



**Judicial Service Commission v Lubengu & 2 others (Civil Application  
E003 of 2026) [2026] KECA 442 (KLR) (6 March 2026) (Ruling)**

Neutral citation: [2026] KECA 442 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E003 OF 2026  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
MARCH 6, 2026**

**BETWEEN**

**THE JUDICIAL SERVICE COMMISSION ..... APPLICANT**

**AND**

**KENNEDY ECHESA LUBENGU ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**ALDRIN OJIAMBO T/A ACORN LAW ADVOCATES ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay and/or suspension of part of the Judgment  
and Decree pending the hearing and determination of the Intended Appeal  
from the High Court at (R. E. Aburili, J. M. Chigiti and A. M. Muteti,  
JJ.) delivered on 18<sup>th</sup> December 2025 in Petition No. E110 of 2025)*

**RULING**

1. Before us are two applications. The first application is dated 2<sup>nd</sup> January 2026, expressed to be brought under sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rules 5(2)(b) and 41 of the Court of Appeal Rules, 2022. It is brought by the applicant herein, the Judicial Service Commission (JSC), in which it seeks stay and suspension of the declaration and orders stopping the applicant from considering and processing complaints against judges pending the hearing and determination of its intended appeal against part of the decision delivered by the High Court on 18<sup>th</sup> December 2025 in Petition No. E110 of 2025. The second application is dated 7<sup>th</sup> January 2026 expressed to be brought under sections 3A & 3B of the [Appellate Jurisdiction Act](#) and rule 2 of the Court of Appeal Rules, 2022. It is brought by the Law Society of Kenya (LSK), seeking to be joined to these proceedings as an interested party.



2. A brief synopsis is necessary to place the dispute in context. The proceedings from which this application arises were commenced by way of a constitutional petition by the 1<sup>st</sup> respondent, an advocate of the High Court of Kenya. According to him, the procedure adopted by the JSC in handling petitions against judges infringes on their rights to fair administrative action and fair hearing as guaranteed by Articles 47 and 50(1) of *the Constitution* and also violates the *Judicial Service Act* (the Act). The 1<sup>st</sup> respondent's position was that the procedure adopted by the JSC has a negative impact on the independence of the judiciary and the dignity and security of all judges of superior courts in this country. Of relevance to the instant application, it was contended that since the JSC lacks any written rules or regulations that guide it in handling complaints against judges. The JSC, as an administrative body, was faulted for failing to demonstrate that in handling the complaints against judges, it adheres to constitutional principles of procedural fairness and that, in attempting to hear petitions which have the potential for removal of judges without codified rules and regulations in place to direct it on how to handle such complaints or petitions, amounts to infringement of the constitutional guarantees of fair administrative action under Article 47 of *the Constitution*. It was contended that the inaction on the part of JSC threatens to compromise judges' security of tenure as guaranteed under *the Constitution*.
3. In the impugned judgement, the learned Judges found that the JSC cannot lawfully continue to process petitions capable of leading to removal of a judge, until such regulations are put in place, gazetted and applied consistently. In their view, to allow proceedings before the JSC against any judge, absent of regulations, would be to countenance an illegality and an unconstitutionality. Therefore, the learned Judges: declared that until the JSC gazettes regulations contemplated under section 47 of the Act for handling of petitions against judges, it cannot lawfully proceed with the processing or hearing of any petition lodged against any judge; and declared that the absence of such regulations violates Articles 47 and 50 of *the Constitution*, and that allowing the JSC to proceed with the processing of petitions against judges without regulations would amount to condoning an illegality. The learned Judges, therefore, issued an order prohibiting the JSC from considering or processing for hearing any petitions lodged against judges until the regulations contemplated under section 47 of the *Judicial service Act* are promulgated and implemented.
4. When this application was called out for plenary hearing on 13<sup>th</sup> January 2026, learned counsel, Mr Issa Mansur, appeared for the JSC, learned counsel, Ms. Kihara held brief for Mr. Makumifor the 1<sup>st</sup> respondent, learned counsel, Mr. Thande Kuria, appeared for the 2<sup>nd</sup> respondent and learned counsel, Mr. Ian Nyboma, held brief for Mr. Colbert Ojiambo, for the 3<sup>rd</sup> respondent. Learned Senior Counsel, Mr. Philip Murgor and Mr. Ahmednasir Abdullahi appeared with learned counsel, Mr. Onderi Nyabuto for the LSK.
5. The Law Society of Kenya, in its application, contends that the said decision hamstringing a constitutional Commission charged with the responsibility to guarantee judicial independence and accountability since the JSC can no longer consider any complaints made to it or petitions for the removal of judges for as long as there are no regulations to govern the process. The LSK and its members, it was averred, are reasonably aggrieved with the decision of the High Court as any complaints submitted by them or the general public will now be left in limbo, in violation of the rights to access justice and fair hearing.
6. The LSK asserted that its interest and identifiable stake in the proceedings is self-evident since, as legal professionals and officers of the court, its members ordinarily lodge complaints at the JSC, whether on their own behalf or on behalf of their clients, and represent parties in proceedings before the JSC. The LSK intends, upon being joined to these proceedings, to address the Court on the proper interpretation to be accorded to *the Constitution* of Kenya and to advance the submission that the



judgement of the court below claws back on established constitutional principles and norms. By taking a brief historical detour of our Nation, the LSK will also demonstrate the rationale behind the birth of independent Commissions and offices in our current Constitutional order. It viewed these proceedings as transcending the named parties and affecting the general public since the judgement of the court below is in rem.

7. All the parties to these proceedings, apart from the 1<sup>st</sup> respondent, supported the application by the LSK.
8. In his oral address, Mr Murgor, SC, stressed that the LSK is, under section 4 of the [Law Society of Kenya Act](#), mandated to take care of the public interest and the interests of its members, and that the decision has a profound effect on the public, the LSK and its members.
9. In opposing the application, Ms. Kihara submitted that the LSK had not demonstrated that there were any new issues it intends to bring forth in the matter that would assist the Court in determining the case. In learned counsel's view, the existing parties have sufficiently canvassed the issues, hence the application by LSK should be disallowed.
10. It is important that we determine this application before proceeding to determine the application by JSC because, at the plenary hearing, we allowed the LSK to make submissions in respect of the JSC's application in the event that it was joined to these proceedings. Accordingly, those submissions may be considered if the joinder application succeeds.
11. The Supreme Court in *Francis Kariuki Muruatetu & Another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR, set out the factors to be considered in determining an application for joinder and held that sufficient grounds must be laid before the Court, on the basis of the following elements:
  - i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - iii. , a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”
12. In this case, it is not in doubt that the decision impacts on the public and transcends the interest of the parties to the suit. It bars the JSC from considering complaints made against judges. Section 4 of the [Law Society of Kenya Act](#) provides that the objectives of the Law Society of Kenya are to:
  - a. assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;
  - b. uphold [the Constitution](#) of Kenya and advance the rule of law and the administration of justice;
  - c. ...
  - d. protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law.



13. We are satisfied that the LSK has an identifiable interest and stake in the outcome of this matter. Although the petition was filed on the basis of ongoing proceedings against a sitting Judge of the High Court, the decision itself affects proceedings against all judges. To that extent, we agree that the LSK's input is necessitated by its mandate of upholding *the Constitution* and advancing the rule of law. Based on the said mandate, we are satisfied that the LSK's role in the matter, pursuant to its mandate, may not necessarily be articulated by the other parties in the matter.
14. Consequently, we find merit in the application dated 7<sup>th</sup> January 2026, and we direct that the Law Society of Kenya be and is hereby joined to these proceedings as an interested party.
15. As regards the application dated 2<sup>nd</sup> January 2026 by the JSC, this Court has, on numerous occasions, restated the conditions for the grant of stay pending an appeal or an intended appeal, which conditions were crystallised and summarized in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, whose substance is: that the Court has to decide first, whether the applicant has presented an arguable appeal, and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied; that an arguable appeal, is not one which must necessarily succeed, but one which ought to be argued fully before the Court, one which is not frivolous; that the term "nugatory" has to be given its full meaning and does not only mean worthless, futile, or invalid but also means trifling; 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; and that in considering whether an appeal will be rendered nugatory, each case must depend on its facts and peculiar circumstances.
16. In this case, the applicant, through Mr Issa Mansur, contends that it will be argued in the intended appeal that: Article 168(4) of *the Constitution*, which sets out the JSC's mandate, does not contemplate the making of regulations in disciplinary proceedings affecting judges, hence the learned Judges erred in finding that the JSC had failed to make the said regulations; that the power to make regulations under section 47 of the Act is not mandatory; that the exercise of a constitutional mandate cannot be subjected to regulations; and that the effect of the impugned decision is to suspend the constitutional provisions.
17. On the nugatory aspect, Mr Issa submitted that unless the decision is stayed, the JSC will not be able to consider complaints made against judges currently being interviewed for nomination for appointment to the Court of Appeal, yet that consideration is a requirement in making its determination.
18. Mr. Murgor, SC, while supporting the application, wondered what the fate of the already processed complaints, which were dealt with without the said regulations, would be. In his view, the decision creates an absurd situation. Mr. Ahmednasir, SC submitted that the decision ignored the doctrine of *stare decisis* since this Court and the Supreme Court had addressed the issue of lack of regulations in proceedings concerning judges as opposed to judicial officers. The application was also supported by Mr. Nyboma and Mr. Kuria, the latter submitting that the disciplinary process is guided by the provisions of the Fair Administration Act, notwithstanding lack of regulations, hence there was no justification in granting the impugned orders based on lack of regulations.
19. Ms. Kihara, while opposing the application, submitted that what the learned Judges of the High Court issued were declaratory orders which, it has been held, are incapable of being stayed. In her view, the court only directed the JSC to comply with *the Constitution* and the law. It was learned counsel's position that the court did not bar the JSC from receiving the complaints but only barred it from hearing them. The grant of the orders sought, it was contended, will legitimise an unlawful process. Ms. Kihara did not find any demonstration of irreparable harm being caused to the JSC if the orders



sought in this application are not granted and submitted that the grant of the orders will undermine the public confidence in the administration of justice.

20. We have considered the submissions made before us. It is true that this Court seldom stays decisions where purely declaratory orders are issued. However, as we set out at the beginning of this ruling, the court prohibited the JSC from considering or processing for hearing any petitions lodged against judges until the regulations contemplated under section 47 of the *Judicial Service Act* are promulgated and implemented. That was not a declaratory order. It is an order directing the JSC not to undertake its constitutional mandate which it has been undertaking. It is an order capable of being executed since, in the event of disobedience, consequences may arise. It is an order capable of being stayed.
21. The intended appeal, we are told, raises arguable issues. In our view, whether or not lack of regulations bars the performance of constitutional functions is a matter that needs to be investigated by this Court. Further, the question whether the mandate of promulgating regulations under section 47 of the Act is mandatory, and whether the section is applicable to judges as opposed to judicial officers, is also arguable. Only one arguable ground suffices for purposes of fulfilling the first condition. We are satisfied that the intended appeal is not frivolous. It is arguable.
22. As regards the nugatory aspect, we appreciate that the effect of an order of stay, generally, is to preserve the subject matter pending the hearing and determination of the appeal. It is not meant to, in effect, reverse the decision of the court appealed from, at that stage. See *Teachers Service Commission v Kenya* [2015] KESC 29 (KLR). However, there are exceptional circumstances where, in an application under rule 5(2)(b) of the Rules of the Court, a stay may be granted whose effect may be to temporarily reverse the decision being appealed against. This was appreciated in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others*, (supra) where it was held 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. Importantly, in considering whether an appeal will be rendered nugatory, each case must depend on its facts and peculiar circumstances.
23. As held by the Nigerian Court of Appeal in *United Cement Company of Nigeria v Dangote Industries Ltd & Minister of Solid Mineral Development* [CA/A/165/2005], the Court ought to ensure that:

“appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order.”
24. In this case, it is common knowledge that there are interviews being conducted for appointment of judges of the Court of Appeal. In conducting those interviews, the JSC calls for members of the public to give their views regarding the suitability of the candidates to be appointed to this Court. Some of the candidates are serving judges. The effect of the impugned order is to bar the JSC from considering the adverse public views or complaints against judges, yet it is a constitutional imperative that the JSC considers those views. If the appeal succeeds and, in the meantime, judges shall have been appointed without complaints against them being taken into account, the process of removal, if the complaints were to be found to be of substance, is laborious. It is not the kind of damage that can be compensated in damages, since such damage may occur not just damage to the applicant, but to the public at large.
25. We are mindful of our duty to decide the matter taking into account the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion,



the principle of proportionality ought to be taken into account. As restated by this Court in the case of African Safari Club Limited v Safe Rentals Limited [2010] eKLR:

“...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly... to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

26. Taking into account the constitutional obligations of the JSC in the ongoing interviews, we find that unless we stay part of the impugned judgement, the intended appeal may not only be rendered nugatory, but the implementation of the order, at this point, also goes contrary to the public interest. See *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 Ors* [2014] eKLR.
27. Consequently, pending the hearing and determination of the intended appeal, against the judgement delivered on 18<sup>th</sup> December 2025, we hereby stay and suspend the declaration and orders of the High Court in Petition No. E110 of 2025 prohibiting the Judicial Service Commission from considering or processing for hearing any petitions lodged against judges.
28. The costs of this application will be in the intended appeal.  
Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH 2026.**

**D. K. MUSINGA, (PRESIDENT)**

**JUDGE OF APPEAL**

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**MUMBI NGUGI**

**JUDGE OF APPEAL**

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**G. V. ODUNGA**

**\*\*JUDGE OF APPEAL\*8**

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

Signed

**DEPUTY REGISTRAR.**

