



**Mwilu v Radio Africa Limited & another (Civil Case 296 of 2016)  
[2023] KEHC 4053 (KLR) (Civ) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE 296 OF 2016  
AN ONGERI, J  
APRIL 28, 2023**

**BETWEEN**

**PHILOMENA MBETE MWILU ..... PLAINTIFF**

**AND**

**RADIO AFRICA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE STAR PUBLICATIONS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 25/4/2023 filed under certificate of urgency by the firm of Kemboy and Company Advocates.
2. The application is seeking for the following orders:
  - i. That this application be certified as urgent and heard ex-parte in the first instance for the purpose of prayers 2 and 3 hereof.
  - ii. That for reasons set out in the certificate of urgency this Honourable court do grant an urgent date when this application may be heard inter-partes.
  - iii. That the Honourable court be pleased to arrest its judgment in this matter slated for April 28, 2023 pending the hearing and determination of this application interpartes.
  - iv. That the Honourable court be pleased to issue an order that the file be transmitted to Honourable Justice Joseph Sergon for the writing and delivery of judgment.
  - v. That the Honourable court be pleased to issue further or better orders as shall meet the ends of justice.



- vi. That the costs of this application be provided for.
3. The application is based on the grounds on the face of it as follows
- i. That this matter has been presided over substantially by the Hon. Justice Joseph Serгон including when it came up for hearing on February 8, 2022 when the witnesses for both the plaintiff and the 2<sup>nd</sup> defendant were examined on their respective testimonies and evidence to conclusion. Thereafter the matter has been mentioned severally before Hon. Justice Sergon with a view of confirming whether parties have filed their respective written submissions.
  - ii. That it would however seem that this matter has now been re-assigned to Lady Justice Asenath Ongeru for purposes of writing and delivering judgment. Indeed, when it last came up for mention on April 17, 2023, Lady Justice Asenath Ongeru directed that she would deliver judgment on April 28, 2023.
  - iii. That it is however the plaintiff's considered view that since Lady Justice Asenath Ongeru did not have the benefit of seeing and hearing the parties' respective witnesses and thus was not in a position to ascertain the credibility, emotions and demeanor of those witnesses which details may not be recorded in a detailed manner. As such Lady Justice Asenath Ongeru may be handicapped in estimating the probative value of the said witnesses' verbal testimony. Even more, the plaintiff is unaware of whether the proceedings in this matter have been typed and placed on the court record to enable Lady Justice Asenath Ongeru to appreciate what transpired in this matter from inception until conclusion of trial.
  - iv. That it has been the practice that the trial Judge, who presides over the hearing of a matter takes evidence, presides over the admissions of documents and has the full view of trial, should have responsibility of rendering the decision unless prevented by exceptional circumstances such as death, illness, resignation and/or retirement. These exceptional circumstances are not applicable to this case as the trial Judge, Hon. Justice Sergon, who presided over the trial of the matter is still available.
  - v. That the concern raised by the plaintiff is not an idle one. The arena of trial of any dispute is ring-fenced for the benefit of the litigants and the adjudicator. It is the legitimate expectation of the parties to a civil dispute that once they have presented their evidence the adjudicator will render a decision based on his or her appreciation of the evidence tendered by the parties. It would be an unmitigated miscarriage of justice if an interloper, whatever their station in life, were to intervene and usurp the sacrosanct duty of the adjudicator.
  - vi. That it is for the above reasons that the plaintiff is of the considered view that the Honourable Lady Justice Asenath Ongeru cannot possibly be in a position to write and deliver a judgment that would satisfy the constitutional principles on the fair administration of justice. In any event, such a misadventure would run afoul of the centuries' old refrain that justice must not only be done but must also be seen to be done.
  - vii. That the plaintiff has through its letters dated April 18, 2023 and April 24, 2023 conveyed the above concerns. However, the same have not elicited any response.
  - viii. That the plaintiff is apprehensive that unless this application is heard on a priority basis, her right to a fair trial will be infringed if the court proceeds to deliver judgment in this matter before her concerns are conclusively addressed.



- ix. That it is therefore in the interest of justice that this application be placed before the Duty Judge as a matter of priority for purposes of directions as sought herein.
4. The application is supported by the affidavit of Julius K. Kemboi sworn on April 25, 2023 which is in essence a retaliation of the grounds on which the Application is premised which are stated above.
5. The sole issue for determination is whether this court is seized of the jurisdiction to deliver the judgment in this case.
6. In the case of Owners of the Motor Vessel "*Lillian S*" *V. Caltex Oil Kenya, (1989)* KLR1, the Hon. Justice Nyarangi JA, Said;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no Jurisdiction, there would be no basis of a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. A brief history of the background of this case is that on 1/3/2023 I was transferred from Kericho High Court where I was the Presiding Judge to Milimani High Court in the Civil Division.
8. The Presiding Judge at Milimani Civil Division Hon. Lady Justice Christine Meoli directed me to take over the files that were being handled by Hon. Justice Dr. Serگون besides other matters and I gladly obliged. I have written several judgments in matters that had been finalized by my senior justice Dr Serگون and several others are still pending judgment.
9. On April 17, 2023, this matter came for filing of submissions and for a judgment date.
10. The counsels for both parties were present and they confirmed the filing of submissions and I slated the matter for judgment for April 28, 2023 and prepared the judgment with dispatch.
11. On or about April 20, 2023, the Deputy Registrar of this court brought a letter requesting for a mention.
12. I talked to Hon. Justice Dr. Serگون and he told me if the parties felt I should send the file to him since he had substantially handled it I could send it to him but if they had no objection I could deliver the judgment.
13. I asked the Deputy Registrar to respond to the letter and ask the parties to appear before me on 28/4/2023 for the said directions.
14. I also withdrew the file from my secretary where it was awaiting typing. My secretary told me she had already typed it.
15. After that I have received several letters and the disturbing thing about the letters is that they are copied to my employer the JSC for reasons I do not know.
16. The learned counsel for the plaintiff then filed the application dated April 24, 2023 which is coming for consideration in this ruling.
17. The proceedings on the 17<sup>th</sup> and 28<sup>th</sup> April are reproduced here for ease of reference;

PROCEEDINGS



17/4/2023

Hon. A. Ongeru, J

CA Ubah

(for compliance on filing of submissions and a judgment date)

Mr. Kere for the plaintiff

Miss Gichoya for 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Order

Judgment on 28/4/2023

Hon. A. Ongeru

Judge

17/4/23

26/4/2023

In chambers

Before A. N. Ongeru – Judge

N/A by the parties

Order

The application dated 25/4/2023 to be served upon the respondents for directions on 28/4/2023 when this matter is slated for judgment.

Hon. A. Ongeru

Judge

26/4/23

28/04/2023

Coram Hon. A. Ongeru, J

CA Phyllis

Mr. Kemboi for the plaintiff together with Mr. Kere

Miss Gichoya for the 2<sup>nd</sup> defendant

Miss Gichoya

We were served the application dated 25/4/2023.

We do not wish to file a response. We do not oppose the application.

Hon. A. Ongeru

Judge

28/4/23

Mr. Kemboi



I rely on the supporting affidavit to the application since the facts are not controverted. I will go to the legal basis for the application.

This matter was heard and finalized by your brother Justice Sergon.

The parties presented oral evidence through witnesses and produced various documents as evidence in the matter.

Upon conclusion of the trial your learned brother directed that parties file written submissions which was done and the matter was pending judgment before your brother Justice Sergon.

Order 18 rule 1 stipulates that upon completion of trial a Judge shall pronounce his or her decision on the matter.

The Judge of course is the Judge that presided over the trial. There is a provision where a Judge who has not done the matter to pick up the file and proceed to write the judgment unless a Judge is prevented by illness, death or any other exceptional circumstances.

It is the duty of the Judge who heard the matter to write the judgment and to deliver it.

Justice Sergon is still a serving Judge of the High Court. He may be on transfer but transfer cannot prevent him from delivering the judgment.

Under Order 18 rule 3, it is permissible for a Judge to take over conduct of a trial from another Judge and proceed to conclude that trial.

That particular window does not apply in the matter before you because this matter was completed by Justice Sergon.

The only other time when a Judge can interact with a matter heard by another Judge is under Order 21 rule 2 that is to deliver a judgment that is prepared and signed by another Judge.

Over and above the provisions of the law, the established practice in our court is that even when Judges have been promoted to the Court of Appeal they deliver and sign their judgments even when they are promoted to the appellate court.

It is therefore our humble submission that there is no provision in law to enable you to write and deliver a judgment in this matter.

You are specifically handicapped because you did not hear the evidence and you possibly you have no recollection on the demeanor of the witnesses and to proceed and write a judgment would be to occasion a miscarriage of justice upon the parties.

The constitutional provisions on the right to fair hearing extend throughout the process of trial until the delivery of judgment which is the fruit of justice.

A litigant is denied justice when a Judge who did not hear a matter presides over the trial.

For those reasons we ask that you step down from writing the judgment in the matter and you direct that the file be forwarded to Justice Sergon so that he can deliver the judgment.

We are not alleging that you have any integrity issues or for whatever reason you are unfit to deliver that judgment we are saying the law does not permit you.

Hon. A. Ongeru

Judge

28/4/23



Miss Gichoya

I do not wish to say anything. I was in court on 17/4/2023. I am not opposed to you writing the judgment. If counsel wished to oppose his representative should have told the court on that day.

Hon. A. Ongeru

Judge

28/4/23

Asked by the court Mr Kemboya responds as follows;

Q: Why did you not tell me that on 17/4/2023?

A: My colleague attended and that is why I wrote the letter dated 18/4/2023.

Q: How many letters have you written?

A: I wrote a letter on 18<sup>th</sup> and another on 24/4/2023 and that is why I did the application on 25/4/2023.

Q: What did you expect after writing the letters?

A: I expected a response from the Deputy Registrar.

Q: Under what provisions were you writing the letters?

A: I did not receive any response.

Q: Did you copy your letter to the other party?

A: I do not have the letter. The letters are copied I should think so.

Q: How did you know I said you appear before me on 28/4/2023 if you did not receive any response?

A: The cause list shows that the matter is listed for judgment on 28/4/2023.

Q: What did you mean by calling me an interloper or an intruder?

A: What the law contemplates is that it is only the Judge and trial Judge that should be present and anybody else tries to take any position belonging to the parties or the trial Judge is an 'intermeddler, a trespasser or an alien, an outsider, intermeddler, I meant there are many words that can be used to describe someone who goes to a place where they are not permitted.

Q: Do you mean I am not permitted to deliver the judgment in this case?

A: If that were to be the case, there is no reason to assign a Judge a case they did not do. The proper thing to say is that the Judge should send the file to any other Judge.

Q: Have I delivered judgment?

A: What I am saying is that there is no room for you to do that.

Q: Do you have to insult me to have the file removed from me by calling me an interloper?

A: It is not an insulting word. My position is that we have presented an application and we have put down our grounds and the responsibility of the court is to deliver a ruling.

The position that you hold is by its nature requires that you dispassionately deal with the matter because we present our arguments without being contemptuous. I am entitled to present my case. The word interloper has been used even by the Court of Appeal and Supreme Court to describe a party who is intermeddling. I have no reason to insult this court.



Q: How did I become an interloper?

A: By proceeding to write the judgment. I wrote to JSC so that they can know that when Judges are transferred from one place to another, that act of transfer does not negate the provisions of the law that Judges deliver judgment.

If you write judgment, I will file a complaint at JSC.

Hon. A. Ongeru

Judge

28/4/23

Order

Ruling at 12.30.

Hon. A. Ongeru

18. The application dated April 25, 2023 contains a serious allegations touching on my competence as a Judge and also my jurisdiction to handle the matters placed before me. The most disturbing aspect of the Application was referring to this court as an interloper.
19. When I checked the dictionary the word interloper means  
“ a person who is present in a place or a situation where they do not belong or are not wanted.  
Synonym intruder.”
20. When the Application came for directions with a view of letting the parties know that the file would be sent to Kericho for drafting of the judgment, Mr. Kemboi continued hurling insults at the court as captured in the proceedings above by saying that what he meant by the word interloper is that this court would be an intermeddler, an alien and a trespasser if I delivered the judgment.
21. Mr. Kemboi went ahead to threaten this court that he would file a complaint with JSC if I went ahead to deliver the Judgment.
22. It is noted with concern that Mr. Kemboi has little or no respect for this court and it is a grave mistake to let him get away with threats and insults. The dignity of the court is something that must be jealously guarded.
23. Mr Kemboi has displayed unbecoming behavior which is not acceptable as it is demeaning to this court and it amounts to contempt of court.
24. I reserve the right to punish Mr Kemboi for being in contempt of this court by issuing threats and insults as evident from the above proceedings but first I want to give Mr. Kemboi an opportunity to retrospect and retract his threats and insults and to tender a written apology copied to my employer the JSC in the same manner he copied the letters.
25. Mr Kemboi is in contempt of this court and it is the duty of this court to say no to intimidation, unwarranted threats and insults while in the line of duty.
26. I am alive to the fact that the work of a Judge is not a walk in the park. Negative comments are bound to be made but insulting and threatening the court in its precept amounts to being in contempt of court and the same calls for punishment.



- 27. I took oath of office and committed myself to dispense justice without fear or favor. In the light of threats and insults hurled at the court. This case is not about my reputation or character but it is all about the dignity of this court and whether this court has the requisite jurisdiction and competence to deliver the judgment herein.
- 28. It would be shameful for this court to give in to the threats by Mr Kemboy and to condone insults. It is now a matter of principle whether I will be true to my call of duty or I will allow myself to be cowed by the likes of Mr Kemboy.
- 29. The right thing to do in the circumstances is to refuse to be intimidated or threatened to submission and instead to defend the cause of justice.
- 30. My favourite author says as follows;
  - “The greatest want of the world is the want of men--men who will not be bought or sold, men who in their inmost souls are true and honest, men who do not fear to call sin by its right name, men whose conscience is as true to duty as the needle to the pole, men who will stand for the right though the heavens fall. {Ed 57.3}”
- 31. This court is not a final court of record and with tremendous respect to Mr Kemboy every person who is aggrieved by the decision of this court has a right to appeal to the Court of appeal.
- 32. Mr Kemboy’s client will not be prejudiced by the decision of this court since she has a right of appeal.
- 33. I also wish to clarify to Mr. Kemboy that I am not an interloper as he said. I am properly seized of this case having been allocated the same by the presiding Judge of the Civil Division.
- 34. I am a Judge of the High Court of Kenya having been so appointed in 2015 with the requisite jurisdiction and competence to handle this case and I am also a child of the Most High King whom I diligently serve.
- 35. I have an experience of 34 years on the bench where I have risen through rank and file from District Magistrate II (prof) to my current position as a High Court Judge.
- 36. Finally, Mr Kemboy ought to have raised his concerns when the matter was listed for submissions and for a judgment date.
- 37. I accordingly dismiss the Application dated April 25, 2023 for want of merit with no orders as to costs and I proceed to deliver the judgment.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**A. ONGERI**  
**JUDGE**

In the presence of:

- ..... for the Plaintiff
- ..... for the 1<sup>st</sup> Defendant
- ..... for the 2<sup>nd</sup> Defendant