



**AWG v SG (Matrimonial Cause E002 of 2024)
[2025] KEHC 12614 (KLR) (9 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MATRIMONIAL CAUSE E002 OF 2024
FN MUCHEMI, J
SEPTEMBER 9, 2025**

BETWEEN

AWG APPLICANT

AND

SG RESPONDENT

RULING

1. The application for determination dated 7th May 2025 seeks for orders that the applicant and her witness JWM be allowed to testify virtually during the hearing scheduled for 13th May 2025. The applicant further seeks that her witness and herself be allowed to give their testimony in the absence of the respondent but in the presence of his legal representative.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 23rd May 2025.

The Applicant’s case

3. The applicant states that during the course of the instant proceedings and in the mediation sessions, the respondent has been verbally abusive, intimidating and aggressive towards her causing her significant distress. The applicant further states that she has previously suffered from anxiety and post traumatic stress, which has been caused and exacerbated by the respondent’s conduct during their marriage and after separation. The applicant is apprehensive that if she appears in the same physical or virtual space as the respondent during the hearing she will be retraumatised, emotionally destabilised and intimidated from presenting her case effectively.
4. The applicant further states that one of her witnesses informed her on 5th May 2025 that he was withdrawing from the proceedings after the respondent called his wife and threatened to kill him should he proceed with his testimony. During the call, the respondent made false and malicious allegations that she engaged in an extramarital affair with the said witness in an attempt to damage his marriage and dissuade him from testifying.



5. The applicant avers that her only remaining witness, JWM has also expressed fear for her safety and has requested to testify virtually and in the absence of the respondent to avoid being intimidated or victimised.

The Respondent's Case

6. The respondent states that JWM did not participate in the mediation sessions and neither does he have evidence of the applicant's stress during their marriage and after separation. The respondent further states that he must participate in the case as a matter belongs to a litigant and not his advocate. Furthermore, his non attendance during the hearing of the applicant's case is an impediment to his right to a fair hearing.
7. The respondent states that he is amenable to either a physical or virtual hearing. He further states that his health has been deteriorating by day and the allegations by the applicant have taken a toll on him and negatively affected his health conditions.
8. The respondent further states that the allegations of threats to witnesses are grave allegations which the applicant has failed to prove.
9. Parties put in written submissions.

The Applicant's Submissions

10. The applicant relies on Articles 28, 29, 48 and 50(1) & (8) of *the Constitution* and Section 2, 4 and 10 of the *Victim Protection Act* and the cases of Republic vs Mohhamed Dadi Kokane & 4 Others [2010] KEHC 609 (KLR) and Republic vs Joktan Mayende & 3 Others [2012] KEHC 5551 (KLR) and submits that the right to a fair hearing includes the rights of the victims and witnesses. The applicant argues that the respondent's conduct, including threats to kill a witness, verbal abuse and intimidation during mediation is a violation of her constitutional rights under Articles 48 and 50.

The Respondent's Submissions

11. The respondent submits that neither the applicant's witness or his wife have recorded a statement with the police or any other relevant authority regarding the alleged threats. There is no indication that any report was made or that any investigations were commenced. Additionally, there is no affidavit from the said witness indicating his alleged withdrawal from testifying which further undermines the veracity or seriousness of the allegations. The respondent submits that the applicant did not perceive the alleged threats herself and thus her evidence is hearsay evidence which is inadmissible.
12. The respondent submits that the applicant has not indicated any actions taken against him for such threats during the marriage and mediation sessions and thus the allegations are an afterthought meant to impute bad character on him.
13. The respondent submits that the audio recording is inadmissible under Section 78A and Section 106B of the *Evidence Act* as the certificate in support of the electronic evidence is signed by the applicant's advocate yet he is not the one who took the recording or the one in charge of the recording device or activity. The respondent further argues that the recording is neither in English or Kiswahili and it is not accompanied by any certified translation into English or Kiswahili therefore rendering it procedurally deficient and ought to be struck out. The respondent further submits that the language of the recording denies him and the court an opportunity to respond to the contents of the recording to asses if he participated in the call and whether the recording entails threats to kill.



14. The respondent submits that the screenshots of whatsapp messages the applicant relies on do not disclose the identity of the sender or recipient, the date and time of the conversation or the context in which they were made. They do not meet the threshold for reliability, authenticity or admissibility under the law. In the absence of meta data, sworn statements by either party to the alleged conversation or authentication in accordance with section 106B the screenshots amount to hearsay and ought to be disregarded.
15. The respondent argues that the right to protection from intimidation must be balanced with his right to be present during the hearing to face the evidence against him and to fully participate in the proceedings pursuant to Article 50(1) of *the Constitution*. The respondent argues that the reliance on Article 50(8) of *the Constitution* and the Victims Protection Act is misplaced.
16. The respondent submits that the right to be present at one's hearing cannot be replaced by representation through an advocate alone.

The respondent further submits that he has a right to hear the evidence directly, assess the demeanour of the witnesses and give instructions in real time, which right is not dispensable at the mere request of the opposing party. To support his contentions, the respondent relies on the case of *Duale Mary Ann Gurre vs Amina Mohammed Mahmood & Another* [2014] eKLR.
17. The respondent submits that the cases cited by the applicant are criminal cases dealing with vulnerable witnesses under clear and substantiated threats. The factual and legal threshold established in the said cases is not comparable to the facts before the instant case.
18. The respondent submits that he shall be unjustly prejudiced as his right to a fair hearing will be compromised which will set a dangerous precedent where unverified claims can be used to exclude a party from participating in proceedings affecting their legal rights.

The Law

Whether the application has merit.

19. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh vs Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 which was cited with approval in *James Kanyiita Nderitu & another vs Marios Philotas Ghikas & Another* [2016] KECA 470 (KLR)-

There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.
20. The right to be heard is very fundamental to the extent that it has been entrenched in *the Constitution*. Article 50(2)(f) of *the Constitution* provides that:-

Every accused person has the right to a fair trial, which includes the right:-

To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.
21. It is therefore a constitutional right of parties to be present during hearing of their cases unless they make it impossible for the trial to proceed due to disturbance or misconduct of some kind. In the instant case, the applicant urges the court to allow her to proceed with the hearing in the absence of the



respondent as he is abusive and he has gone to the extent of threatening her witnesses. I have perused the court record and noted that the matter went through mediation vide THK/MED/041/2024 and parties reached a partial settlement in regard to one of the properties in this case. The applicant alleges that the respondent was unruly during the mediation proceedings but that is not reflected on the record of the mediator. The fact that a partial settlement was reached does not support the contentions that the respondent was unruly during the proceedings. As for the allegations by the applicant that her witness withdrew from testifying due to threats, the said witness has not sworn an affidavit to support the allegations.

22. In my considered view, denying the respondent to be present in court whereas he is a party to the proceedings and in a case where he has a major stake/duty in defending his property rights would be a violation of his rights of fair hearing under Article 50 of *the Constitution*. That notwithstanding, the respondent has stated that he is open to attending court physically or virtually.
23. I am convinced from the facts of this application that the applicant is suffering from some kind of emotional stress and fear due to the conduct of the respondent since this dispute began. However, this will not be solved by keeping the respondent out of these proceedings in that such a move would be denying him his constitutional rights of fair hearing. However, if the respondent is issuing threats to the witnesses of the applicant or even to herself, the law provides a remedy in criminal law for any aggrieved party. The incidents ought to be reported to the police for investigation and prosecution.
24. Consequently, I hereby partly allow the application in the following terms: -
 - a. That the applicant and her witness JWM shall testify virtually in this case and that the respondent shall desist from any threats on any of the witnesses during the existence of this case.
 - b. That the applicant and her witness are at liberty to report any kind of threats from the respondent to the relevant authorities either during or after the hearing.
 - c. That the parties are hereby advised to keep peace and to cooperate with one another for the smooth resolution of this dispute and execution of any orders that the court may grant herein.
25. Due to the reasons given in the foregoing paragraphs of this ruling, I decline to grant prayer No.3 of this application.
26. Being a family matter, there shall be no order as to costs for this application.
27. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE

