

**IN THE COURT OF  
APPEAL AT NAIROBI**

**(OKELLO, JA. (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. E567 OF 2024**

**BETWEEN**

**AGNES MUTHINI MUSILA.....APPLICANT**

**AND**

**MACHARIA CHEGE..... 1<sup>ST</sup>  
RESPONDENT SUSAN NDUGE KIOKO....  
.....2<sup>ND</sup> RESPONDENT LENA MUKAMI  
MIGWI.....3<sup>RD</sup> RESPONDENT**

*(An application for leave to serve hearing notice and requisite appellate documents by substituted service in Civil Appeal No. E567 of 2024)*

**R U L I N G**

1. By a Notice of Motion dated 14<sup>th</sup> January, 2026, the applicant applied for service of the hearing notice and all the requisite documents upon the 2<sup>nd</sup> respondent Susan Nduge Kioko by way of substituted service.
2. This Application is based on the grounds stated on the face of it together with the Supporting Affidavit sworn on 14<sup>th</sup> January, 2026 by Abdirizak Roba Duba, an advocate of the High Court of Kenya, who has the conduct of this matter. He

averred that the

respondents are parties affected by the outcome of the appeal and therefore require to be served with the hearing notice and all requisite appellate documents in accordance with the Court of Appeal Rules, 2022. He further avers that the 2<sup>nd</sup> respondent has never been served personally with the hearing notice or other appellate process, not out of omission or neglect, but because she has remained completely untraceable despite diligent, sustained and bona fide efforts. He prays that leave be granted to the applicant to effect hearing notice and all requisite appellate documents on the 2<sup>nd</sup> respondent. He further prays that substituted service be effected by advertisement in a daily newspaper with a national circulation and by affixing the hearing notice at the registry of the High Court at Machakos and Nairobi respectively.

3. The application is premised on the following grounds, *inter alia* —

(a) *That the 2<sup>nd</sup> respondent **Susan Nduge Kioko** is a party directly affected by the appeal and should be served pursuant to Rule 79(1) of the Court of Appeal Rules (2022);*

(b) *That despite diligent, sustained and bona fide*

*efforts, the applicant has been unable to effect personal service on the 2<sup>nd</sup> respondent;*

- (c) *That the applicant does not know and despite reasonable inquiry has been unable to ascertain the physical residence of the 2<sup>nd</sup> respondent, her postal address, her telephone contact and her email address or electronic means of communication;*
- (d) *That all reasonable and practical avenues of tracing the 2<sup>nd</sup> respondent have been fully exhausted, rendering prompt personal service impossible; and*
- (e) *That compliance with the Court's directions is not feasible without an order for substituted service;*
- (f) *That no prejudice will be occasioned to the 2<sup>nd</sup> respondent if the orders sought are granted, while refusal will impede the applicant's constitutional right to be heard on appeal.*

9. The firm of Roba & Associates Advocates LLP is on record for the applicant. Mr. Macharia Chege, the 1<sup>st</sup> respondent appears in person. The hearing notice was effected on all respondents on record, where the parties were reminded to comply with the directions issued in regard to service and filing of written submissions before the hearing date.

10. This application is governed by **Order 5 Rule 17** of the Civil Procedure Rules which states:

**“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorised or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

11. Save for the 1<sup>st</sup> respondent, the other parties did not comply with directions as required. The 1<sup>st</sup> respondent appearing in person filed his written submission dated 27<sup>th</sup> April, 2026. In his submission, the 1<sup>st</sup> respondent does not oppose the application but urges that the applicant pays the costs appurtenant to this application. He also draws the attention of the court to the fact that this is an old matter that need to be dispensed with as a priority.
12. Hearing of this application is by way of written submissions.
13. The applicant sought leave be granted serve the hearing notice and all requisite appellate documents on the 2<sup>nd</sup> respondent by substituted service by advertisement in a daily newspaper with a national circulation and by affixing the hearing notice at the registry of the High Court at Machakos and Nairobi.

14. He avers that the 2<sup>nd</sup> respondent has never been served personally with the hearing notice or other appellate process, not out of omission or neglect, but because she has remained completely untraceable despite diligent, sustained and bona fide efforts. There is however no document attached to demonstrate this attempt to effect service. The applicant has not attached any document to demonstrate that she has attempted to effect personal service or otherwise. Curiously, there is an affidavit of service by one, a registered process server, who has sworn that on Friday 16<sup>th</sup> January, 2026 upon receipt of a hearing notice and Notice of Motion dated 16<sup>th</sup> January 2026 and 14<sup>th</sup> January 2026, he effected service on the 2<sup>nd</sup> respondent. Service was effected at the behest of the 1<sup>st</sup> respondent. He has attached signed hearing notice and Notice of Motion served on and signed by the 2<sup>nd</sup> respondent Susan Ndunge Kioko and the same are marked as exhibit “MC-4 and MC-5” respectively.

**15.** I have examined the application and the supporting affidavit by learned counsel Roba and I must say that I am disappointed. There is no attempt whatsoever to demonstrate

attempted service. Indeed, the affidavit by the process server  
one **Kooro**

**Erastus Samuel** is very clear that the 2nd respondent is traceable. The fact that the 1st respondent was able to trace the 2nd respondent and effect service, is clear proof that the applicant has not attempted to effect personal service. I must state that counsel must be careful not to bog the court down with applications which are vexatious and frivolous. Justice delayed is justice denied and it is not appropriate for an officer of the Court to frustrate that very justice that he swore to uphold.

16. My opinion is that the applicant has not met the threshold for the grant of leave to serve the 2<sup>nd</sup> respondent by way of substituted service through advertisement in one of the daily newspapers with wide circulation. I therefore dismiss the application. I further order that the applicant effect personal service on the 2<sup>nd</sup> respondent following the route well provided for by the process server one Koro Erastus Samuel in his affidavit of service dated 16<sup>th</sup> January, 2026.
17. The upshot of the foregoing is that this application is dismissed.

Costs shall be in the cause.

18. **CONSEQUENTLY**, the Notice of Motion dated 14th

January, 2026, is dismissed. I further order that —

- (i) The applicant effect service of the hearing notice and the requisite appellate documents personally following the route deposed in the affidavit of service by Kooro Erastus Samuel dated 16<sup>th</sup> January, 2026;
- (ii) This matter be mentioned before the Registrar to confirm compliance.

Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2026.

**DR. J. O. OKELLO**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original.*

**Signed**

**DEPUTY REGISTRAR.**