

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

APPEAL NO. E041 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

LINUS ALUOCH ODERA.....
APPELLANT

VERSUS

MIGORI COUNTY PUBLIC SERVICE BOARD.....
RESPONDENT

RULING

Before the court for determination is the applicant/Appellant's Notice of Motion dated 30th September 2025 filed under Certificate of Urgency seeking Orders that:

1. Spent.
2. Spent.
3. *The Honourable Court be pleased to issue a temporary injunction restraining the validity, operationalization, implementation and/or coming into effect of the decision of the Public Service Commission delivered on 11th June, 2025 in County Appeal No. 126 of 2024 and/or any actions*

consequent there on pending the inter pares hearing and determination of the appeal herein.

4. This Honourable Court be pleased to grant such other Orders as it may deem just in the circumstances.

The Notice of Motion is expressed under Rule 47 of the Employment and Labour Relations Court (Procedure) Rules, 2024, Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6(6) and Order 51 of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting Affidavit of the Applicant/Appellant sworn on 30th September 2025.

The applicant's case is that after his employment was terminated by the Migori County Public Service Board on 26th October 2024 he appealed to the Public Service Commission and the appeal was dismissed on 11th June 2025.

This is the dismissal the applicant seeks stayed and/or restrained from implementation or coming into effect pending the hearing and determination of the appeal.

The respondent opposed the Notice of Motion vide the Replying Affidavit of Mr. Adrew Ocholla sworn on 23rd October 2025 who deposed that since the event had

already occurred, it could not be injuncted as it had been overtaken by events.

That while the motion was seeking injunctive Orders, the Supporting Affidavit sought conservatory and stay Orders at the same time and had not met the threshold for the grant of a temporary injunction and there was no subject matter to be preserved by conservation or stay Orders as not irreparable loss had been demonstrated.

The affiant further deposed that the Orders sought to be stayed were of a negative nature and could not be stayed as it was a dismissal of the appeal by the Public Service Commission.

Applicant's submissions

As to whether the applicant had met the threshold for the grant of injunctive relief, counsel for the applicant relied on the provisions of Order 42 Rule 6(6) of the Civil Procedure Rules to submit that the High Court was guided by the overriding objective in Section 1A(2) and 63 of the Civil Procedure Act in exercising its powers under Order 42 Rule 6(6) of the Civil Procedure Rules and further cited the decision in **Stanley Amwayi Were V Frida Omari Gardison & 3 others** [2021] KEELC 649 (KLR) on

substantial loss as were the decisions in **Kenya Power & Lighting Co. Ltd V Kigaita Ngare Unduthu & 36 others** [2020] eKLR, **Kenya Shell Ltd V Benjamin Karuga Kibiru & another** [1986] eKLR and **James Wangalwa & another V Agnes Naliaka Cheseto** [2012] eKLR, to urge that the applicant risked total loss of employability if the Public Service Commission's decision was not stayed.

That the applicant would lose his reputation and the appeal would be rendered nugatory.

The decision in **Reliance Bank Ltd (in liquidation) V Norlake Investments Ltd** and **KDA V William Odhiambo Ramogi** C/A E12 of 2021 appeal among others to urge that the applicant was exposed to substantial loss.

Counsel submitted that the application was made without undue delay as it was filed within 3 months of the decision sought to be stayed and the applicant had an arguable appeal as held in **Britam General Insurance Co. Kenya Ltd V Abigail Khasoa Simiyu** Civil Application No. E025 of 2020 and the Memorandum of Appeal enlisted seven (7) grounds.

Counsel urged that he invoked the inherent jurisdiction of the court to enable the applicant prosecute the appeal and the respondent stood to suffer no prejudice.

In his supplemental submissions filed on 4th November 2025, the applicant's counsel submitted that the ELRC had jurisdiction to injunct the impugned action or conduct citing the decision in **Clive Nyaaga Ogwora V Governor Nyamira County & 2 Others** [2021] eKLR as well as the provisions of Article 162 of the Constitution of Kenya.

Counsel submitted that the applicant was not seeking a stay of any negative Order but to restrain the validity, operationalization, implementation or coming into effect of the decision dated 11th June 2025.

Reliance was placed on the sentiments of the court in **Swift Energy Distributors Gals Ltd V Energy and Petroleum Regulatory Authority & another** [2020] eKLR as well as **Benjamin Macfoy V United Africa Ltd** [1961] 3 ALLER 1169 to reinforce the submission.

Counsel submitted that the applicant was seeking an Order to suspend or stay the decision of the Public Service Commission as opposed to a reinstatement.

Finally, counsel submitted that the respondent had not demonstrated the prejudice it stood to suffer if the injunction was granted.

Respondent's submissions

As to whether an injunctive relief can be granted on a negative Order, counsel relied on the sentiments of the court in **Catherine Njeri Maranga V Serah Chege & another** [2017] eKLR, where the court held that a dismissal Order was not capable of being stayed as the applicant had lost nothing as he/she reverts to the pre-application situation.

Reliance was further placed on the sentiments of the court in **Kaushik Panchamaita & 3 others V Prime bank Ltd & another** [2020] eKLR, **Kenleb Cons Ltd V New Gatitu Service Station Ltd & another** [1990] eKLR and **Paul Gitonga Wanjau V Gathuthi Tea Factory Co. Ltd & 2 others** [2016] eKLR to urge that

the applicant's status quo prior to the dismissal of the appeal by the Public Service Commission was that he had been dismissed from employment by the respondent.

Finally, reliance was placed on the sentiments of the Court of Appeal in **Western college of Arts and Applied Sciences V Oranga & others** [1976 - 80] KLR and **Kenya Commercial Bank Ltd V Tamarind Meadows Ltd & 7 Others** [2016] eKLR on staying of negative Orders.

Counsel urged the court to dismiss the application with costs.

Analysis and determination

The court has considered the Notice of Motion, Replying Affidavit and submissions by learned counsel for the parties.

Strangely, the applicant relied on the provisions of Order 42(6)(6) of the Civil Procedure Rules as opposed to Order 42 Rule (1) 6(2) Order 42 Rule 6(6) provides:

Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks

just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

Although the court has jurisdiction to exercise the power under the foregoing provision, the applicant did not demonstrate that he had complied with the procedure of instituting an appeal from the Public Service Commission, as no provision of law was relied upon.

This is because the foregoing provision of Order 42 Rule 6(6) has an in-built *proviso*.

It is plain that the applicant is seeking a temporary injunction against the dismissal of his appeal by the Public Service Commission on 11th June 2025, prior to which he had been dismissed from employment by the respondent on 26th October 2024, thus the applicant has been out of employment since October 2024.

While the applicant submitted that the injunctive Order sought was merited, the respondent, on the other hand deponed and submitted that it was not as the Order sought to be injuncted was negative in nature, as it was a dismissal of the applicant's appeal.

It is trite law that a negative Order cannot be injunctioned or stayed and the respondent's counsel has demonstrated the same through several judicial authorities of the Court of Appeal.

In **Catherine Njeri Maranga v Serah Chege & another (supra)** the court held:

“The applicant seeks to appeal against the Order dismissing his application. This is not an Order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was before coming to court and therefore the issues of substantial loss that he is likely to suffer and the appeal being rendered nugatory does not arise”.

Similarly, in **Kaushik Panchamatia & 3 others V Prime Bank Ltd & another** [2020] KECA 418 (KLR) the Court of Appeal held:

“We reiterate the position taken by the court in the above case that a negative Order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant stay Order in the manner prayed by applicants”.

See also Western College of Arts and **Applied Sciences V Oranga & others (supra)**, where the court stated:

“But what is there to be executed under the judgment, the subject of the intended appeal of the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs...”

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction”.

See also **Kanwal Sarjit Singh Dhiman V Keshauji Juvraj Shah** [2008] eKLR, **Raymond M. Omboga V Austine Pyan Maranga and Kenya Commercial Bank Ltd V Jamarind Meadows Ltd & 7 Others** (supra).

The foregoing sentiments in the three decisions mentioned above, relied upon by the respondent’s counsel, apply with equal force to the circumstances of this case.

These cases demonstrate beyond peradventure that a negative Order, analogous to the one in this case is

incapable of being stayed in law. This is because the Public Service Commission dismissed the applicant's appeal for reinstatement and the applicant was already out of employment at the time.

Contrary to the submission that the applicant was not seeking a stay of a negative Order, but to restrain the validity, operationalization, implementation and/or coming into effect of the decision by the Public Service Commission, the dismissal of the applicant's appeal was valid became effective on 11th June 2025 and there is nothing to restrain or stay as judicial authority lays it bare and the court so finds.

Finally, having found as above, the court is satisfied that the tests of timing of the application, substantial loss, arguability of appeal, prejudice to the respondent and appeal being rendered nugatory do not arise.

For those reasons the applicant's Notice of Motion dated 30th September 2025 fails and it is accordingly dismissed with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 12TH DAY OF NOVEMBER, 2025.**

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL