



**Okoti v The Cabinet Secretary, National Treasury And Planning & 13 others;
Katiba Institute (KI) & 5 others (Interested Parties) (Petition E317 of 2021)
[2022] KEHC 12116 (KLR) (Constitutional and Human Rights) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E317 OF 2021

HI ONG'UDI, J

JULY 27, 2022

BETWEEN

OKIYA OMTATAH OKOITI APPLICANT

AND

**THE CABINET SECRETARY, NATIONAL TREASURY AND
PLANNING 1ST RESPONDENT**

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

THE KENYA DEVELOPMENT CORPORATION 5TH RESPONDENT

BEATRICE GATHIRWA (BOARD MEMBER KDC) 6TH RESPONDENT

ELISU ELEMA HARO (BOARD MEMBER KDC) 7TH RESPONDENT

JUDITH KERICH (BOARD MEMBER KDC) 8TH RESPONDENT

MBOCHE WAITHAKA (BOARD MEMBER KDC) 9TH RESPONDENT

HENRY MAOSA (BOARD MEMBER KDC) 10TH RESPONDENT

MS NORAH RATEMO (BOARD MEMBER KDC) 11TH RESPONDENT

MR. ERASTUS NJOROGE (BOARD MEMBER KDC) 12TH RESPONDENT

CHRISTOPHER HUKA (BOARD MEMBER KDC) 13TH RESPONDENT

GRACE MAGUNGA (BOARD MEMBER KDC) 14TH RESPONDENT



AND

KATIBA INSTITUTE (KI) INTERESTED PARTY
THE INDUSTRIAL AND COMMERCIAL DEVELOPMENT
CORPORATION INTERESTED PARTY
THE TOURISM FINANCE CORPORATION INTERESTED PARTY
IDB CAPITAL LIMITED INTERESTED PARTY
THE PRIVATIZATION COMMISSION INTERESTED PARTY
THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY

RULING

1. Before court for determination is the petitioner's Notice of Motion application dated 28th October 2021 brought pursuant to articles 20, 22, 23(3), 50(1), 159 (2) (d), 162 (2) (a), 165 (5), and 25 of *the Constitution* of Kenya 2010; Rules 2, 7(2), 18, 19 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules) and all other enabling laws.
2. The application seeks the following orders:-
 - i. Spent
 - ii. That the Honourable court be pleased to issue and hereby issues an interim order directing that the 6th, 7th, 8th, 9th, 10th, and 13th respondents be served through the 1st and 14th respondents.
 - iii. That the Honourable Court be pleased to issue and hereby issues an interim order directing the Principal Secretaries for Tourism, Trade, and industrialization to secure and take responsibility as appropriate for the assets and affairs of the 1st, 2nd and 3rd interested parties pending the hearing and determination of this petition.
 - iv. That the Honourable Court be pleased to issue such further directions and orders as may be necessary to favour the cause of justice.
 - v. That costs be in the cause.
3. The Application is premised on the grounds on its face and the petitioner's affidavit sworn on even date. The grounds are, that;
 - i. This matter is extremely urgent and the proceedings have stalled over the question of service of the petitioner's pleadings on the 6th, 7th, 8th, 9th, 10th and 13th respondents.
 - ii. On 13th October 2021, the court directed the petitioner to effect direct service on the 6th, 7th, 8th, 9th, 10th and 13th respondents and file a return of service on court. He has been unable to locate them as he does not know them personally



or where to find them. He only learnt of their existence through their being mentioned in official documents in evidence herein.

- iii. From the evidence placed before this court, the 6th, 7th, 8th, 9th, 10th and 13th respondents are well known to the 1st and 14th respondents. To wit, in her Replying Affidavit dated 10th September 2021 the 14th respondent who is the corporation secretary of the 5th respondent states that she has the authority of the Board of Directors of KDC to swear the affidavit on their behalf; the 6th, 7th, 8th, 9th and 10th respondents are directors of the 5th respondents; and that at paragraph 20 in her Replying affidavit, the 14th respondent deposes that the 13th respondent is merely serving KDC as an interim Director General and the record shows that it is the 1st respondent who makes appointments to the KDC.
- iv. Since the petitioner does not know nor have their contacts but they are well known to the 1st and 14th respondents, granting the orders to serve them through the 1st and 14th respondents will serve the ends of justice by facilitating the hearing and determination of this petition.
- v. Having drawn and filed the 14th respondent's affidavit dated 10th September 2021 on behalf of the Board of Directors of KDC, who include the 6th, 7th, 8th, 9th, and 10th respondents, Mr. Lazarus M.O. Odongo, the advocate on record for the 5th, 11th, 12th and 14th Respondents, cannot claim that he does not represent them.
- vi. It is urgent and important that the assets of the 1st, 2nd and 3rd interested parties are secured and protected by the responsible secretaries of Tourism, Trade and industrialization for the period it will take to hear and determine this suit because the Board of the three state corporations have irregularly and unlawfully been dissolved by the 1st respondent.

4. In the affidavit in support of the application, he reiterated the facts and the grounds of the face of the application.

DIVISION - The 1st 4th Respondents' case

5. The 1st -4th respondents filed grounds of opposition dated 15th November 2021. The summary of the grounds are that:-
 - i. The 6th, 7th, 8th, 10th and 13th respondents are sued in their own capacity and as such the petitioner has the duty to effect personal service on them.
 - ii. The petitioner is put to strict proof of allegations of inability to effect service.
 - iii. Personal service is a mandatory requirement in the petition and as such the suit cannot proceed for hearing without service upon the respondents.
 - iv. Section 14 of *the constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules) provides for service of petition where "the petitioner shall serve the respondent with the petition ,



documents and relevant annexures within 15 days of filing or such time as the court may direct”.

- v. Section 23 of the Mutunga Rules on conservatory or interim orders provides for personal service on the respondent or the advocate on record or with leave of the court, by substituted service within such time as may be limited by the court.
- vi. The petitioner with leave of court can effect substituted service upon the respondents pursuant to Order 5 Rule 17 of the Civil Procedure Rules.
- vii. The court in Mohammed Odha Maro v The County Returning Officer, Tana River and others (2013) eKLR makes it mandatory for the service of the petition.
- viii. Due diligence is a prerequisite to service and the petitioner’s claim of inability to effect service is unsatisfactory. Fatuma Fille Elmi v I.E.B.C & 3 others [2017] eKLR
- ix. In Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka and 216others Interested Party National Assembly [2016] eKLR the court gave directions on the issue of service stating that:
“the court adopts a multi-service approach in view of the different circumstances of the respondents:
 1. For the Respondents who are also members of the 11th Parliament, by service through the offices of the respective Speaker of the House of Parliament and by affixing a copy of the summons/ notice of the Petition at Parliament buildings’ notice Board.
 2. For respondents who are not members of the current Parliament by posting summons/ notice of Petition on the Court notice boards including the website.
 3. The petitioner will wherever possible serve by personal service.
 4. The petitioner may also use email, where available.”
- x. The court of Appeal in Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others [2014]eKLR where the court held that failure to serve a petition upon the respondents went to the root of the petition and a petition could not stand in the absence of service even when the respondents had participated in the proceedings.
- xi. The application amounts to an abuse of the court process and is incurable defective and the respondents shall pray that the application be dismissed with costs.



The 5th, 11th, 12th and 14th Respondents' case

6. The 5th, 11th, 12th and 14th Respondents filed grounds of opposition dated 10th November 2021. The grounds are that:-

- i. The petitioner has not made any reasonable attempts to serve the 6th, 7th, 8th, 9th, 10th, and 13th respondents in person neither has he used all due and reasonable diligence to find them.
- ii. The 14th respondent has not been empowered by the 6th, 7th, 8th, 9th, 10th and 13th respondents to accept service on their behalf.
- iii. The general rule for service of summons under order 5 of the Civil Procedure Rules is personal service on the defendant or upon his agent Pursuant to Order 5, Rule 8(1).
- iv. Order 5 Rule 14 specifically provides for due and reasonable diligence in effecting personal service.
- v. The court of Appeal in the case of *Elkanah Omuchilo v Ayub Muchiwa* [1966]EA 229 (Harris J) Held that “due diligence is a prerequisite for the exercise of this mode of service.”
- vi. The High Court in the case of *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka and 216 others Interested Party National Assembly* [2016] eKLR directed the petitioner to wherever possible serve by personal service and adopt use of technology.
- vii. The petitioner has alternative means at his disposal to serve the 6th, 7th, 8th, 9th, 10th and 13th respondents with the petition and the motions filed herein.
- viii. Order 5 Rule 17 of the Civil Procedure Rules provides for substituted service of process of the court.
- ix. The petitioner has failed to satisfy any of the ingredients required for the grant of prayer 2 of the application.
- x. The court of appeal in the case *Misnak International(UK) Limited v 4MB Mining Limited c/o Ministry of Mining Juba Republic of South Sudan & 3 others*[2019] eKLR held that:

“we concur with and adopt the following sentiments of Aburili J, in *Law Society of Kenya v Martin Day & 3 others*. It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstance of this case are such that summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submit to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the



summons in the manner provided for in the rules, the jurisdiction of this court is not invoked”

- xi. The civil procedure rules and requirements of service are applicable to the proceedings before this Honourable Court. In *Gabriel Otiende & 4 others v County Commissioner Siaya County & 2 others; John Nyapola Okuku & 3 others (Interested Parties)* [2021] eKLR the court adopted the view that: the civil procedure rules still remains the parent rules in civil matters and where there is a lacuna in a procedure under the Mutunga Rules, The civil Procedure Rules apply.
- xii. Prayer 3 cannot be granted since it is sought against persons who are not party to the petition.
- xiii. The application is misplaced and an abuse of the court process.

The Petitioner’s submissions

7. The petitioner filed submissions dated 14th October 2021. On whether it was not necessary to directly join the three PSs to these proceedings, and while relying on section 2(3) and 13 of the *Government Proceedings Act*, he affirmed that it was not necessary to directly join the three PSs to these proceedings.
8. On whether the three PSs should be ordered to preserve the public assets in issue, he relied on Article 23(3) (b) as read with the provisions of Article 165 and Rule 23 of the Mutunga Rules and the cases of *Lucy Wangui Gachara v Muinudi Okemba Lore; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2015] eKLR; *Judicial Service Commission vs Speaker of the national Assembly & another* [2013] eKLR; and *Kevin K. Mwiti Others v Kenya School of Law & Others*. He argued that this court is vested with the jurisdiction to grant interim/conservatory orders and that he had met the threshold for grant of the interim orders, sought.
9. According to him, he had established a prima facie case showing that the assets of the 1st -3rd interested parties are in acute danger of being taken away if the orders sought are not granted. Reason being that the boards of the three State corporations have irregularly and unlawfully been dissolved by the 1st respondent.
10. On whether the Honourable court should order service through the 1st and 14th respondents, he submitted that unless the temporary order compelling the 1st and 14th respondents to accept service on behalf of the 6th, 7th, 8th, 9th, 10th and 13th respondents is made these proceedings will be frustrated. Further relying on Order 5, rules 8(1) and (2), 19(1) and 20(1) and (2) of the Civil Procedure Rules 2010 he submitted that the 6th, 7th, 8th, 9th, 10th and 13th respondents are public officers by dint of Article 260 of *the Constitution* and this instant application is merited and should be allowed.
11. Reiterating the contents of his application, he argued that no prejudice will be suffered should this court direct the 1st and 14th respondents to accept service on behalf of the respondents named herein as they are known to them. The 1st respondent appointed them to KDC board and the 14th respondent has acted on behalf of the directors of KDC, including the 6th, 7th, 8th, 9th and 10th respondents. Further that the 14th respondent works as a corporation secretary of the offending organization, to which the said respondents are members of the board.
12. On whether costs are payable and while, relying on *Kenya Human Rights Commission v Communications Authority of Kenya and 4 others* and *Republic v Rosemary Wairimu Munene, Ex parte v Uhuru Dairy Farmers Co-operative Society Ltd* [2018] eKLR and *Erick Okeyo v County*



- Government of Kisumu & 2 others he submitted that the respondents should be condemned to pay costs of the suit.
13. He further submitted that should the suit fail, he should not be condemned to pay costs for the reason that this matter is filed in public interest under Articles 22 and 258 of *the Constitution*. He relied on the South African case of Biowatch Case, CCT 80/2008 or 2009 ZACC 14 at para 21.
 14. On whether this court should issue any other remedy in the interest of justice, he relied on Articles 23(3), 19(3) (b), 20 and 259(1) (c) of *the Constitution* and the cases of Minister of Health & others vs Treatment Action Campaign & others (2002) 5 LRC 216; Fose v Minister of Safety and Security [1997](3) SA 786 (CC) 1997 (7) BCLR 851 ;and Hoffman v South African Airways (CCT17/00) [2000] ZACC 17. He urged this Court to be guided by the above cited cases, evidence on record, authorities provided as well as laws applicable and award appropriate reliefs that it may deem just to grant to further the respect and protection of *the Constitution*.
 15. He requested for a relief as directing 5th respondent to divulge the contact details of the 6th, 7th, 8th, 9th, 10th and 13th respondents to him to enable service as provided under the Civil Procedure Rules, 2010 by Electronic Mail Services [Order 5, Rule 22B] and/ or Mobile – enabled messaging Application [Order 5 , rule 22c].

The Respondents' submissions

16. The respondents filed submissions dated 14th March 2021 through learned counsel Christopher Mamba raising two issues for determination namely:
 - i. Whether the Honourable Court should order service of the 6th, 7th, 8th, 9th, 10th and 13th Respondents through the 1st and 14th respondents.
 - ii. Whether the three Principal Secretaries should be ordered to preserve the public assets in issue.
17. On the 1st issue, they submitted that the 6th to 13th respondents were sued in their personal capacity hence improper for the 1st and 14th respondents to shoulder the responsibility of accepting service on their behalf. Further that the Petitioner /Applicant has not disclosed any attempt made in effecting the service on the said respondents.
18. Counsel relied on Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and the cases of Ephraim Njugu Njeru v Justin Bedan Njoka Muturi & 2 others [2006] eKLR; Saad Yusuf Saad v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR; Mohamed Odha Maro v the County Returning Officer, Tana River and others [2013] eKLR (Malindi EP No. 15 of 2013); and Fatuma Fille Elmi v I.E. B. C & 3 others [2017] eKLR, He argued that the petitioner had a legal duty to personally serve the respondents in question and that there were other modes of service available.
19. On the 2nd issue, he argued that it would be practically impossible for the Court to make such an order as the three principal secretaries are not parties in these instant proceedings. They would therefore be condemned unheard. They relied on Bloggers Association of Kenya (Bake) v Attorney General & 5 others [2018] eKLR and Zack Kinuthia v Judicial Service Commission; Ngugi Grace Mumbi & 3 others (Interested Parties) [2020] eKLR.



Analysis and Determination

20. Having carefully considered the parties' pleadings and submissions I find the following issues to arise for determination:-
- i. Whether the Honourable Court should order service of the 6th, 7th, 8th, 9th, 10th and 13th Respondents through the 1st and 14th respondents.
 - ii. Whether the three Principal Secretaries should be ordered to preserve the public assets in issue.

i. Whether the Honourable Court should order service of the 6th, 7th, 8th, 9th, 10th and 13th Respondents through the 1st and 14th respondents.

21. The petitioner is asking this court to direct that he serves the 6th – 10th & 13th respondents through the 1st and 14th respondents. I have captured in the preceding paragraphs what the petitioner has averred. The respondents have challenged the petitioner saying he has not stated what efforts he has made in trying to serve the 6th – 10th and 13th respondents. It's argued that the 14th respondent has not been authorized by the said respondents to receive service on their behalf. The rest are in the responses captured above.
22. Rule 14 (1) of the Mutunga Rules provides for Service of Petition. It provides:-
- 14(1) The petitioner shall serve the respondent with the petition, documents and relevant annexures within 15 days of filing or such time as the court may direct.
- (2) Proof of service shall be the affidavit of service set out in Form B in the Schedule with such variations as may be necessary.
23. Rule 23 of the Mutunga Rules on conservatory and interim orders provides;
- 23.
- (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.
 - (2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.
 - (3) The orders issued in sub-rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.
24. In the case of *Kooba Kenya Limited v County Government of Mombasa* [2020] eKLR, Ogola J, stated:

10. The Mutunga Rules are mainly concerned with procedures to protect fundamental rights of parties in a petition. The fact that the said rules are silent in regard to how a party can replace its advocate after an entry of Judgment is not meant, in my view, to create a confusion, or a free for all enterprise where parties can do as they wish when it comes to replacing their advocates in matters in a petition. The Civil Procedure Rules still remain the parent rules



in civil matters, and where there is a lacuna in a procedure under the Mutunga Rules, the Civil Procedure Rules must apply. The other way to look at it is like this. The Mutunga Rules deal with issues of procedural justice in petitions. A change of advocate may not be deemed to be an issue at the heart of justice in a petition, and therefore, if it was not expressly provided for, nothing stops the application of the Civil Procedure Rules.

25. Although the Mutunga Rules under Rule 14 provide for service of the petition, it does not explicitly or in detailed form provide for the mode of service or give alternatives where personal service is untenable. On the other hand, the Civil Procedure Rules, 2010 provide for the same. It therefore calls for this court to also consider the provisions of the Civil procedure Rules on service. See *Kooba Kenya Limited (supra)*
26. Order 5 Rules 6, 7, 8, 14, 17, 19, 22B & 22C of the Civil Procedure Rules, provide for the various modes of service on defendants. This includes substituted service, service on public officers and soldiers, mobile – enabled messaging applications.
27. What is depicted from the provisions of the civil procedure rules is that as a general rule service of summons shall be effected on each defendant (Order 5 Rule 7). Generally, service should be made on the defendant personally or his empowered agent. An advocate with instructions to receive summons and to enter appearance can also be served with the summons (Order 5 Rule 8).
28. Where the defendant cannot be found after making reasonable and exercising due diligence, then service can be effected on an agent empowered (Order 5 Rule 12). The court can also order for substituted service on application and the same shall be effectual as if it had been made on the defendant personally (Order 5 Rule 17). Where the defendant is a public officer, the court may send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant. With the amendment to the civil procedure rules, service can now be effected through the last confirmed email address of the defendant and the same shall be effected when the sender receives a delivery receipt which he shall attach to the affidavit of service (Order 5 Rule 22B). Lastly, service of summons can also be made through mobile-enabled messaging Applications to the defendants last known and used telephone number (Order 5 Rule 22C).
29. In the case of *Mohamed Odha Maro v The County Returning Officer, Tana River and others* [2013] eKLR (Malindi EP No. 15 of 2013), the Court pronounced itself as follows on the issue of service: -

“The purpose of service of a petition is to give notice to the Respondents or persons affected by the petition that a petition had been filed challenging the outcome of the elections and the grounds upon which the challenge had been instituted to enable them prepare their responses and to defend their respective positions regarding the conduct of the contested elections. Service provides the respondents with an opportunity to be heard and goes to the root of all important tenets of the principle of fair trial and good administration of justice...Failure to serve a petition is a matter that goes to the very core of the proper and just determination of the petition and cannot be wished away.”
30. The Court further found and held that;

“Service of the petition is a mandatory requirement and a petition that has not been served cannot proceed for hearing as the respondent is denied the opportunity to contest the facts



in the petition. Mere knowledge of existence of a petition by the respondent can neither cure want of service nor discharge the burden imposed on the petitioner by the law”

31. In *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka and 216 Others Interested Party National Assembly* [2016] eKLR, the Court stated: -

6. The general rule for service of summons under Order 5 of the Civil Procedure Rules is personal service on the defendant or upon his agent –

“[Order 5, rule 8.] Service to be on defendant in person or on his agent.

8.

(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

32. The Court further stated;

8. Where personal service of the process of court is not possible with due diligence of the process server, there is an option for affixing it on the premises of the Respondent as follows:

“[Order 5, rule 14.]

14. Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.”

Due diligence is a prerequisite for the exercise of this mode of service – see *Elkanah Omuchilo v Ayub Muchiwa* [1966] EA 229 (Harris, J.)

9. For respondents who are also serving members of the current Parliament, as state officers, being public officers within the meaning of Article 260 of *the Constitution* for this purpose, service is to be effected through the Speaker of the National Assembly or Senate as the case may be -

“[Order 5, rule 19.] Service on public officers and soldiers.

19.

(1) Where the defendant is a public officer or an officer of a local authority, the court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.”

12. The Court adopts a multi-service approach in view of the different circumstances of the respondents:



1. For Respondents who are also members of the 11th Parliament, by service through the offices of the respective Speaker of the House of Parliament and by affixing a copy of the summons/notice of the Petition at Parliament Buildings' notice board.
 2. For Respondents who are not members of the current Parliament, by posting summons/notice of Petition on the Court noticeboards including its website.
 3. The Petitioner will wherever possible serve by personal service
 4. The Petitioner may also use email, where available.
33. Before finalizing on the issue of service it is important to state that the 5th respondent is a publicly owned private company and that it operates in the interest of the public. It is therefore subject to ministerial review and parliamentary scrutiny as required under the *State Corporations Act*, Chapter 446 of the Laws of Kenya and the *Public Finance Management Act*, 2012. This fact is averred to in the replying affidavit by the 14th Respondents. What this means is that the 6th, 7th, 8th, 9th, 10th and 13th respondents who are board directors of the 5th respondents which is essentially a public company are public officers by virtue of Article 260 of *the Constitution* hence can be served as envisaged under Order 5 Rule 19 of the Civil Procedure Rules 2010.
34. In respect of the prayer sought by the petitioner, that the 6th, 7th, 8th, 9th, 10th and 13 respondents be served through the 1st and 14th respondents, the same is not tenable. They are not empowered agents of the said respondents. They have also not authorized the advocate acting on behalf of the 5th, 11th, 12th and 14th respondents to accept service on their behalf.
35. A point to note is that whereas the petitioner states that he has been unable to serve the 6th, 7th, 8th, 9th, 10th and 13th respondents because they are not known to him and he does not know where to find them, he has not demonstrated to this Court even by way of affidavit the efforts he has made to trace them. He has not shown this court that he has exercised due diligence and was unable to find them contrary to the requirements of Order 5 Rule 14. He claims to have just seen their names in documents and then sued them without trying to establish who they are and how to access them. There is no short cut to this!
36. The petitioner, as rightly stated by the respondents also has the option of substituted service pursuant to Order 5 Rule 17. He has neither invoked this court's jurisdiction to order for substituted service. Therefore, this appears to be a case of a party who has not exercised the required due diligence to serve the 6th, 7th, 8th, 9th, 10th, and 13th respondents.
37. This court may however pursuant to Order 5 Rule 19 and as observed in *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka and 216 Others Interested Party National Assembly* [2016] eKLR, direct that service be made on the head of the company (5th respondents) accompanied with a copy of the summons for the said respondents. This can only be done where the Applicant shows that he has tried to serve in vain. In this case he has not shown that.
38. Alternatively, by virtue of Article 23(3) of *the Constitution* which speaks to the issue of appropriate relief, this court could direct that the 5th respondent does provide the last contacts of the said respondents for purposes of effecting service either through email or mobile-enabled messaging applications being that they are well known to the 5th respondent as they are its board members. The respondents have not refuted, this fact.



iii. Whether the three Principal Secretaries should be ordered to preserve the public assets in issue.

39. The petitioner has asked this court to issue orders directing the principal secretaries for Tourism, Trade, and Industrialization to secure and take responsibility as appropriate for the asset and affairs of the 1st, 2nd and 3rd interested parties pending the hearing and determination of this petition. According to him it is not necessary for the said principal secretaries of the interested parties to be directly joined in these proceedings for the orders sought to be issued.
40. The respondents noted that the three Principal secretaries are not parties in these proceedings and therefore orders cannot be issued against them before them being heard. This was also noted by this court when it declined to issue *ex parte* orders against them as the orders were against persons who are not parties in this suit.
41. I find that the order being sought herein, is sought against persons who are not parties in this suit. This therefore means that they will not have a chance to express themselves which is against the rules of natural justice. The assets the petitioner wants preserved are public and not personal properties. What are they? It's only the principal secretaries who can explain yet they are not parties in this petition.
42. As stated hereinbefore, this Court under Article 23 (3) of *the Constitution* is vested with the jurisdiction to issue any other appropriate relief. The Court in the case of *E W A & 2 others v Director of Immigration and Registration of Persons & another* [2018] eKLR defined appropriate relief as hereunder: -

24. As for the appropriate reliefs, this Court is empowered by Article 23 (3) of *the Constitution* to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*[6]thus:-

"...appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

43. The Constitutional Court of South Africa in *Fose vs. Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

"Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is



necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

44. The question is what would be an appropriate relief in the circumstances of this case? The petitioner wants this court to issue orders directed at persons who are not parties in this suit. Should the court think it is necessary to issue the said order, what should it do? Pursuant Rule 5 (d)(ii) of the Mutunga Rules, this court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just that the name of any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the court adjudicate upon and settle the matter, be added. On this my answer would in the negative since the petitioner has not satisfied the court on why it is necessary for the said assets to be preserved by the court. The Cabinet secretary and Permanent secretary of the relevant ministries are responsible for their assets.
45. After considering the entire application and the analysis above I make the following orders:
- Prayer
- (i) Spent.
 - (ii) Disallowed.
 - (iii) Disallowed
 - (iv) Let the 5th respondent avail to the petitioner in the next 7 days the last known contacts of the 6th – 10th & 13th respondents for purposes of service. Counsel for the other respondents should ensure compliance.
 - (v) Upon receipt of the last contacts the petitioner should serve the said respondents with the pleadings within 7 days.
 - (vi) The respondents to file responses to the petition and notice of motion both dated 16th August 2021 within 14 days upon service of the pleadings.
 - (vii) Mention on 31st August 2022 before the Deputy Registrar to confirm compliance.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

