



**Law Society of Kenya v Mwau & 6 others (Civil Application  
E634 of 2025) [2026] KECA 387 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KECA 387 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E634 OF 2025  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
FEBRUARY 27, 2026**

**BETWEEN**

**THE LAW SOCIETY OF KENYA ..... APPLICANT**

**AND**

**HON JOHN HARUN MWAU ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL , NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL POLICE SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**THE NATIONAL SECURITY COUNCIL ..... 6<sup>TH</sup> RESPONDENT**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 7<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution pending the hearing and determination of the intended appeal, against the judgment of the Employment and Labour Relations Court at Nairobi (H. Wasilwa J.) delivered on 30th October 2025 in ELRC Petition E196 of 2025)*

**RULING**

1. The application before us is brought by way of Notice of Motion dated 31<sup>st</sup> October 2025. In the Motion, the applicant (the Law Society of Kenya) seeks an order staying the execution of the judgment delivered on 30<sup>th</sup> October 2025 by the ELRC, Nairobi (Wasilwa, J.) in ELRC Petition No. E196 of 2025, pending hearing and determination of the intended appeal against the said judgment.
2. In the judgment sought to be appealed from, the learned Judge gave the following reliefs:



- a. A declaration be and is hereby issued that the National Police Service Commission is not a national security organ under Article 239(1) of *the Constitution*.
- b. A declaration be and is hereby issued that the recruitment by national security organs under Article 238(2) (d) of *the Constitution* can only be done by the national security organ itself not any other entity outside the national security organ.
- c. A declaration be and is hereby issued that Article 243 establishes the National Police Service and that it constitutes the Kenya Police Service and the Administration Police Service and that the constitutional functions and duties vested in the national police service must be performed by it and not any other person.
- d. A declaration be and is hereby issued that Article 244(a) and (d) of *the Constitution* vests on the National Police Service the function to (a) strive for the highest standards of professionalism and discipline among its members; and (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity.
- e. A declaration be and is hereby issued that Article 245(1) &(2)(b) of *the Constitution* establishes the Inspector General of the National Police Service and provides in mandatory terms that the Inspector General shall exercise independent command over the National Police Service.
- f. A declaration be and is hereby issued that Article 245(2)(b) and (4)(c) of *the Constitution* vests independent command of the National Police Service and provides that no person may give a direction to the Inspector-General with respect to the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
- g. A declaration be and is hereby issued that Article 246(1) and (3) of *the Constitution* establishes the National Police Service Commission and vests on it the power to appoint and recruit persons holding or acting in offices in the service and to exercise disciplinary control, transfer, and promote persons holding or acting in offices.
- h. A declaration be and is hereby issued that Constitution creates two distinct classes of persons in the service: members of the service who are under the independent command of the Inspector General and persons holding offices in the service that are under the remit of the National Police Service Commission.
- i. A declaration be and is hereby issued that article 238(2)(d), 239(1), 243, 244(a) & (d) and 245 1, (2)(b) and (4)(c) of *the Constitution* vests on the National Police Service and the Inspector General the independent command concerning the recruitment, training, employment, assignment, promotion, suspension and dismissal of the members of the service, without any direction or control from the National Police Service Commission.
- j. A declaration be and is hereby issued that Articles 238(2)(d), 239(1) 243, 244(a) & (d) and 245 1, (2)(b) and (4)(c) of *the Constitution* read with Sections 4 and 22 of the *National Police Service Act* and the first schedule to the Act in relation to members of the service relates to Inspector General; Deputy Inspector General, Senior Assistant Inspector General; Assistant Inspector General; Senior Superintendent; Superintendent; Assistant Superintendent; Chief Inspector; Inspector; Senior Sergeant; Sergeant; Corporal; and Constable.
- k. A declaration be and is hereby issued that under the constitutional doctrine of independent command under Article 245(1)(2)(b) and (4)(c) of *the Constitution*, the National Police Service Commission has no power in relation to employment, assignment, promotion, suspension or dismissal of members of the service.





- Police Service; and that it is just, equitable, and in the public interest that this Court grants the orders sought, including a stay of execution of the judgment of the Employment and Labour Relations Court, to preserve the constitutional mandate and independence of the National Police Service Commission pending hearing and determination of the intended appeal.
6. The supporting affidavit sworn by Florence Muturi, the applicant's Chief Executive Officer, reiterates these grounds and expounds: that the judgment, contrary to Article 246(3) of *the Constitution*, declared that the National Police Service Commission has no constitutional authority to recruit, appoint, promote or discipline members of the National Police Service and restrained the Commission from undertaking the recruitment of police constables; that pursuant to section 10(2) of the *National Police Service Commission Act*, the power to recruit, appoint and promote police officers under the rank of superintendent may be delegated to the Inspector General, but only upon request, and provided that account is taken of gender, county and ethnic balancing; that the impugned judgement has the immediate effect of suspending the exercise of the Commission's constitutional and statutory mandate, thereby paralysing the operations of the Commission to the detriment of the public; that proceeding with the intended recruitment of Police Constables pursuant to the said judgement would amount to perpetuating an illegality; that the learned Judge's decision that the Commission lacks powers to recruit, train, employ, assign, promote, suspend or dismiss police officers and the nullification of Legal Notice No. 159 of 19<sup>th</sup> September 2025 that published the recruitment regulations, restrained the Commission from discharging its lawful functions under *the Constitution*; that the effect of allowing the impugned judgement to stand would be to plunge the National Police Service into a constitutional crisis, jeopardizing the integrity of human resource management, undermining merit-based recruitment, and reversing the gains achieved in police reforms intended to promote professionalism, discipline and transparency in the Service.
  7. Through a replying affidavit sworn on 6<sup>th</sup> November 2025 by its Chief Executive Officer, Peter Leley, the 4<sup>th</sup> respondent supported the application, averring: that the impugned judgment raises weighty questions of constitutional interpretation relating to the delineation of functions between the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the proper application of the doctrine of separation of powers and the extent of the independence of constitutional commissions under Chapter Fifteen of *the Constitution*, thereby warranting appellate intervention; and that unless a stay is granted, the intended appeal will be rendered nugatory and the constitutional equilibrium established under Articles 246 and 249 of *the Constitution* will be gravely undermined; that the resultant injury from the recruitment scheduled for 17<sup>th</sup> November 2025 will be irreversible, as colossal public resources will be expended and appointments made under a process devoid of constitutional and regulatory legitimacy; that no subsequent award of costs or declaratory relief can remedy or reverse the far-reaching consequences of such an unconstitutional recruitment process, and therefore in the interest of justice, fairness and good governance, and in furtherance of the principles of constitutionalism and public interest, this Court should stay execution of both the judgment of the Superior Court and the scheduled recruitment exercise pending hearing and determination of the intended appeal.
  8. The application was, similarly, supported by the 7<sup>th</sup> respondent, the Independent Policing Oversight Authority (IPOA) through the replying affidavit sworn on 6<sup>th</sup> November 2025, by its Director/Chief Executive Officer, Elema Halake, in which it was averred that the applicant has clear locus standi under Article 258 (1) and (2) of *the Constitution* and section, 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 5 (2) (b) as read with rule 77 of the Court of Appeal Rules to file the appeal and this application which is predicated on public interest, since the decision of the trial court transcends the parties to the petition and relates to a matter of interpretation of *the Constitution* affecting the public at large; that the judgment is fundamentally flawed, drawing from a clear misinterpretation of *the Constitution*, the *National Police Service Act*, the Employment Act, the *Employment and Labour Relations Court*



Act, and other statutes, leading to absurd outcomes, thus the applicant's appeal has an overwhelming chance of success; and that unless an order for stay of execution of the impugned judgment and decree of the trial court issues, the intended appeal will be rendered nugatory.

9. In opposition, the 1<sup>st</sup> respondent has filed an undated replying affidavit wherein he avers: that no authority, resolution or minute of the Council of the Law Society of Kenya has been filed or annexed to the said affidavit or this Motion authorizing Florence Muturi to swear any affidavit and/or instructing counsel to act on behalf of the Society; that the applicant lacks locus standi to seek orders in these proceedings as they were not a party to the proceedings before the Employment and Labour Relations Court; that in the impugned judgment, the court did not issue any order, of or concerning the applicant or affecting the applicant that can warrant the filing of a Notice of Appeal or the intended appeal by the applicant; that the recruitment scheduled for 17<sup>th</sup> November 2025 which is the subject of the instant application is a completely new and distinct cause of action between the applicant and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> respondents and which was never part of the dispute and/or proceedings in the Employment and Labour Relations Court; that nothing will be rendered nugatory in the 1<sup>st</sup> respondent's original case which concerned a different advertisement (19<sup>th</sup> September 2025) that has been overtaken by events as at the date of the judgment of the lower court; that the applicant does not seek stay of the decision of the Employment and Labour Relations Court but the recruitment scheduled for 17<sup>th</sup> November 2025 as advertised on 31<sup>st</sup> November 2025.
10. Douglas Kanja Kirocho, the Inspector General of Police, in his affidavit sworn on 7<sup>th</sup> November 2025, opposed the application and averred: that the intended appeal is not arguable since, pursuant to Article 245(4)(c) of the Constitution, the 2<sup>nd</sup> respondent has the mandate to employ, assign, promote, suspend and dismiss any member of the police service without being directed by any person or body including the 4<sup>th</sup> respondent; that the 4<sup>th</sup> respondent's role under Article 246(3) of the Constitution is distinguishable from the role of the 2<sup>nd</sup> respondent under Article 245(4)(c) of the Constitution; that the application does not disclose any nugatory aspect should the orders of stay of execution of the judgment be declined; that public interest militates against granting orders of stay of execution of judgment and favours the recruitment of the police since there has been no recruitment of police officers for the past three years; that as a result of natural attrition, there is a shortage of police officers in the country, thus the need to fill the capacity of the 3<sup>rd</sup> respondent to enable it continue to effectively discharge its constitutional mandate of guaranteeing peace, security, law and order in the country as we approach the impending general election to be held in August, 2027; and that it is in the interest of justice that the application be dismissed.
11. The 3<sup>rd</sup> respondent opposes the application based on 13 grounds of opposition, whose gravamen are: that the applicant, not having been a party to the proceedings before the trial court, lacks locus standi to invoke the appellate jurisdiction of this Court; that the applicant has not satisfied the twin principle guiding the grant of stay of execution pending appeal; that the applicant's bid to stay execution is therefore misconceived, as there is nothing left to preserve or protect since granting the order sought would amount to suspending the effect of a valid judicial pronouncement; that the applicant stands to suffer no demonstrable prejudice should the stay be denied; and that conversely, there exists a real and substantial risk of irreparable harm to the public were the ongoing recruitment of police officers to be stalled; that the applicant and the 4<sup>th</sup> respondent have not demonstrated any prejudice arising from the earlier recruitment exercise undertaken by the 3<sup>rd</sup> respondent in the same manner and under the same authority.
12. When the application was called out for plenary hearing on the Court's virtual platform on 8<sup>th</sup> December 2025, learned counsel, Mr Angiela, held brief for Mr Okach for the applicant, learned



counsel, Mr Ouma, appeared for the 1<sup>st</sup> respondent, learned counsel, Mr Paul Nyamodi, appeared with Mr Patrick Baraza for the 2<sup>nd</sup> respondent, learned counsel, Mr Martin Gitonga, appeared with Mr David Mikwa for the 3<sup>rd</sup> respondent, learned counsel, Ms Chebet, appeared with Ms Rwenji for the 4<sup>th</sup> respondent, learned counsel, Mr Marwa, appeared for the 5<sup>th</sup> and 6<sup>th</sup> respondents and learned counsel, Mr Kinoti, appeared for the 7<sup>th</sup> respondent.

13. Counsel highlighted the submissions filed on behalf of their respective parties.
14. In its submissions, the applicant reiterated the grounds upon which the application was based and added: that the impugned judgment raises grave constitutional issues regarding the separation of powers and the delineation of mandates between the National Police Service Commission and the Inspector- General of Police under Articles 245 and 246 of *the Constitution* of Kenya, 2010, thereby necessitating urgent intervention to preserve constitutional sanctity and order; that the implications of the judgment extend beyond the parties to the petition and disturb the delicate constitutional balance between the Commission and the Inspector-General as established under Articles 243, 244,245, and 246 of *the Constitution* of Kenya, 2010 and therefore it is important for this Court to protect the constitutional mandate of the National Police Service Commission; that the learned Judge erroneously conferred jurisdiction upon the Employment and Labour Relations Court; that absent stay, the recruitment of police constables schedule for 17<sup>th</sup> November 2025,(now past), would proceed, which event would not only be irreversible, but would have extreme consequences with regards to utilization of the public funds; that in the event of the appeal succeeding, total confusion would ensue as to the recruitment process and the outcome thereof, which would end up affecting thousands of Kenyans; and that should the appeal ultimately succeed, such expenditure will have been irregular, unlawful, and incapable of reversal, thereby rendering the success of the appeal purely academic.
15. At the hearing, Mr Ang'ielia informed us that recruitment had been done and that training had commenced.
16. Supporting the application, the 4<sup>th</sup> respondent submitted: that the appeal is meritorious and raises substantial constitutional and legal questions that go beyond mere technicalities and concern the proper constitutional delineation of powers between the National Police Service Commission and the National Police Service, thus, the intended appeal is arguable and not frivolous; that unless this Court grants a stay, the appeal will be rendered nugatory since the trial Court nullified the National Police Service Commission (Recruitment and Appointment) Regulations, 2025, creating a legal vacuum that has left no lawful framework to guide the recruitment of police officers; that once the appointments are made under such an irregular framework, the process cannot be reversed; that the expenditure of public funds, issuance of appointment letters, and deployment of officers would create legal and administrative consequences that cannot be undone.
17. Before us, Ms Chebet suggested that we only stay the human resource functions of the Commission in light of the fact that recruitment had taken place.
18. On behalf of the 7<sup>th</sup> respondent, it was submitted that although the applicant was not a party to the petition before the trial court, it had locus standi, pursuant to Article 258(1) and (2) of *the Constitution* and sections 3, 3A and 3B of the *Appellate Jurisdiction Act* as read with rule 5(2)(b) and rule 77 of the Court of Appeal Rules, to file the appeal and this application. Reliance was placed on Okiya Omtatah Okioti and Another v Afrison Export Import Limited, and 8 others, [2016] KECA 265 (KLR) in support of this submission. It was submitted that the dispute before the trial court was a dispute in rem concerning the interpretation of *the Constitution* regarding the mandate, functions, and powers of the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents and also the place of civilian authority vis a vis the national security organ. According to the 7<sup>th</sup> respondent, the trial court's decision, therefore, transcends the parties to



the petition, affecting the public at large. In its view, the application is brought in good faith, based on the applicant's statutory mandate under section 4(b) and (d) of the *Law Society of Kenya Act* to uphold *the Constitution* of Kenya and advance the rule of law and the administration of justice, and to protect and assist members of the public in matters relating to the law. It submitted that the Supreme Court decision in *Law Society of Kenya v Communications Authority of Kenya & 10 others* (Petition 8 of 2020) [2023] KESC 27 (KLR), is inapplicable to the present case as it focused only on the narrow appellate jurisdiction of the Supreme Court under Article 163(3)(a) and (b) and rule 36 of the Supreme Court Rules and has no application to appeals to the Court of Appeal under Article 164 (3) and (b) of *the Constitution* and rule 77 of the Court of Appeal Rules.

19. The 7<sup>th</sup> respondent submitted that the intended appeal is arguable with an overwhelming chance of success on, inter alia, the grounds that the trial court did not have jurisdiction to determine the petition. In its view, since the gravamen of this appeal is which entity has the constitutional and statutory mandate to recruit police officers, should the recruitment proceed, the substratum of the appeal will be lost.
20. In opposing the application, Mr Ouma submitted: that the application was overtaken by events since the recruitment had taken place; that the declarations made by the trial court were as per *the Constitution*; that pursuant to Articles 244 and 245 of *the Constitution*, the Inspector General of Police cannot be directed in the conduct of his duties; that if the Court stays all human resource functions, it would not be possible to undertake the necessary functions, yet the money for training was budgeted to the Inspector General of Police.
21. The 2<sup>nd</sup> respondent, in opposing the application, submitted: that the appeal is not arguable since the respective roles of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on one hand and the 4<sup>th</sup> respondent on the other, are clearly set out in *the Constitution*; that the application does not disclose any nugatory aspect should the orders of stay of execution of the judgement be declined; that the impugned judgement is a declaratory judgement, akin to a negative order, which did not direct the applicant to do anything; that the stay, if granted, will benefit the 4<sup>th</sup> respondent by permitting it to perform the functions which the court has found it has no powers to perform; that the human resource functions in question can easily be transferred to the 4<sup>th</sup> respondent in the unlikely event that the appeal is successful, hence no permanent damage will be occasioned to the 4<sup>th</sup> respondent if the stay is not granted; that the grant of the stay will be akin to mandatory injunction by compelling the 2<sup>nd</sup> respondent to transfer the said functions to the 4<sup>th</sup> respondent; and that in that event, should this Court affirm the decision of the trial court, all recruitments, employment, assignment, promotion, suspension and dismissal of members of the Service undertaken by the 4<sup>th</sup> respondent in the intervening period will be legally untenable.
22. It was the 2<sup>nd</sup> respondent's view that in light of the foregoing, the justice of the matter lies in the expeditious disposal of the main appeal and not in staying the execution of the judgement.
23. In highlighting the submissions, Mr Nyamodi traced the historical background that led to the creation of the Commission and contended that the functions that were performed by the 2<sup>nd</sup> respondent before the promulgation of the current Constitution were largely left intact. He reiterated that an order staying the performance of human resource functions will bring to a standstill the functions of the police service.
24. On his part, Mr Gitonga reiterated that the Law Society of Kenya did not participate in the proceedings before the court below and therefore has no locus standi to institute proceedings before this Court. In this regard, he disclosed that the third respondent had applied for the striking out of the appeal. According to him, the effect of granting stay would be to stop the disciplinary proceedings



and recruitment, yet the National Police Service has always undertaken the recruitments since the promulgation of the 2010 Constitution.

25. Mr Marwa, on his part, relied on the submissions made by the respondents opposing the application.
26. We have considered the application as well as the submissions made. It is contended that the applicant has no locus standi to bring these proceedings since it was not a party to the proceedings before the court below. Our jurisdiction, as has been held several times, emanates from the filing of a Notice of Appeal. See *Morris Ngundo vs Lucy Joan Nyaki & another* [2015] eKLR. Rule 77(1) of the Rules of this Court provides that:

A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court. [Emphasis added].

27. The choice of words in that rule is deliberate. It does not talk about “any party” but “any person”. Once any person files a Notice of Appeal, the jurisdiction of this Court is thereby activated, and that person may file an application under rule 5(2)(b) of the Rules. At the stage of such application the validity of the intended appeal is not in question since an application under rule 5(2)(b) is a distinct application from one seeking to strike out the appeal. See *Peter Njuguna Njoroge vs Zipporah Wangui Njuguna* [2013] eKLR. However, the fact that the Court entertains an application under rule 5(2)(b) does not preclude the opposing party from making an application to strike out the appeal or the Notice of Appeal. In this case, we have been informed that the 3<sup>rd</sup> respondent has made such application. The less we say about the application the better. However, as far as we are concerned, our jurisdiction has been properly invoked, and we disallow the objection that the applicant has no locus to bring this application.

28. As regards the authority to bring the application, section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

29. Since it is the 1<sup>st</sup> respondent who contends that the Law Society of Kenya had not made a resolution authorising the swearing of the supporting affidavit, it was upon the 1<sup>st</sup> respondent to prove this fact. The deponent of the supporting affidavit is indicated as the Chief Executive Officer of the applicant. Prima facie, she has ostensible authority to swear the said affidavit unless proved otherwise. Based on the evidence before us, we cannot say with certainty whether or not she had such authority. In those circumstances section 3 of the *Evidence Act* provides that a fact is not proved if it is neither proved nor disproved. The objection fails on that score.

30. It is further contended that the reliefs that the court gave were merely declaratory orders which are incapable of being executed since they were akin to negative orders which this Court has consistently held cannot be stayed. As set out at the beginning of this ruling, one of the orders issued was:

A permanent order be and is hereby issued directed at the National Police Service Commission barring and/or restraining it from the recruitment, training, employment, assignment, promotion, suspension and dismissal of the members of the service, including a permanent stay of the advertisement dated 19th September, 2025 on the Daily Nation and legal Notice no. 159 of 19th September 2025.

31. That order, read with the declaration that *the Constitution* vests on the National Police Service and the Inspector General the independent command concerning the recruitment, training, employment,



assignment, promotion, suspension and dismissal of the members of the service, without any direction or control from the National Police Service Commission, in our view, constitute positive orders capable of being executed since they vest certain powers on the Inspector General of Police while depriving the National Police Service Commission of the same.

32. Having disposed of the preliminary issues, we now embark on the merits of the application. 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, if successful, 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.
33. In this case, the intended appeal, we are told, will challenge the jurisdiction of the ELRC to entertain the petition. We are also told that the gravamen of the appeal relates to the question as to which entity has the constitutional and statutory mandate to recruit police officers. These are not frivolous questions. We agree that the impugned judgment raises weighty questions of constitutional interpretation relating to the delineation of functions between the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the proper application of the doctrine of separation of powers and the extent of the independence of constitutional commissions under Chapter Fifteen of *the Constitution*, thereby warranting appellate intervention. The intended appeal is clearly arguable.
34. As regards the nugatory aspect, it is important to understand 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. This was appreciated by the Supreme Court in *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] KESC 29 (KLR) in which the said Court considered the nature and scope of the jurisdiction of this Court under rule 5(2)(b) and stated as follows:

“It is clear to us that Rule 5(2) (b) is essentially a tool of preservation. It safeguards the substratum of an appeal, if invoked by an intending appellant, in consonance with principles developed by that Court over the years...Rule 5(2) (b) of the Court of Appeal Rules, 2010 is derived from Article 164(3) of *the Constitution*. It illuminates the Court of Appeal’s inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal.”
35. Therefore, where the decision sought to be appealed from has been executed, the Court ordinarily does not grant orders of stay since there is nothing to be stayed. In this case, it is agreed by all the parties that recruitment of police officers has been done and training has commenced. It would be futile to stay the said recruitment.
36. However, it is clear to us that the intended appeal revolves around the interpretation of Articles 245(4) and 246(3) of *the Constitution*, the former provides that:



4. The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
  - a. the investigation of any particular offence or offences;
  - b. the enforcement of the law against any particular person or persons; or
  - c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
  
37. On the other hand, Article 246(3) provides that:
  3. The Commission shall—
    - a. recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
    - b. observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and
  
38. The intended appeal therefore revolves around the determination of the powers of recruitment, employment, appointment, assignment, promotion, suspension, transfer and dismissal of members of the National Police Service. The learned Judge declared that *the Constitution* vests on the National Police Service and the Inspector General the independent command concerning the recruitment, training, employment, assignment, promotion, suspension and dismissal of the members of the service, without any direction or control from the National Police Service Commission. It would appear that there are serious constitutional overlaps in the functions of these two entities which require careful consideration and delineation when the appeal comes up for hearing. At this juncture, 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 *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.”
  
39. While we are reluctant to suspend the powers to discipline by, inter alia, suspension of officers of the service, as that may lead to breakdown of law and order in the service, we believe that no prejudice will be occasioned if, temporarily, the powers to promote and dismiss members of the National Police Service are suspended pending the hearing and determination of the intended appeal. We say so because once promoted or dismissed, the process of reinstatement or stripping of the ranks, in the event that the appeal succeeds, should be avoided.
  
40. Consequently, we hereby stay the judgement of the ELRC made on 30<sup>th</sup> October 2025 in ELRC Petition No. E196 of 2025, to the extent that it declared that *the Constitution* vests in the National Police Service and the Inspector General the exclusive and independent command concerning promotion and dismissal of the members of the service. For avoidance of doubt, we are not, by this



ruling, reverting those powers to the National Police Service Commission. The exercise of those powers shall await determination of the appeal.

41. We direct that, in the circumstances of this case, and considering the public interest involved, the intended appeal be filed and be determined on the basis of priority within the next three months from the date hereof
42. We make no order as to the costs of this application.
43. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2026.**

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

.....

**JUDGE OF APPEAL MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR \_.**

