



Teachers Service Commission v Makanda (Employment and Labour Relations Appeal E012 of 2026) [2026] KEELRC 1249 (KLR) (8 May 2026) (Ruling)

Neutral citation: [2026] KEELRC 1249 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2026**

**JW KELI, J
MAY 8, 2026**

BETWEEN
TEACHERS SERVICE COMMISSION APPELLANT
AND
JOSHUA MUTUKU MAKANDA RESPONDENT

RULING

1. The applicant dissatisfied with decision of the lower court filed appeal to this court and the instant application by way of Notice of Motion dated 5th February 2026 brought under Article 159 of *the Constitution*, Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2024, Sections 3A, 75, 78 of the *Civil Procedure Act* and Order 42 rule 6 (1) and 8 and Order 51 Rule 1 of the Civil Procedure Rules, sections 21 Section 21(1) and (3) of the *Government Proceedings Act* and all enabling provisions of law) seeking for the following orders-
 1. spent
 2. That the Honourable Court be pleased to order stay of execution of the Judgment of Hon. P.N. GESORA (CM) delivered on 22/1/2026 in Makueni CMELRC NO. E002 of 2023 Joshua Mutuku Makanga v TSC and all the consequential Orders pending the hearing and determination of this Application;
 3. That the Honourable Court be pleased to order stay of execution of the Judgment of Hon. P.N. Gesora(CM) delivered on 22/1/2026 in Makueni CMELRC No.E002 of 2023 Joshua Mutuku Makanga v TSC VS TSC and all consequential Orders pending the hearing and determination of Machakos Elrc Appeal No. E012 of 2026;
 4. That the costs of this Application be provided for.
2. Grounds of the application



- a. The Honourable Court delivered judgment in Makueni CMELRC No. E002 of 2023 Joshua Mutuku Makanga v TSC in favour of the Claimant/ Respondent.
 - b. The Applicant is dissatisfied with the entire Judgement and has in exercise of its right of appeal, filed an appeal against the said Judgment at the Employment and Labour Relations Court at Machakos.
 - c. The said appeal raises substantial and weighty issues of law with high probability of success as demonstrated in the Memorandum of Appeal.
 - d. In the event that the Judgement is enforced in its present form; the Applicant herein is likely to suffer irreparable loss and damage in that: -
 - i) Reinstatement of the Claimant to service will disrupt the internal processes of the Applicant as well as undermine its constitutional and statutory mandate.
 - ii) Reinstatement of the Claimant to service is against common law doctrine of mutuality of contracts and the principle of freedom of Contracts.
 - iii) Reinstatement of the Claimant to service will erode and/or compromise the nobility, integrity and sanctity of the teaching service.
 - iv) The Respondent may not be able to refund the 12 months' salary together with costs and interest in the event the Applicant's appeal is successful.
 - v) Reinstatement to employment is a process that cannot be undone in the event the appeal is successful.
 - e) By virtue of Section 21 of the TSC Act and Article 260 of *the Constitution*, the Applicant is exempted from depositing security for costs under Order 42, rule 8 of the Civil Procedure Rules 2010 as it is capable of satisfying the decree should the appeal be unsuccessful.
 - f. Unless this Application is heard and determined urgently, the intended Appeal shall be rendered nugatory and purely an academic exercise.
 - g It is in the interest of justice and fairness that pending the hearing and determination of MACHAKOS ELRC APPEAL NO. E012 of 2026 the subject matter of the appeal be preserved.
 - h That the decretal sum constitutes exclusively public funds that ought to be preserved by all means due to public interest considerations.
 - i The Respondent will not suffer any prejudice in the event that the orders sought herein are granted as the Applicant is capable of satisfying the Court's decree should the appeal be unsuccessful.
 - j The Applicant has met the requirements under Order 42, Rule 6 of the Civil Procedure rules 2010. It is therefore in the interest of justice that pending the hearing and determination of its appeal, the subject matter be preserved by granting orders of stay.
 - k) That this application has been filed timeously and without unreasonable delay
3. The application was supported by the affidavit of David Mukui sworn on the 6th February 2026. Mukui stated he was the Acting Director in charge of teacher discipline management at the Teachers Service Commission(The applicant) and authorised to swear the affidavit. He annexed a copy of the impugned



judgment, memorandum of appeal, request for proceedings, and a certified copy of the judgment from the lower court.

4. The application was opposed by the respondent through his replying affidavit dated 4th March 2026 as follows-. That on 22nd January 2026, the trial court deliberated and rendered judgment in the respondent's favour ordering reinstatement to employment together with payment of twelve (12) months' salary. That the application is opposed for being unmerited and intended to deny the respondent the fruits of judgment. That the Applicant has failed to demonstrate any substantial loss that may arise if the decree is executed. That the Applicant is a constitutional commission funded through public funds and has not demonstrated any operational or financial incapacity to comply with the decree. That the Decree consists of reinstatement and twelve (12) months' salary, which cannot reasonably occasion substantial loss to a public institution of the Applicant's financial standing. That no financial statements, budgetary constraints or evidence of prejudice have been produced to show compliance would disrupt its operations or mandate. That reinstatement merely restores the employment relationship and does not extinguish the Applicant's disciplinary mandate and authority under the law. That in the event the appeal succeeds, the Applicant retains full administrative and disciplinary powers in accordance with the law. That the allegation that reinstatement is irreversible is incorrect because employment relationships are by nature regulatable through lawful administrative action. The applicant averred that the proceedings against the Applicant are deemed proceedings against the government and the government is presumed solvent and ordinarily not required to deposit security, such status does not automatically, entitle the Applicant to stay' of execution without proof of substantial loss. That the Applicant's motion is therefore founded on apprehension and speculation rather than evidence of real loss. That the trial court found the dismissal unlawful and procedurally unfair after full hearing. That the investigator in his case participated in the disciplinary panel thereby violating the rules of natural justice and procedural fairness. The applicant averred that he had been out of employment for approximately four (4) years, suffering financial hardship and loss of livelihood. That continued delay in enforcing the judgment will occasion him further prejudice that cannot be remedied by damages. THAT the balance of convenience favors enforcement of the judgment as he continues to suffer while the Applicant demonstrates no tangible prejudice. That public interest labors obedience to court judgments and protection of employees from unlawful, full administrative action. That the Applicant has failed to meet the legal threshold for the grant of stay of execution.

Decision

5. The application was canvassed by way of written submissions. Both parties filed.
6. The applicant lodged appeal against the decision of the lower court, being the Judgment, Orders and Decree of Hon. P. N. Gesora (C.M) delivered on 22/01/2026 in Makeni CMELRC Case No. E002 OF 2023 and sought a grant of an order of a stay of execution pending the hearing and determination of the appeal. The application is opposed vide replying affidavit of the respondent outlined above.
7. Rule 73 of the Employment and Labour Relations Court Rules of 2024 provides as follows- '(2) Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules.' The relevant rule under the Civil Procedure Rules is Order 42 Rule 6 to wit- '6. Stay in case of appeal [Order 42, rule 6].

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court



to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.(2)No order for stay of execution shall be made under subrule (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.”

8. The court established that there was no unreasonable delay in filing the application. The impugned decision was dated 22nd January 2026, and the memorandum of appeal filed on 4th February 2026. The appeal was thus filed within the 30-day statutory period for appealing from the magistrate’s court to this court. The appeal challenged the orders of reinstatement in addition to the compensation award. The court finds the foregoing to be arguable grounds of appeal.
9. On substantial loss, this being a money decree, the loss is disclosed as the respondent did not demonstrate capacity to repay the money in the event of a successful appeal by filing an affidavit of means. In his replying affidavit, the respondent omitted to address the issue of financial capacity. The mere fact that the applicant is to utilize public funds to pay the decretal sum does not mean there is no risk of substantive loss, as the applicant ought to be a prudent custodian of the said public funds entrusted to it by the taxpayers.
10. On the issue of security, which is a mandatory condition under section 42(6) of the Civil Procedure Rules. The respondent admitted the appellant was exempt from deposit of security under the *Government Proceedings Act*, and I need not belabor the uncontested issue.
11. The court then finds that the application is merited and meets the conditions for the grant of stay of execution under Order 42 rule 6 of the Civil Procedure Rules. The court is guided by decision in *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR) where the Court of Appeal gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.” The application is allowed, the applicant having complied with the provisions of Order 42 Rule 6 of the Civil Procedure Rules and, in order to prevent the appeal, if successful, from being nugatory, Costs in the cause.

12. The appeal is ordered to be heard on a priority basis. Mention 5th June, 2026 for further directions.



13. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8th MAY, 2026.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Applicant/Appellant – Ochieng

Respondent- Musau

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