



**Simiyu v Principal Secretary, State Department For Internal Security and National Administration & 6 others; Okumu & 2 others (Interested Parties) (Constitutional Petition E004 of 2024) [2026] KEELRC 54 (KLR) (22 January 2026) (Ruling)**

Neutral citation: [2026] KEELRC 54 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CONSTITUTIONAL PETITION E004 OF 2024**

**DN NDERITU, J  
JANUARY 22, 2026**

**BETWEEN**

**DANIEL SAYA SIMIYU ..... PETITIONER**

**AND**

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT FOR  
INTERNAL SECURITY AND NATIONAL ADMINISTRATION .... 1<sup>ST</sup>  
RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, WEBUYE WEST SUB  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY COMMISSIONER, BUNGOMA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**REGIONAL COMMISSIONER, WESTERN REGION ..... 4<sup>TH</sup> RESPONDENT**

**THE SECRETARY, PUBLIC SERVICE COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**DAVID NGATAWEKESA ..... 6<sup>TH</sup> RESPONDENT**

**HOSEA WAMALWAWEKESA ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**PHILIP KIBERENGE OKUMU ..... INTERESTED PARTY**

**SICHANGI FRANKLIN WANJALA ..... INTERESTED PARTY**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION .... INTERESTED  
PARTY**



## RULING

### I. Introduction

1. In a judgment dated and delivered on 6<sup>th</sup> March 2025 that inter alia declared the appointment of the 6<sup>th</sup> and 7<sup>th</sup> respondents' (the Applicants) as assistant chiefs invalid, the court ordered as follows –
  - a. A declaratory order be and is hereby issued that the actions by the 1<sup>st</sup> to 4<sup>th</sup> respondents in appointing and coronating the 6<sup>th</sup> and 7<sup>th</sup> respondents as assistant/sub-chiefs for Miendo and Matisi sub-locations of Webuye Sub-County of Bungoma County were discriminative, selective, unfair, unlawful, and violated Articles 10, 27, 41, & 47 of *the Constitution*.
  - b. That the above appointments were therefore invalid, unlawful, unconstitutional, null, and void ab initio.
  - c. That the said unlawful and unconstitutional appointments violated the legitimate expectation of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.
  - d. That an order of a permanent injunction be and is hereby issued restraining the 6<sup>th</sup> and 7<sup>th</sup> respondents from carrying on duties of assistant chiefs in the said sub-locations respectively.
  - e. That the letters of appointment issued to the 6<sup>th</sup> and 7<sup>th</sup> respondents into their respective positions be and are hereby called into this court and quashed and declared nullities.
  - f. That in the interest of justice and to spare the taxpayer further unnecessary costs, the respondents, and in that behalf the 5<sup>th</sup> respondent, is hereby ordered and directed to within 30 days of this judgment issue appointment letters to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to occupy their respective positions for which they were ranked first.
  - g. There is no order as to costs.
2. In a notice of motion dated 13<sup>th</sup> March 2025 (the application) the 6<sup>th</sup> and 7<sup>th</sup> respondents (applicants) are seeking orders that –
  - a. Spent.
  - b. Pending hearing and determination of this application, this Honourable court be pleased to issue an order of stay of execution of the judgment dated 6<sup>th</sup> March, 2025 and decree therein.
  - c. This Honourable court be pleased to order a stay of the judgment and all consequent orders of this Honourable court delivered on the 6/03/2025 pending the hearing and determination of this application.
  - d. This Honourable court be pleased to order a stay of execution of the judgment and all consequent orders of this Honourable court delivered on the 6/03/2015 pending the hearing and determination of the appeal.
  - e. This Honourable court be pleased to order and direct that in default of prayers (a)(b)(c) and(d) in case of effecting of the judgment, this Honourable court be pleased to order and direct that the 6<sup>th</sup> and 7<sup>th</sup> respondents were legally and lawfully appointed as Assistant Chiefs of Matisi and Miendo sub-locations respectively pending hearing and determination of the appeal.
  - f. Costs of this application be provide for.



3. The application is expressed to be founded on Article 159 of *the Constitution*, Sections 3, 3A, 63, 75, & 78 of the *Civil Procedure Act* (Cap 21); Order 40, Rule 1, & Order 42, Rules 6 & 8 of the Civil Procedure Rules, 2010; and Section 12(3) of the *Employment and Labour Relations Court Act*. The application is based on the grounds on the face of it and supported with the joint affidavit sworn by the applicants on 13<sup>th</sup> March 2025 with several annexures thereto.
4. In opposition to the application, the petitioner filed a replying affidavit sworn on 29<sup>th</sup> May 2025. The 5<sup>th</sup> respondent filed the replying affidavit sworn by Paul Famba the secretary/CEO, on 16<sup>th</sup> May 2025. The 1<sup>st</sup> to 4<sup>th</sup> respondents did not respond to the application.
5. On 13<sup>th</sup> June 2025 the applicants filed a joint “replying affidavit” sworn on 29<sup>th</sup> May 2025 in response to the petitioner’s and 5<sup>th</sup> respondent’s replying affidavits.
6. By consent, the court directed that the application be canvassed by way of written submissions.
7. Mr. Akenya for the applicant filed his written submissions dated 13<sup>th</sup> June 2025. Counsel for the petitioner and the 5<sup>th</sup> respondent indicated that they were to rely on the respective replying affidavits and hence filed no written submissions.

## II. Evidence

8. In the supporting affidavit and “replying affidavit” which is actually a further affidavit, it is deponed that the applicants were competitively recruited as the assistant chiefs of Matisi and Miendo sub-locations after they applied, shortlisted, and were duly appointed on merit.
9. It is deponed that the court delivered the judgment on 6<sup>th</sup> March, 2025 in the absence of the applicants, at which stay of execution was not requested for nor granted.
10. It is deponed that in the judgment the court directed that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties be issued with appointment letters as they ranked first, despite their non-participation in the suit.
11. It is deponed that the applicants are dissatisfied with the said judgment and have lodged a notice of appeal in the Court of Appeal and requested for typed proceedings within the statutory timelines.
12. It is deponed that the applicants were not served with the court documents and that the applicants only heard about the matter from their immediate supervisor, the Area chief Mrs. Caro Nekesa Lwiki, who informed them that a suit against their appointment had been filed by a civil rights activist and indeed they confirmed from the Court’s Registry at Bungoma that there was a challenge to their appointment.
13. It is deponed that indeed on 25<sup>th</sup> February 2025, the applicants reported to the 2<sup>nd</sup> respondents’ office at Webuye from where they boarded a GK Vehicle to Kakamega law courts. They state that they were informed that proceedings were virtual and struggled to join the link. It is deponed, however, that when the applicants sought information from the court clerk, they were informed that by the time they joined the court their matter had been called and judgment date issued.
14. The applicants depone that on 6<sup>th</sup> March 2025 they joined the court virtually when the judgment was delivered against them.
15. It is deponed that thereafter the applicants instructed their advocates on record who upon obtaining a copy of the judgment found that the petition was unopposed except by the 5<sup>th</sup> respondent who filed a replying affidavit.



16. It is deponed that the applicants found that they were not represented by the Attorney General as promised by that office. The applicants deponed that their supervisors, the 1<sup>st</sup> to 4<sup>th</sup> respondents, assured them that as government employees they were to be represented by the Attorney General.
17. It is deponed that the intended appeal, as expressed in the attached draft memorandum of appeal is arguable and has high chances of success. It is further deponed that if the judgment is executed the appeal shall be rendered nugatory. It is further deponed that the petitioner will suffer prejudice if the orders sought are granted and that the application was made expeditiously and without undue delay.  
It is further deponed that the court has jurisdiction to correct clerical errors and it is thus not functus officio as claimed by the petitioner.
18. In the replying affidavit, the petitioner states that the application is unmeritorious, frivolous and an abuse of court process as the applicants like all the other respondents were served with the petition filed on 20<sup>th</sup> September 2024 but chose not to enter appearance or file a response.
19. It is deponed that despite the applicants' assertion that the petition was undefended, only the applicants failed to defend the suit even becoming aware of the court proceedings as they admitted in their application and they even approached the office of the Attorney General to seek representation.
20. It is deponed that the court is functus officio and thus cannot issue the orders sought staying its own judgment. It is deponed that the appeal as filed cannot stand as the applicants did not defend the petition to provide legal basis and for the same. It is stated that the intended appeal raises no arguable issues and that the application does not meet the threshold for grant of a stay of execution.
21. The petitioner advances that allowing the stay shall amount to condemning the residents of Miendo and Matisi sub-locations who have not had assistant chiefs for two years to remain so. It is urged that no substantial loss has been demonstrated in the application.
22. The petitioner further states that there is no demonstration that the intended appeal shall be rendered nugatory if the stay is not granted and, in any event, the judgement shall amount to allowing an illegality to persist.
23. On the other hand, the 5<sup>th</sup> respondent states that the application as filed is misconceived and devoid of merit as the applicants confirmed that they were duly represented by the Attorney General and were indeed aware of the court proceedings.
24. It is stated that the application is overtaken by events as the judgment and decree have been fully satisfied as evidenced by the letter of 26<sup>th</sup> March 2025 annexed to the affidavit. The 5<sup>th</sup> respondent asserts that the court is functus officio and no substantial loss or irreparable injury has been demonstrated. It is stated that the appeal shall be rendered nugatory should the application be denied. The court is urged to dismiss the application as the same has no merits.

### **III. Submissions By Applicants**

20. Counsel for the applicants submitted on a single issue – Whether the application dated 13.03.2025 is merited.
21. Counsel cited *Rwagi v Kariuki* (KEHC 3889(KLR)) on the principles for grant of stay of execution pending appeal arguing that the applicants will suffer substantial loss if they were removed from public office and further taint their reputation and deny them opportunity to ever find employment in public service.



22. Further citing *Ken-Kit Kenya Limited v Nyegenye* (2024) KEELRC 2276 (KLR), it is submitted that the application was filed without unreasonable delay as the judgment was delivered on 6<sup>th</sup> March 2025 while the applicants filed this application on 13<sup>th</sup> March, 2025.
23. It is submitted that the appeal by the applicants raises arguable issues as it is demonstrated that the applicants were summarily dismissed contrary to Articles 41 and 47 of *the Constitution* as they were not heard before the judgment was pronounced against them.
24. Citing *Lekakimon v Speaker, County Assembly of Baringo & 3 others* (2024) KEELRC 1948 (KLR) the court is invited to consider that the offices held by the applicants are public and to allow their removal through a contested judgment before an appeal is heard would leave the administrative office vacant. The court is urged to maintain the status quo.
25. As noted above the applicants and the other respondents did not file submissions and opted to rely on the filed responses as summarized above.

#### **IV. Analysis & Determination**

20. The court has carefully read and considered the application, the affidavit in support, the replying affidavits, and the written submissions by counsel for the applicants, alongside all the cited authorities. The issue that commends itself to the court for determination is – Whether an order for stay should issue? In other words – Is the application with merits?

#### **V. Stay Of Execution**

20. The application has two limbs – On one hand the applicants are seeking stay of execution of the judgement of 6<sup>th</sup> March 2025 (prayers (b) to (d) and on the other hand, a prayer for the court to review its judgement and find that the applicants were legally and lawfully appointed (prayer (e)).
21. The petitioner posits that the applicants have not met the threshold for grant of a stay as no appeal can be proffered by a party who did not enter appearance. The 5<sup>th</sup> respondent has stated that the stay orders cannot issue as the judgement and decree have already been executed and satisfied.
22. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, that provides –
  - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
20. As to what amounts to substantial loss it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR that –

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors



which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. It is trite law that execution is a lawful process, and it cannot be a ground for granting stay of execution. The applicants are required to show and demonstrate that execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory.
21. On whether the applicants have demonstrated substantial loss, the applicants assert that their removal from public office will deny them benefits accruing from the said office of assistant chief, which is pensionable, and further taint their image preventing them from obtaining future opportunities in the public service.
22. The 5<sup>th</sup> respondent on its part indicates that it already complied with the judgment which the applicants are seeking to stay. That position is confirmed by a letter dated 26<sup>th</sup> March 2025 which in part stated that –

‘Arising from the above, the Commission has considered the above findings of the court and being in agreement with the learned judge has resolved to fully comply with the said judgment.

Accordingly, this is to notify you that the commission has appointed the following persons to the positions indicated against their names....

S/No	Name & ID No.	Position	Sub-Location	Sub-County
1.	Philip Kiberenge Okumu 22*	Assistant Chief II	Matisi	Webuye West
2.	Sichangi Franklin Wanjala 27*	Assistant Chief II	Miendo	Webuye West

This should be done immediately and in any event by 5<sup>th</sup> April, 2025.’

20. The effect of the above is that the substratum of the matter that the applicants are seeking to stay, being the implementation of the impugned judgment, has already been executed and enforced.
21. The essence of a stay is to maintain the status quo subsisting as at the time the application was made. The judgment has been complied with and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties appointed as assistant chiefs, the positions previously held by the applicants. There are no vacancies or vacuum in those offices.
22. The applicants have not demonstrated any substantial loss that they will suffer other than lawfully losing positions that they held. In any event, on 23<sup>rd</sup> September 2024 interim orders were issued restraining the applicants from assuming the office of assistant chief of their respective sub-locations of Matisi and Miendo. The said orders were confirmed on 14<sup>th</sup> October 2024 and they subsisted until the determination of the petition. The applicants have not been undertaking the functions of assistant chief and thus no substantial loss shall be suffered if the application is denied. They did not and should not have assumed the said positions in view of the interim orders.



23. In *Butt v Rent Restriction Tribunal* (1982) KLR 417, the Court of Appeal gave guidance on how a court should exercise its discretion in an application for stay of execution and held that –

- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or reusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion(sic) (trial court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. The court in exercising its powers under order XLI rule 4 (2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse”. Emphasis Added

20. While the court is satisfied that there has been no inordinate delay in the filing of the application, as the judgment was delivered on the 6<sup>th</sup> March 2025 and the application was filed seven days later. The court finds and holds that the application has no merits.

21. The part of the application seeking for review has no merits at all as the applicants cannot legally pursue a review and an appeal concurrently.

22. The court has already pronounced itself on the unlawfulness of the appointment of the applicants and, as rightly pointed out by the petitioner, the court is functus officio on the issue and the only recourse available to the applicants is to file an appeal to the Court of Appeal. This court cannot sit on appeal of its own judgment.

23. Consequently, the court finds no merit in the application dated 13<sup>th</sup> March 2025 and it is hereby dismissed.

## **VI. Order**

20. The court orders that –

- i. The application dated 13<sup>th</sup> March, 2025 is unmeritorious and is hereby disallowed.
- ii. There is no orders as costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 22<sup>ND</sup> DAY OF JANUARY, 2026.**

\*\* .....\*

**DAVID NDERITU**

**JUDGE**

