



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. E006 OF 2025

JAMES

OMARIBA

NYAOGA.....**APPLICANT**

VERSUS

KISII COUNTY ASSEMBLY SERVICE
BOARD
OTHERS.....

&

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RESPONDENTS

RULING

1. The Applicant, James Omariba Nyaoga, moved the Court by way of a Notice of Motion dated 8th May 2025 brought under section 89 of the Public Service Commission Act and Rule 69(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules 2024, seeking the following orders;

- (a) *Spent*
- (b) That the Court do recognize, adopt, and enforce the decision of the Public Service Commission dated 26th March 2025 in PSC County Appeal No. 102 of 2024 as a judgment and decree of the Court;
- (c) That he be allowed to resume office as Clerk of the County Assembly of Kisii without hindrance;
- (d) That he be paid withheld salaries and emoluments amounting to Kshs. 2,454,690/- as at 5th May 2025, together with subsequent monthly dues; and
- (e) costs of the application.

2. The application is premised on the grounds apparent on its face and the supporting affidavit of James Omariba Nyaoga. The Applicant avers that on 26th March 2025, the Public Service Commission (PSC) rendered a decision allowing his appeal and setting aside the earlier decision by the 1st and 2nd Respondents dated 29th August 2024, to revoke his appointment and remove him from office. He contends that the effect of the PSC decision was to reinstate him to his

former position with all attendant benefits as though the 1st and 2nd Respondent's decision had never been made. He deposes that the decision was communicated to the Respondents on 27th March 2025 pursuant to section 89(1) of the Public Service Commission Act, but the Respondents have declined to implement it in violation of sections 88(4) and 89(2) of the said Act. The Applicant states that as at 29th August 2024, he was owed withheld salaries, allowances, and other emoluments from the date of his suspension, including house, extraneous, entertainment, and domestic servant allowances. He adds that he continues to be owed monthly emoluments from 30th August 2024 to date.

3. He avers that his removal from office was illegal, irregular and unconstitutional, and that he successfully appealed to the PSC after this Court directed him to exhaust the statutory appeal mechanism under sections 77 of the County Governments Act and sections 85 to 87 of the Public Service Commission Act, read together with Article 234(2)(i) of the Constitution. The Applicant further deposes that despite the PSC's decision in his favour; the Respondents have

persistently defied it. He avers that on 15th April 2025, he reported back to work but was denied entry by the 3rd Respondent, Mr. Jacob Onkeo, acting under the instructions of the Speaker, Hon. Philip Nyanumba. The Speaker allegedly informed him that the PSC was not a court, that he did not recognize its decision, and that the Applicant had been properly removed from office. He adds that his further attempt to resume duty on 16th April 2025 was frustrated when the Assembly gates were locked on instructions from the Speaker. The Applicant describes the Respondents' conduct as blatant disobedience of the Constitution and disregard of the rule of law, contrary to Articles 232 and 236 of the Constitution, which protect public officers from victimization and enjoin public institutions to uphold values of accountability, responsiveness, and fairness.

4. The Applicant avers that the Respondents have neither sought a review of the PSC decision under section 88 of the Act nor challenged its jurisdiction, and that this Court has a statutory duty under section 89 to adopt and enforce the decision. He asserts that failure by the Court to do so would

render the entire appellate process contemplated under the Public Service Commission Act nugatory. He therefore prays that the Court enforces the PSC decision dated 26th March 2025, orders his reinstatement to office, directs payment of all withheld salaries and allowances, and awards him the costs of the application.

5. In response the 1st and 2nd Respondents in their replying affidavit sworn by the 3rd Respondent on 22nd May 2025, deposed that the Applicant's Notice of Motion was an abuse of the court process and was premised on a misinterpretation of section 88 of the Public Service Commission Act. They averred that the issues raised were *sub judice*, pending before the Court in **Kisii ELRC Constitutional Petition No. E006 of 2025**. They further averred that the Public Service Commission's decision was illegal, unconstitutional, and contrary to Articles 10, 27, 41, 47, 48, 50, and 232 of the Constitution, as it removed the 3rd Respondent from office without following due process or the correct legal procedures. They contended that reinstatement was not a viable remedy as the vacancy had already been filled following a lawful recruitment process, and that the

Applicant had attempted, unsuccessfully, to stop the recruitment process via **Kisumu ELRC Petition E046 of 2024**.

6. The 1st and 2nd Respondents emphasized that the adoption of the Commission's decision would create legal uncertainty, contravene principles of public service, violate natural justice, and prejudice their right to a fair hearing. They urged the Court to dismiss the application as it sought to enforce an illegal and irrational decision to their detriment.
7. The 3rd Respondent on his part also filed a replying affidavit sworn on 22nd May 2025. He deposed that he is the Clerk of the County Assembly of Kisii, having been duly appointed on 12th November 2024. He deposed that the applicant had previously challenged his removal from office through **Kisumu ELRC Petition E046 of 2024, James Omariba v Kisii County Service Board and others**, which was dismissed, and the vacancy was lawfully filled, resulting in his appointment. The 3rd Respondent averred that the Public Service Commission's decision dated 26th March 2025, which had the effect of removing him from office, was made

without affording him an opportunity to be heard and was therefore unlawful, unconstitutional, and prejudicial. He asserted that the decision violated his rights to fair administrative action, due process, fair labour practices, and legitimate expectation under Articles 10, 27, 41, 47, 48, 50, and 232 of the Constitution, as well as provisions of the Fair Administrative Actions Act, the County Governments Act, and the County Assembly Services Act. He further deposed that the Commission acted irrationally, illegally, and contrary to established legal principles by ignoring that the Clerk's position had already been duly filled, and that reinstatement is not an automatic remedy. He maintained that adoption of the Commission's decision would prejudice him, render his pending constitutional petition via **Kisii ELRC Constitutional Petition No. E006 of 2025** moot, and contravene the principles of transparency, accountability, and prudent public resource use. He urged the court to dismiss the application and strike out the adoption of the Commission's decision as it sought to enforce an illegal and unconstitutional decision to his detriment.

8. The application was disposed of by way of written submissions.

Applicant's Submissions

9. The Applicant submitted that section 89(1) of the PSC Act expressly empowers this Court to adopt and enforce decisions of the PSC, which is an appellate body with jurisdiction over appeals arising from the county public service. He relied on the authorities of **Walingo v Maasai Mara University Council & 4 others [2023] KEELRC 1, Mudi v County Government of Kakamega & 3 others [2024] KEELRC 1546, Sweta v County Government of Kakamega [2024] KEELRC 1554, Republic v Kajiado County Public Service Board; PSC (Interested Party) [2025] KEELRC 481, and Wambugu v County Government of Nairobi [2025] KEELRC 917**, where the courts held that decisions of the PSC are enforceable as judgments of the Employment and Labour Relations Court.

10. The Applicant submitted that the PSC found his removal from office on 29th August 2024 to have been unlawful,

illegal, and unconstitutional, and ordered his reinstatement. He asserted that despite the decision having been communicated to the Respondents on 27th March 2025, they had refused to comply. He averred that when he attempted to resume duty on 15th April 2025, the Speaker of the County Assembly denied him entry, stating that the PSC was not a court and that its decision would not be recognized. The Applicant contended that such conduct violated section 88(4) of the PSC Act, which prohibits the deferment or refusal to implement decisions of the Commission, and exposes those responsible to disciplinary action under section 89(2) of the Act.

11. The Applicant further submitted that decisions of the PSC have a quasi-judicial force equivalent to judicial determinations, citing the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** to that effect. He asserted that the Respondents, being public entities and officers, were bound by the national values and principles of governance under Article 10, as well as the values and principles of public

service under Article 232 of the Constitution, which demand observance of lawful authority, accountability, and respect for due process. Their refusal to obey the PSC decision, he maintained, was unconstitutional, contemptuous, and contrary to good governance. The Applicant also submitted that no application for review had been filed against the PSC decision under section 88(1) of the PSC Act, and therefore the decision remained valid, binding, and enforceable. He contended that the Respondents' continued defiance amounted to gross misconduct and violated Article 236 of the Constitution, which protects public officers from victimization and unlawful removal from office. He urged the Court to enforce the PSC decision, order his reinstatement to the position of Clerk, direct payment of all withheld and current emoluments, and award him the costs of the application.

Respondents' Submissions

12. The Respondents submitted that the Applicant's motion dated 8th May 2025 was incompetent and an abuse of the court process as the issues raised therein were *sub judice*, the same being alive and pending before this Court in **Kisii**

ELRC Constitutional Petition No. E006 of 2025. They contended that the present application sought to have this Court determine issues that were already the subject of active litigation, contrary to the doctrine of *sub judice*, and that entertaining it would lead to conflicting decisions and prejudice the pending proceedings. The Respondents further submitted that although the Applicant relied on section 88(4) of the Public Service Commission Act, that provision did not prohibit deferment of the implementation of a PSC decision. They asserted that the correct interpretation of Section 88 was that the filing of an appeal or review does not automatically stay implementation of a decision, but that a party must seek such orders from the appropriate court or authority. To support this position, they relied on **County Government of Mandera & another v Attorney General & another; Hussein Dayow Abdullahi & 3 others (Interested Parties) [2020] eKLR**, where the Court held that section 88(4) does not oust the jurisdiction of courts to grant conservatory orders or stays. They submitted that the Respondents had already challenged the impugned PSC

decision and that the matter was pending before this Court, making the present application premature and prejudicial.

13. The Respondents submitted that Article 25 of the Constitution of Kenya, 2010 provides that the right to a fair trial and hearing cannot be limited, and that adoption and enforcement of the PSC decision would gravely prejudice their rights to a fair trial, equal protection of the law, and access to justice guaranteed under Articles 10, 24, 25, 27, 47, 48, and 50 of the Constitution. They maintained that the PSC's decision of 26th March 2025, which arose from **PSC County Appeal No. 102 of 2024, James Omariba Nyaoga v Kisii County Assembly Service Board & Kisii County Assembly** was adverse to the 3rd Respondent as it purported to remove him from office despite his lawful appointment as Clerk of the County Assembly of Kisii on 12th November 2024, gazetted in Gazette Notice No. 14839 of 15th November 2024. They contended that enforcing such a decision would violate the 3rd Respondent's constitutional rights and offend the principles of transparency,

accountability, and adherence to national values under Articles 10 and 232 of the Constitution.

14. The Respondents further submitted that the PSC's decision was reached in breach of the rules of natural justice and was therefore a nullity incapable of enforcement. They cited the authorities of **Onyango Oloo v Attorney General [1986-1989] EA 456**, **General Medical Council v Spackman [1943] 2 All ER 337**, **Ridge v Baldwin [1963] 2 All ER 66**, and **Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex parte George Saitoti [2006] eKLR**, in which courts held that decisions made in violation of the right to be heard are void ab initio and cannot be cured by correctness on the merits. They submitted that the PSC had condemned the 3rd Respondent unheard, rendering its decision unconstitutional and invalid. The Respondents also submitted that the remedy of reinstatement ordered by the PSC was unavailable and impracticable, as the position of Clerk had already been filled lawfully with the sanction of this Court in **Kisumu ELRC Petition No. E046 of 2024**. They relied on the Court of Appeal decision in **Kenya Airways Limited v Aviation &**

Allied Workers Union Kenya & 3 others [2014] eKLR, where the Court emphasized that reinstatement is not an automatic remedy and must be guided by the factors under section 49(4) of the Employment Act, including practicability and the need to avoid strained employment relationships. They also cited **Mundia Njeru Geteria v Embu County Government & 3 others [2013] eKLR**, where the Court held that reinstatement should not be granted where the necessary trust and confidence between employer and employee have broken down.

15. The Respondents submitted that the Applicant was guilty of material non-disclosure, having failed to inform the Court that he had previously sought to halt the recruitment process for the position of Clerk and the Court had declined to do so. They asserted that litigants are under a duty to make full and fair disclosure of all material facts, citing **Sceneries Limited v National Land Commission [2017] KEHC 8460 (KLR)**, where the Court held that deliberate non-disclosure renders proceedings and the impugned decision questionable. The Respondents submitted that

section 88(4) of the PSC Act does not oust this Court's jurisdiction under Article 23(3) of the Constitution to grant conservatory orders, nor does it fetter the Court's discretion in constitutional proceedings. They submitted that under Articles 2(1) and (4) of the Constitution, any law inconsistent with the Constitution is void to the extent of the inconsistency. They therefore urged the Court not to sanction an illegality, as the 3rd Respondent had been condemned unheard, contrary to Articles 10, 25, 47, 48, and 50 of the Constitution. They further noted that the Court had previously declined to stop the recruitment process that led to the 3rd Respondent's appointment, and that process had never been challenged. In conclusion, the Respondents urged the Court to find the application devoid of merit and to dismiss it.

Disposition

16. The Applicant herein asserts that by a decision made on 26th March 2025, the Public Service Commission (PSC) his appeal against his removal from office by the 1st and 2nd Respondents dated 29th August 2024 revoking his

appointment and removing him from office was successful. He contends that the effect of the PSC decision was to reinstate him to his former position with all attendant benefits as though the 1st and 2nd Respondents decision of 29th August 2024 had never been made. He asserts the Respondents have declined to implement the decision of PSC in violation of sections 88(4) and 89(2) of the Public Service Commission Act. The Applicant further asserts that as at 29th August 2024, he was owed withheld salaries, allowances, and other emoluments from the date of his suspension, including house, extraneous, entertainment, and domestic servant allowances. He adds that he continues to be owed monthly emoluments from 30th August 2024 to date.

17. This issue is eerily similar to Kisii ELRC Constitutional Petition No. E006 of 2025 – **Kisii County Assembly Service Board & 2 others v Public Service Commission; Nyaoga (Interested Party)**. The issues raised in this matter are *sub judice*, pending before this Court in the aforesaid petition. As such I decline to make a determination on the matter before me at present as the Petition is the

proper forum to articulate the position of the Applicant vis-à-vis the Respondents herein. The application is dismissed albeit with no order as to costs.

Orders accordingly.

Dated and delivered at Kisumu this 12th day of

November 2025

**Nzioki wa Makau, MCI Arb.
JUDGE**

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