



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 292 OF 2016**

**ISAAC ALUOCH POLO ALUOCHIER .....PETITIONER**

**VERSUS**

**THE HON. STEPHEN KALONZO MUSYOKA AND 216 OTHERS - RESPONDENTS**

**AND**

**THE NATIONAL ASSEMBLY .....INTERESTED PARTY**

**RULING**

1. This is a ruling on service of the Petition on the numerous respondents some of whom the Petitioner has not been able to serve personally with the Petition to enable its proceeding to hearing and determination. The Petitioner has sought directions for substituted service by way of publication by affixing at the Court Notice board in view of the large number of respondents and prohibitive cost of newspaper advertisement setting out all the names of the Respondents.

2. The Respondents were members of the 10<sup>th</sup> Parliament some of whom did not make it to the 11<sup>th</sup> Parliament and their whereabouts for purposes of service is understandably difficult to establish. The Court has previously directed service to the respondents through advertisement in the newspapers but the advertisement did not name all the respondents but rather referred to them by exclusion in a notice entitled “Substituted Service by Advertisement to all Voting Members of the 10<sup>th</sup> Parliament (except A. Neto, T. Ngahu and M. Sakuda)” in the Classified Ads section of the Daily Nation of 20<sup>th</sup> September 2016.

**Right to fair hearing**

3. First principles on service of summons and other process of the Court, of course, must be geared to affording fair trial to the parties in accordance to the Article 50 provision on fair hearing as follows:

*“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a **fair** and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

4. In giving effect to the constitutional provision for fair hearing, the overriding objective of the Civil Procedure Act, the Rules made thereunder and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 for the enforcement of constitutional rights

and freedoms is facilitate justice. Section 1A of the Civil Procedure Act provides as follows –

**“1A. Objective of Act**

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the **just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**”*

5. Serving court process on a defendant so that he may know the case that he has to meet and giving him an opportunity to respond to the charge or allegation in the suit is the cardinal principle of justice for which the rules on service of process are maidens.

**Substituted Service of Court Process**

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.**”*

7. Order 5 rule 17 of the Civil Procedure Rules provides for substituted service of process of the court as follows:

**“[Order 5, rule 17.] Substituted service.**

*17. (1) ‘Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order **the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.***

*(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.*

*(3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.*

*(4) Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.”*

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.”*

10. The Civil Procedure Act encourages use of technology in the process of the Court as follows:

***“1B. Duty of Court***

*(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—*

*(a) the just determination of the proceedings;*

*(b) the efficient disposal of the business of the Court;*

*(c) the efficient use of the available judicial and administrative resources;*

*(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

***(e) the use of suitable technology.***

*[Act No. 6 of 2009, Sch.]”*

11. The Court considers that the use of email and notification through the Court website is thus contemplated.

***Directions for service in this case***

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 11<sup>th</sup> 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.

13. The matter will be mentioned for directions as to hearing on a date to be fixed allowing 14 days after publication of the notice for the respondents to enter appearance, if they so desire.

14. Costs in the cause.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Isaac Alouch Polo Aluchier petitioner in person

Mr. S. M. Mwendwa with Ms. Wangechi Thanji for the Interested Party.