



**Parliamentary Service Commission & another v Orwoba (Civil Appeal
(Application) E551 of 2025) [2025] KECA 2111 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KECA 2111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E551 OF 2025
DK MUSINGA, M NGUGI & P NYAMWEYA, JJA
DECEMBER 5, 2025**

BETWEEN

PARLIAMENTARY SERVICE COMMISSION 1ST APPLICANT

CLERK OF THE SENATE 2ND APPLICANT

AND

HON GLORIA ORWOBA RESPONDENT

(Being an application for stay of proceedings in the Employment and Labour Relations Court of Kenya at Nairobi (Nduma Nderi, J.) in ELRC Constitutional Petition No. E251 of 2025)

RULING

1. Before this Court is a notice of motion dated 17th July 2025 which is brought by the applicants under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5(2)(b) and 49 of the Rules of this Court. The main orders sought by the applicants are a stay of further proceedings in or arising from Nairobi Employment and Labour Relations Court Constitutional Petition No. E251 of 2025 pending the hearing and determination of the appeal.
2. The application stems from proceedings which were commenced by the respondent through a constitutional petition, to wit, Employment and Labour Relations Petition No. E251 of 2025 and an accompanying urgent application dated 27th March 2025. In that petition, the respondent sought declarations that the withholding of her salary violated Articles 40, 41 and 47 of the [Constitution](#); a declaration that the conduct of the 2nd applicant amounted to gross misconduct and abuse of office; orders of certiorari to quash directives stopping her salary; an order of mandamus compelling the 1st applicant to investigate complaints against the 2nd applicant; an injunction restraining any form of victimization; and an award of general damages for alleged constitutional violations.



3. The applicants responded by filing a preliminary objection, arguing that the court lacked jurisdiction because the respondent, as a nominated Senator, was not in an employer-employee relationship with the Parliamentary Service Commission, and that the matter was res judicata in view of Nairobi High Court Petition No. 2 of 2024.
4. Vide a ruling delivered on 8th May 2025, the Employment and Labour Relations Court (ELRC), on the issue of res judicata, held that the petition before it was not barred because the matters now raised, including the alleged unlawful stoppage of salary, sexual harassment, discrimination and abuse of office by the Clerk of the Senate had not been determined in the earlier High Court Petition No. 2 of 2024. The ELRC noted that the earlier dispute concerned suspension from the Senate under the *Parliamentary Powers and Privileges Act* and involved different parties, whereas the present petition includes new issues and incorporates the Parliamentary Service Commission, which was not a party in the previous litigation. Since the prayers sought and the factual matrix differed materially, the objection based on res judicata failed.
5. On jurisdiction, the ELRC held that it had a constitutional and statutory mandate under Article 162 (2) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act* to hear and determine the dispute. The court held that the petition concerns alleged violations of the petitioner's rights arising within her workplace, namely the Senate, and involves the terms and conditions of service of a serving member of Parliament, including payment of salary and protection from discrimination and harassment. It therefore concluded that it had jurisdiction to entertain the petition.
6. The preliminary objection raised by the 1st and 2nd applicants was therefore held to have no merit and was accordingly dismissed with costs.
7. Being aggrieved and dissatisfied with the decision of the ELRC, the applicants herein have already lodged an appeal before this Court, to wit, Nairobi Civil Appeal No. E551 of 2025.
8. This application is supported by the grounds set out on its face and in the affidavit in support sworn by Anthony Njoroge, Director, Litigation and Compliance at the Parliamentary Service Commission. On arguability, the applicants contend that their appeal raises substantial legal questions with high chances of success. In the Memorandum of Appeal dated 16th July 2025, they contend, inter alia, that the learned judge erred in law and in fact by finding that the ELRC had jurisdiction to determine a dispute touching on the exercise of the powers and privileges of a House of Parliament in regulating the conduct of a Member of Parliament; by holding that the ELRC had jurisdiction to hear and determine the suit despite the respondent, as a Member of Parliament, failing to demonstrate the existence of any employer-employee relationship with the Parliamentary Service Commission; by proceeding with the matter in a manner contrary to Article 162 (2)(a) and (3) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act*; by failing to adhere to Article 105 of the *Constitution* which vests jurisdiction over questions relating to the vacancy of a parliamentary seat and matters tied to discipline of Members of Parliament, exclusively in the High Court; and by failing to find that the issues raised in the petition were res judicata in light of Nairobi High Court Petition No. 2 of 2024 where the suspension of the respondent was conclusively determined.
9. On the nugatory aspect, the applicants contend that unless a stay is granted, the pending appeal will be rendered futile. They assert that the Employment and Labour Relations Court is set to proceed with the hearing of the petition on 21st July 2025 (now past), and may issue far-reaching declarations, orders of certiorari, mandamus and injunctive relief touching on the applicants' constitutional and statutory mandates even though their challenge concerns the ELRC's authority to entertain the matter at all. They contend that being subjected to proceedings before a court without jurisdiction would expose them to prejudice that cannot be remedied by an award of costs and would undermine the appellate



process. It is therefore contended that a stay is necessary to preserve the substratum of the appeal and avoid a situation where the jurisdictional question becomes moot.

10. The application is opposed through a replying affidavit sworn by the respondent. She avers that the applicants' supporting affidavit is defective because it was sworn by Mr. Anthony Njoroge who, in her view, previously acted as counsel for the Parliamentary Service Commission when prosecuting the preliminary objection before the ELRC, and therefore cannot now depose to factual matters as a witness without creating conflict or impropriety. She maintains that only the Chairperson of the Parliamentary Service Commission or a duly authorised commissioner may swear affidavits on its behalf, and that Mr. Njoroge's claimed authority is unsupported. She adds that it is unfair, embarrassing and professionally inappropriate for him to have appeared as advocate for the 1st applicant in the ELRC and now appear before this Court as a witness having sworn the impugned affidavit.
11. The respondent disputes the applicants' contention that the Parliamentary Service Commission is not her employer, asserting that Article 127 of the Constitution together with the Parliamentary Service Act demonstrate that the 1st applicant sets and oversees the terms and conditions of service of Members of Parliament, including the payment of their remuneration. She avers that section 12 of the Employment Act does not exclude Members of Parliament from its scope and argues that the ELRC therefore has jurisdiction. She questions the basis on which the 1st applicant pays salaries to members of parliament without the employer-employee relationship or even agency. She further avers that the applicants' position on the non-existent of an employer-employee relationship was contradicted by the fact that during the ELRC proceedings, counsel for the applicants informed the court that her salary had started being paid, thereby confirming the employment nexus.
12. The respondent also avers that the applicants' attempt to rely on issues of constitutional jurisdiction and res judicata is misplaced as these issues have no bearing on her claims regarding the unlawful stoppage of salary and the workplace violations she alleges in her petition. She deposes that the applicants' arguments are designed to delay the hearing and determination of her petition while continuing to withhold her dues, which is detrimental to her. She reiterates that this application has no merit because the applicants have not demonstrated an arguable appeal, bearing in mind that the ELRC dismissed their preliminary objection after carefully considering the facts and law.
13. On nugatory aspect, she avers that the appeal cannot be rendered nugatory because any payments made to her, if later found erroneous, can be recovered at the end of her term, including through adjustment of her pension and benefits. She further avers that the applicants will suffer no prejudice if stay is denied as any alleged loss is compensable. She concludes by urging us to dismiss the application with costs.
14. In a further affidavit sworn by Anthony Njoroge in response to the respondent's replying affidavit, the deponent avers that the respondent's allegation that this application is incompetent because it was supported by an affidavit sworn by an advocate is unfounded, noting that under Article 123 (3) of the Constitution, the Clerk of the Senate is the Secretary to the Parliamentary Service Commission and ordinarily swears affidavits on its behalf. He adds that because the Clerk is a substantive party to the suit, having been sued as the 2nd respondent in the ELRC and now the 2nd appellant in the appeal pending before this Court, it was necessary for a different authorised officer to depone to facts on behalf of the Commission to avoid any conflict of interest. He maintains that his affidavit is proper, that the respondent's objections are misguided, and that the only real issue before the Court is whether the application satisfies the principles for stay under rule 5(2)(b), namely whether the appeal is arguable, whether it will be rendered nugatory if stay is not granted, and whether granting the orders sought serves the public interest.



15. At the hearing hereof, learned counsel, Ms. Thanji, appeared for the 1st applicant, while the 2nd applicant was represented by learned counsel Ms. Opola. The respondent was represented by learned counsel Mr. Karanja. All counsel made brief oral highlights of their clients' written submissions, which was largely a reiteration of the grounds outlined hereinabove. We therefore see no need to rehash those arguments.
16. In brief, Ms. Opola, who led the arguments for the applicants and with whom Ms. Thanji associated herself, urged this Court to find that the appeal is arguable because it raises substantive questions about the jurisdiction of the ELRC, including whether a Member of Parliament can be regarded as an employee of the Parliamentary Service Commission and whether such disputes fall under Article 162(2)(a) rather than Article 105 which assigns those matters to the High Court.
17. On the nugatory aspect, she submitted that the petition had already been listed for judgment on 18th December 2025 and that allowing a court without jurisdiction to proceed risked producing a determination that would be rendered meaningless if the appeal ultimately were to succeed. She added that the ELRC's decision could have significant implications for the constitutional status of Members of Parliament.
18. On public interest, she argued that the respondent had already litigated the issue of her suspension before the High Court which she described as the proper forum, and that allowing her to pursue the same subject matter before the ELRC risked undermining the constitutional structure governing the resolution of such disputes.
19. On his part, Mr. Karanja contended that the matter before the ELRC was not an election or removal dispute but a straightforward claim for withheld salary and dues by a Member of Parliament. He asserted that the applicants had not met the threshold for stay under rule 5(2)(b), emphasizing that the dispute was personal to the respondent and did not raise the broad constitutional issues the applicants sought to project. On the nugatory limb, he submitted that the applicants had not demonstrated any irreparable prejudice they would suffer if the ELRC ordered payment of the withheld sums particularly since they continued to hold the respondent's pension and benefits. He added that there was no indication that the respondent would be unable to refund the money should the appeal succeed. He further submitted that the matters the applicants raised, including jurisdiction, could be fully addressed in the substantive appeal if necessary, and that it would be premature to speculate on the ELRC's final determination, especially given the judge's finding that the issues were not pure points of law but required evidence.
20. 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.
21. As regards arguability, the law is settled that an arguable appeal is not one that must ultimately succeed, but one that raises at least a single bona fide issue worthy of full consideration on appeal. The applicants have raised questions concerning the ELRC's jurisdiction to entertain a dispute implicating the powers and privileges of Parliament in regulating the conduct of a Member of Parliament, whether the court properly satisfied itself that an employer-employee relationship existed and whether it erred by proceeding in a manner said to be inconsistent with Article 162(2)(a) and (3) of the [Constitution](#) and section 12 of the [Employment and Labour Relations Court Act](#). These are not trivial points; they call for examination at the appellate stage. We are therefore satisfied that the intended appeal is arguable.



22. Turning to the nugatory aspect, this Court stated in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* (supra) that 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.
23. The intended appeal is against an interlocutory ruling. This Court in *Meta Platforms, Inc & Another v Samasource Kenya EPZ Limited t/a Sama & Another; Kenya National Humans Rights Equality Commission & 9 Others (Interested Parties)* [2023] KECA 996 (KLR) citing with approval the Court of Appeal of Nigeria in *NNPC & Anor v Odidere Enterprises Nigeria Ltd* [2008] 8 NWLR (Pt. 1090) 583 at 616-618 underscored that a stay of proceedings is a serious interruption of a party's right to advance their case and should not be granted unless it is shown that the proceedings ought not to continue.
24. The Court in *Meta Platforms, Inc & Another v Samasource Kenya EPZ Limited t/a Sama & Another* (supra) went on to hold thus:
- A balance must be maintained between the right of a party to have the substantive suit heard timeously and the desire of his opponent to be given adequate time to prosecute his appeal. In granting an order of stay of proceedings, the court should be guided primarily by the necessity to be fair to both parties. In our view, the following considerations, though not exhaustive, are relevant, bearing in mind the fact that the peculiar facts and circumstances of the case must always be considered.
- a. A stay of proceedings can be granted only if there is a pending appeal, which is, prima facie, valid in law.
 - b. The appeal, which forms the basis of an application for stay of proceeding, must be competent and arguable on its merits. Where an appeal is frivolous, vexatious or an abuse of court process, an appellate court will decline jurisdiction to entertain the application.
 - c. Where the interlocutory appeal following an application for stay of proceedings will finally dispose of the case or put an end to the proceedings in the lower court, stay of proceedings would be granted.
 - d. Where the case will be destroyed, damaged or annihilated before the matter is disposed of, an appellate court will grant stay.
 - e. The Court of Appeal would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused.
 - f. A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory.”
25. Applying the reasoning and holding of this Court in *Meta Platforms, Inc & Another v Samasource Kenya EPZ Limited t/a Sama & Another* (supra), and in light of the fact that the appeal filed by the applicants in Nairobi Civil Appeal No. E551 of 2025 will determine whether or not the ELRC has jurisdiction to proceed with the subject proceedings, we are satisfied that the applicants have advanced sufficient grounds for grant of the orders sought, which we hereby grant.
26. The costs of the application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025.



D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

