



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 69 OF 2015**

**IN THE MATTER OF: CHAPTER FOUR OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: PROTECTION OF RIGHT TO PROPERTY UNDER ARTICLES 40 AND 29 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: PROTECTION OF ECONOMIC AND SOCIAL RIGHTS, RIGHT TO PRIVACY AND SECURITY OF BOTH PROPERTY AND LIFE PURSUANT TO ARTICLE 43 (1) ©, 29 © OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: CHAPTER SIX OF THE CONSTITUTION, RESPONSIBILITIES OF LEADERSHIP AND CONDUCT OF STATE OFFICERS PURSUANT TO ARTICLE 73 AND 75 THEREOF**

**AND**

**IN THE MATTER OF: STATUTORY AND PECUNIARY JURISDICTIONS OF MAGISTRATES, AUTHORITY OF COURTS TO UPHOLD AND ENFORCE THE BILL OF RIGHTS UNDER ARTICLE 23 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE SENIOR RESIDENT MAGISTRATE'S COURT CIVIL SUIT NO. 2067 OF 2015 (MOMBASA) BETWEEN THOYA MAITHA BAYA & OTHERS VS. LEAH NTHAMBI BRYANT & 2 OTHERS**

**AND**

**IN THE MATTER OF: THE RIGHT TO RECEIVE POLICE PROTECTION BY PROPERTY AND HOME OWNERS PURSUANT TO ARTICLE 23, 29 AND ARTICLE 40 OF THE CONSTITUTION**

**BETWEEN**

**ANTONY KATUMI MBEBE & 31 OTHERS.....PETITIONERS**

**VERSUS**

**1. THE HON. ATTORNEY GENERAL FOR THE MINISTRY OF INTERIOR**

**COORDINATION OF NATIONAL GOVERNMENT**

**2. THE NATIONAL POLICE SERVICE**

**3. THE COUNTY COMMISSIONER, THE COUNTY GOVERNMENT OF MOMBASA**

**4. THOYA MAITHA BAYA**

**5. KARISA KATANA KARISA**

**6. KAZUNGU KARISA CHARO**

**7. KUSINYA KAZUNGU**

**8. JUMAA DENA MENZA (THE 4<sup>TH</sup>, 5<sup>TH</sup>, 6<sup>TH</sup>, 7<sup>TH</sup> AND 8<sup>TH</sup> RESPONDENTS ARE SUED**

**FOR AND ON BEHALF OF 389 OTHERS IN SRMCC NO. 2067 OF 2015 MOMBASA)**

**9. THE SENIOR RESIDENT MAGISTRATE, MOMBASA.....RESPONDENTS**

**RULING**

**The Application**

1. By the Notice of Motion herein dated 16/10/2019 the Petitioner/Applicant pray for the following orders:

(i) That this motion be certified urgent and its service be dispensed with at the first instance.

(ii) That this court be pleased to stay delivery of Judgment scheduled for 31<sup>st</sup> October, 2019 and hear prayers c, d, e, f and g below.

(iii) That this Honourable Court be pleased to set aside the orders issued on 18/9/2019 and extracted on 20/9/2019 and any other orders issued in CMCC No. 1556 of 2019 between Hamisi Mustafa & Katana Karisa & others for lack of jurisdiction.

(iv) That orders of mandamus do issue directed to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to evict all the parties in CMCC No. 1556 of 2019 between Hamisi Mustafa & Katana Karisa & Others and any other person who has entered, accessed, occupied and/or trespassed into the Plot L.R. 274/I/MN and the resultant plots in this petition pursuant to the court order of 18/9/2019 in CMCC No. 1556 of 2019 between Hamisi Mustafa & Katana Karisa & others or otherwise.

(v) That this Honourable Court be pleased to issue orders of certiorari and bring to this court CMCC No. 1556 of 2019 between Hamisi Mustafa & Katana Karisa & others for quashing for lack of jurisdiction on the Chief Magistrate's Court.

(vi) That Mr. Angelo Owino Advocate T/A Angelo Owino and Company advocates be punished for contempt.

(vii) That the costs of this application be borne by Mr. Angelo Owino Advocate T/A Angelo Owino and Company Advocates.

2. On 28/10/2019 this court granted prayers (a) to (e) of the application because the application was not opposed. However, prayers (f) and (g) remained outstanding. Prayer (f) prays that Mr. Angelo Owino T/A Angelo Owino & Company Advocates be punished for contempt and prayer (g) prays that the said Mr. Owino pays the costs hereof.

3. The application is premised on the grounds set out therein, mainly that this petition is fully heard and is pending Judgment on 31/10/2019. In the meantime, Mr. Angelo Owino Advocate T/A Angelo Owino and Company advocates who is the advocate for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents here has filed a fresh suit before the Chief Magistrate's Court Mombasa and obtained orders which undermine the existence of this petition and the constitutional rights of the Petitioners. This is in CMCC No. 1556 of 2019 between Hamisi Mustafa & Katana Karisa & Others. Using the order issued by the Senior Resident Magistrate on 18/9/2019 the Plaintiffs in CMCC No. 1556 of 2019 (above) have moved into the suit property subject of this petition and occupied it by force from the 15<sup>th</sup> October, 2019. They are still there and are constructing further structures. It is stated in the grounds therein that the suit property, Plot L.R. 274/I/MN originally measured approximately 200 acres and is situate in Bamburi and has a value in excess of Billions of Kenya shillings, and that the lower court does not have jurisdiction, and that the orders issued were issued in excess of jurisdiction. It is stated that Mr. Angelo Owino Advocate T/A Angelo Owino and Company Advocates, the advocate for the parties has copies of this petition which has all the details of the suit property but chose to mislead his clients to obtain ex parte orders.

4. The application is supported by affidavit of Jeniffer Maria Mweu sworn on 16/10/2019, on behalf of herself, and on the behalf of all other Petitioners. The deponent avers that it is within her knowledge that this petition is fully heard and is pending delivery of Judgment by the trial court, Honourable Justice Eric Ogolla on 31<sup>st</sup> October 2019. It is equally within her knowledge that the firm of Angelo Owino & Co. Advocates is on record for several parties. She annexed a copy of the Notice of Appointment of advocates dated 2/2/2016. For this reason, the deponent, upon advice from her counsel Mr. Munyithya, believes that the said Mr. Angelo Owino, advocate was served with a copy of the petition herein before he filed the Notice of Appointment, and further that when the Application by additional Petitioners was filed, Mr. Owino was duly served by Mr. Titus Munyao, a process server, with a copy of the application by the additional Petitioners dated 22/12/2015. The deponent also avers that the firm of Angelo Owino has copies of Plot 274/I/MN and all the resultant plots. She annexed a copy of the petition, Title Deed for Plot 274/I/MN and mark them as a bundle.

5. The Petitioner's collective case is that they were surprised when on 14/10/2019, the deponent herein received a call from Pastor Justus Kimeu of Jesus Celebration Centre and informed her that people had invaded their land and were busy erecting temporary structures thereon. The deponent rushed to the scene and confirmed the truth of the said information. She informed other Petitioners of the invasion and reported the matter to Bamburi Police Station. However, the police informed them that there was a court order authorizing the invaders to move into their land. It later transpired that the alleged Court Order was issued on 18/9/2019, and extracted on 20/9/2019 by Honourable G. Kiage, S.R.M Mombasa. The Court Order relates to a plot known as 274/II/MN in Utange Mombasa, and was obtained in CMMC No. 1556 of 2019, where apparently the Respondents misled the court that they were the genuine owners of the suit property, and further did not inform the court that the suit property was the subject matter of this petition where Judgment was to be delivered on 31/10/2019. The lower court was misled that the suit property had been sub-divided. Even then, it is the Petitioners' case that the value of the sit property is in excess of Kshs. 1.6 Billion, and so the lower court did not have jurisdiction to issue the orders of 18/9/2019.

6. The Petitioner's case is that the filing of CMCC No. 1556 of 2019 Mombasa by the firm of Angelo Owino & Co. Advocates was done in contempt of court and was calculated to steal the match against the Petitioners herein and this court should not entertain such a practice.

### **The Response**

7. Mr. Angelo Owino in response hereto filed a Replying Affidavit sworn on 24/10/2019 stating that he is an advocate of the High Court of Kenya and no longer a party to this Petition No. 69 of 2015 as he no longer has instructions to act for the 4<sup>th</sup> to 8<sup>th</sup> Respondents, although he is yet to file an application to cease from acting for the said parties. Mr. Angelo further states that court proceedings would bear the record that he has never appeared in court in this Petition No. 69 of 2015 and neither has he filed any pleadings and or appeared in court on behalf of the 4<sup>th</sup> to 8<sup>th</sup> Respondents. Mr. Angelo deponed that a look of CMCC No. 1556 of 2015 between Hamisi Mustafa and Katana Karisa & others and this Petition No. 69 of 2015 shows totally different parties; that the orders obtained from the lower court were orders obtained by totally different plaintiffs from this Petition; that he has no objection to the court setting aside the said orders issued on 18/9/2019 and extracted on the 20/9/2019 in CMCC No. 1556 of 2019; that he has never visited the suit premises neither has he done valuation of the property but only relied on information given by the claimants; that he has no objection to orders of mandamus being issued in terms of prayer No. (d) of the Notice of Motion herein to evict all the parties in CMCC No. 1556 of 2019; that now having seen the valuation report placing value of the suit property to close to 1.6 billion shillings, indeed the Chief Magistrate's Court has no jurisdiction in the matter.

8. Mr. Angelo states that he cannot be punished for contempt of court since he is not a party to the said two suits, and that in CMCC 1556 of 2015 he was only acting as an advocate under instructions; that no specific orders were issued against him that he has disobeyed; that a party has the right to file many claims as they can and that Petition No. 65 of 2019 is pending Judgment on 31/10/2019 before Hon. Justice E. Ogola and he has never participated in the proceedings to warrant him to be in contempt of court.

### **Submissions**

9. Mr. Mukoma, learned Counsel for the Applicants submitted that Mr. Angelo Owino deliberately breached the orders of this court when he filed a suit in the subordinate court against orders issued herein. Counsel urged the court to punish Mr. Owino for dishonesty and for misleading the court. Counsel submitted that the court has inherent powers to punish contempt and to bring dignity to its proceedings. Further the Court has powers under Section 5 of Judicature Act and Section 63 of CPA to punish contempt. Counsel also submitted that under Article 4 of the constitution all officers of this Court are bound by the rule of law. Counsel urged this court to exercise judicial authority under Articles 159 to deal with the alleged contempt.

10. Mr. Makuto, learned Counsel for the Attorney General agreed with the submissions of Mr. Mukoma. Counsel added that Mr. Owino has indeed committed contempt crime and should be punished. Mr. Makuto referred the court to Replying Affidavit of Mr. Owino in which he merely states that he did not file the suit in the lower court but he does not state who did it.

### **The Determination**

11. I have carefully considered the application and submissions of counsel. In my view the issues for determination are:

(i) Whether Mr. Angelo Owino has appeared in both this matter and in the Chief Magistrate matter and whether he was aware of the orders existing herein.

(ii) If above is in the affirmative, whether Mr. Owino should be punished by this court for contempt.

12. The petition herein was filed on 22/12/2015. Record shows that Ms. Angelo Owino & Company Advocates entered appearance on 2/2/2016 on behalf of 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants. Thereafter the firm of Ms. Angelo Owino & Company Advocates has been on record and has participated in the proceedings including receiving of Notice of Site Visit dated 10/2/2016, and Notice of Site Report dated 4/4/2016. All subsequent pleadings have been copied to the said Ms. Angelo Owino & Company advocate and there is no record showing that the said firm of advocates at some time ceased to represent the said defendants.

13. On 3/2/2016 Mr. Owino attended proceedings in this matter before the Deputy Registrar Hon. Wasike. On 28/7/2016 Mr. Angelo Owino attended proceedings before Hon. Lady Justice Njoki Mwangi. He also attended on 12/1/2017. Therefore, the allegations by Mr. Angelo Owino that he has never participated in this matter is a blatant lie to this court. This lie is also extended to the matter in the Chief Magistrate being Civil Suit No. 1556 of 2019. The Notice of Motion dated 11/9/2019 is filed by Ms. Angelo Owino & Company Advocate on 11/9/2019. The Supporting Affidavit sworn by Hamisi Mustafa on 11/9/2019 is also drawn and filed by the firm of Mr. Angelo Owino.

14. The order of the court dated 20/9/2019 shows that counsel appeared in person before Hon. G. Kiage for the said order. Clearly Mr. Angelo is not telling the truth in this matter. The worst thing is that he continues to lie. He has not seen the need to stop and tell the truth. An advocate is an officer of the court and must not intentionally lie to the court.

15. The Supreme Court in Petition No. 39/2018 **Republic vs. Ahmed Abolfathi Mohamed & Another** had the following to say on the honesty and integrity expected from advocates:

**“(7)The status of an Advocate as an Officer of the Court, is expressly provided for in Section 55 of the Advocates Act. An Advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process ¾ ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, Advocates bear the ethical duty of telling the truth in Court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the Court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.”**

**“(8) These principles are underlined also in the Law Society Act, which charges the Advocate with certain obligations (Section 4):**

**“(e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;**

**(f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya.**

**(g) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent.”**

**“(9) So clear, then, is the position of the statute law, regarding the integrity of the Advocate, as a vital player in the cause of justice, as this manifests itself within the Court system.”**

**“(10) So much has, indeed, been the clear message emanating from judicial interpretation. And in Francis Mugo & 22 Others v. James Bress Muthee & 3 Others, Civil Suit No. 122 of 2005 [2005] eKLR, Justice Musinga thus stated:**

**“While I agree that the choice of [counsel] is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an Advocate has a duty to his client, a duty to his opponent, a duty to the Court, a duty to himself, and a duty to the State, as well [expressed] by Richard Du Cann in The Art of the Advocate. As an Officer of the Court, he owes allegiance to a cause that is higher than serving the interests of his client, and that is to the cause of justice and truth.”**

**“(11) It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity.”**

16. There is no novelty in judicial interpretation, in relation to the foregoing provision. In the High Court case, **Equip Agencies Limited vs. Credit Bank Limited**, Nairobi HCCC NO. 773 of 2004, it was thus observed (*Warsame, J*):

**“The Court... has jurisdiction to make an Order in exercise of its disciplinary jurisdiction. The purpose of the punitive and disciplinary powers of the [Court]...over [the] Advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the Court, by virtue of Section 57 of the Advocates Act (Cap. 16, Laws of Kenya)... It is not the business of the Court to oppress an Advocate for no reasonable cause. The Court is always reluctant to degrade an Advocate unless the circumstances show that his conduct is dishonourable as an officer of the Court, and it is for that reason that the Court would exercise its punitive and disciplinary powers to ensure that Advocates conduct themselves in a manner that pleases the eyes of justice.”**

17. The Supreme Court in the matter cited above concluded that

**“there is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court’s authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice.”**

18. Section 5 of the Judicature Act states that

**“every superior court shall have power to punish for contempt of court on the face of the court; punish for contempt of court; and uphold the dignity and authority of subordinate courts.”**

19. Section 63 of the Civil Procedure Act states that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

**(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.**

20. From the foregoing paragraphs of this Ruling it is clear that Mr. Angelo Owino has conducted himself in a manner which brings disrepute to the court, and in a manner which degrades his own dignity as an advocate of the High Court of Kenya, and he deserves to be punished by this court. The application to hold Mr. Angelo Owino in contempt of this court has been proved, and it is the finding hereof that Mr. Angelo Owino shall be punished for the said contempt.

21. However, since Mr. Owino has not actively participated in this application, a notice will issue to him to come and show why he should not be punished for contempt.

22. I therefore make the following orders:

(i) Mr. Angelo Owino is in contempt of this court.

(ii) A notice to show cause shall issue for Mr. Owino, on a date to be served by the Applicant, why he should not be punished for contempt of court.

**Dated, Signed and Delivered in Mombasa this 7<sup>th</sup> day of May, 2020.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

No appearance for parties

Mr. Kaunda Court Assistant