



**Mulaa v Office of the Director of Public Prosecutions & another; Oparanya
& 4 others (Interested Parties) (Constitutional Petition E004 of 2024)
[2026] KEHC 642 (KLR) (Constitutional and Human Rights) (30 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E004 OF 2024**

**BM MUSYOKI, J
JANUARY 30, 2026**

BETWEEN

FREDRICK MULAA APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

AND

WYCLIFFE AMBETSA OPARANYA INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

TRANSPARENCY INTERNATIONAL INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

INUKA KENYA NI SISI INTERESTED PARTY

RULING

1. This court delivered judgement on the petition on 16th September 2025 after which the 1st interested party approached this court through a notice of motion dated 2-10-2025 asking for the following orders;

1. That the application be certified urgent and be heard on priority basis.



2. That the Honourable Court be pleased to set aside the Court's judgment delivered on 16th September 2025 in Fredrick Mulaa vs Office of the Director of Public Prosecutions and 2 others.
 3. That upon grant of order 2 above, the Honourable Court be pleased to grant leave to the 1st interested party/applicant unconditional leave to enter an appearance and to file its response to the petition herein.
 4. That the Honourable Court be pleased to have the matter heard de novo.
 5. That the costs of this application be provided for.
2. The ground upon which the application is based is that the 1st interested party was not served with the petition and notices in this matter. The same is supported by affidavit of the 1st interested party sworn on 1-10-2025 in which he swears that he was not aware of the proceedings as he was never served. The 1st interested party states further that service which was effected upon the legal department of the Ministry of Co-operatives and Micro, Small and Medium Enterprises (MSMEs) Development (hereinafter referred to as 'the ministry') which he heads was not personal service as the ministry was not a party to this matter. He takes the stand that the process server should have explored other ways of personal service within his office or his residence before resorting to serving through the legal department which he maintains is not his authorized agent. The interested party concludes by stating that his right to fair hearing was violated by the lack of personal service which led to him being condemned unheard. He added that he has a good defence to the claims mounted in the petition.
 3. The petitioner has opposed the application through replying affidavit sworn on 9-10-2025 while all the other parties have chosen not to participate in the application. The petitioner depones that the 1st interested party was served on 7-04-2025 and 13-05-2025. He depones further that the 1st interested party being a Cabinet Secretary, personal service upon him could only be effected at his ordinary place of work. He confirmed that the two services were not personal but insists that they were effected through the 1st interested party's agents and added that the service was adequate pursuant to Order 5 Rule 8 as read with Rule 12 of the Civil Procedure Rules. According to the petitioner, the judgement of the court being final, the only remedy available to the 1st interested party is either review or an appeal.
 4. During the prosecution of the application, the 1st interested party made an application which I granted that, the process server be subjected to cross-examination on his mode of service. When Nornael G'oganyo, the process server appeared before me on 18-11-2025, he confirmed that he did not serve the 1st interested party personally and he could not reach him and maintained that the service upon the reception and the legal department of the ministry was sufficient.
 5. I have read submissions of the 1st interested party dated 28-11-2025 and those of the petitioner dated 1-12-2025 alongside the said parties' affidavits. It is not disputed that the 1st interested party was not personally served with the petition and the notices. The contention is whether the service upon his receptionist and the ministry's legal department was proper and sufficient service.
 6. On 7-04-2025 this court made specific order that;

'The court notes that the 1st interested party who is likely to be affected by the outcome of the petition has not been served with today's mention. It is also not clear whether the petition has been served upon the 1st interested party. It is therefore ordered and directed as follows;

 - a. The petitioner shall serve the 1st interested party with the petition and all other pleadings in this matter within seven days and an affidavit of service to that effect filed.



- b. Upon service, the 1st interested party shall file a response and his submissions within 21 days.
 - c. This matter shall be mentioned for further directions on 7-05-2025.
7. Until the above order was made, the petitioner did not seem keen in serving the 1st interested party. In the affidavit of service dated 17th April 2025, the only paragraph which spoke of service was paragraph 3 which stated that the process server served the 3rd interested party's ministry's offices located on the 11th floor of Social Security Buildings Bishops Road in Nairobi. He avers that at the said offices, he introduced himself and stated the purpose of his visit and proceeded to serve the petition on the receptionist who received and affixed their stamp. Attached to the affidavit was a mention notice which clearly showed a rubber stamp of the ministry.
 8. The aforesaid affidavit of service had indicated that the service was on the 3rd interested party and although the petitioner's advocate attempted to explain that it was a typographical error, I was not satisfied with the service and I ordered a fresh service and fixed the matter for further mention on 16-06-2025. Come this day, the petitioner indicated to the court that he had served all the parties and pointed the court to affidavit of service dated 13-06-2025 which led the court to reserve the matter for judgement on honest belief that service had been properly done. As it would turn out, the second service was on the legal department of the ministry and not personally on the 1st interested party.
 9. As I have observed earlier, the person who stood to be largely affected by the outcome of the petition was the 1st interested party in his personal capacity. In the circumstances, service on him was paramount and a constitutional requirement. It is not disputed that the 1st interested party is the Cabinet Secretary in the ministry where service was done. Whereas one may say that the 1st interested party may likely have had notice of these proceedings as it is doubtful that a receptionist would fail to alert a such a high-flying public officer of a court case in which he is personally involved, there is a possibility that he may not have been aware however remote it is. The onus of proof of service was on the petitioner and I find that he has not discharged it. What he has proved is that he served the receptionist and the legal department of the ministry.
 10. By dint of Article 25(c) of *the Constitution*, the right to a fair trial cannot be limited. It is a fundamental principle of natural justice that no one should be condemned unheard and this right includes right to be served and notified of the case against the person. The petitioner has argued that serving the 1st interested party personally was impracticable. Where a party is faced with a situation where personal service is difficult to achieve, the petitioner must seek leave of the court to serve by substituted service under Order 5 Rule 17 of the Civil Procedure Rules.
 11. In 2020, the Civil Procedure Rules were amended to include Rules 22B and 22C which allows service by electronic mails and mobile-enabled applications which are considered to be adequate. The petitioner did not make any effort to establish the 1st interested party's addresses or contacts through which he could serve through electronic method. Leaving the documents with a receptionist and the ministry's legal department was in my view not proper and adequate service.
 12. The obvious conclusion from the above discussion is that the 1st interested party was not served with the petition and has a right to be given an opportunity to defend himself as much as the waste of judicial time is regrettable. This is a matter of right as held by the Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* (2016) KECA 470 (KLR) thus;

‘In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a



matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.’

13. The 1st interested party deserves the orders sought in the notice of motion dated 2-10-2025 and I proceed to give the following orders;
 1. The judgement of this court dated 16th September 2025 is hereby set aside and the petition re-opened for fresh hearing.
 2. The 1st interested party shall file and serve his replying affidavit within seven (7) days from the date of this ruling failure to which the application dated 2nd October 2025 shall stand dismissed.
 3. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Ruling delivered in presence of Miss Magogo holding brief for Mr. Malenya for the petitioner, Mr. Osiemo for the 1st interested party and in absence of all the other parties.

