REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
ELRC PETITION NO. E033 OF 2026

MARK NABUYUMBU BARASA, 'ndc' (K) ……
PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ……1ST RESPONDENT
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS …… 2ND RESPONDENT
THE PUBLIC SERVICE COMMISSION ……3RD RESPONDENT

RULING

The 1st and 2nd Respondents being aggrieved by the Court's ruling of 20th April 2026, brought this application seeking orders that:

a. Spent.

b. That this Honourable Court be pleased to discharge and set aside the conservatory orders (hereinafter, the impugned order) issued on 20th April 2026 vide its Ruling in the application dated 28th January 2026 (hereinafter, the impugned ruling) staying the 2nd Respondent's recruitment process and restraining the Respondents jointly and

severally from filing the vacancies in the subject advertised positions of SDDPP and DDPP, pending the hearing and determination of the petition.

c. That the Court be pleased to issue any other orders that the ends of justice demand.

The Application is grounded on the sworn affidavit of Dr. Solomon Kiawa, a Senior Assistant Director human resource management and the grounds that: the orders were issued on the basis of material non-disclosure on the part of the Petitioner; that the Petitioner failed to disclose to the Honourable Court that Hon. J. W. Keli had already considered the application dated 28th January 2026 on the prayer on conservatory order, declining to issue the same, in the ruling of 30th January 2026; that the Petitioner failed to inform the Court that the orders sought and granted by this Court had been overtaken by events as the positions had already been filed and payroll adjusted accordingly; that there was no established basis for this Court to review the initial rejection of the conservatory orders as the Petitioner had not established any change of circumstances for review and or revision of the said ruling; that the orders were granted contrary to trite law and settled principles including that conservatory orders cannot be issued to stay events that had already occurred; there is no legal or factual basis why the impugned orders should continue to be in force, having been premised on non-disclosure and awfully erroneous foundation; not setting aside the impugned orders would not only prejudice the 2nd Respondent, but would also affect several; successful candidates who already got selected and appointed, and who are not party to

this suit contrary to principle of fair hearing; and that the impugned orders would not only embarrass the Respondents but also this Court.

The Petitioner opposed the Application through his grounds of opposition and Replying Affidavit sworn on 23rd April 2026. The grounds raised are that: that the allegation of material non-disclosure is a fabrication and a gross mischaracterization of the record since the Petitioner disclosed all the previous court directions in his pleadings; that there has been no change of circumstances since the ruling of 20th April 2026, and the application is an attempt to reopen and re-argue the matters already considered; that the Petition raises substantial constitutional and administrative law issues warranting preservation of the subject matter pending its hearing and determination; that public interest is ensuring that the ODPP is staffed through a transparent, merit based process that outweighs the administrative embarrassment claimed; maintaining the status quo is the only way to ensure that the petition is not rendered nugatory before determination; that the “completed events” argument is legally flawed as the continued occupation of public offices through a disputed and potentially unconstitutional process is a constitutional injury, violated Article 232, that this Court has the mandated to stay; the conservatory orders serve to safeguard the public interest and principles under Articles 10, 47 and 232 of the Constitution; that the documents produced by the Respondents constitute only post decision and administrative correspondences and do not disclose the basis upon which the decisions were undertaken; that the Respondents’ affidavits offend

section 106 of the Evidence Act and Order 19 Rule 3 of the Civil Procedure Act; and that the Court has the primary duty to deal with the case justly having already ordered an expeditious pathway for resolution of the case.

I have considered the rival submissions by the parties.

Analysis

Having considered the rival arguments, the singular issue for determination whether the orders of the Court of 30th January 2026 rendered the Petitioner's prayer for conservatory orders moot and therefore this Court lacked the jurisdiction to grant the same.

In its order of 30th January 2026, the court held as follows:

> ***"The matter coming up for inter-parties' direction on the notice of motion dated 28th January 2026 in the presence of the Petitioner acting in person and Mr. Owiti for the 1st and 2nd Respondents, the Court having heard the parties and understood the cause is of the opinion that the Petitioner has remedy to prosecute the Petition on merit if dissatisfied with the interview outcome of which he has been given an opportunity to attend. The Court for the foregoing reasons declines to issue conservatory orders. Mention on 3rd March 2026 for directions in the main Petition. The Application to be considered on merit together with the Petition. It is so ordered."***

From a simple reading of the order, it is apparent that the only order not granted by the Court was that seeking orders pending hearing and not determination of the Application, which is basically the order to stop interviews. There are express directions for the Application to be determined on merit, granting this Court the discretion to determine the same.

On the issue on non-disclosure of material facts, the Respondents blame the Petitioner for not informing the Court of the progress of the recruitment process. In rejecting the assertion that the Petitioner bore the burden of disclosure relieving the Respondent of the same, the court takes cognizance of the sentiments of the Court in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)** as follows:

> ***104. All these cases make reference to the principle as stated in the well-known case of R v Kensington Income Tax Commissioner E.p. Princess Edmond De Polignac [1917] 1 KB 486, and so for the sake of completeness, I think I ought to read two passages from the judgments delivered in the Court of Appeal in that case.***
> ***105. The first is to be found in the judgment of Warrington LJ at page 509, where he said;***
> ***"It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in***

the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

From the above excerpt, it is clear that the duty is absolute only in *ex-parte* applications, which was not the case in this matter, as the application proceeded inter-parties. The court is further guided by the holding of the Court in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR)** where the Court of Appeal held as follows:

Mr. Sharma's third main argument was that Ole Keiwua, J. and this court should have stopped at the stage when the issue of non-disclosure of material facts at the ex parte hearing stage became clear. It was not for him to decide, argued Mr. Sharma, to tell the court to stop when it reached such a decision; it was for the court itself to do so. In our view, however, it is for the parties to conduct their civil litigation the way they deem fit. It is not for courts to direct the parties how to conduct their civil litigation. UHDL had a choice, that is, to have

the application by the CBK heard first in time, but UHDL decided to have both applications, that is, the one filed by it on 6th January, 1995 and the other filed by the CBK on 12th January, 1995, heard first; but that is being wise after the event. We see no merit in this argument propounded by Mr. Sharma and we reject it.

Another argument which Mr. Sharma advanced was to say that the decision in the first application was not res judicata, was that after the court had concluded that there was lack of candour on the part of UHDL in obtaining the ex parte injunction, all the observations which followed were obiter dicta had no binding force and could not therefore constitute the basis for the application of the principle of res judicata.

Any application for an interim injunction of necessity and prudence makes it obligatory upon the court to first inquire into the issue as to whether there is a prima facie case with a probability of success. Whilst such observations which lead the court to reach such a decision will not bind the trial court, they are nonetheless binding for the purposes of the interlocutory application. That is to say, no court will reopen the application on supposition that it could have been wrong, save by a review application, provided the application comes within the ambit of section 80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules, otherwise, as pointed out earlier, there would be

no end to repeated applications by a party who does not succeed in the first instance.

It is trite that grounds for review are outlined under Order 45 Rule 1 of the Civil Procedure Rules as follows:

1. Application for review of decree or order [Order 45, rule 1]

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the

applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Similarly, in **Kenya Orient Insurance Co Limited v Kennedy Kagai Kiruku [2022] KEHC 986 (KLR)**, the court held as follows:

"25. The provisions of Order 45, Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya which lay out the grounds under which an order for review may be sought, thus:

a. the discovery of new and important matter or evidence, or

b. some mistake or error apparent on the face of the record, or

c. any other sufficient reason."

On setting aside of the conservatory orders, the court is guided by the holding in **Paleah Stores Limited & 3 others v Mwaura & 22 others; Invesco Assurance Ltd Under Receivership) (Interested Party) [2023] KEHC 25364 (KLR)** as follows:

"32. Clearly therefore, conservatory orders are issued not to aid a party but to preserve the status quo that is being challenged by the petition. Consequently,

reviewing the conservatory orders dated 16th December, 2019 would not be in the best interest of the administration of justice and would render the Petitioners' case nugatory."

In the end, it is the finding of the court that the Application does not meet the threshold for review of the orders issued on 20th April, 2026, the application lacks merit and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14th DAY OF MAY, 2026.

DR. JACOB GAKERI
JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been

guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE