learners in school thus, disrupting school programmes. Viewed from this perspective, and taking into account the lingering doubts about the propriety of e-citizen platform, including ownership and its effectiveness, there was no justification for directing parents to pay fees. Parents struggle to raise fees and forcing them to pay fees through e-citizen is not doing a favour to parents. The directive was arbitrary, disproportionate, capricious and lacked stakeholders' engagement and validation.
125. The petitioner raised yet another concern regarding potential discrimination. According to the petitioner, some parents live in areas that do not have internet connectivity which will negatively affect such parents' ability to use e-citizen. Further, that some parents pay fees in kind yet the directive did not take into account such situations. The respondents only stated that payment of fees through e-citizen



will be to the parents' and guardians' convenience. KUPPET and LSK supported the petitioner's position.

126. The concerns raised by the petitioner, supported by KUPPET and LSK are not idle. There is no denial that some areas in this country do not have internet coverage and connectivity. That is, not all parents and guardians are able to access or use internet every time or at all. Similarly, not all parents and guardians have phones. The directive did not take into account these factual positions.
127. The respondents did not also deny that some parents may be paying fees in kind. How such parents would be accommodated yet they are required to pay fees through e-citizen was not explained in the directive or by the respondents. Failure to address these concerns and insisting that fees be paid as directed creates indirect discrimination in contravention of Article 27(4) of *the Constitution* which prohibits the State from directly or indirectly discriminating any person on any grounds, including his or her social origin.
128. The respondents were under obligation, when formulating or implementing policy decisions, to take into account all possibilities and ensure that there is reasonable accommodation for those who may be negatively affected by the policy shift. Failure to take this into account, the directive violated legitimate expectation of such parents and guardians to continue paying fees for their children as they had done before without interruption due to their social standing.
129. As the Supreme Court stated in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR), "legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil."
130. In *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR, the court observed that legitimate expectation enables those affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.
131. Those parents paying fees in kind have a legitimate expectation that they will continue paying fees for their children as they have done before without interruption or change of circumstances to their disadvantage or detriment. The directive violated this expectation.

Convenience fee

132. The next issue is on the lawfulness of convenience fee. The petitioner argued that convenience fee of Kshs. 50 is not based on any law; is not justified and violates Articles 6(3), 27, 46 (1) (b) and (c), 201 and 210 (3) of *the Constitution* and is thus, unconstitutional. This position was supported by KUPPET and LSK. The respondents took the opposite view, arguing that convenience fee is lawful and is intended to ensure that e-citizen platform is self-sustaining.
133. The respondents admitted that anyone uses e-citizen is charged convenience fee also known as administrative fee for each transaction. Their argument was that convenience fee is not static at Kshs. 50, but is prorated based on the amount of the transaction as contained in Gazette Notice No. 17422 dated 14th December 2023. The respondents justified convenience fee, contending that the government has the mandate to determine the fee to be paid. Further, that convenience fee is necessary in ensuring that e-citizen payment platform is self-sustaining.
134. As admitted, convenience (administrative) fee is paid by anyone who seeks government services through e-citizen. Gazette Notice No. 9290 issued on 23rd December 2014 stated that "the ecitizen.go.ke shall charge a nominal administrative fee per transaction, which shall be a prorated percentage of the payment made." The current Gazette Notice No. 17422 dated 14th December 2023 states that "the ecitizen.go.ke shall charge a nominal administrative fee per transaction, which shall



- be prorated as follows: bellow 199-Kshs. 5; 200-299 Kshs. 10; 300-499 Kshs. 15; 500-699 Kshs. 20; 700-999 Kshs. 25; over 1000 Kshs. 50. Any Dollar amount- 1 US dollar.” According to the Gazette Notice, charges are to apply to all services unless waived by the Cabinet Secretary. The previous Gazette Notices were revoked.
135. The petitioner relied on Article 210 (1) which states that no tax or licensing fee may be imposed except as provided for by legislation. This position was supported by KUPPET and LSK. Although *the Constitution* does not define the word “tax”, tax is a mandatory financial charge or levy imposed by the government to support government spending.
 136. The respondents on their part argued that convenience/administrative fee is not a tax. They relied on Article 209(4) of *the Constitution* for the argument that the government has a right to impose charges, including the administrative fee.
 137. The administrative/convenience fee, whatever the name, is a financial charge imposed by the government on those using e-citizen platform. Article 209(4) allows the national and county governments to impose charges for the services they provide. The administrative fee was imposed when paying for government services through e-citizen.
 138. Charges for government services are those already in place for services the government provides. These are the charges paid through e-citizen. On the other hand, convenience/administrative fee is an extra charge separate from that paid for government services. The respondents did not point out a clear legal provision that permits the Cabinet Secretary to impose an administrative fee (convenience fee) on top of the charges imposed for the particular government service. The Gazette Notice relied on did not state what this administrative fee is for leaving it to the respondents to merely state that it is to ensure that e-citizen payment platform is self-sustaining.
 139. Convenience fee raises a number of unanswered questions. One; why should a person paying for government service also be required to pay an extra charge called administrative fee for every transaction outside the fee for the service sought. The charge, be it convenience fee or administrative fee, means people are paying an extra fee, to ostensibly, sustain a payment platform they did not ask for. By forcing people to use the platform, they pay an extra fee that was not explained or justified in the Gazette Notice.
 140. Two, it is not clear who collects the convenience or administrative fee and what it is used for since there is no openness transparency and accountability for it. It is also not clear, as the Auditor General stated in the report, where the money is deposited. In other words, paying school fees through e-citizen would mean more convenience fee collection for unexplained purpose.
 141. Payment of convenience fee is clearly a double charge on those seeking government services. The normal charges paid for government services should be used to sustain the payment platform rather than charge people seeking government services an unexplained extra fee. Kenyans did not ask for the introduction of e-citizen and should not be charged an extra fee to maintain a system imposed on them without their input. This, in my respectful view, was arbitrary, capricious, irrational and unconscionable.
 142. The respondents argued that the government had waived convenience fee on transactions involving universities and public Hospitals. There was however no evidence to that effect. In any case, if that be the case, it would amount to discrimination since convenience fee or administrative fee should not be paid by some only and not others.
 143. There is also the unanswered question of who collects convenience fee. This issue arises because, if indeed the money is used to maintain e-citizen payment platform, who collects the fee, where is it



deposited, who accounts for it and to whom. Further, who maintains e-citizen so as to be paid and how much is paid for that purpose. Is convenient fee government revenue given that it is different from the cost of the particular government services rendered. If it is government revenue, why should the government charge convenient fee on top of the usual charges for the services it renders? It does not make legal sense for the government to change the mode of paying for its service and force people to pay an extra fee to maintain the system.

144. As already stated earlier in this judgment, the Auditor General raised fundamental questions regarding convenient fee for the year 2022 which could not be accounted for, raising the question of openness, transparency and accountability of this money. The issue of ownership of e-citizen is also still in doubt. It would be inappropriate and quite incomprehensible to ask parents to pay school fees for their children through a system whose propriety is still in doubt and incur further unexplained charges called convenience/administrative fee.
145. The government does not do business with its people when rendering service. It offers services at a minimal cost and that is the cost that should sustain any mode of payment it chooses. The government cannot legitimately ask people to use a particular payment system and still force them to maintain that system by imposing a separate and extra fee. It is not only unconscionable but also irrational given that use of the payment system is imposed on the people.
146. In the premise, I agree with the petitioner, KUPPET and LSK that forcing people to pay convenience fee to maintain a payment system they did not choose is not only a double charge but is also irrational, unconscionable, a burden to people thus, unlawful. It also makes government services unnecessarily expensive.

Personal data

147. There is also the issue of people's data when using the e-citizen. The respondents argued that the management of e-citizen has put in place various safeguards to protect personal data acquired in the course of registration, access and use of the platform.
148. Article 31 guarantees everyone's right to privacy, including the right to have information relating to their family not to be unnecessarily revealed. This includes information about their children. Indeed, when people use e-citizen, they have to fill in their details. Some have to use third parties to access e-citizen, thus disclosing their personal data to such people.
149. The respondents did not tell the court what measures had been put in place and how they comply with Article 31 of *the Constitution* and the Data Protection Act. Furthermore, the Auditor General' report raised concerns regarding personal data, stating that e-citizen platform may not guarantee integrity of the data processed through it.
150. In the circumstances, the data of parents, guardians and the learners cannot be guaranteed making the scheme constitutionally and legally questionable.

Single payment system

151. The petitioner again faulted the government plan to have a single account for both national and county governments. He argued that the decision to implement Treasury Single Account System for government banking contravenes Articles 6(2), 10(1) & (2) (a), 189 (1)(a) and 201 (a) of *the Constitution* as read with section 29 of the PFM Act. According to the petitioner operationalizing the county single account system and adopting one government approach as sanctioned by the Cabinet to the extent that it includes the operations of the county governments is an unconstitutional and illegal.



152. The respondents on their part, relied on Articles 1(4), 6 (2), 10(2) (a), 174 and 189(1) (a) of *the Constitution* and section 12(1)(e) of the PFM Act to contend that implementation of the single account is to provide for an efficient, transparent and accountable system for collection and administration of public finance. Operating the single account does not compromise the distinct character of the county governments.
153. I have considered arguments by the parties on this issue. The petitioner's concern is that the government's intention to operationalize the single account system and adopting one government approach which includes the operations of the county governments is unconstitutional and illegal.
154. Article 189(1)(a) states that the government at either level should perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level, and respects the institutional status and institutions of government at the other level and in the case of county government, within the county level.
155. Article 6(2) also provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation. The Article acknowledges distinctiveness and interdependence between the national and county governments.
156. On the other hand, section 12(1) of the PFM Act provides that subject to *the Constitution* and the Act, the National Treasury shall-
- (e) design and prescribe an efficient financial management system for national and county governments to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of *the Constitution*
- Provided the National Treasury shall prescribe regulations that ensure that operations of a system under this paragraph respects and promotes the distinctiveness of the national and county levels of government.
157. Section 12(1)(e) talks of an efficient financial system and not systems which means it is one system. The petitioner did not demonstrate that the proposed implementation is against section 12 (1)(e) of the PFM Act. The petitioner did not also challenge the constitutionality of section 12(1) (e) so that the court could determine its constitutional validity. Apart from what was stated in the pleadings, it was not made clear to the court how the system will operate to enable the court examine the constitutionality or legality of the proposed implementation. In other words, the court was called upon to pronounce itself on insufficient material. I am unable to agree with the petitioner on this issue. Moreover, Council of Governors though a party in this petition the entity to that may be affected, did not participate in the proceedings, challenge implementation of the single account or make its stand known on the issue to assist the court. In the premise, the less I say about the issue, the better.

Conclusion

158. Having considered the petition, responses and arguments by parties, the court comes to the following conclusions. There was no legal basis for directing parents to pay school fees through e-citizen platform. The directive was issued without stakeholders' engagement in the education sector in violation of Articles 10 and 232 of *the Constitution*. School fees is not strictly speaking government money or revenue to be collected by the national government.



159. The directive failed to take into account those parents who may not access internet services; have no phones and those who pay school fees in kind, a violation of those parents' legitimate expectation. The directive also poses potential indirect discrimination in violation of *the constitution*.
160. The propriety of e-citizen platform, its ownership as well as its transparency and accountability are questionable. It would be inappropriate to demand that parents pay fees for their children through a system whose integrity is not only in doubt but cannot also be guaranteed. This will also put schools in a difficult financial position in case of delayed remittances or less remittances as the case may be.
161. Convenient fee is a double charge and has no legal basis. People cannot be forced to use a system they did not ask for and be made to pay an extra and unexplained and unaccounted for charge in the name of maintain the system. This is irrational and unconscionable. There is also no explanation regarding who receives convenience fee and what it is used for making the charge unlawful.
162. Data protection for those using e-citizen cannot be guaranteed. This is not only a threat to violate but is indeed a violation of peoples' right to privacy of their data. This is a violation of *the Constitution* and the law.
163. The issue of single payment system was not substantiated to enable the court make an informed determination on it.
164. Based on the above conclusions, the court makes the following declarations and orders it considers appropriate:
1. A declaration is hereby issued that the directive that parents pay school fees and/or any levies to government institutions of learning through the e-citizen payment platform was done without public participation or stakeholders' engagement and is unconstitutional and illegal and therefore void.
 2. A declaration is hereby issued that the introduction of convenience, administrative or transaction fees of Kshs. 50 or any other amount is a double charge, was done without public participation and is thus, unconstitutional and void.
 3. An order of certiorari is hereby issued quashing the letter/circular dated 31st January 2024 by the Principal Secretary, Ministry of Education, directing High school Principals that parents pay school fees through e-citizen payment platform.
 4. An order of prohibition is hereby issued prohibiting the Cabinet Secretary, National Treasury and Planning; Cabinet Secretary, Ministry of Information, Communication and Digital Economy and Cabinet Secretary, Ministry of Education either by themselves, their agents, servants and/or any other persons acting on their behalf from demanding that school fees be paid through e-citizen payment platform and/or giving effect to the letter /circular dated 31st January 2024.
 5. An order of prohibition is hereby issued prohibiting the Cabinet Secretary, National Treasury and Planning; Cabinet Secretary, Ministry of Information, Communication and Digital Economy and Cabinet Secretary, Ministry of Education either by themselves, through their agents, servants and/or any other persons acting on their behalf from charging convenience/ administrative/ transaction fee of Kshs. 50 or any other amount per transaction paid through e-citizen payment platform
 6. This being a public interest litigation, each party shall bear their own costs.



DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL 2025

E C MWITA

JUDGE

