



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, J.A (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 4 OF 2006**

**BETWEEN**

**WILLIAM NGARE ..... 1<sup>ST</sup> APPELLANT**  
**DAVID MIANO ..... 2<sup>ND</sup> APPELLANT**  
**WINNIE ROSE WANGU ..... 3<sup>RD</sup> APPELLANT**  
**EPHARAIM GIKANDI ..... 4<sup>TH</sup> APPELLANT**  
**JANE GATHIGIA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**THE PUBLIC TRUSTEE ..... 1<sup>ST</sup> RESPONDENT**  
**MARGARET WANGUI MURIUKI ..... 2<sup>ND</sup> RESPONDENT**  
**PETER WANDERI MURIUKI ..... 3<sup>RD</sup> RESPONDENT**  
**BEATRICE WAITHIRA ..... 4<sup>TH</sup> RESPONDENT**  
**MARY NYAWIRA ..... 5<sup>TH</sup> RESPONDENT**  
**ELIZABETH WAITHENYA MURIUKI ..... 6<sup>TH</sup> RESPONDENT**  
**BENSON WANDERI MURIUKI ..... 7<sup>TH</sup> RESPONDENT**  
**JOHN MANYO KAGUNYA ..... 8<sup>TH</sup> RESPONDENT**  
**DAVID GITHUI KAGUNYA ..... 9<sup>TH</sup> RESPONDENT**  
**MARGARET WAITHERA ..... 10<sup>TH</sup> RESPONDENT**  
**MARY GATHONI MUGO ..... 11<sup>TH</sup> RESPONDENT**

**(REPRESENTATIVE OF JACKSON MUGO WANDERI**

*(An application for leave to serve the eleventh respondent with the record of appeal, the supplementary record and the amended supplementary record of appeal by substituted service from the ruling and the order of the High Court of Kenya at Nairobi (Githinji, J.) dated 29<sup>th</sup> April, 2004*

in

**H.C SUCCESSION CAUSE NO. 1401 of 1990)**

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**RULING**

1. By an application dated 20<sup>th</sup> May 2013 presented under Rule 17 of the Rules of this Court and under Order 5 Rule 17(1)(4) of the Civil Procedure Rules 2010 the applicants seek leave of this Court to serve the record of appeal, the supplementary record and the amended supplementary record of appeal in this matter upon the 11<sup>th</sup> respondent, Mary Gathoni Mugo, the representative of Jackson Mugo Wanderi, deceased by substituted service by way of advertisement in the local daily newspaper.
2. The application is supported by two affidavits. The first affidavit is labelled “affidavit of non-service” and was sworn by Samson N. Wambua, a process server, on 20<sup>th</sup> May 2013. David Miano, the 2<sup>nd</sup> applicant swore the second affidavit.
3. At the hearing of the application before me, learned counsel for the applicants Mr. G.N Thiongo referred to the affidavits and stated that the process server has explained that he made several attempts to serve process on the 11<sup>th</sup> respondent unsuccessfully; that he (the process server) interviewed neighbours of the 11<sup>th</sup> respondent as well the Chief and Assistant Chief and a church minister who informed the process server that the 11<sup>th</sup> respondent had left her home early in 2010 and had not been seen since; that efforts to trace the 11<sup>th</sup> respondent through her daughter and son was fruitless as they did not have information regarding their mother’s whereabouts; that she could not be traced at her last known place of work at the National Water Corporation in Nairobi; that the process server subsequently received information that the 11<sup>th</sup> respondent may have moved to Mombasa to do business there. According to Mr. Thiongo the applicants have made all efforts had been made to effect service on the 11<sup>th</sup> respondent unsuccessfully.
4. Opposing the application, Dr. Khaminwa learned counsel for 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents who also held brief for Mr. Kimani Muhoro for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the decision that is the subject of the present appeal was delivered in 2004; that given the long history, this litigation should come to an end; that the orders sought are discretionary and the applicants have not established sufficient grounds why that discretion should be exercised in their favour and that there has been delay in prosecuting the application.
5. In his brief reply, Mr. Thiongo submitted that although the application was filed on 23<sup>rd</sup> May 2013 it has previously come up for hearing and was taken out of the hearing through no fault of the applicants; that an order was given by this Court on 3<sup>rd</sup> August 2010 for the 11<sup>th</sup> respondent to be served and that it is necessary that the orders sought be granted in order for service on the 11<sup>th</sup> respondent, who is a necessary party, to be effected.
6. I have considered the application, the supporting affidavits and the submissions by learned counsel. Rule 17(1) of the Rules of this Court requires that service of process to be effected personally unless the Court otherwise directs. In **Ephraim Njugu Njeru v Justin Bedan Njoka Muturi & 2 others [2006] eKLR** the Court stated that: “*Substituted service is resorted to after all*

*reasonable and proper efforts have been made to trace the respondent but in vain.”* The decision of the Court in **Filimina Afwadi Yalwala v Ronald Indimuli & Another Civil Appeal No.69 Of 1987** is to the same effect.

7. The process server, Samson N. Wambua, has in his affidavit set out in detail the efforts made to trace the 11<sup>th</sup> respondent in vain. He visited her home, where he had previously effected service and found it deserted; he made enquiries with her neighbours, the local Chief and Assistant Chief of the administrative location from where she hails, the church minister of the Church where she was known to worship and also contacted her children none of whom knew or disclosed her whereabouts. Despite the length of time this matter has taken in the courts and mindful that the 11<sup>th</sup> respondent was brought into the matter as a representative of her deceased husband who, based on the record, died during the pendency of the matter in court, this in my view is a proper case in which service by substituted service should be allowed notwithstanding that a previous application to the same effect was dismissed by the court on grounds that there was no evidence presented to the Court at the time of the efforts made to effect service on the 11<sup>th</sup> respondent.
8. I accordingly allow the application in terms of prayer 1 of the application dated 20<sup>th</sup> May, 2013. The applicants are at liberty to serve the 11<sup>th</sup> respondent with the Record of Appeal and the Amended Supplementary Record of Appeal by substituted service by way of Advertisement in the local daily Newspaper.
9. Costs of the application shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 19th day of September, 2014.**

**S. GATEMBU KAIRU**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**