



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 122 OF 2013

COALITION ON VIOLENCE AGAINST WOMEN

(COVAW) & 11 OTHERSPETITIONERS

VERSUS

THE ATTORNEY GENERAL & 5 OTHERS.....RESPONDENTS

RULING

1. Following the appointment to the Supreme Court of the previous trial court judge, Lenaola, J., the counsel for the petitioner has requested the Court for directions that on account of the advanced stage of hearing of the matter, the court file be referred to the said judge for final hearing and determination.
2. It was urged that the case was at the defence hearing stage with the petitioner having called a total of 24 witnesses and that the taking over of the matter by a new court will delay the conclusion of the case which involved continuing trauma for the petitioner victims.
3. The application was opposed with the respondents contending that there was no provision for a judge who is appointed to another court to continue to hear and determine cases in the High Court where he previously served, and that this Court could not in any event order a judge of the Supreme Court to proceed with a matter before it.
4. I have considered the application and regrettably do not find that there is provision for the continuation of the hearing of High Court proceedings by a judge previously of the Court who has been appointed to another Court, in this case to the Supreme Court. In the former Constitution of Kenya, 1969, there was provision for a judge of the High Court who is appointed to the Court of Appeal to continue to conclude his cases before the High Court under section 64 (4) of the Constitution which provided as follows:

“(4) Where a puisne judge has been appointed as a judge of appeal he may continue to exercise the functions of a puisne judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being so appointed.”
5. There being no similar provision in the Constitution of Kenya 2010, I would and so hold that there is no jurisdiction for a previous trial judge of the High Court to continue to hear and determine a matter pending before the Court after his appointment to another Court.

6. At the practical level, the Supreme Court being a seven-judge Court cannot suffer the disruption of its benches by reason of some of its judges who have recently been appointed from other Courts being required to conclude matters previously pending hearing and determination before them. The only exception that could be made is with respect to the writing of judgment and rulings on cases whose hearing has already concluded before such judges.

7. The matter therefore falls to be dealt with in accordance with Order 18 rule 8 of the Civil Procedure Rules 2010 as follows:

“[Order 18, rule 8.] Power to deal with evidence taken before another judge.

8. (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.

(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 18 of the Act.”

Orders

8. Accordingly, I decline the request for the placing of the court file to the learned Judge of the Supreme Court for hearing.

9. The matter will, as previously directed, be referred to the Hon. Judge Onguto of the High Court for hearing and determination.

DATED AND DELIVERED THIS 17TH DAY OF NOVEMBER 2016.

EDWARD M. MURIITHI

JUDGE

Mr. Otieno for the petitioner and holding brief for Mr Waikwa for the Katiba Institute

Mr. Bitta for the Attorney General

Mr. Ndege for the Director Public Prosecution