



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CONSTITUTIONAL PETITION NO. E002 OF 2021**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 1(3) (c), 2(1), 3(1), 10.22.23(1) & (3), 73, 74, 75, 79,80, 159(1), 160(5), 161(2) (b), 163(b), 165(3)(a) & (b) & (3) (d) (ii), 166(2) (c) & (3)d, 258, 259 (1) & (3) and 260 OF THE CONSTITUTIONAL**

**AND**

**IN THE MATTER OF THE PRINCIPLES OF LEADERSHIP AND INTEGRITY UNDER CHAPTER 6 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RESPONSIBILITIES OF LEADERSHIP UNDER ARTICLE 73 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF THE PRINCIPLES GOVERNING THE CONDUCT OF STATE OFFICERS UNDER ARTICLE 75 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 5, 6, 7, 8 AND 11 OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012**

**AND**

**IN THE MATTER OF GENERAL LEADERSHIP AND INTEGRITY CODE AS SET OUT IN PART II OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012**

**BETWEEN**

**MWONGELA ISAAH MBITI.....PETITIONER**

**AND**

**HON. LADY JUSTICE PHILOMENA MBETE MWILU....1<sup>ST</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> INTERESTED PARTY**

**DIRECTOR OF CRIMINAL INVESTIGATIONS...3<sup>RD</sup> INTERESTED PARTY**

**AND**

**RULING**

1. This morning, having given parties today's date, obviously during recess, with the intention to hear the matter which all sides considered urgent, I was unable to commence the hearing at 9am because the Physical Court files including criminal files for taking pleas had not been delivered to the Deputy Registrar, High Court, Migori, by the Courier Service Provider.

2. When the court convened for the second time at about 11am and the file had not been received, Miss Soweto Advocate, on record for the 1<sup>st</sup> respondent and being led and assisted by other counsel including Orengo SC and Mr. Havi, addressed the Court to say that she was indisposed and was finding it difficult to continue being in Court and proceeding because even the seniors leading her like Mr. Orengo SC had left to attend to other urgent matters. I recall that it was while MS Soweto was making those submissions that Mr. Havi interjected to announce his presence.

3. Mr. Havi Advocate in his address to the Court took the position that my conduct in the matter amounts to misbehavior which he can no longer entertain as the President of the Law Society of Kenya. He said, among other things, that I am bound to hear the parties and that the absence of the file is an excuse not expected of a Judge. He swore to take up the matter with the Judicial Service Commission. I heard the counsel to say that there are directions by the Chief Justice given in July 2020 to the effect that a Judge should be able to hear parties wherever he/she sits and the absence of a Physical Court file is no bar to a hearing because as a Judge I should ensure that I have a digital file to work upon. He however, did not state his being ready to proceed. I was at that time faced with a divided team for a party unable to take a common position. It is of note that the attack on me came very closely behind another unfortunate incident on 4<sup>th</sup> March 2021 when judicial staff stationed in Meru was threatened with a sack like his colleagues who had dared not be dictated by Mr Havi's court assistant.

4. I must today confess that the intensity of insolence I have received from Counsel, in particular Mr. Havi, while flashing his position as the President of the Law Society of Kenya, in both social media and before me in Court has demonstrated wholesome disrespect to me as a person and the Court I preside over. I must, however, remind Mr. Havi that judges are human beings and Kenyan citizens and were so even before going to school to become lawyers and subsequently becoming Judges. They too enjoy rights and freedoms like all citizens and must not be treated like serfs in the medieval Europe.

5. Further the office of Judge is not inherent, neither is it a duty that binds the judicial officer to a lifetime of service but rather it is a constitutional office whose terms and tenure are determined and an additional privilege to serve fellow countrymen. That to me therefore means that the threat that one can be removed from the office cannot be reason for baseless and just peevish accusations being flashed as a way to cow and intimidate. In fact, to me, a complaint against a judicial officer should never be used as a threat but must remain what it is, an accountability toolkit.

6. Counsel, as an officer of the court, old, young, senior, junior, established or otherwise, remain such important officers of the court with the ever present duty to at all times exercise sobriety and show courtesy and decorum in both deeds and words to the court, his/her colleagues and indeed to all he/she interacts with in the course of performing his/her duty before the court. That duty is heavily more placed upon Mr Havi given the responsibility bestowed upon him by members to lead the bar. That the president of the Law Society now leads in social media attacks on the judiciary and its officer leaves a lot to be desired. I wonder for myself what professional etiquette and decorum a newly admitted advocate would learn from the current leadership of the society.

7. I took my oath of office and in it I swore by the bible, not as a matter of course, but as a believer in the bible and what it means to take an oath for a Christian faithful. I will be guided by that oath and execute my judicial duties without being distracted by those who come to Court to only showcase their disregard to the known norms and thereafter engage in social media bravado purposely to besmirch other peoples character and reputation on account of their social positions. While I cannot entangle myself with counsel in a spat, I will continue to perform my constitutional duty to the Kenyan public without fear, favour or affection and definitely bereft of intimidation and arm-twisting from any quarters.

8. Having come by the views of Mr Havi of me in this matter, every time this matter has come before me, I have taken every opportunity to ask the parties if any of them has any misgivings with my continued handling of the matter and on each occasion, nobody raised any issue. I think not all have been honest and candid when they have urged me to go on.

9. With that observation, and my recollection that in taking this date I literally imposed it on the Respondents who were not ready for a date within April 2021, I make a determination that Mr. Havi and his team have no faith in me handling this matter. I have asked myself how I could have misbehaved in the matter of a file being transmitted from Meru to Migori not reaching in time to enable me commence proceedings as at 9am. To Mr. Havi, I should have taken charge of the delivery van and the delivery man and ensured files are with me at commencement. May be I should have just broken my recess and travelled to Meru to pull the file so that I can assuage Mr. Havi's feelings. As preposterous as the accusation may be, my interest in the matter remains the dispensation of justice to the parties as an uninterested arbiter. With such accusations, baseless as they are, and to avoid any semblance of perceived bias that may be read into my decision, I find it in the wider interests of justice that the matter be handled by another judge. I appreciate the fact that with those accusations on record, if I were to find for the party or side that Mr Havi appears for, the perception would be that I have been intimidated, while if I were to find against them, it could be perceived that I have been propelled by vengeance. In both scenarios, I would have failed the test of perceived bias.

10. In recusing myself, and this must remain clear, I am not by any chance appeasing Mr. Havi so as he can abandon his desired approach against me. As said before, the process of complaints against Judicial Officers is an accountability tool which must be encouraged. It must however be done in good faith, for the betterment of the Judiciary and in observance of individual rights and freedoms.

11. This matter will be mentioned before the Presiding Judge, Meru Law Courts, on 08/04/2021 for further directions. Let the status quo now prevailing be maintained till the set date.

**DATE, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 31ST DAY OF MARCH, 2021.**

**PATRICK J O OTIENO**

**JUDGE**