



**Mobile Pay Limited v Governor Central Bank of Kenya & another (Constitutional
Petition E028 of 2023) [2024] KEHC 8940 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E028 OF 2023**

DO CHEPKWONY, J

JULY 24, 2024

**IN THE MATTER OF: ARTICLES 10, 40, 47 AND
232 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

MOBILE PAY LIMITED PETITIONER

AND

GOVERNOR CENTRAL BANK OF KENYA 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

RULING

1. This ruling relates to the petitioner's notice of motion application dated June 9, 2023 and the respondents notice of preliminary objection dated June 22, 2023.
2. In its Notice of Motion, the Petitioner seeks for the following orders: -
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That Pending the hearing and determination of this Petition, the Honourable Court issue an order suspending the Gazette Notice dated October 26, 2021, volume CXXIII-No. 217 that revoked the Applicant's authorization to conduct or Carry out Business of Payment Services in Kenya for the year 2022.
 - e. That the costs be provided for.



3. The Applicant's case, as presented in the application and the supporting affidavit by Oscar Wambugu Ikunu, the Applicant's Director, is that in 2010, the applicant was licensed to launch a product known as Tangaza e-Commerce and Money Transfer Services. This license allowed the Applicant to conduct payment services. Since then, the Applicant had been operating the payment services business by applying for yearly authorizations until 26th October, 2021, when the Respondents revoked the Applicant's authorization to continue these services. Following this, the Respondent took over the Applicant's business premises located at Fortis Suites No. 608, Upper Hill, Nairobi, along with its operational systems.
4. The Applicant asserts that the Respondent has never returned the premises and systems, including physical files, which amounts to a violation of the Applicant's property rights under article 40 of the Constitution. The Applicant subsequently applied for renewal of the authorization to conduct payment service business, but no action has been taken despite numerous follow-up letters, including those dated November 1, 2021, and November 18, 2022. The Applicant argues that the Respondents' failure to respond violates the right to fair administrative action under article 47 of the Constitution and the principles of Public Service under article 232 of the Constitution. Due to these violations, the Applicant is unable to carry on its business and is at risk of being sued by its customers and creditors.
5. The application is opposed through a replying affidavit and a supplementary affidavit sworn by Walter Onyino on June 23, 2023, and 6th July, 2023, respectively. The Respondent's case is that the Applicant was granted authorization to conduct payment services in Kenya in line with the National Payment System Act, 2011, (the Act) and the National Payment System Regulations, 2014, which also allow the Bank to revoke the authorization at any time. That the Applicant's license was revoked under section 15 of the Act and regulation 10 due to persistent violations of the Act, particularly regulation 23 (prohibiting outsourcing of the Applicant's services), regulation 29(3) requiring submission of audited financial statements and a system security audit, and Regulation 10 (mandating that the payment service provider hold core capital managed in accordance with the trust deed).
6. Furthermore, the authorization/license is renewed for a period of twelve months, and since the last authorization held by the Applicant ended in 2021, it cannot be renewed as it is now overtaken by events. Additionally, since the license revocation by the 2nd Respondent is an administrative action, its review should have been sought within six months as per section 9(3) of the Law Reform Act.
7. The Respondents further contend that the Act provides for an internal dispute resolution mechanism under Section 21, recommending first internal resolution, then mediation, and finally arbitration. Therefore, the Applicant should have exhausted these alternative dispute resolution mechanisms before filing the present case. Consequently, the Petition and the Application contravene section 9(2) of the Fair Administrative Actions Act, which precludes the court from reviewing an administrative action unless internal mechanisms, including review and appeal, are first exhausted.
8. The Respondents also claim they returned the premises and tools of trade, including computers, to the Applicant, and thus, the allegation that they are still occupying the premises is false and intended to mislead the court. Additionally, a similar claim was made by the Applicant's affiliate, Our Open Market Limited, in Petition No. E300 of 2022, which is still pending.
9. In further opposition to the application, the Respondents filed the Notice of Preliminary Objection dated 22nd June, 2023 raising the following grounds: -
 - a. The Petition is an abuse of process as it does not disclose any violation of the Constitution.



- b. The alleged dispute is subject to the dispute settlement provision as provided for under section 21 of the [National Payment Systems Act](#) No.39 of 2011.
 - c. That this Honourable Court does not have jurisdiction to entertain any proceedings therein save in compliance with the [Fair Administrative Act](#) No. 4 of 2015.
 - d. In any event, the issues raised are the subject matter of another pending Petition No. E300 of 2022: Our Open Market Limited, v Central Bank of Kenya filed in the High Court at Nairobi, in the Constitutional Division.
10. The Applicant filed a Supplementary Affidavit sworn by Oscar Wambugu Ikunu on June 30, 2023, stating that the Petition and Application were filed under the relevant constitutional provisions, thus the court has jurisdiction to hear it. He asserted that no disputes are pending between the Applicant or its agents, as alleged, since Our Open Market Limited is a distinct entity. Lastly, he argued that the dispute did not fall under section 21 of the [National Payment System Act](#), as the Applicant is not a designated payment system operator but only a payment service provider.
 11. This Court directed that the Application be canvassed by way of written submissions. Both parties complied and filed their respective submissions, which have duly been considered.

Analysis and Determination

12. Having carefully considered the Petitioner's application, the supporting and rebuttal affidavits, and the parties' submissions, the main issue for determination is whether the Petitioner/Applicant has made a case to justify suspending the Gazette Notice dated 26th October, 2021.
13. However, before addressing this issue, the court must first consider the Respondents' Preliminary Objection dated the 22nd June, 2023. This objection challenges the court's jurisdiction to hear and determine the Application and the Petition on the grounds that the Petition fails to disclose any constitutional violations, the Respondent did not adhere to the doctrine of exhaustion, and the Petition contravenes the doctrine of sub-judice.
14. However, before delving into the merits of the objection, it is crucial to revisit the established principles in our jurisprudence regarding what constitutes a preliminary objection. In the case of [Oraro v Mbaja](#) [2005] 1 KLR 141, the court noted that a preliminary objection must not deal with disputed facts and must not be based on factual information that requires testing by rules of evidence.
15. In the locus classicus case of [Mukisa Biscuits Manufacturing Ltd -v- West End Distributors](#) (1969) EA 696, the Superior Court observed thus: -

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

In the same case Sir Charles Newbold, P. stated:-

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising



of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

16. Following the above decision, a Preliminary Objection should always be on a point of law apparent on the face of the pleadings without extensive analysis of facts and circumstances. And if argued at a preliminary stage it might dispose the suit. It usually implies that the facts as pleaded are correct save for the legal barrier to the sustenance of the suit.
17. In the Present case, the Preliminary Objection challenges the jurisdiction of the court and in this court’s view, it is sustainable. As to whether it is merited, the first ground is based on want of form to institute a suit, arguing that the issues raised by the Petitioner do not disclose any constitutional violations to meet the threshold for a Constitutional Petition. However, order 2 rule 14 of the *Civil Procedure Rules, 2010* provides that no technical objection may be raised to any pleading on the ground of any want of form. Nonetheless, the Applicant alleged violation of its rights to property claiming that the Respondents raided its premises and took over its business premises and tools of trade. Therefore, in this court’s view, the issue raised can be canvassed during the hearing of the petition where the court will determine whether the petitioner’s rights have been violated or whether the petition meets the set threshold.
18. The second ground relates to the doctrine of exhaustion. This principle was upheld in the case of *Speaker of National Assembly v. Karume* [1992] eKLR, where the court held that where a clear procedure for redress is prescribed by statute, that procedure should be strictly followed. Additionally, Section 9 (2) of the *Fair Administrative Action Act, 2015* codifies the doctrine of exhaustion of administrative remedies with which also resonates with article 159 of the *Constitution* as these provisions encourage the use of alternative dispute resolution. In the case at hand, the Respondent has argued that under section 21 of the Act provides for dispute resolution mechanisms. The said Section Provides as follows: -

[21]. Settlement of disputes

- 1) If any Central Bank settlement system participant considers itself aggrieved by a decision taken by the Central Bank under any provision of this Act, the matter shall be deemed to constitute a dispute between that Central Bank settlement system participant and the Central Bank, which dispute shall be settled as provided in this Section.
- 2) The Central Bank settlement system participant concerned shall, within ninety days after the decision of the Central Bank, in writing, furnish the Central Bank with full particulars of the grievance, and thereafter the Central Bank settlement system participant and the Central Bank shall endeavour to settle the dispute within seven business days of the receipt by the Central Bank of those particulars.
- 3) If the Central Bank settlement system participant and the Central Bank do not settle the dispute as provided for under subsection (2), they shall refer the dispute to mediation within a further period of ten business days.
- 4) The following provisions shall apply to mediation under subsection 3 —
 - a) the Central Bank settlement system participant concerned and the Central Bank shall agree on a mediator;
 - b) the mediator shall familiarize himself with the position held by the Central Bank settlement system participant concerned and the Central Bank, respectively;



- c) the mediator, the Central Bank settlement system participant concerned and the Central Bank shall discuss the dispute at a meeting attended by them all;
 - d) the Central Bank settlement system participant concerned and the Central Bank shall, at or following such meeting, and with the aid of the mediator, attempt to settle the dispute by consensus; and
 - e) the Central Bank settlement system participant concerned and the Central Bank shall share the mediator's costs in such proportion as they may agree.
- 5) If the Central Bank settlement system participant concerned and the Central Bank are unable to settle the dispute by consensus in accordance with subsection (2) or (4), the dispute shall be referred—
- a) to a single arbitrator to be agreed upon by the Central Bank settlement system participant and the Central Bank; or
 - b) failing such agreement, to an arbitrator appointed, at the request of the Central Bank settlement system participant or the Central Bank, by a recognised body concerned with the facilitation and promotion of the resolution of disputes by means of mediation or arbitration
- 6) An arbitrator referred to in subsection (5) shall, as far as possible, be a person appointed on account of his knowledge of the law and payment systems.
- 7) The provisions of the Arbitration (Act Cap. 49) or any revisions thereof, shall apply, mutatis mutandis, to an arbitration undertaken in accordance with subsection (5).
- 8) The decision of the arbitrator shall be final and binding on the Central Bank settlement system participant concerned and the Central Bank.
19. However, the Applicant submitted that it was not subject to the provisions under section 21 of the said Act since it was not a Central Bank Settlement System Participant but operated as a Payment Service Provider.
20. The Act defines a "Central Bank of Kenya Settlement System Participant" to include the Central Bank, a bank, an institution, a branch of a foreign institution, or a designated payment system operator that participates in the Central Bank of Kenya settlement system. It defines a "Payment Service Provider" as a person, company, or organization involved in sending, receiving, storing, or processing payments, or providing other payment services through any electronic system, or managing a public switched network for payment services. This also includes any entity that processes or stores data on behalf of payment service providers or their users. Based on these definitions, this court is persuaded that a Payment Service Provider is distinct from a Central Bank System Participant and, therefore, not subject to the mechanisms provided for under section 21 of the Act.
21. Lastly, the Respondents Challenged the court's jurisdiction to hear the matter in view of the existence of Petition No. E300 of 2022: Our Open Market Limited, v Central Bank of Kenya filed in the High Court at Nairobi, in the Constitutional division. Section 6 of the Civil Procedure Act cap 21, provides for the doctrine of *sub judice* 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.”

22. It serves repetition to reiterate the principle encapsulated Section 6 above that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed. 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.
23. In this context, it is common ground that the parties in Petition No. E300 of 2022 are Our Open Market Limited and the Central Bank of Kenya. The Petitioner herein, Mobile Pay Limited, and the 1st Respondent are not parties to the earlier Petition, although it is alleged that Mobile Pay Limited and Our Open Market Limited are affiliated companies which can claim under the same head. In this court’s view, although Mobile Pay Limited and Our Open Market Limited share a common director, the principle established in the case of *Salmon v. Salmon* [1895-9] All ER 33 asserts that a company is a separate and distinct entity from its directors and shareholders. Thus, having reviewed both petitions, there is no indication that either company was authorized to represent the rights of the other, it cannot be concluded that the two suits are between the same parties. As to whether the subject matter in the two suits is the same, it is acknowledged that both suits stem from the 2nd Respondent’s notice and decision to revoke the Petitioner’s license via the Gazette Notice dated October 26, 2021. However, in Petition No. E300 of 2022, the Petitioner seeks compensation for the loss resulting from the shutdown of its software services, while in this suit, the Petitioner primarily seeks the reinstatement of its license. Since the license was issued specifically to the Petitioner herein, the court is of the view that a case for its reinstatement could not be properly made in the earlier Petition.
24. The basic purpose and underlying objective of sub judice is to prevent courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations involving the same cause of action, subject matter, and relief. In this case, although this suit and Petition No. E300 of 2022 arise from the same series of facts, the reliefs sought are different and cannot be properly adjudicated in the same suit. Therefore, it would be improper to impose the doctrine of sub judice in this circumstance. The correct course would have been to seek the transfer of this suit to the Milimani Constitutional Division for consolidation with Petition No. E300 of 2022. For these reasons, this court does not agree with the Respondents that the instant petition is sub judice to Petition No. E300 of 2022.
25. Having considered all the grounds in the preliminary objection and found no merit in any of them, this court proceeds to dismiss the Respondents’ Notice of Preliminary Objection dated 22nd June, 2023.
26. The court now proceeds to the issue on whether the Petitioner/Applicant has made a case to warrant the suspension of Gazette Notice dated 26th October, 2021 which suspended its authorization to operate as a payment service provider. Essentially, the Petitioner seeks the reinstatement of its authorization to trade as a Payment Service Provider.
27. The court now proceeds to the issue on whether the Petitioner/Applicant has made a case to warrant the suspension of Gazette Notice dated 26th October, 2021, which suspended its authorization to operate as a payment service provider. Essentially, the Petition seek the reinstatement of its authorization to trade as a payment service provider. However, it is this court’s view that the issue may



be properly articulated alongside the prayers in the main Petition. In this regard, the court directs the parties as follows:-

- a. The parties do expedite the hearing of the main Petition.
- b. The Respondents are granted fourteen (14) days leave to file and serve a response to the Petition.
- c. The parties to dispose of the Petition by way of written submissions.
- d. The Petitioner be and his hereby granted seven (7) days leave to file and serve a further affidavit alongside written submissions upon being served with the responses by the Respondents.
- e. The Respondents are equally granted seven (7) days corresponding leave to file and serve their written submissions upon being served with the Petitioner's submission.
- f. Mention on August 26, 2024 for parties to confirm compliance and further directions before the Deputy Registrar.

It is so ordered.

DATED AND SIGNED AT KIAMBU THIS22NDDAY OF.....JULY....., 2024.

D.O CHEPKWONY

JUDGE

DELIVERED AT KIAMBU THIS ...24TH ...DAY OF ...JULY., 2024.

ABIGAIL MSHILA

JUDGE

In the presence of:

Mrs. Omondi holding brief for Omollo for the Petitioner

No appearance for the Respondents

Court Assistant - Mourice

