



## **RULING**

1. The application before me is the Appellant/Applicant's Notice of Motion dated 9<sup>th</sup> March 2026 seeking stay of execution of the Judgment of Hon. S.O. Ongeru delivered on 27<sup>th</sup> February 2026 and all consequential orders pending hearing and determination of the appeal. The motion was argued in Court on 12<sup>th</sup> May 2026 and the parties having filed submissions on the same, the Court reserved Ruling for this morning, 13<sup>th</sup> May 2026. The motion is supported by the Affidavit of Counsel for the Appellant and the grounds on the face of the motion.
  
2. The Appellant identifies the following as the issues for determination:
  - i. Whether the Applicant has met the threshold for grant of orders sought.*
  - ii. Whether the Applicant should pay security for costs as condition for grant of the orders for stay of execution pending appeal.*

3. The Appellant submits that the factors to consider in an application for stay are set out under Order 42 Rule 6(2) of the Civil Procedure Rules. It is submitted that no order for stay of execution shall be made under sub rule (1) unless- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

4. The Applicant submits the Respondent has not discharged the burden. The Appellant submits that in the case of **Tassam Logistics Ltd v David Macharia & another [2018] eKLR** the Court reiterated the threshold to be met for grant of orders for stay of execution pending appeal and held thus:

*The legal basis for grant of stay pending appeal is Order 42 Rule 6 of the Civil Procedure Rules, 2010. Basically, the Defendant/Applicant is required to demonstrate that: "Substantial loss may result unless the order is made; the*

*application has been made without unreasonable delay: such security as the court orders for the due performance of the decree has been given before the applicant"*

5. In regard to substantial loss being occasioned to the Applicant, the Appellant submits that the amount of money required for compliance with the Judgment in this matter runs into colossal public funds/resources. Additionally, it is submitted that in the event that the Judgment is enforced in its present form, the Applicant herein is likely to suffer irreparable loss and damage in that it will lose a substantial amount of money given that the Respondent has not demonstrated to this Honourable Court that he is a person of means and is able to repay the amount should the Applicant's Appeal succeed. It was submitted that the Respondent has not filed any Affidavit of Means to demonstrate his capability to refund the sum of approximately Kshs. 1,072,457/- (plus interests and costs) being the decretal sum. It was submitted that the burden of proving the ability to refund the decretal sum lies with the Respondent. The Appellant cites the case of **Rhoda Mukuma v John Abuoga [1988] eKLR** where the Court of

Appeal while referring to the exercise of discretion in the grant of stay of execution, under Order 42 of the Civil Procedure Rules and Rule 5(2)(b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

*"...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

6. Further the Appellant cites the cases of **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] eKLR** and **G.N Muema P/A {sic} Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** for the argument that the issue of substantial loss is one which is key to the determination of the stay pending appeal. The Appellant submits that on the timeous presentation of the motion seeking stay, it filed the application on 9<sup>th</sup> March 2026 after the decision of 27<sup>th</sup> February 2026.

7. On the question of security, the Appellant/Applicant submits that it is exempt from the condition for security as it is Government. It submits that Order 42, rule 8 of the Civil Procedure Rules provides an exemption to Government thus:

*No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.*

8. The Appellant/Applicant submits that it is a Commission established under Article 237(1) of the Constitution of Kenya 2010 with its principal objectives and functions set out thereunder and under the Teachers Service Commission Act, No. 20 of 2012. It submits that section 21 of the Act provides that proceedings against the Commission shall be deemed to be proceedings against the Government and shall be subject to the Government Proceedings Act.

It cites the case of **Laikipia County Government v Tirus Kinyua Thumbi [2020] eKLR** to buttress this position. It urges the grant of the motion as prayed without requiring it

to provide security as it is a corporate body with perpetual succession therefore guaranteeing the Respondent will receive his money should the Appeal fail.

9. The Respondent is opposed to the motion by the Appellant and filed two affidavits sworn by Mr. Bethuel Kapere Advocate for the Respondent. It was asserted by the Affiant that the Learned Trial Magistrate at Oyugis entered judgment for the Respondent herein directing *inter alia* that the Respondent be reinstated to his job and the teachers register without loss of rank, salary and benefits with effect from the date of dismissal. The Respondent submits that in addition to this relief, the Court awarded damages/compensation amounting to Kshs. 995,852/-. It was deposed that the Appellant had adamantly refused/declined to reinstate the Respondent.

10. The Respondent submits that the order for reinstatement is self-executory hence incapable of being stayed. The Respondent submits therefore, before invoking the jurisdiction of this Honourable Court, the Appellant ought to

have complied with the order for reinstatement. The Respondent cites the case of **Aggrey Lukarito Wasike v Kenya Power Lighting & Company Limited [2017] eKLR** where Ongaya J. (as he then was) held

*"A reinstatement takes effect immediately as it is self-executory and only subject to - the terms imposed in the order itself.*

*The employer is bound to comply with a reinstatement order by allowing the employee to resume duty as reinstated and to pay full salary and other due benefits from date of the impugned removal or dismissal (being the date of the reinstatement) and to continue paying until the unlawful termination of the employment or until the date the reinstatement order is reversed by this court on review or by the Court of Appeal following a relevant appeal..... "*

11. The Respondent also cited the case of **Cooperative Bank of Kenya Limited v Banking Insurance and Finance Union (Kenya) [2015] eKLR** where Mwilu JA (as she then was) stated: -

"20 In considering whether to stay the order of reinstatement or not, I have also considered Article 23(1) of the Universal Declaration of Human Rights which provides for the right to work, to free choice of employment and to protection against none employment. Article 2(6) of the Constitution domesticates as part of our laws any treaties and conventions ratified by Kenya. The Constitution further protects the freedom of expression, against forced labour and the right to economic and social rights which can be construed to include the right to work .....Reinstatement is in any event a statutory remedy and I find it appropriate here".

12. The Respondent also cited the Court of Appeal in **Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment)** where the Court of Appeal

"The question that I must grapple with is whether it is permissible that a public body that is subject to the Constitution and its statute and which has been found to have been in breach of law and to have acted unlawfully, irrationally and disproportionately in dismissing an

employee, can escape an order of reinstatement. I think that were courts to accept such a position, they would be aiding in the entrenchment of a culture of lawlessness and impunity by such bodies, which would consider themselves safe from a reversal of their actions, notwithstanding that they were irrational, unjustified and in violation of the duty to act fairly. I reiterate the position taken by this court in **Stephen S. Pareno v Judicial Service Commission of Kenya [2014] eKLR** that once a dismissal decision involving a state officer is adjudicated unlawful null and void, reinstatement is an automatic remedy."

13. The Respondent also cited the case of **Union of Kenya Civil Servants v Cabinet Secretary Ministry of Health & 3 others [2015] eKLR** which cited the Court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2013] eKLR** thus:-

*We reiterate here that Court orders must be obeyed. Parties to whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is*

*not optional, rather it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said "no man is above the law and no man is below it; nor do we seek any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour"*

14. The Respondent submits that the Appellant having declined to obey the court orders issued cannot obtain the orders sought in the motion herein. The Respondent thus urged the dismissal of the application with costs.

#### Disposition

15. The issue before the Court is stay pending appeal. The power to grant stay pending appeal under Order 42 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. The powers to grant or refuse an application for stay of execution

pending appeal is discretionary in that the Court when granting stay has to balance the interests of the Appellant with those of the Respondent.

16. The Appellant/Applicant has satisfied the conditions for grant of the stay pending appeal in that the motion was made timeously and there would be irreparable loss if the monies decreed were paid and the Respondent was unable to refund upon successful appeal. The Court is convinced of the Appellant's persuasion to grant stay pending appeal. The only issue that is of concern is the allegation of the Appellant's refusal to reinstate the Respondent. The Court grants the stay pending appeal on condition the Appellant reinstates the Respondent to the Register of Teachers and places him on payroll within the next 21 days. Should the Appellant not reinstate him as directed, the stay granted herein will automatically lapse. The costs of the motion will abide the outcome on the intended appeal.

17. The appeal must be filed within the 30 days of today and directions as to the mention to confirm shall be issued after this Ruling.

It is so ordered.

**Dated and delivered at Kisii this 13<sup>th</sup> day of May 2026**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

Original. Do not remove from the file.