

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW & LABOUR RELATIONS DIVISION

ELRCJR NO. E012 OF 2026

JAMES MUNGAI WARUI, ndc (K)

.....APPLICANT

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST
RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The applicant filed an Originating Motion under the certificate urgency by Ochiel Dudley Advocate of Bond Advocates LLP, dated 29th January 2026 seeking for various orders as follows-
 - a. Spent
 - b. Due to the urgency, and the Applicant’s unanswered letter of 26 January 2026, the Applicant be and is exempted from further pursuing internal reliefs under section 9(4) of the FAA.
 - c. Pending the hearing and determination of the application interpartes, a conservatory order does issue:
 - i. Suspending the promotion interviews for the positions of Senior Deputy Director of Public Prosecutions (DPP 2) and Deputy Director of Public Prosecutions (DPP 3) scheduled for 2–4 February 2026; or

- ii. In the alternative, restraining the ODPP from making a final determination on the interviews for the two positions; or
 - iii. In the alternative, directing the ODPP to preserve and leave vacant one slot in each of the two positions.
- d. Under Article 23 of the Constitution, the court does grant the following or other appropriate judicial review reliefs:
- i. A declaration that the transfer of the Applicant's personnel records from the ODPP to the Public Service Commission (PSC) on 19 June 2023 was unlawful, unjustified, and of no legal effect.
 - ii. A further declaration does issue that the exclusion of the Applicant and the failure to consider his application, due to the secondment, violated his rights, among others, under Article 41 and 47.
 - iii. An order of mandamus does issue directing the ODPP to receive the Applicant's application, to consider it, and to shortlist the Applicant for interview for the positions of Senior Deputy Director of Public Prosecutions and Deputy Director of Public Prosecutions ..
 - iv. An order of mandamus does issue directing the Respondents to, within 14 days of the order, restore the Applicant's personnel file and employment records to the custody of the ODPP.
 - iv. A further order of mandamus does issue directing the Respondents, within 3 months of the order, to calculate and to make good all lost employment benefits, including annual salary increments and pension contributions, arising from the unlawful transfer of the Applicant's employment records during the secondment.

- v. A structural interdict directing the Respondents to file an affidavit after six months indicating their status of compliance with the orders in (ii) and (iii) above. vii. Constitutional damages for violation of the Applicant's rights.
2. The application is supported by the affidavit of the applicant, James Mugai Warui, dated 29th January 2026. Among the annexures was the application for the 2 positions advertised by the OPP, namely, the position of Senior Deputy Director of Public Prosecutions and the position of Deputy Director of Public Prosecutions. Both applications were dated 12th January 2026. Further, the applicant annexed a letter dated 26th January 2026 addressed to the Secretary Public Service Commission being an appeal against failure by the advisory board of the office of the Director of Public Prosecutions (ODPP) to the applicant for the aforesaid positions.
3. The certificate was placed before me on the 30th January 2026 in chambers and I issued the following orders- 'THIS MATTER is coming up on 30th January 2026 for directions on the Notice of Motion dated 29th January 2026 before Honourable Justice J.W. Keli . Upon perusal of the application in the absence of the parties, I decline to issue the order of stay of the interviews, as the applicant has approached the court on the eve of the interviews. The court finds that the applicant has not even attempted to invoke the internal mechanism and seek the reason for non-shortlisting. The applicant has a remedy of compensation in the event the court finds violations of their rights.

IT IS HEREBY ORDERED:-

1). THAT the Originating motion be served for response in 14 days. Right of reply together with submissions within 14 days of service. within 14 days of service the respondent to do file submissions.

2). Mention on 16th March 2026 to issue a judgment date.

GIVEN under my hand and seal of the Honourable court this 30th January 2026.

Penal Notice: Take notice that any disobedience or non-observance of the order of the court served herewith will result in penal consequences to you and any other person(s) disobeying and not observing the same .’’

4. The applicant aggrieved with my Exparte Order filed a further application under certificate of urgency which application was by way of Notice of motion dated 31st January 2026 seeking for the following orders-

a. spent

b. This Honorable Court be pleased to review and vary its orders issued on 30 January 2026 to the limited extent of bringing forward the return date from 16 March 2026 to 2 or 3 February 2026.

c. Pending inter partes hearing, this Honorable Court be pleased to issue orders preserving the Applicant’s candidacy in the interview process.

The grounds of the application were as follows-

This Court has jurisdiction to review its decisions under Rule 33 of the ELRC Rules. In Benjoh Amalgamated Ltd v KCB (2014) eKLR, the Court affirmed the inherent power of Courts to review its orders to prevent injustice.

5. The Applicant seeks a review for an error on the face of the record, where the Court stated that the Applicant had not attempted internal remedies, despite Annexure JMW-2 clearly demonstrating that he did.
6. The Court further implied non-exhaustion and overlooked the Applicant's express pleading under Section 9(4) of the Fair Administrative Action Act seeking exemption due to urgency.
7. At any rate, the ELRC has consistently, for example in *Mercy Auma Ochieng v Robi Mbugua Njoroge & 2 others* (2025) eKLR, held that internal mechanisms are optional and do not bar an employee from seeking the court's intervention. Moreover, no internal forum can remedy the constitutional violations the Applicant brings before the court.
8. In *Republic v National Environment Management Authority ex parte Sound Equipment Ltd* (2011) eKLR, the Court affirmed that exhaustion is not absolute and may be exempted in exceptional cases, such as the Applicant's.
9. The court summoned all the parties to appear before me today for an interpartes hearing on a preliminary basis, even without filing responses to the prayer c of the originating motion. The court noted that the appeal on the shortlisting was to the Public Service Commission but not to the employer who is accused of failing to shortlist the applicant(Annexure JMW-3). The court heard the parties, and it was confirmed by Mr. Owiti, counsel for the ODPP, the 1st respondent, that the interviews had begun yesterday, on 3rd February 2026 and end today on 4th February 2026. This explains the urgency and the need to write dispense-with responses at the first instance.

The parties' submissions

10. The applicant, through his counsel Ochiel Dudley, told the court that the applicant is on secondment and eligible for promotion by his primary employer, the 1st respondent. The applicant's personnel file was moved from the 1st respondent to the place of secondment by mistake, so the applicant missed out on promotion. The applicant, vide letter dated 26th January 2026, explained to the 1st respondent why the file was moved. The interview dates were announced on 26th January 2026. The applicant sought the preservation of the positions ODPP2 and ODPP3, which he had applied for, pending the determination of the application. The applicant is currently acting Inspector General (Corporations).

11. The 1st respondent, through his counsel, Mr. Owiti, told the court that he had not had the opportunity to respond, which was true, as the court summoned the parties on the basis of urgency, with less than 24 hours. He told the court the interviews end today. The counsel was unable to respond on the issue of the file of the applicant on secondment and related issues. He sought for time to respond. On the issue of the stay of the interviews, the counsel submitted that the first instance denial of conservatory orders was based on a last-minute application, and that it had not changed. On the prayers sought related to the interviews, counsel submitted that the appointment was not automatic. On the stay of announcement of the results of the interview, the counsel submitted that the applicant, having not participated in the interview, would not be prejudiced by the release of the results. That the remedy lies in the damages. The application was late and the court had no basis to review earlier orders.

12. Ms Wangechi submitted on behalf of the Public Service Commission, the 2nd Respondent. The counsel gave a brief history of the secondment of the applicant, and the court noted that correspondence on the same was filed by the applicant(JMW-4 to JMW-10). The 2nd

respondent had clarified that the applicant remained an employee of the 1st respondent. He still acting as a vacancy had not been declared for competitive recruitment. The personnel file is in the office where the applicant is working. She told the court it was the applicant who asked for a transfer.

13. In rejoinder, counsel for the applicant submitted that the applicant never asked for transfer of his services from the 1st respondent. The request to second the applicant came from the 2nd respondent. The 1st respondent did not tell the court why the applicant was not shortlisted. The court can give an order under Article 23 of the Constitution. The officer seeks an opportunity to be heard by the 1st respondent.

14. Article 23 of the Constitution provides as follows-

‘(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including--

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.’’ This court has powers to issue conservatory orders pursuant to article 162(2)(a) and 165(5)(b) of the Constitution.

15. In Nairobi Constitutional Petition No. 206 of 2016 Satinderjit Singh Matharu v. Armajit Singh Gahir & 5 Others this court said that:

“Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-

1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the

relief sought.

2. The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and

3. As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner’s and

the respondent’s case must favour the grant of the conservatory order.”

16. In the matter before me, the applicant states in ground 7 of the Originating Motion – ‘The Applicant believes that he was excluded because, during a secondment, his personnel file was irregularly transferred to the state department to which he’d been seconded.’ This belief was not supported by any evidence. The court finds that the issue of shortlisting is a managerial prerogative; the court cannot guess why the applicant was not shortlisted. The applicant has not sought an order of court for disclosure of the reason for not being shortlisted. The court,

in the circumstances, finds no basis to interfere with the internal mechanisms of the 1st respondent. There is no proof of unfairness in the failure of the applicant to be shortlisted, and no order is sought for the reason. The balance of convenience tilts towards the 1st respondent who started the interviews yesterday. The court declines to order an interview for the applicant, as it cannot be conducted without him first being shortlisted. Further, affected candidates who may be taken are not parties to the suit and cannot be condemned unheard. The first business the applicant ought to have dispensed with is seeking an order for disclosure of the reasons for non-shortlisting, after which the court can determine whether the shortlisting process was fair. In the circumstances, the court found no prima facie basis established for the grant of the conservatory orders, and in any case the balance of convenience tilts in favour of the 1st respondent, which is exercising its constitutional duty and has begun the process with over 100 candidates participating and who are not parties to the suit.

17. The conservatory orders sought in prayer (c) of the Originating Motion are declined.
18. The parties shall take directions in the disposal of the Originating Motion.
19. The application dated 31st January 2026 prayers 1 and 2 were allowed. Prayer 3 was disallowed. Costs in the cause.
20. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH
FEBRUARY, 2026.

J. W. KELI,

JUDGE.

In the presence of:-

Applicant – Ojala h/b Ochiel Dudley

1st Respondent – Owiti

2nd Respondent - Wangechi