



**Madzayo v Pesaflo Limited & 3 others; Safaricom Limited (Interested Party)
(Petition E009 of 2023) [2024] KEHC 17090 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION E009 OF 2023**

**M THANDE, J
MAY 17, 2024**

BETWEEN

STEWART MADZAYO PETITIONER

AND

PESAFLOW LIMITED 1ST RESPONDENT

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND
PLANNING 2ND RESPONDENT**

KENYA COMMERCIAL BANK LIMITED 3RD RESPONDENT

EQUITY BANK LIMITED 4TH RESPONDENT

AND

SAFARICOM LIMITED INTERESTED PARTY

JUDGMENT

1. By his Petition dated 21.12.23, the Petitioner challenges the convenience fee payable by every person accessing government services on e-citizen. His Petition is supported by his affidavit sworn on even date and a supplementary affidavit sworn on 6.2.24. The Petitioner claims that on 2.10.23, he visited the Fort Jesus Museum accompanied by his children. Upon payment of the entry fee on the eCitizen.go.ke platform, he noted that 2 invoices were generated. The first invoice was for Kshs. 100/= was in the name and letterhead of the Government of Kenya. The second invoice was in the name and letterhead of the 1st Respondent and was for the sum of Kshs. 50/= “convenience fee”, which is half the amount of the substantive service. The Petitioner added that on the same date, he was charged a service fee of Kshs. 500/- and an additional Kshs. 50/- convenience fee to the 1st Respondent, to peruse a company file within the companies’ registry.



2. It is the Petitioner's case that the convenience fee charged on every transaction whether uniform or pro-rated is unconstitutional, not anchored on any law and amounts to taxation absent of legislation, contrary to Article 210 of *the Constitution*. The Petitioner thus seeks the following reliefs:
- a. A declaration be and is hereby issued that the impugned convenience fee charged by the 1st Respondent on all payments made on or through the eCitizen.go.ke platform offends the principles of public finance provided for under Article 201 of *the Constitution* and the same be stopped forthwith.
 - b. A declaration be and hereby issued that the charging of a uniform, standard, indiscriminate, one-size-fits-all, flat-rate amount of Kshs. 50.00 for every transaction regardless of the amount payable for the service being sought, offends the constitutional right to equality, non-discrimination and equal protection enshrined in Article 27 of *the Constitution* and that the same is unconstitutional and illegal.
 - c. A declaration be and is hereby issued that the Respondents have violated the Consumer rights of the Petitioner guaranteed under *the Constitution* of Kenya, 2010.
 - d. A declaration be and is hereby issued that the impugned convenience fee charged by the 1st Respondent on all payments made on or through the eCitizen.go.ke platform offends the principles of public finance provided for under Article 201 of *the Constitution*.
 - e. A declaration be and is hereby issued that the impugned convenience fee charged by the 1st Respondent on all payments made on or through the eCitizen.go.ke platform is an unlawful fee which offends Article 209 of *the Constitution* as the 1st Respondent is neither a county government nor the national government.
 - f. A declaration be and is hereby issued that the impugned convenience fee charged by the 1st Respondent on all payments made on or through the eCitizen.go.ke platform offends Article 210 of *the Constitution* as it imposes and varies fees charged for government services otherwise than by legislation.
 - g. A declaration be and is hereby issued that by supposedly single-sourcing the payment services on the eCitizen.go.ke platform to the 1st Respondent, the 2nd Respondent has violated Article 227 of *the Constitution* on the principles of public procurement.
 - h. A declaration be and is hereby issued that collection of fees by a private entity, the 1st Respondent herein, is unconstitutional since the eCitizen.go.ke platform is wholly owned by the Government of Kenya as per the gazette notice number 16008 of 2022.
 - i. An order be and is hereby issued compelling the 3rd and 4th Respondents to provide the beneficiary accounts that receive the impugned 'convenience fee'.
 - j. An order be and is hereby issued compelling the 3rd and 4th Respondents to publish details of the amounts paid to the 1st Respondent since the government commenced the use of the eCitizen.go.ke platform.
 - k. An order be and is hereby issued compelling the 1st Respondent to surrender the sum total of all the monies it has collected as 'convenience fee' to Kenya Revenue Authority.
 - l. A declaration be and is hereby issued that should the government require the provision of any payment services, it must procure the same in accordance with the provisions of Article 227 of *the Constitution*.



- m. Costs of this Petition be borne by the Respondents.
- n. Such other alternative reliefs as the court shall deem just and expedient.
3. The Petitioner filed a Notice of Motion of even date seeking interim relief pending the hearing and determination of the Petition.
4. The Petitioner argues that the gazette notices relied on by the Respondents as the instrument allowing them to charge the impugned convenience fee are unconstitutional, not being anchored in any legislation.
5. The Petitioner further claimed that the decision to pay for government services through the platform was communicated in a gazette notice number 9290/2014 dated 30.12.14 by the 2nd Respondent. That the notice indicated that the platform is a wholly owned domain and portal of the government and the government's official digital payment platform. That the notice also provided that the platform would charge a nominal administrative fee for each transaction which would be a pro-rated percentage of the payment made by an individual. The Petitioner asserted that the said notice did not specify the beneficiaries of the nominal administrative fee or the exact percentage that would be charged against each transaction. As a result, the 1st Respondent has continued to charge a standard convenience fee of Kshs. 50/- for each transaction regardless of the payment done.
6. The Petitioner further alleged that on 20/12/2022, the 2nd Respondent revoked the gazette notice number 9290/2014 and released gazette notice number 16008/2022 which he stated was a replica of the former save for changes of the official government paybill number hosted by the interested party herein. He added that the second notice does not make any reference to administrative costs or convenience fee but the 1st Respondent has continued to charge the same for any transactions on the platform.
7. The Petitioner's grievance is that the said convenience fee is shrouded with mystery and secrecy; it is oppressive and lacking in legal basis. To him, that a user is subjected to pay thrice for the same service, that is, government service fee, convenience fee, and transaction charges by the Interested Party, is illegal and especially because the role of the 1st Respondent in a transaction between the user and the government is unknown. The Petitioner averred that the convenience fee is an illegal tax not based on any legislation and is imposed on persons seeking government services yet the same money flows to a private entity.
8. To the Petitioner, by allowing the charging of a uniform and standard convenience fee, the 2nd Respondent violates Article 10 and 27 of *the Constitution* of Kenya, 2010; by charging a convenience fee on top of the government service fee, the 1st and 2nd Respondents violate the Petitioner's rights under Article 46 (1) (c); by imposing a convenience fee without any legal basis, the 1st and 2nd Respondents violate Article 210 of *the Constitution*; for failure to disclose the formula used to arrive at the rate for the convenience fee and that the same is paid to a private entity, the 1st and 2nd Respondents violate the principles of openness, transparency and accountability in public finance provided under Article 201 and 209 of *the Constitution*.
9. The Petitioner added that there was no known procurement process undertaken to identify the 1st Respondent as the service provider in violation of Article 227 of *the Constitution* and sections 3, 66, 102 and 104 of the *Public Procurement and Asset Disposal Act*, 2015. That imposing the convenience fee is a breach of consumer rights guaranteed under Article 46 of *the Constitution* and sections 3, 13 and 15 of the *Consumer Protection Act*.



1st Respondent's case

10. The 1st Respondent opposed the Petition vide a preliminary objection dated 6.12.23. The objections are that:
 1. The matter is res sub judice as the issues raised in the matter are substantially in issue in Constitutional Petition Number 156 of 2018 Okiya Omtatah Okoiti v the Cabinet Secretary, National Treasury and others filed at the Constitutional and Human Rights Division of the High Court in Nairobi.
 2. The Petition filed before the Honourable Court is based on two fundamental errors of the law which render the Petition fatally defective in substance and in form:
 - a. The Petitioner has not brought to the notice of the court the existence of gazette notice number 1350 dated 23rd January 2023 and published in the Kenya Gazette Volume CXXV Number 27 on 3rd February 2023 which specifically mandates a fee of Fifty Kenya Shillings (Kshs. 50/-) for access to ecitizen.go.ke digital government services;
 - b. The Petitioner has not taken into account Rule 35(2) and (3) of the National Payment System Regulations, 2014 which provide that a payment service provider must provide, at the point of sale or immediately after information about: its name, means of accessing its customer care representatives, a reference number for the transaction, details of the payee, amount of e-money debited, and the date of the transaction.
11. The 1st Respondent also filed a Replying Affidavit sworn by its director, one Charles Wambani Sewe on even date. He stated that the 1st Respondent is a licensed payment service provider providing payment gateway services to various institutions including the Government of Kenya on the platform. He stated that via a Gazette Notice Number 1350 dated 23/1/2023 published in Gazette Vol. CXXV No. 27 on 3/2/2023, annexed therein as CWS 1, the CS, National Treasury and Economic Planning notified the public that an access fee of Kshs. 50/- or 1 US Dollar would be charged for any government services accessed through the platform. He added, that the Petition lacks legal basis and does not disclose any constitutional issues.
12. According to the 1st Respondent, reference to “convenience fee” was an oversight and that it was in the process of rectifying the same to read “access fee” as defined in the Gazette Notice Number 1350. It was asserted that the access fee amount was advised by the 2nd Respondent in line with Article 201 (a) of *the Constitution*. He emphasized that the said access fee as charged on the platform is not channeled to the 1st Respondent, but to the government along with the fees charged for government services.
13. The 1st Respondent filed another replying affidavit sworn on 15.1.24 by Charles Wambani Sewe who deposed that since the alleged violation or the Petitioner's rights occurred in Mombasa, this Petition should have been filed in Mombasa. He reiterated the objection on the ground of sub judice and annexed therein the amended petition filed in Nairobi Petition No. 156 of 2018. He explained that the services offered by the 1st Respondent in relation to the platform is that of processing payments on behalf of the government. That the 1st Defendant's services are necessary due to the complexities involved in accepting, processing and settling payments made by vast numbers of people accessing the services on the platform.
14. The deponent added that the 1st Respondent has built a digital infrastructure with the capability of identifying payments and settling them to the appropriate accounts through a one-click system as is



available on the platform. That it has built technical connections with various digital payment systems and card networks both in Kenya and around the world to allow seamless processing of payments.

15. It was further asserted that the 2nd Respondent published another gazette notice number 17422 dated 14/12/2023 published in Kenya Gazette Volume CXXV-No. 268 on 22/12/2023 (the Access gazette notice) notifying the public that a pro-rated access fee would be charged for any government services on the platform. He stated that that notice lays out various bands of access fees to be charged dependent on the costs of the government services being provided beginning with Kshs. 5/- at the lowest up to Kshs. 50/- at the highest. He added that the changes to the access fee for various government services on the platform are in the process of being actualized and systematically rolled out. To illustrate this position, he annexed as CWS 4 a copy of an invoice and receipt for payment of government services on the platform done on 15/1/2024.
16. It was explained that the systematic roll out is necessary due to the complexity involved in ensuring that when one invoice is generated for a multiplicity of government services, the access fee for all the services is included in calculating the total access fee to be paid to ensure that users do not make multiple payments for access to related services. Further that before the changes are finalized in the platform, several approvals have to be issued by the ministry of information, communication and digital economy, ministry of finance and national treasury, and the ministry of interior and national administration process which is ongoing.
17. He added that the terms convenience fee and access fee refer to one and the same fee that has been in line with gazette notices published by the 2nd Respondent. He stated that the access fee is charged to ensure that the platform is a self-sustaining enterprise that defrays its own operational costs. Further that the 1st Respondent was contracted by the Government to provide its services since the year 2014 as a result of procurement through the World Bank before the enactment of the *Public Procurement and Asset Disposal Act*, 2015. That in any event, the Petitioner did not provide any evidence of an improper procurement process or that it challenged the procurement through laid down mechanisms.

The 2nd Respondent's case

18. The 2nd Respondent opposed the Petition vide a preliminary objection and grounds of opposition both dated 5.12.23, a replying affidavit sworn on 29.12.23 by its Principal Secretary.
19. The preliminary objection is premised on the following:
 - a. That the petition offends the principle of sub judice as there is a pending matter before commercial court in Nairobi Petition No. 156 of 2018 Okiya Omtatah Okoiti v the Cabinet Secretary, National Treasury, the Ministry of Information, Communications & 6 others which was filed prior to the present Petition.
 - b. That the Petitioner has violated the trite legal principle which dictates that internal mechanisms for appeal or review must be exhausted before proceeding to court. This contravention is evident under section 68 and 70A of the *Competition Act*. This interpretation is supported with the provisions of article 159 (2) (c) and 169 (1) (d) and (2) of *the Constitution* along with Sections 9(2) and (3) of the *Fair Administrative Action Act*, 2015. The Petitioner ought to have utilized the avenues specified in the aforementioned provisions before bringing his case to this Court. The Competition Authority, utilizing both its Consumer Protection Department and its authority to refer complaints to other specialized consumer protection agencies would have served as the appropriate mechanisms for appeal or review, which the petitioners should have pursued before seeking redress from the court.



- c. That the Petitioner has in the same vein have gone against the constitutional avoidance doctrine seeing as there are other ways of resolving this dispute outside a constitutional petition. This matter can be remedied as provided in law under section 68 and 70A of the *Competition Act*.
- d. That this court has no jurisdiction to entertain this matter in the manner that it is drafted. In the KIBOS case on judicial abstention the court noted that where a claim in a petition or suit is multifaceted as the one we have here the best approach to take is to reserve the constitutional issues to await the determination of the primary adjudicative authority. In this case, there is active litigation on this same set of facts in Petition No. 156 of 2018.
20. The aforementioned grounds are restated in the grounds of opposition. The Court thus need not restate the same.
21. The 2nd Respondent also filed a replying affidavit sworn on 29.12.23 by Chris Kiptoo, its Principal Secretary. He asserted that the platform in question was developed by the World Bank in 2014 to assist the government in collection and mobilization of revenue through a digital platform. That the World Bank then procured Webmasters Kenya Limited to design and develop the platform. Ultimately, the World Bank handed over the platform to the Government of Kenya in 2016 to be fully owned by the government. It was stated that the platform was intended to be self-sustaining thus the introduction of payment of the convenience fee was to assist in defraying operation expenses arising from hosting the platform, support and maintenance of over 10,000 services and to cater for SMS notifications to users of the platform. This fee, which he deposed was first introduced in the gazette notice no. 9290 was tabled at Kshs. 50/- and 1 USD to be paid under paybill number 206 206. The same nominal amount was gazetted in a second gazette notice no. 1350 to be paid under a different paybill no. 222 222.
22. It was further averred that the prayers addressing the matters of custody of the account which the convenience fee is remitted are misconceived and misguided since the monies collected are solely utilized by the government to maintain the platform. He explained that the government contracted services of the 1st Respondent and other service providers to run the process of the platform. For instance, that the 1st Respondent provides the payment engine for revenue collection while another provides short message services and USSD (Unstructured Supplementary Service Data) notifications on applications made. He added that the platform is hosted by the Interested Party which service was procured through an open procurement process.
23. He further asserted that through the gazette notice no. 17422 published on 22.12.23, the government has since conveyed the decision of pro-rating the nominal administrative fee per transaction, and that the national treasury is in the process of amending all invoices and receipts to read “Government of Kenya” instead of “Pesaflo Limited”. To him, the petition and application are therefore overtaken by events and do not raise any substantial issues for deliberations.

3rd Respondent’s case

24. Velma Okoth the 3rd Respondent’s Senior Legal Officer swore a replying affidavit on 19.12.23 in opposition to the Petition. She averred that the Petitioner proceeds on an erroneous assumption that the 3rd Respondent holds funds on behalf of the 1st Respondent and that the platform payment channel is a digital payment system that is compatible with many other digital payment channels including the 3rd Respondent’s digital payment channel. She annexed as VO-1 a copy of a payment guide by NEMA showing the various payment channel options on the platform. She asserted that all the funds paid through its channel even in the form of cash are normally deposited to an account controlled by the 2nd Respondent.



The 4th Respondent's case

25. On its part, the 4th Respondent opposed the Petition vide a replying affidavit sworn on 18.12.23 by Samuel Wamaitha its assistant manager, legal services. He deposed that the Petition does not disclose any reasonable cause of action against the 4th Respondent as it is not in any way involved with the collection of the convenience fee charged on the platform. He asserted that there is no proof that the said fee collected is held in the 1st Respondent's accounts held with the 4th Respondent Bank. To him, the Petitioner has not established any grounds to warrant conservatory orders to freeze the 1st Respondent's accounts allegedly held by the 4th Respondent.

The Interested Party's case

26. The Interested Party filed grounds of opposition dated 8.12.23 which are summarize as follows:
- a. That the Petition is improperly filed against the Interested Party and that the court should order it be struck out from the proceedings pursuant to rule 5(d)(ii) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
 - b. That the Petition and Application fail to meet the test for admissibility of constitutional petitions set out in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
 - c. That the Petition and Application do not disclose any right or relief arising out of the role of the Interested Party in the acts complained of by the Petitioner, in other words, they do not disclose a reasonable cause of action against the Interested Party.
27. In rejoinder, the Petitioner filed a supplementary sworn on 25.1.24 in which he reiterated his earlier averments. He stated that eCitizen platform collects approximately Kshs. 36,000,000,000 annually yet the same has never been included in the national budget as revenue collected from the platform. He further asserted that the 2nd Respondent has not demonstrated why the users of the platform are being charged convenience fee by the Government for its own revenue collection. He added that as published by the Central Bank of Kenya, the 1st Respondent and Interested Party were first licensed as authorized payment service providers on 16/3/2023 and 1/1/2016 long after the platform had started collecting convenience fees through the 1st Respondent.
28. On the issue of geographical jurisdiction of this Court, the Petitioner asserted that this Court has unlimited civil and criminal jurisdiction and that being a resident of Kilifi County, this Court is the proper forum. He further denied that the Petition offends the doctrine of sub judice stating that the issues and parties herein are distinct from those in Petition 156 of 2018.
29. The Petitioner further averred that a gazette notice is solely used for purposes of conveying information and should not be treated as a legislative instrument to crystallize the Respondents' illegal actions. He maintained that the convenience fee is superfluous and a duplication as it is a fee being charged to access government services on top of the substantive fee charges for the government services in total violation of public finance laws.
30. The Petitioner also filed a further affidavit which he swore on 6.2.24. He deposed that despite the Respondents claiming that they had vide gazette notice number 17422 of 2023 pro-rated the convenience fee, they continued to charge a flat rate of Kshs. 50/=. He exhibited receipts for parking at Kenyatta National Hospital and the National Museum, Malindi, entry fee, both of which cost Kshs. 50/= and the access fee charged was Kshs. 50/=.



31. Directions were given that the matter proceed to the hearing of the Petition given that the prayers sought therein were similar to those sought in the Notice of Motion. I have given due consideration to the parties' written submissions which were highlighted before me.
32. At the very outset, it is necessary to state that the preliminary objections challenge the Petition mainly for being sub judice Petition 156 of 2018. Due to the nature of the said objection it is critical that the same are determined first. In the event that the preliminary objections are upheld, then the Court will not delve into the merits of the Petition and will down its tools.
33. It is the 1st and 2nd Respondent's case that the present Petition is sub judice Petition No. 156 of 2018.
34. The 1st Respondent drew the similarities in both Petitions. In a bid to demonstrate the similarity the 1st Respondent drew a table which the Court has duly considered.
35. The 2nd Respondent submitted that the issues in both cases substantially overlap and that considering the shared subject matter and parties involved, the sub judice rule is clearly triggered. The 2nd Respondent submitted that the Petitioner has brought this case while a similar case namely Petition 156 of 2018 is subsisting. It was contended that the issues in both matters substantially overlap. As such, the present Petition offends the doctrine of sub judice.
36. On its part, the 3rd Respondent submitted that the Petition is an abuse of the Court process in light of the existence of Petition No. 156 of 2018. It was submitted that being aware of the earlier Petition challenging the convenience fee, the Petitioner ought to have applied to join the same instead of moving to the Court in Malindi. It was further submitted argued that conflicting decisions by courts of coordinate jurisdiction erodes public confidence in the administration of justice. The 3rd Respondent urged the Court to find that the conduct of the Petitioner is an abuse of the court process.
37. The 4th Respondent and Interested Party made no submissions in this issue.
38. The Petitioner submitted that the cause of action and parties in Petition 156 of 2018 are distinctively different from those in the instant Petition and that the parties are different. He argued that the main issues in that petition are procurement of the services of the 1st Respondent and protection of personal data and that the issue of the convenience fee is only peripheral. As such the doctrine of sub judice cannot be invoked in this case. The Court is thus clothed with the necessary jurisdiction to hear and determine the instant Petition.
39. The doctrine of sub judice is captured in Section 6 of the [Civil Procedure Act](#) provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
40. Section 6 deprives the court of jurisdiction to entertain a suit in which the subject matter is also directly and substantially in issue in a previously instituted suit between the same parties. The rationale of this bar is to avoid issuance by courts of concurrent jurisdiction, of conflicting decisions over the same matter. 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.



41. In its advisory opinion in *Kenya National Commission on Human Rights v Attorney General (supra)*, cited by the parties, the Supreme Court pronounced itself on the doctrine of sub-judice as follows:

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.

42. I have looked at the exhibited Petition No. 156 of 2018. The petitioner therein sought the following reliefs:

i. A Declaration that:

- a. In the manner they handpicked and appointed or allowed the 4th, 5th, 6th and 7th respondents to operate, control and/or in any way whatsoever and howsoever to be associated with the eCitizen platform, the 1st, 2nd and 3rd Respondents violated *the Constitution* of Kenya, 2010, the *Public Procurement and Asset Disposal Act*, 2015, and the *Public Finance Management Act*, 2012.
 - a1. Because the IFC handed the ecitizen portal to the Government of Kenya with all its licences and with no strings attached, and also handed over the permission to use and even replicate the portal, no third party, including the 4th, 5th, 6th and 7th respondents, can lay any ownership claim of any shade or colour or form on the portal which, from inception, was government property and which remains government property.
 - a2. Since the National Treasury did not approve or authorize Goldrock Capital Limited to collect funds on behalf of the Government in compliance with the *Public Finance Management Act*, 2012 and the *Public Procurement and Asset Disposal Act*, 2015, the entity collected the funds illegally.
 - a3. Webmasters Africa unlawfully and unconstitutionally subcontracted Goldrock Capital Limited to collect funds on behalf of the Government.
 - a4. The Kshs.50/- charged per transaction on eCitizen.go.ke is illegal and unlawful to the extent that is not a pro-rated percentage of the payment made contrary to the revoked Gazette Notice No.9290 OF 204, which enacted it.
 - a5. Pursuant to Article 210 of *the Constitution*, as read together with Article 114 and section 7 of the Sixth Schedule to *the Constitution*, subsidiary legislation cannot be used to impose, waive or vary any tax or licensing fee.



- a6. All digital payment options on e-Citizen MUST be authorized and designated collectors or revenue for an on behalf of the Government of Kenya.
 - a7. For purposes of protecting the personal data of members of the public who use the portal, the Government must take complete control of eCitizen portal, and it must be run by Government employees NOT private entities.
 - a8. By allowing third parties (private entities) to control and/or operate the eCitizen portal, the Government violated Article 31 of *the Constitution* as read together with the *Data Protection Act, 2019*.
 - a9. The Government violated the Public Procurement and Disposal Act, 205 when it single sourced and appointed Pesaflo Limited to collect funds on the Ecitizen portal.
 - b. Gazette Notice No.9290 of 23rd December, 2014 is was a void law.
 - c. The single sourcing/selective and direct procurement of digital payment options for the government's e-citizen.go.ke digital payments platform from Mpesa, Airtel Money, Visa Card, MasterCard, Eazzypay, E-agent, KCB Cash, and Equity Cash service providers iswas both unlawful unconstitutional and, therefore, invalid, null and void ab initio.
 - C1. The digital payment options for the government's e-citizen.go.ke digital payments platform should be open to all digital payment service providers and payment service integrators.
- (ii) An Order:
- a. Annulling in its entirety the single sourcing/direct procurement of digital payment options for the government's e-citizen.go.ke digital payments platform from Mpesa, Airtel Money, Visa Card, MasterCard, Eazzypay, E-Agent, KCB cash, and Equity Cash.
 - b. Suspending the annulment in Order (a) for a period not exceeding six months to allow the respondent time to regularize the procurement from private service providers of digital payments options for e-citizen and to open it up to all digital payment service providers and payment service integrators.
 - c. Compelling the 1st Respondent to fairly, transparently, competitively and cost-effectively procure digital payments options for the government's eCitizen.go.ke strictly according to the law.
 - d. Compelling the 1st Respondent to make a full disclosure of the amounts of money the Government has raised on the eCitizen portal and how the money has been used, including the amounts paid to the current service provides since the e-Citizen portal was set up to date.
 - d1. Compelling the 4th, 5th, 6th and 7th Respondents to make full disclosure of the money they have collected on the Ecitizen.
 - d2. Revoking the appointment of Pesaflo to collect funds on the Ecitizen portal.



- d3. Compelling the 4th, 5th, 6th and 7th Respondents to refund any and all the monies they have been paid in relation to the eCitizen portal.
- d4. Compelling the Government to protect the personal data of members of the public who use the eCitizen portal, by eliminating any third parties and taking full and complete control of the eCitizen portal within a period three (3) months from the date of issuing the orders.
- e. Compelling the respondent to bear the costs of this suit.

(iii) Any other relief the court may deem just to grant.

43. A careful look at the 2 Petitions will show that they both challenge the constitutionality of the convenience fee that is not a pro-rated percentage of the amount payable for the service sought and further that the convenience fee is not anchored in law. The 2 Petitions challenge the collection of the convenience fee by a private entity and that procurement of the said private entity which they allege was in violation of Article 227 of *the Constitution* and the *Public Procurement and Asset Disposal Act*. Both Petitions seek an order for disclosure and accounting of the money collected on the eCitizen platform. The issues raised in the instant Petition are clearly also directly and substantially in issue in the previously instituted Petition.

44. The test for the sub-judice rule was aptly stated by Mativo, J. (as he then was) in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR as follows:

The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit.

45. Applying the test, the question to then ask is, will a decision in Petition 156 of 2018 on the render the present Petition moot? Would it operate as res judicata in the present Petition? It certainly would.

46. It may be argued that the 2 petitions are not between the same parties. The Petitioners are different. The Respondents are also different save for the 1st and 2nd Respondents and the Interested Party herein who are in both petitions.

47. The orders sought in both Petitions are orders in rem. In Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR cited in the case of Abukar G Mohamed v Independent Electoral and Boundaries Commission [2017] eKLR, it was held as follows:

It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

48. As indicated, any orders made in this Court on the issues raised will be orders in rem and will affect the issues in Petition 156 of 2008. That petition is before a court of concurrent jurisdiction. To proceed to make a determination on the issues in this Petition which are directly and substantially in issue in that petition therefore, is expose the 2 courts to risk of contradictory verdicts. This must be avoided.



49. In the case of Republic v Paul Kihara Kariuki, Attorney General (supra), Mativo, J. (as he then was) stated:

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.[11]

50. Any prayers granted herein would most certainly impact that petition. Sustaining the instant Petition cannot therefore be defended as it is not possible to interrogate and determine the matter herein without delving into the issues pending in Petition 156 of 2018.

51. Further, this Petition unfairly burdens the 1st and 2nd Respondents by requiring them to defend themselves twice, which as Mativo, J (as he then was) stated, is an affront to the doctrine of sub judice. Additionally, to entertain and determine this Petition will militate against the principle of efficient use of the available judicial resources, which can be better deployed elsewhere.

52. Applying the principles discussed above and guided by the authorities cited therefore, I find and hold that this Petition offends the doctrine of sub judice. Section 6 of the *Civil Procedure Act* bars this Court from proceeding with this latter matter. Accordingly, and in order to avoid the risk and absurdity of arriving at conflicting decisions, (see *Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others* [2018] eKLR), I decline jurisdiction to entertain the Petition herein. However, rather than staying this matter pending the conclusion of Petition 156 of 2018, my view is that the interests of justice will be better served if both matters are heard together.

53. In the end, I uphold the preliminary objections and make the following orders:

- i. This Petition is hereby transferred to the Constitutional and Human Rights Division in Nairobi, to be heard together with Petition No. 156 of 2018 *Okiya Omtata Okiiti v The Cabinet Secretary, National Treasury & Others*.
- ii. The matter shall be mentioned before the Presiding Judge of that Division on 10.6.24 for directions.
- iii. No order as to costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF MAY 2024

M. THANDE

JUDGE

