

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA (P), TUIYOTT & NYAMWEYA, JJ.A.)

**CIVIL APPEAL (APPLICATION) NO. E323 OF
2025**

BETWEEN

**CABINET SECRETARY NATIONAL TREASURY &
ECONOMIC PLANNING 1ST
APPLICANT CABINET SECRETARY, INFORMATION
COMMUNICATION & DIGITAL ECONOMY 2ND
APPLICANT CABINET SECRETARY, EDUCATION
3RD APPLICANT HON. ATTORNEY GENERAL
..... 4TH APPLICANT**

AND

**DR. MAGARE GIKENYI J. BENJAMIN.....1ST RESPONDENT
CABINET SECRETARY, INTERIOR &
NATIONAL ADMINISTRATION 2ND
RESPONDENT
KENYA REVENUE AUTHORITY.....3RD
RESPONDENT COUNCIL OF GOVERNORS
4TH RESPONDENT KENYA SECONDARY SCHOOLS HEADS
ASSOCIATION 5TH
RESPONDENT KENYA PRIMARY SCHOOLS
HEADS ASSOCIATION 6TH
RESPONDENT KENYA PARENTS ASSOCIATION
7TH RESPONDENT CONSUMER FEDERATION OF KENYA 8TH
RESPONDENT
KENYA UNION OF POST
PRIMARY SCHOOL TEACHERS 9TH
RESPONDENT
LAW SOCIETY OF KENYA.....10TH**

**RESPONDENT OPERATION LINDA JAMII
(PUBLICLY KNOWN AS OPERATION LINDA GATUZI)
(Sued through its officials) 11TH
RESPONDENT**

*(Being an application for stay of execution of the decision and orders of the orders of the High Court of Kenya at Nairobi (**Mwita, J.**) delivered on 1st April 2025*

in

Petition No. E059 of 2024)

RULING OF THE COURT

1. Before this Court is a Notice of Motion dated 4th April 2025, which is brought by the applicants pursuant to the provisions of section 3A and 3B of the Appellate Jurisdiction Act as well as rule 5(2)(b), 44 and 45 of the Rules of this Court. The main order sought in the application is a stay of execution of the judgement and decree of the High Court at Nairobi (***E.C. Mwita, J.***) delivered on 1st April 2025 in **Nairobi High Court Constitutional Petition No. E059 of 2024**, in relation to the Court's declaration of unconstitutionality of the convenience fees payable upon transaction of the e-Citizen payment platform, pending the lodging, hearing and determination of the intended appeal.
2. The background to this application can be traced to a circular issued by the Ministry of Education dated 31st January 2024,

reference number **MOE.CONF/G6/20/48**, addressed to all

principals of national schools through the County Directors of Education. The circular informed the recipients that the Directorate of e-Citizen in collaboration with the Information Communication Technology Authority (ICTA), the Ministry of Information, Communication and the Digital Economy, and the National Treasury, was coordinating the onboarding of all government services onto the e-Citizen platform to enhance service delivery. In compliance with this requirement, it was directed that parents and guardians make fee payments for learners through the e-Citizen platform. To facilitate the implementation, school principals were required to submit their schools' bank account details namely, account name, bank, account number, bank code, and branch code to the Director General, State Department for Basic Education, by 6th February 2024. The circular, which was signed by Dr. Belio R. Kipsang, CBS, Principal Secretary, Ministry of Education, State Department for Basic Education, signaled the formal commencement of the government's plan to digitize school fee payments through the e-Citizen platform.

3. This circular and/or directive was challenged by **Dr. Magare Gikenyi J. Benjamin** (hereinafter referred to as “**Dr. Magare**”) through **Petition E059 of 2024** wherein he contended that the directive was unconstitutional, unlawful, and discriminatory. He asserted, *inter alia*, that the directive was introduced without public participation, lacked a legal framework, and imposed an illegal Kshs. 50 convenience fee per transaction.
4. In addition, Dr. Magare also questioned the legality of centralizing government revenue collection, including funds meant for counties and schools, under a single Treasury account managed through e-Citizen. The petition thus raised broader questions about transparency, data protection, administrative fairness, and the limits of executive power in implementing digital financial systems.
5. Dr. Magare thus contended that the directive was unconstitutional because it violated **Articles 10, 27, 43,** and **201** of the Constitution. He postulated that the lack of public participation made the policy process illegitimate and that the requirement for payment of school fees via e-Citizen discriminated against parents in rural or marginalized

areas

with limited access to internet or banking services and those parents who also paid school fees in kind. He also contended that the imposition of a Kshs. 50 convenience fee was an illegal levy without legal basis, was double taxation, and allowed other entities to collect funds for the national government other than the Kenya Revenue Authority. He maintained that the e-Citizen platform, which was being used for collection was operated by a private company, Webmasters Kenya Ltd, raising questions about data security, accountability, and the lawful handling of public funds.

6. The respondents, including the Cabinet Secretary for the National Treasury & Economic Planning, the Attorney General, and other state agencies, opposed the petition. Their contention was that the e-Citizen platform had been lawfully established to improve efficiency, transparency, and accountability in government revenue collection under the Public Finance Management Act. They contended that the system was a digital reform consistent with Article 201 of the Constitution, promoting openness and prudent use of public resources. They maintained that the Kshs. 50 convenience

fee did not amount

to a tax but was a modest administrative charge intended to cover system maintenance costs, which, in any event, was applied on a prorated basis. They also argued that the government had conducted adequate sensitization, and that the directive did not discriminate against anyone.

7. On its part, the Kenya Revenue Authority (**KRA**) contended that the Kshs. 50 convenience fee was not a tax, and thus lay outside its mandate under section 2 and Parts I and II of the First Schedule to the KRA Act, thus rendering the claim of double taxation unfounded.
8. The Kenya Union of Post Primary Education Teachers (**KUPPET**), which was an interested party, supported the petition, contending that the directive would negatively affect institutions led by its members as it lacked a legal and operational framework and was introduced without public participation. KUPPET also added that the circular failed to clarify how funds would be allocated; applied only to national schools; ignored alternative payment methods such as fees in kind; and was therefore discriminatory and contrary to Article 27 of the Constitution.

9. The Law Society of Kenya (**LSK**), which was also an interested party, supported the petition, contending that the directive lacked a legal basis and was issued without public participation as required by the Constitution. LSK cited Auditor General reports from 2022 and 2023 that exposed governance gaps in the e-Citizen platform, including absence of an IT policy, inadequate oversight, and weak data integrity controls that risked revenue leakage and poor accountability.
10. In his judgment delivered on 1st April 2025, **Mwita, J.** examined whether the government's directive and the associated convenience fee complied with constitutional requirements of legality, public participation, non-discrimination, and transparency. He noted that while digitalization of revenue collection was consistent with good governance principles, the process leading to this particular directive lacked the procedural fairness required by the Constitution. The learned judge found that the government failed to demonstrate that it had consulted key stakeholders such as parents, schools, or county governments before issuing the directive. He also held that the e-Citizen

platform's ownership and operational

structure raised legitimate concerns, as documents indicated that a private company, Webmasters Kenya Ltd, remained deeply involved in its management, contrary to the principles of public finance accountability.

11. The learned judge thus held that compelling parents to pay school fees through the e-Citizen platform was unconstitutional because it was implemented without public participation, was discriminatory to those unable to access or use digital platforms, and violated the principle of inclusivity under Article 27.
12. As regards the convenience fee of Kshs. 50, the court observed that the government does not engage in business with its citizens but provides services at minimal cost, which should cover the chosen mode of payment. It held that the government cannot compel citizens to use a specific payment platform and at the same time require them to fund its maintenance through an extra fee. According to the learned judge, such a demand was irrational, unconscionable, and a form of double charging. The court therefore agreed with the Dr. Magare that imposing a

convenience fee for a mandatory payment system was unlawful and made government services needlessly expensive.

13. In the end, the court declared the directive requiring payment of school fees through e-Citizen unconstitutional, null, and void. It quashed the circular issued by the Principal Secretary, Ministry of Education, directing high school principals that parents pay school fees through e-citizen payment platform, and prohibited the respondents from enforcing or implementing the directive. The court also declared that the Kshs. 50 convenience fee was an illegal charge and ordered that it should not be levied on citizens.
14. Being dissatisfied with the judgment of the High Court, the applicants intend to lodge an appeal before this Court against part of the said judgment as is evinced by the notice of appeal dated 1st April 2025.
15. In this application which is supported by the grounds on the face thereof and by an affidavit sworn by **Dr. Chris K. Kiptoo**, Principal Secretary, The National Treasury, the applicants contend that their intended appeal raises several *bona fide* and substantial issues of law and fact deserving

full appellate

consideration. They contend, *inter alia*, that the learned judge erred in relying on an affidavit commissioned by an unqualified advocate; in basing his findings on an Auditor General's report which introduced issues not pleaded, thereby denying them a fair hearing; in finding that ownership and operational control of the e-Citizen platform were unclear despite evidence showing it was fully owned and managed by the government; and for addressing matters not pleaded, including data breach vulnerabilities and the validity of a handover agreement, which were not issues before the court.

16. In addition, the applicants contend that the finding that public participation was necessary before issuing the impugned directive was erroneous because the directive merely aligned with existing fiscal management policies under section 12(1)(e) and (2) of the Public Finance Management Act. They maintain that public participation was an ongoing process integrated throughout the development and operationalization of the e-Citizen system, and that the finding of discrimination ignored the multiplicity of payment channels such as mobile money, credit cards,

bank transfers, and agency banking which were

available to all users. In their view, the learned judge failed to appreciate that the purpose of the directive was to promote transparency and accountability in the management of school fees and not to disadvantage any segment of the population.

17. On the foregoing grounds, the applicants submit that they have demonstrated that their intended appeal raises arguable issues worthy of consideration by this Court.
18. On the nugatory aspect, the applicants contend that unless the impugned judgment is stayed, the intended appeal will be rendered nugatory and the government will suffer grave prejudice. They contend that the e-Citizen platform is designed to be self-sustaining and operates without budgetary support from the exchequer, relying entirely on the convenience fee to meet recurrent costs such as hosting, system maintenance, SMS support, and connectivity. They aver that the prohibition of the convenience fee will deprive the platform of its operational funding, leading to the disruption of over 15,000 government services accessed by approximately 120,000 users daily. The applicants assert that the government has contractual obligations to the

platform's service providers, who may

terminate their engagement upon non-payment, which would cripple the system's functionality and paralyze the delivery of public services. They therefore urge this Court to preserve the *status quo* in the public interest, asserting that a stay is necessary to ensure the continued operation of critical government services and to prevent the intended appeal from being rendered a mere academic exercise.

19. The application is opposed by Dr. Magare. In his replying affidavit, he avers that the application is without merit and is an abuse of the court process, contending that granting a stay as sought would perpetuate an illegal and fraudulent charge imposed on Kenyans. He avers that the applicants have approached this Court with unclean hands, having failed to comply with the High Court's orders barring them from collecting the Kshs. 50 convenience fee. It is averred that the applicants continue to collect the impugned fee in defiance of the judgment and have thus come to court with unclean hands.
20. On arguability, Dr. Magare avers that the intended appeal is not arguable and raised no substantial questions of law or fact. He depones that the High Court's judgment was

well-reasoned,

anchored in the Constitution, and based on clear findings that the e-Citizen convenience fee lacked legal basis and was imposed without public participation. He contends that the applicants have failed to identify any error in the court's interpretation of Articles 10, 27, 201, and 210 of the Constitution and are merely seeking to sanitize an unlawful and exploitative charge on the public. He further avers that the intended appeal is frivolous and filed in bad faith to delay compliance with lawful court orders. Relying on the Auditor General's reports filed before the High Court, Dr. Magare avers that the e-Citizen platform is not wholly government-owned, as claimed, but controlled by private entities, thereby confirming the High Court's concerns about lack of accountability and transparency. In his view, the issues raised in the application are factual and settled, leaving no arguable ground for review on appeal.

21. On the nugatory aspect, Dr. Magare avers that the government will not suffer any irreparable harm if the stay is refused since the judgment only required compliance with the law by ceasing to collect an illegal fee. He avers that even assuming, without

conceding, that the High Court judgment affects the financing of the e-Citizen platform, its functionality remains secure since the government, as a perpetual entity, can finance its projects through lawful means such as reallocations or supplementary budgets. He maintains that the appellants' claim that the judgment could cripple government operations is exaggerated, noting that the court only declared the Kshs. 50 convenience fee unconstitutional and did not invalidate the e-Citizen platform itself.

22. He further depones that if the Court denies the stay and the appeal later succeeds, the government can still meet any valid contractual obligations to the platform's service providers. However, if the stay is granted and the appeal ultimately fails, it would be nearly impossible to recover the unlawfully collected funds from the private actors behind the platform. Dr. Magare asserts that public interest and justice favour denying the stay to stop the continued exploitation of citizens, accusing the applicants of colluding with shadowy entities to perpetuate a fraudulent scheme contrary to Article 209 of the Constitution. He concludes by deponing that the application is frivolous,

vexatious, and an abuse of the court process, and urges this Court to dismiss it in its entirety with costs.

23. **KUPPET**, the 9th respondent, also opposes the application through a replying affidavit sworn by **Akelo M.T. Misori**, its Secretary-General. From the onset, it is averred that the application is defective, misconceived, and bad in law. In this regard, it is averred that the impugned judgment is clear, lawful, and properly reasoned, having been reached after the trial court carefully evaluated the evidence and applied the law correctly. On this basis, it is deponed that the grounds raised in the application as grounds of appeal should have been canvassed before the High Court and that the applicants, having failed to do so, are guilty of indolence and cannot now seek this Court's indulgence.

24. KUPPET further contends that the applicants have approached this Court with unclean hands, as they continue to charge and collect the Kshs. 50 convenience fee despite the High Court's express declaration that it is illegal. It is averred that parties who defy valid court orders cannot benefit from equitable reliefs, emphasizing the maxim that "he who seeks equity must do

equity.” According to KUPPET, the applicants are acting in bad faith and are not motivated by public interest, but rather by a desire to sustain an unlawful practice that burdens citizens.

25. It is also averred that the applicants have not demonstrated any substantial loss that they would suffer if the stay is denied, noting that the burden of proving such loss lies entirely on them. KUPPET emphasizes that court judgments are not issued in vain, and that continued defiance of the High Court’s orders undermines the rule of law. KUPPET warns that the its membership of about 200,000 teachers across the country would be prejudiced if the stay is granted, as they are directly involved in implementing government fee payment directives and would be caught in administrative uncertainty.

26. In conclusion, it is averred that the applicants have not met the threshold under rule 5(2)(b) of this Court’s Rules for grant of stay of execution. KUPPET characterizes the application as frivolous, vexatious, and an abuse of the court process, intended only to frustrate lawful compliance with the High Court’s decision and ought therefore to be

dismissed in its entirety with costs.

27. At the hearing of this application, the applicants were represented by Deputy Chief State Counsel, **Mr. Kaumba**, while the 1st respondent, **Dr. Magare**, appeared in person. The 3rd respondent, the KRA, was represented by learned counsel **Mr. Ngetich Kipngeno**; the 9th respondent was represented by **Mr. Nyamagwa** who held brief for **Ms. Akello**, and the 10th respondent, LSK, was represented by learned counsel **Mr. Bosire**. All counsel present briefly highlighted their clients' written submissions. For purposes of this ruling, we shall only set out the key points advanced by each party without regurgitating the entirety of their arguments which was, substantially, a reiteration of the different positions already summarized hereinabove.

28. Mr. Kaumba for the applicants contended that the application met the three-part test for stay, namely, arguability, nugatory effect, and public interest. He contended that the intended appeal raised serious issues, including the competence of the High Court petition and the court's failure to consider evidence of public participation in the rollout of the e-Citizen platform.

He further faulted the judge for relying on issues introduced by an interested party.

29. On the nugatory and public interest limbs, he contended that the e-Citizen system, which was established under Section 12(1)(e) of the Public Finance Management Act, was a self-sustaining platform funded through prorated convenience fees of between five and fifty shillings, which were lawful service charges rather than taxes. He cautioned that suspending the fees would cripple over 15,000 government services and breach contractual obligations with service providers. He also clarified that education and health institutions were exempted and that all collections were lawfully managed by the National Treasury. He urged this Court to grant the orders sought in the public interest to prevent disruption of essential services.

30. **Mr. Ngetich** supported the application and aligned himself with the submissions made by the applicants' counsel. He submitted that KRA services were among those offered through the e-Citizen platform and that any disruption to the system would directly affect its operations. On arguability, he contended that even a single *bona fide*

ground of appeal is sufficient and

contended that the High Court failed to consider whether the 1st respondent improperly introduced new issues in a supplementary affidavit that were not part of the initial pleadings. He contended that by doing so, the High Court violated the applicant's right to a fair hearing and fair administrative action. He urged this Court to allow the application as prayed.

31. Opposing the application, **Dr. Magare** reiterated that the applicants had approached the court with unclean hands since they continued to levy the impugned convenience fee despite the High Court's orders. He asserted that the core constitutional question before the High Court was whether the government could impose such a charge, contending that under Article 209, only taxes and levies authorized by law could be imposed, and that the convenience fee was a "charge on a charge," hence unconstitutional. Dr. Magare further reiterated that the intended appeal was not arguable because the issue of illegality was already conclusively determined.
32. As regards the nugatory aspect, he contended that any loss to the government or suppliers could be compensated by

way of

damages, whereas if stay orders were granted, the public stood to lose billions in continued illegal charges. He maintained that the e-Citizen system itself was not declared unconstitutional and could be sustained through budgetary reallocation. He further accused the applicants of delay in bringing this application, noting that the application, though dated 4th April 2025 was actually filed on 20th May 2025, fifty (50) days after delivery of the impugned judgment and thereby posited that the applicants were not vigilant. On public interest, he maintained that preserving public funds outweighed any inconvenience and asserted that unconstitutional levies cannot be justified as beneficial to the public.

33. **Mr. Nyamagwa** for KUPPET aligned himself fully with Dr. Magare's position, emphasizing that the applicants failed to make full and frank disclosure, particularly on their continued non-compliance with the High Court's orders as regards the collection of the convenience fee of the e-Citizen platform. He contended that such non-disclosure disentitled them to any equitable relief and urged this court to dismiss the application with costs.

34. **Mr. Bosire** associated himself fully with the submissions made by Dr. Magare. On arguability, he contended that the Kshs. 50 convenience fee had no legal basis, being founded only on a Gazette Notice, and that it unconstitutionally commercialized government services. On the nugatory aspect, he maintained that declining a stay would not render the appeal nugatory since the applicants continued to levy the unlawful fee and that granting a stay would merely revive an unconstitutional practice under the guise of protecting public interest.
35. We have considered the application, the affidavits, the rival submissions and the law. It is trite law that in applications of this nature, the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others** [2013] eKLR.
36. In considering the limb of arguability, we are guided by the principle that an arguable appeal is not one that must necessarily succeed, but one that raises *bona fide* issues worthy of the Court's consideration. (See **Dennis Mogambi**

Mang'are v

Attorney General & 3 others [2012] KECA 251 (KLR)).

Whereas even a single arguable point would suffice for purposes of granting a stay, we are satisfied that the intended appeal raises several. First, it is contended that the High Court erred in entertaining a petition supported by an affidavit commissioned by an advocate without a valid practicing certificate, thereby rendering the proceedings incompetent. Second, that the court failed to consider evidence demonstrating that adequate public participation had been undertaken prior to implementing the e-Citizen platform and its convenience fees. Third, that the learned judge relied on issues introduced by an interested party which were outside the original pleadings. These, in our view, are *bona fide* and arguable issues, and we are therefore satisfied that the appeal is indeed arguable.

37. As regards the nugatory limb, the guiding principle is whether if a stay is not granted, the success of the intended appeal would be rendered futile. The applicants must show that the appeal, if successful, would be of no practical value because the harm

suffered in the meantime would be irreversible and that no amount damages would be sufficient in compensation.

38. In the circumstances herein, we are not satisfied that the applicants have demonstrated that the intended appeal would be rendered nugatory if the High Court's judgment is not stayed. In so stating, we note that the convenience fee declared unconstitutional is purely monetary and as such, any financial implications arising from its suspension are capable of being remedied should the appeal succeed. As contended by the respondents, and rightly so, in our view, the government, as a continuing entity retains the capacity to reallocate funds through supplementary budgets to maintain essential services, and there is no evidence that the e-Citizen platform would necessarily collapse without the continued collection of the impugned fee.

39. Further, the applicants have not provided concrete evidence of any imminent termination of service contracts by the respective providers. The alleged threat of system disruption remains speculative and is unsupported by verifiable proof that suppliers would withdraw services immediately upon non-

payment. In contrast, the sums collected under the impugned fee are substantial and accrue daily from citizens. Therefore, if stay were to be granted and the appeal later fails, those funds may not be recoverable, thus creating a greater risk of prejudice to the public.

40. As regards public interest, we are of the view that it favours upholding the High Court's judgment. In this regard, we are mindful that continuing to collect a fee already declared unconstitutional would undermine the rule of law and burden citizens unlawfully. The greater public good lies in ensuring constitutional compliance, transparency, and access to government services without unauthorized charges, of course pending the outcome of the intended appeal.
41. Accordingly, it is our considered view that the intended appeal shall not be rendered nugatory if the stay sought is denied. The potential harm alleged is both speculative and, in our view, reversible.
42. Since the applicant has only satisfied one limb of the twin principles under rule 5(2)(b) of this Court's Rules, this application must fail. We hereby dismiss the application. As this

application involves significant public interest, we make no order as to costs.

43. Lastly, given the nature of the applicants' intended appeal, we direct that the appeal (if already filed) be heard on a priority basis and certainly before this term comes to an end.

Dated and delivered at Nairobi this 21st day of November 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

F. TUIYOTT

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR.