

**REPUBLIC OF
KENYA IN THE COURT
OF APPEAL
AT NAIROBI
(CORAM: NYAMWEYA, MUCHELULE & KORIR JJ.A.)**

**CIVIL APPLICATION NO. E662
OF 2025 BETWEEN**

**ISSA ELANYI CHEMAO.....1ST
APPLICANT
PATRICK KARANI EKIRAPA.....2ND
APPLICANT
PAUL NGWEYO KIRUI.....3RD
APPLICANT
VERSUS
HON. ESTHER MURUGI MATHENGE.....1ST
RESPONDENT
PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT
HEAD OF PUBLIC SERVICE.....3RD
RESPONDENT
NATIONAL LAND COMMISSION.....4TH
RESPONDENT**

**AND
CIVIL APPLICATION NO. E663
OF 2025 BETWEEN**

**ISSA ELANYI CHEMAO.....1ST
APPLICANT
PATRICK KARANI EKIRAPA.....2ND
APPLICANT
PAUL NGWEYO KIRUI.....3RD
APPLICANT
VERSUS
HON. TIYA GALGALO ALI.....1ST
RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT
HEAD OF PUBLIC SERVICE.....3RD
RESPONDENT
NATIONAL LAND COMMISSION.....4TH
RESPONDENT
AND
CIVIL APPLICATION NO. E680
OF 2025 BETWEEN
HEAD OF PUBLIC SERVICE.**

.....
**APPLICANT
VERSUS
HON. ESTHER MURUGI MATHENGE.....1ST
RESPONDENT
PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT**

**NATIONAL LAND COMMISSION.....3RD
RESPONDENT
AND
CIVIL APPLICATION NO. E682
OF 2025 BETWEEN
HEAD OF PUBLIC SERVICE.**

.....
**APPLICANT
AND
HON. TIYAH GALGALO.....1ST
RESPONDENT
PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT
NATIONAL LAND COMMISSION.....3RD
RESPONDENT**

(Being applications for stay of execution and conservatory orders pending the hearing and determination of the intended appeal arising from the judgement of High Court at Nairobi (C. Mwita J.) dated 11th November 2025

in

Petition No. E646 of 2025 and Petition No. E647 of 2025)

RULING OF THE COURT

1. This ruling pertains to four applications that all arise from, and seek to stay execution of the judgment and decree delivered by the High Court of Kenya at Nairobi (**C. Mwita J.- as he then was**) in **Nairobi High Constitutional Petition No. E646 of 2025** and **Nairobi High Constitutional Petition No. E647 of 2025** on 11th November 2025. The first set of applications, being **Civil Application No.E662 of 2025** and **Civil Application**

No. E663 of 2025 were both filed by Issa Elanyi Chemaao, Patrick Karani Ekirapa and Paul Ngweyo Kirui (hereinafter “the first set of applicants”) by way of Notices of Motion dated 13th November 2025. The said applicants state that they are members of the public who are aggrieved by the judgment in **Nairobi High Court**

Constitutional Petition No. E646 of 2025 and **Nairobi High Court Constitutional Petition No. E647 of 2025** that stopped the recruitment of the Commissioners of the National Land Commission.

2. The applicants joined Esther Murugi Mathenge as the 1st respondent in **Civil Application No. E662 of 2025** and Tiya Galgalo Ali as the 1st respondent in **Civil Application No. E663 of 2025**. The Public Service Commission, the Head of Public Service and the National Land Commission are joined as the 2nd, 3rd and 4th respondents in both applications. The applications are supported by two affidavits both sworn on 13th November 2025, by Issa Elanyi Chemaio, the 1st applicant, and submissions dated 2nd December 2025 filed by Manyonge Wanyama & Associates, the said applicants' advocates on record. The 3rd respondent also filed an affidavit in support of the applications, which was sworn on 18th November 2025 by Arthur Osiya, the Principal Administrative Secretary in the Executive Office of the President.
3. The second set of applications, **Civil Application No. E680 of 2025** and **Civil Application No. E682 of 2025**, are both filed by the Head of Public Service (hereinafter "HOPS"). Esther Murugi Mathenge is the 1st respondent in **Civil Application No. E680 of 2025** and Tiya Galgalo Ali

as the 1st respondent in **Civil Application No. E682 of 2025**. The Public Service Commission and the National Land Commission are joined as

the respective 2nd and 3rd respondents in both applications. The two applications are supported by affidavits sworn on 18th November 2025 by Arthur Osiya, the Principal Administrative Secretary in the Executive Office of the President and submissions dated 26th November 2026 filed by Emmanuel Bitta, the Chief State Counsel in the Attorney General's Office.

4. All the four applications were opposed by the respective 1st respondents therein, Esther Murugi Mathenge and Tiya Galgalo Ali. Both respondents each swore two separate replying affidavits on 25th November 2025 and 26th November 2025, in response to the first set and second set of applications respectively. For ease of reference, we shall refer to the two respondents as “the 1st respondents”. Their advocates on record, Ngatia and Associates, filed written submissions dated 5th December 2025 in all the applications.
5. By way of a brief background to the applications, Esther Murugi Mathenge and Tiya Galgalo Ali filed two respective petitions in the High Court, being **Nairobi High Court Constitutional Petition No. E646 of 2025** and **Nairobi High Court Constitutional Petition No. E647 of 2025**, against the Public Service Commission and the Head of Public Service, and in which the National Land Commission

was joined as an Interested Party. The said petitioners claimed that they were appointed as

commissioners of the National Land Commission (hereinafter “the Commission”) by letters of appointment from the Head of Public Service dated 21st December 2020, effective from 21st December 2020 for a single, non-renewable term of 6 years. Accordingly, that the respondents' actions of issuing a Gazette Notice No. 11212 on August 2025 declaring impending vacancies in the positions of chairperson and members of the Commission and publishing an advertisement dated 27th August 2025 in the *Daily Nation* newspaper declaring a vacancy in the office of the chairperson and the eight (8) commissioners of the Commission as from 14th November 2025 and inviting suitably qualified candidates to apply for the said vacant positions, were unlawful and unconstitutional.

6. In particular, that the actions were procedurally unfair and based on an error of fact, thus violating their right to fair administrative action under Article 47 of the Constitution; amounted to a threatened removal from office without just cause, contrary to Article 236(b) of the Constitution which protects public officers from arbitrary dismissal or removal; and threatened their security of tenure guaranteed under Article 250(6) of the Constitution and Section 8(5) of the National Land Commission Act, 2012, which prescribe a fixed, non-renewable term of six (6) years.

7. After hearing the parties, the High Court (**C. Mwita J.**-as he then was)

allowed the petitions and granted the following orders in the impugned judgment:

- a) *A declaration that Hon. Esther Murugi Mathenge and Hon. Hon. Tiyah Galgalo Ali, MBS are entitled to serve their full term of six-year as commissioners of the National Land Commission which commenced on 21st December 2020 and will expire on 20th December 2026.*
- b) *An order of certiorari quashing Gazette Notice No. 11212 dated 11th August 2025 and published in the Kenya Gazette on 15th August 2025 declaring impending vacancies in the position of chairperson and commissioners of the National Land Commission.*
- c) *An order of certiorari quashing the advertisement published by the selection panel in the Daily Nation on 27th August 2025 and the notice of shortlisted candidates published in the Standard Newspaper on 24th September 2025.*
- d) *An order of prohibition prohibiting the respondents, their agents, assigns or anyone acting on their behalf from taking any steps that would lead to recommending people for the appointment of eight commissioners.*

8. These are the orders that are the subject of the four applications for stay of execution before us. In summary, the case put forward by the first set of applicants in **Civil**

Application No. E662 of 2025 and **Civil Application No. E663 of 2025** is that the selection panel which was established on

27th August 2025 commenced the process of recruitment of the

chairperson and members of the Commission whose terms expired on 21st November 2025, except for two members namely Hon. Esther Murugi Mathenge and Hon. Tiya Galgalo Ali whose term expire on 20th December 2026. However, that the High Court in the impugned judgment nullified the entire recruitment process including for the commissioners whose term expired on 21st November 2025.

9. While making reference to the importance of the Commission's functions and various time-bound projects that require the Commission's intervention in the compulsory acquisition of private land, the applicants averred that the statutory quorum of the Commission was five members or three members when there is a vacancy in the Commission. Therefore, that the nullification of the entire recruitment process creates a paralysis in the commission and affects members of the public including the applicants, who have a legitimate interest in a quorate and functioning Commission and there is public interest in having a functioning Commission, otherwise important land management and administration functions will be paralysed with far reaching consequences.
10. The advocates for the first set of applicants, while making reference to the applicants' draft memorandum of appeal,

submitted that the grounds of appeal were arguable and raised novel and substantial questions of

constitutional importance touching on the proportionality of remedies, the independence and functionality of Constitutional Commissions, and the duty of courts to safeguard overriding public interest. Furthermore, that unless an order of stay is granted, the appeal, even if successful, will be rendered entirely nugatory and the public interest will suffer irreparable harm of monumental proportions for reasons that since 22nd November 2025 the Commission has been paralysed, with grave and irreversible consequences including the grinding to a halt of the compulsory acquisition of private land for time bound multi-billion shilling national infrastructure projects, including the Horn of Africa Gateway Development Project funded by the World Bank whose closing date is 30th June 2028, the Rironi-Mau Summit Highway, and numerous other road, railway and sewerage projects.

11. Furthermore, that some contractors were already mobilised and on site, which will expose the public funds to liability for penalties and costs running into hundreds of billions of shillings, and that the management and administration of all public land on behalf of national and county governments will be brought to a standstill, affecting land allocation, historical land injustice claims, and day to day land administration functions that touch the lives of millions of Kenyans and undermine the rule of

law. Accordingly, that neither reversal nor monetary compensation would be capable of remedying the constitutional crisis

and national paralysis that would be visited upon the Kenyan nation and its people and grant of a stay would merely allow a lawful and nearly completed recruitment process to conclude in respect of the six undisputed vacancies, thereby preserving a functional Commission. On the other hand, refusing stay would occasion irreversible chaos to the nation over a technical dispute concerning the timing of the replacement of two members, in a matter involving constitutional commissions and public interest.

12. A similar position was taken by HOPS in **Civil Application No. E680 of 2025** and **Civil Application No. E682 of 2025** who averred that the position and vacancy of the chairperson of the Commission was distinct from that of the commissioners and there was no claim challenging the recruitment of the chairperson, but which was also nullified by the blanket orders of the High Court. In addition, that save for the challenge on the number of positions advertised and apprehension by the two petitioners (1st respondents) that their tenure in office would be unlawfully truncated by reason of the advertisement placed by the selection panel, there was no challenge to the other aspects of the recruitment process of a new chairperson and the commissioners of the Commission. However, that while the High Court gave

declaratory orders affirming the two petitioners, it proceeded to nullify the entire process contrary to the principle of severability. Further, that they were

not challenging the declaration orders affirming the protected tenure of Hon Esther Murugi and Hon. Tiya Galgalo, who would thereby not be prejudiced if the orders sought are granted. HOPS reiterated that the Commission will not be able to undertake its constitutional and statutory mandate if the orders sought are not granted; the selection committee had made significant steps in the process of recruiting a new chair and commissioners which included interviewing shortlisted candidates; and the orders granted by the High Court had occasioned disproportionate hardship to the public, the process and candidates who participated in the recruitment process.

- 13.** The counsel for HOPS submitted that they have raised *bona fide*, weighty, and arguable points of law that are not frivolous , for reasons that the trial Judge granted disproportionate and overbroad reliefs; and failed to apply the doctrine of severability despite a clear basis for doing so on the record, thereby occasioning the wholesale nullification of processes that were neither challenged nor controverted in the petition and unfair prejudice to the Kenyan public, including shortlisted candidates whose rights and legitimate expectations were adversely affected. Further, that the orders substantially disrupted the operations and constitutional functions of a key constitutional commission, contrary to Articles **249 and**

252 of the Constitution. While citing the decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others**

[2014] eKLR, counsel submitted that public interest, a constitutionally recognised consideration in the grant of conservatory and interim relief, weighs heavily in favour of maintaining the *status quo ante* to avoid institutional paralysis and safeguard public resources. Lastly, that the peculiar circumstances of the case, including the blanket nature of the orders and the absence of demonstrable prejudice to the 1st respondents, justify and overwhelmingly favour the grant of conservatory orders.

14. On their part, the 1st respondents commenced their opposition by challenging the competence of the different set of applications. As regards the first set of applications in **Civil Application No. E662 of 2025** and **Civil Application No. E663 of 2025** filed by the three applicants, they averred that whereas the said applicants claim to be members of the public, no identities were tendered nor any information tendered regarding their interest and/or stake in the Commission, and that if they exist, they are proxies of candidate(s) who claim to have invested in the recruitment process and the sole reason for the application is to ensure that the appointments are effected notwithstanding any violations that may be made in the process. The second set of applications, namely **Civil Application No. E680 of 2025** and **Civil Application No. E682 of 2025** were also alleged to be

fatally defective by the 1st respondents, in so far as they seek to stay an order not appealed against since the applicant's Notice of Appeal dated 13th

November 2025 was confined to challenging the orders of certiorari, yet the applications seek to stay both the orders of certiorari and prohibition, yet no notice of appeal has been filed in respect of the prohibition order.

15. The 1st respondents further averred that it is conceded by the applicants that their appointment letter dated 21st December 2020 was for a term of six (6) years which would expire on 20th December 2026. Hence, only six Commissioners could be validly recruited to take up office on 15th November 2025, and the selection panel that was gazetted to carry out the recruitment advertised vacancies for eight (8) commissioners instead of six (6) in an advertisement made on 27th August 2025, despite the 1st respondents notifying HOPS as well as the head of the selection panel of the mistake by letters dated 28th August 2025 and 5th September 2025. They are therefore entitled to serve their term and no arguable ground exists and no substantial loss has been raised. Furthermore, had the High Court not issued them relief, the recruitment of 8 commissioners would have proceeded and occasioned a constitutional crisis since there would have been 10 commissioners instead of 8 commissioners in the Commission.
16. According to the 1st respondents, public interest is served

by compliance with the law, and the time expended in this litigation and attendant

expenses is far in excess of what could have been required for legitimate recruitment. They averred that it will only require a period of 30 days, excluding Sundays, to complete the recruitment of commissioners in accordance with the Constitution and avoid the shortcuts, complex constitutional crisis and recipe to anarchy that is proposed by the applications. Furthermore, that the Commission is a body which has highly skilled manpower and all technical issues are the reserve of the secretariat, and no hardship or prejudice will be occasion to the Kenyan public if the reliefs sought are not granted. In any event that it would be improper and/or beyond the powers conferred by Rule 5(2) (b) of this Court's Rules to stay orders of certiorari and prohibition, and that currently sixteen (16) candidates are nominated for the eight (8) Commissioners alleged vacancies, and another reduction to twelve (12) cannot be made post the existence of the selection panel.

17. These averments were reiterated in the submissions filed by the 1st respondents' advocates on record. It was urged therein that the instant applications seek to illegally and unprocedurally "undo" prerogative orders issued by the High Court, and will unjustly predetermine any appeal. Various decisions of this Court were cited in support of this position as follows: **Attorney General vs Bala [2023] KECA 117 (KLR)** was cited for the submission that

declaratory orders simply state the legal position and they impose no positive obligation capable of

execution; the decisions in **Republic vs Public Procurement Administrative Review Board & 3 others Ex-parte Kenya Electricity Generating Company Ltd [2010] eKLR** and **Republic vs. Municipal Council of Mombasa & 2 Others, Exparte - Adopt a Light Ltd. Civil Application No. Nai. 15 of 2007** for the submission that certiorari cannot be stayed pending appeal because there is no execution to halt and the only recourse is to overturn it on appeal; and the decision in **Kenya Ports Authority Board of Directors & another v Western Human Rights Forum & 3 others [2024] KECA 1475 (KLR)** where it was held that an order of prohibition cannot be stayed, lifted or reversed pending appeal, as that would amount to authorizing conduct in excess of jurisdiction. Furthermore, that a party who has failed to cure an illegality despite having the power and obligation to do so cannot seek the Court's equitable intervention to preserve that illegality, and the Court should not aid a wrongdoer in circumventing clear constitutional dictates as held in **Kenya Pipeline Company Limited vs Glencore Energy (U.K.) Limited [2015] eKLR**. According to counsel, granting a stay would revive the quashed Gazette Notice, authorize unlawful recruitment and negate the tenure declaration.

18. We heard the applications on the Court's virtual platform

on 20th January 2026. Learned Senior Counsel, **Mr. Fred Ngatia SC** appeared for the 1st respondents in all the applications; learned counsel **Mr. Peter**

Wanyama, appeared for the first set of applicants in **Civil Application No. E662 of 2025** and **Civil Application No. E663 of 2025**; learned counsel **Mr. Bonn Bett**, holding brief for learned counsel **Mr. Bitta** appeared for the applicant in **Civil Application No. E680 of 2025** and **Civil Application No. E682 of 2025**; while learned counsel, **Mr. Kennedy Echesa**, together with learned counsel **Mr. Mawira** appeared for the National Land Commission. There was no appearance for the Public Service Commission despite their counsel being duly served, nor did they file any pleadings in response to the applications. Upon application by Mr. Fred Ngatia SC, the replying affidavits by the National Land Commission dated 19th January 2026 were expunged from the record, for reasons that they were filed and served late on the morning of the hearing, and Mr. Echesa was instead granted leave to make oral submissions on points of law during the hearing.

- 19.** It is established that in applications of this nature, an applicant is required to demonstrate that the appeal or intended appeal is arguable, and that absent an order of stay of execution or injunction, that the intended appeal if successful, will be rendered nugatory. See **Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] KECA 378(KLR)**. The public interest is a

legitimate consideration as well, as guided by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** and **Mary Wambui Munene vs Peter Gichuki**

Kingara & 2 others [2014] eKLR. These principles guide the exercise of our discretion under Rule 5 (2)(b) of the Court of Appeal Rules in applications for stay of execution pending determination of an appeal, and in doing so, this Court exercises original jurisdiction as held in **Ruben & 9 others vs Nderitu & another (1989) KLR 459.**

20. We shall accordingly commence our determination by addressing the preliminary issue raised by the 1st respondents on the competence of the applications. As regards the first set of applications, it was alleged that the applications were incompetent for having been filed by applicants who have no identified stake in the matter. In this respect, it is notable that our jurisdiction under Rule 5(2)(b) is contingent on a notice of appeal having been filed by an applicant against the impugned orders within 14 days of the date of issue, pursuant to Rule 77 of the Court of Appeal Rules. This basis has been underscored by various decisions of this Court including in **Wachira vs Wanjohi & 4 others [2025] KECA 1270 (KLR); Halai & Another vs Thornton & Turpin [1963] Ltd. [1990] KLR 365; Equity Bank Ltd vs West Link MBO Ltd [2013] eKLR** and **Nguruman Ltd vs Shompole Group Ranch & Another [2014] eKLR.** The first set of applicants did annex such notices of appeal dated 13th

November 2025 to their application.

21. If the 1st respondents are of the view that the said applicants did not have

locus to file an appeal or that the notice of appeal is in any way incompetent, the appropriate course of action is to apply to strike out the notice of appeal or appeal under the appropriate provisions of the Court of Appeal Rules. Absent such striking out, we find that the notices of appeal giving rise to **Civil Application No. E662 of 2025 and Civil Application No. E663 of 2025** are properly on record, and the said applications are competently before us.

22. In respect to the second set of applications, we have perused the notices of appeal dated 13th November 2025 filed by HOPS, which are exhibited in **Civil Application No. E680 of 2025 and Civil Application No. E682 of 2025**, and whose scope the 1st respondents allege are illegally expanded by the prayer of stay sought in the said applications. Their counsel cited the decision in **Adam vs Jiir & 3 Others [2023] KECA 884 (KLR)**, where it was held that a notice of appeal is a jurisdictional prerequisite that both defines and confines the Court's authority. According to counsel the notice of appeal specifies the precise orders under challenge and forms the essential foundation for any application brought under Rule 5(2)(b).

23. The notices of appeal filed by HOPS state as follows:

“Take Notice that the 2nd Respondent being dissatisfied with the Judgment and orders of the High Court; Honourable Mr. Justice

***E.C. Mwita given at Nairobi on 11th November
2025 intends to***

appeal to the Court of Appeal of Kenya against such part of the decision as decided that;

'An order of certiorari is hereby issued quashing Gazette Notice No. 11212 dated 11th August 2025 and published in the Kenya Gazette on 15th August 2025 declaring impending vacancies

in the position of chairperson and commissioners of the National Land Commission for being a threat to violate the Constitution, the law and Hon. Tiyah Galgalo Ali's right.

'An order of certiorari is hereby issued quashing Gazette Notice No. 11212 dated 11th August 2025 and published in the Kenya Gazette on 15th August 2025 declaring impending vacancies in the position of chairperson and commissioners of the National Land Commission for being a threat to violate the Constitution, the law and Hon. Esther Murugi Mathenge's right.

An order of certiorari is hereby issued quashing the advertisement published by the selection panel in the Daily Nation on 27th August 2025 and the notice of shortlisted candidates published in the Standard Newspaper On 24th September 2025 for purporting to declare a vacancy in the petitioner's position as a commissioner of the National Land Commission and seeking to replace her."

24. Rule 5(2)(b) requires a notice of appeal be lodged in accordance with Rule 77, and the requirements on the

form and content set out in the Rule 77 are that the notice to be in writing; to be lodged within fourteen days after the date of the decision intended to be appealed against; and to state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, specify the part complained of. Once such a notice of

appeal is properly filed, Rule 5(2)(b) states that the Court can grant an order of stay of execution, injunction or a stay of any further proceedings “on such terms as the Court may think just” (emphasis ours).

25. This position was explained by this Court in **Ruben & 9 Others vs. Nderitu & Another [supra]** as follows:

“In dealing with rule 5(2) (b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds de novo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge’s discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: see Stanley Munga Githunguri vs. Jimba Credit Corporation Limited Civil Application No. Nai 161 of 1988.”

26. There is no prescription in Rule 5(2)(b) that limits the powers of the court to grant stay orders only with respect to the orders appealed from as urged by the 1st respondents, and on the contrary the Court has original jurisdiction and a wide discretion to grant such orders, and

in such manner and scope as the justice of the case demands, subject to the guiding principles in the exercise of the discretion we have explained

hereinabove. It is also notable that the decision in **Adam vs Jiir & 3 Others (supra)** is inapplicable as it dealt with a notice of appeal that was filed under rule 6 of the Election Petition Rules, 2017, which had specific and different requirements as regards its form and content. It is also notable that in like vein, under Rule 33 of this Court's rules, the Court has powers after hearing an appeal to make any necessary incidental or consequential orders. We therefore find that the applications in **Civil Application No. E680 of 2025** and **Civil Application No. E682 of 2025** are also properly before us. We shall now proceed to examine if the four applications meet the threshold for grant of the orders sought therein.

27. As regards arguability, counsel for the first set of applicants drew our attention to the four grounds of appeal in the memorandum of appeal filed by the first set of applicants and which challenge the High Court's decision to nullify the recruitment of the Commission's chairperson and vacant commissioners' positions as being inappropriate, not warranted and not in the public interest. Mr. Bett similarly urged that the Judge of the High Court wrongly exercised discretion in granting disproportionate reliefs and failing to apply the doctrine of severability. Mr. Echesa associated himself with the submissions made by Mr. Wanyama and Mr. Bett. Mr. Ngatia SC on his part

reiterated that the notice of appeal must relate to the orders sought in an application. It is

notable that it is not contested that the High Court did grant the orders nullifying the recruitment of the Commission's chairperson and commissioners, and we are satisfied that the first set of applicants and HOPS have raised arguable issues deserving consideration by this Court and are not frivolous, bearing in mind that an arguable appeal is not one that will necessarily succeed, and a single triable issue will suffice.

28. On the nugatory aspect, the concern is whether what is sought to be preserved if allowed to happen is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. The demonstrated prejudice to the public was detailed by Mr. Wanyama, Mr. Bett and Mr. Echesa, in terms of the lack of access to services and monetary loss that is likely to be incurred as a result of the paralysis in the Commission. It is our view that this prejudice and damage is irreversible, and was in this respect held by the Supreme Court in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (supra)** as follows:

“97. Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of

the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established

attribute of ever contributing to the safeguarding of such resources.” ***line-drawing, must have an interest in***

29. We have however in this respect been told by Mr. Ngatia SC that the orders granted by the High Court cannot be stayed, and may determine the appeal at interlocutory stage. In other words, staying the certiorari and prohibition orders will not be reversible. Indeed, it was held in the various decisions cited in **Kenya Ports Authority Board of Directors & another vs Western Human Rights Forum & 3 others (supra)** and relied on by senior counsel that in the circumstances of those cases, that orders of certiorari and prohibition granted therein could not be stayed. In that case, certiorari to quash the applicants’ decision to translate the 4th respondent into the post of Assistant Harbour Inspectorate Officer and prohibition were granted to bar the applicants from reinstating the 4th respondent as a Harbour Inspectorate Attendant. In **Republic vs. Municipal Council of Mombasa & 2 Others, Ex parte - Adopt - A - Light Ltd (supra)** the order of certiorari was issued nullifying both the resolution of Mombasa Municipal Council to award a contract and the contract itself, while in **Republic vs. Public Procurement Administrative Review Board &**

3 other Ex-parte Kenya Electricity Generating Company Ltd (supra) the subject order of certiorari quashed the decision of the Review Board declining to review of an award of a tender to

procure Electrical Land Rigs and associated equipment for drilling wells for geothermal power generation.

30. It is evident that the said orders involved decisions affecting private interests. The substratum of the current appeal are orders nullifying and prohibiting the recruitment of the chairperson and members of a Constitutional Commission, with respect to some whose terms have already expired, in addition to those of the 1st respondents' whose term had not expired. These facts are not contested. The orders accordingly concern the operations of a public body, which distinguishes it from the cited cases, and the impugned orders of certiorari and prohibition in the present application have an impact beyond the private interests of the parties, should the order be granted or denied.
31. This brings to fore the last consideration of public interest in granting stay orders, and it is notable in this respect that it is not contested by the 1st respondents that the positions of chairperson and six commissioners are vacant, with the terms of the previous holders of those offices having ended in November 2025. It is also not contested that the Commission is now not functional, and in this respect Mr. Ngatia SC indicated, during an attempted mediation exercise conducted by the Court, that he would

have considered conceding to the appointment of only the chairperson, so that the Commission can be quorate. The functions of

the National Land Commission are therefore currently not being undertaken, and the applicants referred to various time-bound infrastructure projects of benefit to the public that require the Commission's intervention in relation to acquisition of land. It is evident that it is in the public interest that the Commission is enabled to function while the appeal is being heard and determined, and while the parties await the judgment on the setting aside or otherwise of the orders of certiorari and prohibition.

32. The question that we therefore still need to answer is whether it is a hard and fast rule that this Court cannot grant orders of stay with respect to orders of certiorari and prohibition, Put another way, is this Court powerless to grant appropriate interim orders that serve the justice of the case and the parties in cases where orders of certiorari and prohibition are the subject of an application for stay? We have already found that the Court has the power to grant orders of stay on such terms as may be necessary in the interests of justice. This Court has also held in **Equity Bank Ltd vs West Link Mbo Ltd (2013) eKLR** and **Njuguna S. Ndung'u vs Ethics & Anti-Corruption Commission, Director of Public Prosecutions, Inspector General of Police & Attorney General [2015] KECA 915 (KLR)** that conservatory orders can be granted by the Court in Rule 5(2)(b) applications and that

the incorporation of conservatory orders into this Court's understanding of its **Rule 5(2) (b)** jurisdiction is

a logical and inevitable consequence of fidelity to the Constitution and the overriding principle.

33. This Court expressed itself as follows in **Njuguna S. Ndung’u vs Ethics & Anti-Corruption Commission** (supra):

“A proper reading of this Court’s decision in EQUITY BANK LTD Vs. WEST LINK MBO LTD (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases the aim being to preserve the substratum of the appeal, to maintain the status quo and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm having been visited on them pending the appeal. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution is inherent in the Court and it may, in appropriate cases, invoke and deploy the same ex-debito justiae.

We have gone into some length over this issue if only to underscore that whereas Rule 5(2) (b) provides for specific species of orders that are grantable, namely stay of execution, injunction and stay of proceedings, there appears to us to be no impediment in doctrine or practical good sense to the issuance of what the applicant has called “conservatory orders” under the same Rule as read with Sections 3A and 3B of the Appellate Jurisdiction Act on the overriding objective (“the oxygen principle”) and the

Constitution.”

34. It is notable that orders of certiorari and prohibition are often sought to stop or nullify actions by public authorities as in the present case, and the adverse effects of waiting for the final orders upon hearing of an

appeal can include the irreversible implementation of a law or policy as urged by the 1st respondents, or a lacuna in the implementation of the affected laws and policies as urged by the applicants and Commission. In the present application it is our view that the irreversible harm to the public resulting from a non-operational Commission outweighs the prejudice, if any that may be suffered by the 1st respondents, and particularly in light of the concessions by the applicants on the security of their tenure. The public interest will be better served if the Commission is in the interim allowed to function within the un- contested allowable limits of the law.

35. The Supreme Court explained the role and purpose of conservatory orders in this regard in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (supra)** as follows:

85.. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

86. “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders,

therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

36. We therefore are of the view that that a conservatory order that takes care of the interests of the public as well as that of the 1st respondents is merited in this matter. Lastly, we need to point out that this remedy of conservatory orders was sought by HOPS in their applications. We accordingly grant a conservatory order suspending the operation of the orders of the High Court issued on 11th November 2025 in **Nairobi High Constitutional Petition No. E646 of 2025** and **Nairobi High Constitutional Petition No. E647 of 2025** in so far as they affect and relate to the vacant positions of the chairperson and only six commissioners of the National Land Commission, pending the hearing and determination of the appeals filed by the applicants in **Civil Application No.E662 of 2025, Civil Application No. E662 of 2025, Civil Application No.E680 of 2025** and **Civil Application No. E682 of 2025**. For the avoidance of

doubt the said conservatory orders shall not in any manner affect the positions and tenure of Hon Esther Murugi and Hon. Tiya Galgalo as commissioners of the National Land Commission. In

other words, the High Court declaration “*that Hon. Esther Murugi Mathenge and Hon. Tiyah Galgalo Ali, MBS are entitled to serve their full term of six-year as commissioners of the National Land Commission which commenced on 21st December 2020 and will expire on 20th December 2026*” shall remain in force pending the hearing and determination of the intended appeals.

37. As this is a matter affecting the public interest, each of the parties shall bear their costs of the applications in **Civil Application No. E662 of 2025, Civil Application No. E663 of 2025, Civil Application No.E680 of 2025** and **Civil Application No. E682 of 2025.**

38. Orders accordingly.

**Dated and delivered at Nairobi this 13th day of February, 2026.
P. NYAMWEYA.**

.....
**JUDGE OF APPEAL
A. O. MUCHELULE**

.....
**JUDGE OF APPEAL
W. KORIR**

.....
JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.