

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: KIAGE, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPLICATION NO. E344 OF 2025

BETWEEN

**HON. ATTORNEY GENERAL.....1ST APPLICANT
ADVISORY BOARD-OFFICE
OF THE ATTORNEY GENERAL.....2ND APPLICANT
THE SOLICITOR GENERAL.....3RD APPLICANT**

AND

**DR.MAGARE-GIKENYI B. 1ST RESPONDENT
DISHON KEROTI MOGIRE..... 2ND
RESPONDENT PHILEMON ABUGA NYAKUNDI.....
3RD RESPONDENT PUBLIC SERVICE
COMMISSION..... 4TH RESPONDENT NATIONAL
ASSEMBLY..... 5TH RESPONDENT
WACHIRA NJERI MWANGI 6TH RESPONDENT
NDIBA JANE WANJIRU..... 7TH RESPONDENT
JORAM JANE NJERI..... 8TH
RESPONDENT GATHAGU TERESIA WANJIKU.....
9TH RESPONDENT
MURILA LINDA MUSILIVI..... 10TH
RESPONDENT
MUTARU MARY WANJIKU..... 11TH
RESPONDENT
OTIENO EMILY CHWEYA..... 12TH
RESPONDENT
MUGO LUCY WAMBUI..... 13TH
RESPONDENT
NYAKUNDI GEORGE..... 14TH
RESPONDENT MUTINDA CHARLES MWANZIA.....
15TH RESPONDENT MCHARO PAULINE WAMBUI
WARUINGE..... 16TH RESPONDENT MUINDI JACQUELINE
MBITHE..... 17TH RESPONDENT NGOCHO MARY
MUTHONI WAIRAGU..... 18TH RESPONDENT
NYALWIDHE DORCAS ANYANGO..... 19TH
RESPONDENT
NGUGI LAWRENCE MUIRURI..... 20TH
RESPONDENT
KANANA HUMPHREY NILLY..... 21ST
RESPONDENT
LANGAT WILLIAM KIBET.....22ND RESPONDENT
ODHIAMBO KENNEDY OWOUR..... 23RD
RESPONDENT
REGINA NDERITU WAMBUI..... 24TH
RESPONDENT
MATHIBU GEOGER MWANIKI..... 25TH
RESPONDENT
MARWANGA EVANS NYATIGO..... 26TH**

RESPONDENT	
KAMAU GABRIEL NJOROGE.....	27 TH
RESPONDENT	
MOGERE ENOCK ONSONGO.....	28 TH
RESPONDENT	
MUTSOLI ELIZABETH MUKONGO.....	29 TH
RESPONDENT KORIR NAOMI CHEROP.....	30 TH
RESPONDENT	
KITEGI MARY AWOUR.....	31 ST
RESPONDENT KANYORO MARTIN MACHARIA..	32 ND
RESPONDENT	
IRUNGU SHARO GATWIRI.....	33 RD
RESPONDENT	
NGUMBI JOSEPH MWALYO.....	34 TH
RESPONDENT	
OGOLLA JOANNE ACHIENG.....	35 TH
RESPONDENT NDEDE TOM.....	36 TH
RESPONDENT	
PESA FAITH TABU.....	37 TH
RESPONDENT	
NGUMI PETER NOAH.....	38 TH
RESPONDENT	

NYAMWEYA LILIAN MORAA..... 39TH
 RESPONDENT
 MOEGI KEPHA MOTENDE..... 40TH RESPONDENT
 ALIONGO SARAH AYOTI..... 41ST
 RESPONDENT
 ODIEMA BRENDA AWOUR.....42ND RESPONDENT
 CHIRCHIR FAITH CHEPNGETICH..... 43RD RESPONDENT
 KINUU JOYCE NKIROTE..... 44TH RESPONDENT
 BAARAO MARGARET WANGU..... 45TH
 RESPONDENT
 GICHOHI EAMNUEL KIARIE..... 46TH RESPONDENT
 NG'ANG'A JENNIFER WANJIRU.....47TH RESPONDENT
 MUNENE MARTIN MURIUKI.....48TH RESPONDENT
 MUTOKA BRENDA AKWERA..... 49TH
 RESPONDENT
 MBEDA EVE LORNA..... 50TH
 RESPONDENT
 IRARI FAITH MERCY..... 51ST
 RESPONDENT
 MWENDWA ALICE KALUMU.....52ND RESPONDENT
 KURIA PETER THANDE..... 53RD
 RESPONDENT
 MBUGUA RACHAEL..... 54TH
 RESPONDENT
 OMBASA NEVIS OBINO..... 55TH
 RESPONDENT
 SIMIYU JOYCE..... 56TH
 RESPONDENT OMONDI SARAH ANYANGO.....
 57TH RESPONDENT
 MATUNDA JEREMIAH MOTARI..... 58TH RESPONDENT
 CHILAKA JOYCE LUMITI..... 59TH RESPONDENT
 MAUNDU SAMSON DAVIES..... 60TH
 RESPONDENT
 MUSILA DORCAS KAMENE..... 61ST
 RESPONDENT
 KENDUIYWOH JAMES KIPRONO.....62ND RESPONDENT
 MASAKA CALLEN BOSIBORI..... 63RD
 RESPONDENT
 KAMANDE ANNASTACIA MUGURE..... 64TH
 RESPONDENT
 BETT JOYCE CHEPCHUMBA..... 65TH RESPONDENT
 OYUGI CHRISTINE ATIENO..... 66TH
 RESPONDENT
 OKINDA LEONARD..... 67TH
 RESPONDENT
 ABUBAKAR MARIAM ADAM..... 68TH
 RESPONDENT
 OTIENO STEPHEN TARRELL..... 69TH RESPONDENT
 KAUMBA SAMUEL ODIWOUR..... 70TH
 RESPONDENT
 RANJI HANNA SARAH..... 71ST
 RESPONDENT

NTHIGA KANINI K.....72ND RESPONDENT
MAINA JOY WANJUGU..... 73RD
RESPONDENT
NJOROGE ALLAN KAMAU..... 74TH RESPONDENT
OJWANG PAUL OCHIENG..... 75TH
RESPONDENT
CHIMAU JUDITH AUMA.....76TH RESPONDENT
WAMBUA PRISCA..... 77TH
RESPONDENT
OCHAKO LYDIA MOGITI..... 78TH
RESPONDENT
MAKORI EDNA KERUBO..... 79TH
RESPONDENT
GATHOGA MWAIHAKI..... 80TH
RESPONDENT WABUYUBE VICTOR OKUTOYI.....
81ST RESPONDENT
BETT LEONARD CHERUIYOT.....82ND RESPONDENT
MALUKU SCHOLASTICA KIDI..... 83RD
RESPONDENT
MWANGI ANNE WANJIKU..... 84TH
RESPONDENT
KITI MARYSALOME NIMWAKA..... 85TH RESPONDENT
NYAUMA STAFFORD OMWOYO..... 86TH
RESPONDENT
MOHAMMED ADOW DEISS..... 87TH
RESPONDENT
LEBO EDWARD KIPCHUMBA..... 88TH RESPONDENT
MUTHONI HELLEN WANGUI..... 89TH RESPONDENT
BUNEI LYNNETE CHEPTOO..... 90TH RESPONDENT

ROP JEMUTAI RUTH.....91ST RESPONDENT
 CHEPKWONY NANCY CHEPKORIR.....92ND RESPONDENT
 AKUNO BEATRICE ADHIAMBO..... 93RD RESPONDENT
 SAMICH CHELAGAT LILY..... 94TH RESPONDENT
 MUNGAI RACHAEL WAMBUI..... 95TH
 RESPONDENT
 TOYWA ASHLEY SIMIYU..... 96TH
 RESPONDENT
 NJUGUNA RODAH NDUTA.....97TH RESPONDENT
 OBANDA SSANE LUTTA..... 98TH
 RESPONDENT
 SIMIYU OLIVIA NANJALA..... 99TH
 RESPONDENT
 CHERUIYOT GILBERT TARUS..... 100TH
 RESPONDENT YEGON CAROLYN.....
 101ST RESPONDENT WANDERA WINNIE NAMAHYA. 102ND
 RESPONDENT
 OGWOKA LORNA KERUBO..... 103RD
 RESPONDENT MOHAMMED ODONGO WANZETSE.....
 104TH RESPONDENT WAWIRA MARY
 LINAH..... 105TH RESPONDENT OLANDO
 MERCY MULWALE AFANDI..... 106TH RESPONDENT
 OSICHO BEATRICE ACHIENG..... 107TH
 RESPONDENT
 KIOKO ERNEST MUTINDA..... 108TH
 RESPONDENT KURIA PETER.....
 109TH RESPONDENT WAITHAKA PAULINE
 WANJIKU..... 110TH RESPONDENT KAMUNYA
 CHARLES..... 111TH RESPONDENT
 KARURI SUSAN WANJIKU..... 112TH RESPONDENT
 NYAGA CAROLINE KARIMI..... 113TH RESPONDENT
 OKUMU KEVIN ODHIAMBO..... 114TH RESPONDENT
 MAYAKA DOUGLAS NYANDIGISI..... 115TH RESPONDENT
 KARIUKI CLARIES GATWIRI.....116TH
 RESPONDENT CHEPKIRUI JANET.....
 117TH
 RESPONDENT
 SIELEY JOAN CHELAGAT..... 118TH RESPONDENT
 MWANIKI STEPHEN GITHINJI..... 119TH RESPONDENT
 JUMA MARION CHEPTEPKENY..... 120TH
 RESPONDENT
 MUTAI MESHACK KIPRUTO..... 121ST
 RESPONDENT
 MABIL PATRICIA CHEPCHIRCHIR.....122ND RESPONDENT
 ODENDO MAUREEN AUMA..... 123RD
 RESPONDENT
 MWANGO BRENDA KEMUNTO..... 124TH
 RESPONDENT
 WANJUI HIRUM WANJIKU..... 125TH RESPONDENT
 JEPTO AMELIA CHESIYNA..... 126TH RESPONDENT
 SHIKOLI MAGARINAH APRINAH..... 127TH
 RESPONDENT

WANJOHI ROSE NYAWIRA..... 128TH
RESPONDENT
NGELECHEI JOYCE JEROP..... 129TH RESPONDENT
CHEPTANUI HIEDY..... 130TH
RESPONDENT CHIDAGAYA HAMIDA NIMWENJERO.....
131ST RESPONDENT MUMO DIAN NDUKU.....132ND
RESPONDENT
WANJOHI EDWIN MUNENE..... 133RD
RESPONDENT
ROTICH TERRY CHELAGAT..... 134TH
RESPONDENT
KIPROP JUDITH JEPCHIRCHIR..... 135TH
RESPONDENT OPIYO EVELINE AWOUR.....
136TH RESPONDENT
MBOJE DINAH KISHAGHA..... 137TH RESPONDENT
CHEMATOR JUDY KIPROP 138TH RESPONDENT
MBADU SHELDON BEGISEN..... 139TH
RESPONDENT
ABDURAZAK FATMA ALI..... 140TH
RESPONDENT
MAMMET SHEILA JEPKEMOI..... 141ST
RESPONDENT MAKUTO MELCHEZEDEK EMMANUEL 142ND
RESPONDENT

CHERUIYOT CHARLES KIPKEMOI KOSKE..... 143RD RESPONDENT
KITHAKA BENJAMIN KIMATHI..... 144TH
RESPONDENT
MWENDA SALOME KAREI..... 145TH
RESPONDENT
MWATSUMA JAMES TAIB..... 146TH
RESPONDENT
MUNGA MARTIN MWAROME..... 147TH
RESPONDENT
ODUKENYA WYCLIFF MASANGIR..... 148TH
RESPONDENT LODIAN NELLY CHEYECH.....
149TH
RESPONDENT
MGHANGA MARY MACHOCHO..... 150TH
RESPONDENT
MBUNGU ERIC MUNENE..... 151ST
RESPONDENT
WERE DEBORA OBURA.....152ND RESPONDENT
CHIBOLE PATRICIA APONGA.....153RD RESPONDENT
WAMWAI CAHRLES OWIYE..... 154TH
RESPONDENT
NAKHANYA PAUL WEKESA..... 155TH
RESPONDENT ANYANGOONAM LARICA ANNE MARTINA.....
156TH RESPONDENT NGUYU BARBARA
WANGARE..... 157TH RESPONDENT
OTUNGU GEOFFREY MOMANYI..... 158TH
RESPONDENT
WACHIRA MAGDALINE MWIHAKI..... 159TH
RESPONDENT
KIRAGU MILLICENT WANGARE..... 160TH
RESPONDENT
GISEMBA PAUL NYAMWEYA..... 161ST
RESPONDENT
MUTHURA GLADYS WANGUI.....162ND RESPONDENT
NDUNDU ANNE MWIHAKI..... 163RD
RESPONDENT
NGEIGE MARY MURUGU..... 164TH
RESPONDENT
PEER RUTH KERUBO..... 165TH
RESPONDENT MUNYU VICTORIA WANGECHI.....
166TH RESPONDENT
NDUNGU RACHAEL WANJIKU..... 167TH
RESPONDENT
MUTTUKU CATHERINE SANITTA..... 168TH
RESPONDENT
MICHAEL CAROLYNE KANINI..... 169TH
RESPONDENT
MULATYA CHRISTINE NZAMBI..... 170TH
RESPONDENT MEEME LINAH GAKII.....
171ST
RESPONDENT
MUTISO KENNEDY NGYEMA.....172ND RESPONDENT

AKWARE EMMAH..... 173RD
RESPONDENT
GITHAKA IAN LETEIPAN..... 174TH
RESPONDENT
MKOK JESSE MICHAEL..... 175TH
RESPONDENT SOMEREN CATHERINE MUTHONI.....
176TH RESPONDENT KAIPOI MIRIAM
KAKENYA 177TH RESPONDENT
DAIDO NAGHEA HAGODANA..... 178TH
RESPONDENT
SHIUNDU CLARE NAMAROME..... 179TH
RESPONDENT
OPIYO ESTHER AKINYI..... 180TH
RESPONDENT
SHITUBI LORINE NEREA..... 181ST
RESPONDENT
LUVINZU DARLIVE MALESI.....182ND RESPONDENT
MARWA CHRISTOPHER WEISIKO..... 183RD
RESPONDENT ROBI DEBORAH MWISE.....
184TH RESPONDENT
SHIRIKA FRONICA..... 185TH
RESPONDENT NYAKORA ANNETTE KERUBO.....186TH
RESPONDENT
MAGETO EVA KEMUNTO.....187TH RESPONDENT
MWALOZI ELIZABETH MAGOMBE.....188TH RESPONDENT
KITSAO JOTHAM MWAIGAMBA.....189TH RESPONDENT
KABUCHORU JANET KARIMI..... 190TH RESPONDENT
CHIRINGA MARIAM MEUCHI..... 191ST
RESPONDENT
KORIR STEPHEN KIBET.....192ND RESPONDENT
MBITHI BENJAMIN MUTUKU.....193RD RESPONDENT
LELEI BEVELYNE CHELAGAT.....194TH RESPONDENT

KOSGEI BEATRICE JEPKOECH.....195TH RESPONDENT
MUKUVI FELIX NDONYE..... 196TH
RESPONDENT
SANG DIANA CHEPTOO.....197TH RESPONDENT
SANG DIANA CHEPTOO..... 198TH
RESPONDENT
KIKWAI KENNEDY KIPNGENOH..... 199TH
RESPONDENT
OREGE LORNA ATIENO.....200TH RESPONDENT
MASINDE ABIGAEI KHAKASA..... 201ST RESPONDENT
MWASAO BETTY WANJIRU.....202ND RESPONDENT
MWANDEJE MARTIN MNG'ONG'O..... 203RD
RESPONDENT
WAFULA MAUREEN LYAKA..... 204TH
RESPONDENT
NJERU ALAN MUGAMBI..... 205TH
RESPONDENT
MBUA ANTONY MUINDE..... 206TH
RESPONDENT EAMMAH GRACIE MUSEO MUTINDI. 207TH
RESPONDENT
NZIKA DERRICK KIOKO..... 208TH
RESPONDENT
KUBAI FREEDOM MWARI..... 209TH
RESPONDENT
KOMU ZIPPORAH WANJEERI.....210TH
RESPONDENT GACHANJA LYDIAHWINFRED GATHONI. 211TH
RESPONDENT
KANYI SILVIA WAMBUI..... 212TH
RESPONDENT
MUTHAMI GEORGE NDIRITU.....213TH
RESPONDENT
KANYUGO NAOMI MUTHONI.....214TH RESPONDENT
GITHU MARY WACUKA..... 215TH
RESPONDENT
TOGOI EDNAH..... 216TH
RESPONDENT
MACHESO DAN WECHU.....217TH RESPONDENT
OKWACH IRENE ACHIENG.....218TH RESPONDENT
NJOROGE DANIEL MWANIKI..... 219TH
RESPONDENT
OCHIENG SYBIL AWINO..... 220TH
RESPONDENT
KURIA BENARD KANYUMU..... 221ST
RESPONDENT
MWAKIO MARIAM SHIGADI.....222ND RESPONDENT
MUTEGI DENNIS MUTHOMI..... 223RD RESPONDENT
NJAGI DENNIS NJIRU.....224TH
RESPONDENT KIRUGU PATRICIA KARWIRWA.....
225TH
RESPONDENT
RUTO IMELDA CHEPKOGEI..... 226TH RESPONDENT
NJAGI BENSON KAMUNGE..... 227TH

RESPONDENT
OTIENDE IBRAHIM EMALI..... 228TH RESPONDENT
MULAMA ANNE ALUCKY..... 229TH
RESPONDENT LETTING CLEOPHAS KIPCHIRCHIR.....
230TH RESPONDENT SEKO BRENDA
NANCY..... 231ST RESPONDENT
GODIA EZEKIEL MUDAVADI.....232ND RESPONDENT

(Being an application for stay of execution and orders against the Judgement and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (B. Ongaya, J.) dated 29th May 2025

in

ELRC Petition No. E202 of 2024)

REASONS FOR DECISION

(Under Rule 34(7) of the Court of Appeal Rules)

1. The applicants' application by Notice of Motion dated 3rd June 2025 seeking an order of stay of execution of the judgment and decree issued by the Employment and Labour Relations Court (ELRC) at Nairobi (**B. Ongaya, J.**) in Petition No. 202 of 2024 on 29th May 2025 pending the hearing and determination of the applicants' intended appeal and for an order suspending the implementation of that judgment and any consequential orders, came up for hearing before the Court on 2nd July 2025.
2. Having heard learned counsel **Mr. James Ochieng Oduol** for the applicants; **Mr. M. Ogosso** learned counsel for the Public Service Commission, the 4th respondent; and **Dr. Magare- Gikenyi**, the 1st respondent who appeared in person on his own behalf and on behalf of the 2nd and 3rd respondents; and in the absence of the other parties who were duly served with notice of hearing, we dismissed the application and reserved our reasons for doing so, which we now give.
3. The 1st to 3rd respondents petitioned the ELRC seeking, among other reliefs, declarations that appointments and promotions undertaken in the office of the Attorney General violated the Constitution and that the entire process resulting in the promotion of all the interested parties as communicated by the Solicitor General in a memo dated 26th November 2024 is unconstitutional, irregular, null and

void. They sought orders of certiorari to quash the decision

conveyed by the Solicitor General in that regard; and an order of prohibition prohibiting the implementation or giving effect to the decision of the Advisory Board conveyed by the Solicitor General in the said memo.

4. The petition was opposed, and after hearing the same, the learned Judge of the ELRC in the impugned judgment delivered on 29th May 2025 allowed the petition holding that the promotions of the interested parties violated the Constitution; declared that all appointments and promotions in the Office of the Attorney General must be based on fair competition and merit, gender balance and must represent the face of Kenya through ethnic and regional balance; and granted orders of certiorari and prohibition which had been sought.
5. Aggrieved, the applicants filed a Notice of Appeal dated 29th May 2025 on which the application the subject hereof dated 3rd June 2025 was hinged.
6. Urging the application before us, which was supported by an affidavit sworn by Shadrack J. Mose, Solicitor General, learned counsel for the applicants in written and oral submissions urged on the strength of the Supreme Court's decision in **Board of Governors, Moi High School Kabarak & Another vs. Bell & 2 Others [2013] KESC 12 (KLR)**, among other court decisions, that the purpose of a stay is to preserve the court's appellate power of review and possible reversal which would otherwise be lost if no stay is granted. It was submitted the legal test as pronounced by this Court

in the case of **Stanley Kangethe Kinyanjui vs. Tony Ketter**

& 5 Others [2013] eKLR has been fulfilled; that as demonstrated in the applicants' draft memorandum of appeal, there are serious and bona fide legal and constitutional questions and that the intended appeal is arguable.

7. Although the 1st to 3rd respondents in their submissions submitted that the decision of the ELRC is unassailable as it merely gave effect to the Constitution which does not sanction "non-competitive and non-meritorious appointment" and that the intended appeal is therefore "frivolous and has no arguable point of law", we were persuaded that the intended appeal is indeed arguable. There is for instance the complaint that the ELRC in its decision "engaged in constitutional interpretation beyond a purely employer- employee dispute". The findings by the ELRC on public participation are also under challenge. We do not think the intended appeal is frivolous.
8. On the nugatory aspect, it was submitted for the applicants that if the decision of the ELRC is implemented prior to the appeal being heard and determined, the appellate process will be rendered moot; that if implementation of the decision results in consequences that cannot be reversed or reasonably compensated in damages, the nugatory test is met. Reference was made to the decision of the Court in **George Otieno Gache & Another vs. Judith Akinyi Bonyo & 5 Others [2017] KECA 246 (KLR)**. It was pointed out that the process of effecting the decision of the ELRC was already

underway. Moreover, it was urged that public interest favoured the grant of the orders sought.

9. The 1st to 3rd respondents on the other hand submitted that public interest and convenience tilts in favour of declining stay; that should the appeal ultimately succeed, the Court can reverse the decision of the ELRC and set it aside; that payment of backdated pay and salary in arrears would be adequate compensation.
10. We duly considered the rival arguments on whether this limb is met. In ***Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others*** (above) the Court stated that in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances and that:

“ix) The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA 227 at page 232.

x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403.

11. With those principles in mind we took the view that the

applicants had not demonstrated that the intended appeal

would be rendered nugatory. We concluded, as the Court, differently constituted did in the related case of **Attorney General vs. Magare-Gikenyi & 3 Others (Civil Application No. E693 of 2024) [2025] KECA 684 (KLR)**, that public interest is better served by putting on hold promotions of officers until they are pronounced to have passed constitutional and legal muster because any loss suffered by the affected officers can be compensated by payment of salary arrears. In that ruling, the Court stated:

“It seems to us that public interest is better served by putting a hold on those promotions until they are pronounced to pass constitutional and legal muster by a court of law, because any loss suffered by the interested parties and affected state counsels can be compensated by payment of salary in arrears.”

We respectfully agree.

12. It is for those reasons that we dismissed the application with an order that each party bears its own costs of the application having regard to the public interest involved.

Dated and delivered at Nairobi this 24th day of October 2025.

P.O. KIAGE

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...
JUDGE OF APPEAL

S. GATEMBU KAIRU, C.Arb, FCI Arb.

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.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

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

original.

Signed

DEPUTY REGISTRAR