



REPUBLIC OF KENYA



**Bhailal & another v Kumar & 3 others (Petition 204 of 2017) [2026] KEHC 1033 (KLR)
(Constitutional and Human Rights) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1033 (KLR)

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

PETITION 204 OF 2017

EC MWITA, J

FEBRUARY 5, 2026

BETWEEN

**SACHIN KUMAR BHAILAL 1ST PETITIONER
SHAUKAT ARA BHAILAL 2ND PETITIONER**

AND

**SANTOSH KUMAR 1ST RESPONDENT
THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT**

RULING

1. This court has been called upon to determine the Notice of Motion Application dated 17th June 2025. The Motion Application seeks, in the main, an order setting aside the order dated 11th May 2022, striking out the amended petition and all consequential and incidental orders thereto.
2. The facts in this matter, as can be discerned from the record, are that the petition arose from proceedings in Criminal Case No. 117 of 2017, in which the 1st petitioner was the accused and the 1st respondent was the complainant. The amended petition sought, among others, an order prohibiting the 2nd and 4th respondents from arresting and prosecuting the 1st petitioner.
3. The petitioners and the 1st respondent are family members. According to the petitioners, following family discussions, there was reconciliation and a mutual understanding was reached to amicably resolve the dispute leading the withdrawal of the criminal case. They further reached a mutual



understanding in respect of the petition, so that at the request of the 1st respondent, the petitioners agreed not to pursue prosecution of the petition.

4. The petitioners state that they were not aware of the application filed by the 1st respondent and dated 18th January 2022 which sought to strike the petition for want of prosecution because they were not served with that application. They were also not aware that their amended had been struck out with costs nor were they served with the 1st respondent's party and party bill of costs dated 18th July 2022.
5. The petitioners state that their advocate, the late Boniface Njiru, died on 8th August 2023 and in that regard, they urge, the Notice to Show Cause issued and dated 14th March 2025 was allegedly served on the deceased advocate through email raising the issue of whether that was proper service.
6. The petitioners assert, therefore, that the warrants of arrest issued on 13th May 2025 were irregularly obtained and it is in the interest of justice that their application be allowed to avert a miscarriage of justice.

Response

7. The 1st respondent has opposed the motion application through a replying affidavit. The 1st respondent states that he was served with petition in 2017 and instructed his advocate to represent him and filed a Notice of Appointment on 6th June 2017.
8. The 1st respondent maintains that he neither changed advocates nor withdrew instructions from the advocates. The 1st respondent denies that he and the petitioners reached amicable settlement to abandon the petition otherwise a consent should have been filed or the petition withdrawn all together.
9. The 1st respondent admits that his advocates filed an application seeking to dismiss the petition for want of prosecution given that although the petition was filed on 12th May 2017 and responses filed thereafter, no steps were taken to prosecute the petition. The 1st respondent's advocate filed an application to dismiss the petition for want of prosecution which was heard and allowed on 11th May 2022.
10. The 1st respondent maintains that the application and notice for mention were properly served on the petitioners' advocate, (Mr. Boniface Njiru) on 13th April 2022 by email and an affidavit of service sworn on 14th April 2022 was filed in court. The application for dismissal of the petition dismissed was heard and allowed on 11th May 2022 during the lifetime of the petitioners' advocate given that the advocate passed away on 8th August 2023.
11. The 1st respondent states that the 1st petitioner was also personally served with the notice to show cause and the notice of motion and the ruling notice dated 2nd April 2025. The 1st petitioner had an opportunity to appear in court and or take any other step to protect his interest, but failed to do so.
12. According to the 1st respondent, his party and party bill of costs dated 18th July 2022 was again served on the petitioners' advocate on 27th September 2022. The bill of costs was taxed on 11th October 2022, and Certificate of Costs issued on 28th November 2022. The 1st respondent asserts, therefore, that the striking out of the amended petition on 11th May 2022, finalized the matter lawfully. The 1st respondent further asserts that the notice to show cause dated 14th March 2025 was personally served on the 1st petitioner.
13. It is the 1st respondent's position that the application for warrants of arrest was necessitated following the frustration faced while trying to execute for costs by attaching the petitioners' property on several occasions. It is the 1st respondent's further position, that court processes were followed and, therefore,



this application is an afterthought and has been brought more than two years after the petition was truck out without plausible explanation for the delay. He urges the court to dismiss the application with costs.

Oral highlights

14. During the hearing of this application, counsel for the parties have essentially relied on their respective documents filed in support or opposition to the application. Mr. Anyona, learned counsel for the petitioners who are the applicants, reiterates the facts on the application and argues that the Affidavit of Service on the then advocate for the petitioners-Mr. Boniface Njiru, did not contain a delivery notice. Counsel relies on the decision in BOD County Referral Hospital Kitale & another v DN (Suing through her next friend & Grandmother SK) [2025] KEHC 5344 (KLR) and urges the court to allow the application.
15. Miss Njeru, learned counsel for the 1st respondent, also reiterates the facts as stated in the 1st respondent's replying affidavit. Learned counsel further argues that the petitioners should have filed a reference against the decision of the taxing officer. She urges the court to dismiss the application with costs.
16. The 2nd, 3rd and 4th respondents did not take part in the application.

Determination

17. I have considered the application, the response, arguments by parties and the decisions relied on. The main issue here is whether this court should set aside the decision of 11th May 2022 striking out the amended petition. This is so, because according to the petitioners, the application to dismiss the petition for want of prosecution was not properly served since it was the orders made on 11th May 2022 pursuant to that application that triggered the events that followed.
18. The petitioners' argument is that the application purportedly served on their advocate through email was not properly served. They point out to the affidavit of service sworn on 14th April 2022 to demonstrate the fault in the alleged service.
19. There is no denial that the petition was not set down for hearing for several years after it had been filed. Of course, the petitioners have explained why that was the case but the 1st respondent has disputed the position as explained by the petitioners.
20. The genesis of the petitioners' grievances is the order made on 11th May 2022 which striking out the amended petition with costs. Thereafter, the 1st respondent filed his party and party bill of costs for taxation. After taxation, again in the absence of the petitioners, a certificate of costs issued and the 1st respondent proceeded to execute and applied for warrants of arrest and committal to civil jail which were issued against the petitioners, triggering this application.
21. The petitioners argue that the application was not served as required by law, a claim the 1st respondent has denied. The 1st respondent on his part, asserts that the application was properly served on the petitioner's advocate by email and an affidavit of service was filed.
22. I have perused the affidavit of service sworn on 14th April 2022 by Abel Marube Ondieki, a licensed Process Server. He states that he received a notice of motion application dated 18th January 2022 from John Ogada Advocates on 13th April 2022 with instructions to serve the application on the respondents and Bonface Njiru & Co, Advocates for the petitioners.



23. The Process Server stated that he was provided with the email address of Njiru Boniface & Co Advocates through which he sent the documents pursuant to the provisions of Order 5 rule 22B of the Civil Procedure (Amendment) Rules, 2022 and the Practice Directions on Electronic Case Management.
24. Order 5 rule 8 provides generally that “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.”
25. In *John Akasirwa v Alfred Inai Kimuso* (C.A. No. 164 of 1999) (UR), the Court of Appeal observed that “proper service...of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not.” The position articulated in the decision with regard to service of Summons applies to service of other documents which require a party to respond and participate in the proceedings.
26. Order 5 was amended in 2020 by introducing rule 22B on service of documents by Electronic Mail (emails). Rule 22B provides as follows:
 1. Summons sent by Electronic Mail Service shall be sent to the defendant’s last confirmed and used E-mail address.
 2. Service shall be deemed to have been effected when the Sender shall receive a delivery receipt
 3. Summons shall be deemed served on the day which it is sent, if it is sent within the official business hours on a business day in the jurisdiction sent, or if it is sent outside of the business hours and on a day which is not a business day it shall be considered to have been served on the business day subsequent.
 4. An officer authorized to effect service shall file an affidavit of service attaching the Electronic Mail Service delivery receipt confirming service.
27. Rule 22B applies to service of other documents in equal measure. It requires that Summons (or any other documents for that matter) sent by Electronic Mail Service be sent to the party’s last confirmed and used e-mail address. Further, service will be deemed to have been effected when the sender receives a delivery receipt. The person authorized to effect service has to file an affidavit of service attaching the Electronic Mail Service delivery receipt confirming service. That is the process that would amount to proper electronic service.
28. In the present case, although the Process Server deposed that he was given the email address of Njiru Boniface & Company Advocates through which he sent the application dated 18th January 2022, he did not disclose who gave him that email address. The Process Server did not also state whether that was the “last confirmed and used E-mail address” of the petitioners’ Advocates even though the Process Server attached a copy of the email sent to the advocates.
29. Proper service of Court processes is a critical step in litigation as it ensures due process which is an element of fair hearing, a right guaranteed under article 50(1) of *the Constitution*. That is why the Court of Appeal stated that service in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same and therefore chose to appear or not.
30. Failure to comply with the law with regard to service, vitiates all other processes that result from decisions taken in the absence of a party who was required to be served but was not served or properly as the case may be.



31. In the circumstances of this case, the 1st respondent has not demonstrated that the petitioners' advocates were properly served as required by law. For that reason, the decision made on 11th May 2022 striking out the amended petition with costs cannot stand on account of non-service of the application dated 18th January 2022. Allowing that decision to stand would amount to a serious miscarriage of justice.
32. Consequently, and for the above reasons, the application dated 17th June 2025 is allowed. The order made on 11th May 2022 striking out the amended petition and all subsequent orders are hereby set aside. The amended petition is hereby reinstated to hearing.
33. For avoidance of doubt, the decision of the taxing officer dated 11th November 2022 on the 1st respondent's party and party bill of costs and warrants of attachment or warrants to commit the petitioners to civil jail issued in respect of execution for costs arising from the taxation of the party and party bill of costs are hereby set aside.
34. The 1st respondent will bear the costs of the application.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2026

E C MWITA

JUDGE

DELIVERED AND COUNTERSIGNED THIS 5TH DAY OF FEBRUARY 2026

L N MUGAMBI

JUDGE

