



**Office of the Director of Public Prosecutions v Orengo; Manduku & 2 others (Interested Parties)
(Constitutional Petition 204 of 2019) [2021] KEHC 456 (KLR) (27 April 2021) (Ruling)**

*Office of the Director of Public Prosecutions v James Aggrey Bob Orengo;
Daniel Ogwoka Manduku & 2 others (Interested Parties) [2021] eKLR*

Neutral citation: [2021] KEHC 456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 204 OF 2019**

EKO OGOLA, J

APRIL 27, 2021

**IN THE MATTER OF: ARTICLES 1, 2, 10, 20, 22, 23, 27, 28, 29, 33, 47,
50, 99, 157, 238, 244 AND 249 OF THE CONSTITUTION ON KENYA**

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF: THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013**

AND

IN THE MATTER OF: THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003

AND

IN THE MATTER OF: THE PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT, 2015

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

HON SENATOR JAMES AGGREY BOB ORENGO RESPONDENT



AND

DANIEL OGWOKA MANDUKU INTERESTED PARTY
INSPECTOR GENERAL OF POLICE INTERESTED PARTY
DIRECTOR OF CRIMINAL INVESTIGATIONS INTERESTED PARTY

Conflict of interest where an advocate, who is a Senator, represents a person accused of corruption and likely to appear before a committee of the Senate in which the Senator is a member.

Reported by Kakai Toili

***Constitutional Law** – State officers – members of Parliament as State officers – whether members of Parliament were full time State officers – whether members of Parliament as State officers could engage in other gainful employment - whether there existed a conflict of interest where full time State officers such as members of Parliament engaged in other gainful employment - Constitution of Kenya, 2010, article 77(1).*

***Constitutional Law** – Parliament – Senate – role of the Senate – investigation of corruption claims by Senate committees – claim that an advocate who was a senator represented a person accused of corruption and who was likely to appear before a committee in which the senator was a member – whether there was a conflict of interest where a senator represented an accused person charged with corruption in a situation where Senate had an oversight role - whether it was against public interest for a State officer such as a member of Parliament to represent an accused person charged with corruption offences – Constitution of Kenya, 2010, articles 77(1) and 96; Leadership and Integrity Act, 2012, section 26.*

Brief facts

The applicant's case was that the respondent, by virtue of him being the elected Senator of Siaya County and a Minority leader of the Senate, was a full time State officer who was required by law not to engage in any other gainful employment. The applicant averred that though the respondent was entitled to practice law, such practice should not conflict with the public interest that he was under a duty to protect. The applicant thus sought for among other orders; that the court bars the respondent or any other State officer from appearing for the 1st interested party or any of the parties in the instant matter on account of conflict of interest.

Issues

- i. Whether members of Parliament were full-time State officers.
- ii. Whether members of Parliament as State officers could engage in other gainful employment?
- iii. Whether there existed a conflict of interest where full-time State officers such as members of Parliament engaged in other gainful employment.
- iv. Whether a conflict arose by representing accused persons charged with corruption in court, particularly in light of the Senate's oversight role.

Relevant provisions of the Law

Leadership and Integrity Act, 2012

Section 26 - Gainful employment

1. *Subject to subsection (2), a State officer who is serving on a full-time basis shall not participate in any other gainful employment.*
2. *In this section, "gainful employment" means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.*



Held

1. The respondent was a State officer by virtue of him being the elected Senator for Siaya County. Article 77(1) of the Constitution of Kenya, 2010 (Constitution) provided that a full-time State officer should not engage in any other gainful employment. Gainful employment was defined under section 26 of the Leadership and Integrity Act.
2. The respondent could not be said to be a full-time State officer given that there existed no employer-employee relationship between senators, members of Parliament and the Executive. As such members of Parliament were at liberty to engage in gainful employment in as long as the nature of the gainful employment was not inherently incompatible with their duties and/or functions as State officers. The Constitution accepted that some State officers could be engaged on a part-time rather than full-time basis and the Constitution allowed that category to participate in any other gainful employment.
3. Although the respondent was a State officer, he was free to engage in gainful employment pursuant to the provisions of section 16 of the Leadership and Integrity Act. However, in pursuance of that gainful employment, the respondent was subject to the law and the Constitution.
4. The roles of the Senate were enumerated under article 96 of the Constitution. The Senate represented the counties, and served to protect the interests of the counties and their Governments at the national level. It was mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the counties. The Senate also determined the allocation of national revenue among counties and exercised oversight over national revenue allocated to the county governments.
5. The Senate participated in the oversight of the governors by considering resolutions with regard to their removal or impeachment under article 181 of the Constitution. Together with the county governments, they were constitutionally designed to work together in ensuring the fruits of devolution. The Senate, which was at the national level of Government, had a critical role in ensuring that the counties interests were protected at the national level of Government.
6. The respondent was required by law to sit in the committee that would interrogate the 1st interested party, in the event he was summoned by the Senate. There appeared to be a conflict of interest since the respondent on the one hand would be interrogating the 1st interested party on complaints leveled against him and on the other hand, he would be representing him before a court of law on the same issues raised before the Senate. That was a tenuous scenario where there was a very thin difference between the interrogator and the advocate, hence against the principles of natural justice that;
 1. no one should be a judge in his own cause; and
 2. justice should not only be done but manifestly and undoubtedly be seen to be done.
7. It was arguable that in the event of a possible conflict of interest, a senator could easily recuse himself from such proceedings. That proposition was however a very simplistic way of reasoning, and could not cure the mischief since as a matter of principle, the roles and/or functions of a State officer as provided for by the Constitution and the Leadership and Integrity Act among other statutes were binding on each and every State officer and were not alienable.
8. A decision by the Senate was not only binding on the committee members who made that decision but on all Senators. Therefore, whether or not the respondent or any other State officer sat in the committee interrogating a public officer did not exempt them from the provisions of section 26 of the Leadership and Integrity Act. The fact that there were no active proceedings in relation to the 1st interested party before the Senate's Justice and Legal Affairs Committee did not in itself lessen the fact or perception of conflict of interest. Therefore, the applicant's application was not speculative.
9. The 1st interested party was entitled to an advocate of his choice under articles 48 and 50 of the Constitution. There was no derogation to the right of the 1st interested party to choose an advocate of his choice. In Kenya, there were over 10,000 advocates and the 1st interested party was at liberty to choose any of those advocates. In any event, a public interest outweighed the private interests of an



- individual. The 1st interested party had, in fact, no right to demand to be represented in court by a counsel who had oversight over the 1st interested party's public role.
10. Determining what amounted to a personal interest would not always be easy and would often be made on a case-by-case basis. It did not require any taxing of the mind to find a glaring perception of conflict of interest. To the accused person he had the Senator (respondent) as his advocate; driven to court in a State motor vehicle; chauffeured by a State provided driver; and the vehicle fueled by the State. To the accused, despite facing grave charges of economic crimes, his defence appeared to have the blessings of the State. To the counsel, the unsaid story to the accused was that the accused had the best counsel, who appeared to have State support, and therefore the accused needed not to unduly worry since he was in good hands. To the public taxpayer, he or she was confused, stood akimbo wondering where the world was going and why the accused was charged when he was to be represented by a State officer who arrived in court using State resources.
 11. None of the perceptions was bad or was unlawful. But all of them created scenarios of possible conflict of interest, at least in perception. It was the duty of the court to interpret the Constitution wholesomely and in a manner to bring out the mischief intended to be cured by the Constitution. State officers, even when free to pursue employment for private gain, had to avoid scenarios in which they were either conflicted or in which they created a perception of conflict of interest.
 12. There existed a conflict of interest in the respondent representing the petitioner. That perception was highlighted by the fact that the 1st interested party could at one time be summoned to appear before a committee of the Senate to answer to some of the matters the petitioner was being investigated on. Should that happen, the respondent would be in attendance. Even if he recused himself from the committee, that alone would not alley the perception of conflict of interest, or put bluntly, the perception that the petitioner had friends in the Senate. That would be very unfortunate. In interpreting the Constitution, a literal interpretation approach, which avoided all doubts and rhymes with the spirit of the Constitution took priority.
 13. The continued representation of the 1st interested party by the respondent or any other State officer was against the spirit of Chapter 6 of the Constitution for failure to conform to the mandatory provisions of section 26 of the Leadership and Integrity Act.

Application allowed.

Orders

The 1st interested party was at liberty to engage the services of another advocate other than the respondent to represent him in the proceedings; no orders as to costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic (No 1)* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154; (1976- 80) 1 KLR 1272 - (Explained)
2. *Babayao, Ferninand Ndung'u Waititu v Republic* Civil Appeal 416 of 2019; [2019] KECA 93 (KLR) - (Explained)
3. *International Legal Consultancy Group v Senate & another* Constitutional Petition 74 of 2014; [2014] KEHC 7533 (KLR) - (Explained)
4. *Lenolkulal, Moses Kasaine v Republic* Criminal Appeal 109 of 2019; [2019] KECA 37 (KLR)
5. *Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Explained)
6. *Mwilu, Philomena Mbete v Director of Public Prosecution & 4 others* Petition 295 of 2018; [2018] KEHC 3432 (KLR) - (Explained)



7. *Nagafwa, John Okelo v Independent Electoral and Boundaries Commission & 2 others* Election Petition 3 of 2013; [2013] KEHC 2736 (KLR) - (Explained)
8. *Ng'ang'a, Samuel Muigai v Minister for Justice, National Cohesion and Constitutional Affairs & another* Petition 354 of 2012; [2013] KEHC 6091 (KLR) - (Explained)
9. *Republic v Ethics and Anti-Corruption Commission ex parte Nairobi City County Assembly & 13 others* Miscellaneous Civil Application 383 of 2018; [2019] eKLR - (Explained)

India

Ashwini Kumar Upadhyay v Union of India & another Writ Petition (Civil) No 95 of 2018 - (Explained)

Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Advocates Act (cap 16) section 55 - (Interpreted)
2. Constitution of Kenya articles 3, 10(2)(c); 20; 25; 27; 48; 50; 73(1)(a)(I)(ii)(iii)(2)(b); 77(1); 95(4); 96(3)(4); 116(3)(4); 119; 145; 157(11); 217; 260; Chapter 6 - (Interpreted)
3. Leadership and Integrity Act (cap 185C) sections 3(2); 8; 16(1); 26; 52- (Interpreted)
4. Parliamentary Powers and Privileges Act (cap 6) Schedule 4 - (Interpreted)

Advocates

Ms. Julie Soweto for the petitioner

Mr. Muteti for the Director of Public Prosecutions

Mr. Makuto for the Attorney General

RULING

1. By a notice of motion application dated 10/1/2020, Office of the Director of Public Prosecutions (the applicant herein) prays for the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to issue an order barring the respondent Honourable Senator James Aggrey Bob Orenge or any other state officer from appearing for the Petitioner or any of the parties in this matter on account of conflict of interest.
 4. That an order do issue directed to the 1st interested party to engage any other counsel who is not a State Officer to represent him.
 5. That this honourable court be pleased to find and hold that the continued appearance of the respondent and or any other State Officer in these proceedings is against the letter and spirit of chapter 6 of the [Constitution of Kenya](#).
 6. That this honourable court be pleased to issue any other order that it may deem fit and just to grant.
 7. That there should be no order as to costs.
2. The motion is premised on the grounds set out therein and is supported by the affidavit of Wakio Mwamburi (Prosecution Counsel) sworn on 10/1/2020 and filed in court on 7/9/2020 and a supplementary affidavit of the same person dated and filed in court on 14/1/2020.



3. The applicant's case is that the respondent herein honourable Senator James Aggrey Bob Orenge, by virtue of him being the elected Senator of Siaya County and a Minority leader of the Senate, is a full time State Officer who is required by law not to engage in any other gainful employment. The applicant avers that though the respondent is entitled to practice law, such practice should not conflict with the public interest that he is under a duty to protect.
4. The applicant further avers that under article 10 of the [Constitution of Kenya](#), the respondent is bound to ensure that all State Organ, State Officers, Public Officers and all persons whenever they make or implement public policy decisions, should observe good governance, integrity, transparency and accountability and that the respondent is therefore expected to exercise authority conferred upon him in a manner that is consistent with the purpose and objects of the [Constitution](#).
5. The applicant avers that chapter 6 of the [Constitution](#) ensures that authority assigned to a State Officer is exercised in a manner that demonstrates respect for the people and brings honor to the nation and dignity of the office. That the 1st interested party herein is the Managing Director Kenya Ports Authority and is under investigations for alleged loss of public funds and abuse of the office.
6. The applicant's case is that as much as an individual has a right to a counsel of their own choice, the right is not absolute especially where a conflict of interest can be demonstrated. In the case herein, the issue under investigation is the use or misuse of public funds in public institutions. This means that parliament shall have a direct interest in establishing whether there was prudent spending of public money through its public investment and Public Accounts Committees. Therefore, Members of Parliament who appear in courts of law to stop lawful processes of investigations and prosecutions in the interest of their clients would be directly conflicted for they would certainly have to defend the interests of their clients as opposed to defending public interest.
7. The applicant avers that where the interest of a client conflicts with public interest, then public interest must prevail. Therefore, the conflicted counsel must cease from acting for that client in furtherance of the public interest. The applicant further states that parliament, being the institution that allocates public funds, should be first in seeking to establish how those funds are expended. The applicant avers that under section 26 of the [Leadership and Integrity Act](#), a full time State Officer such as the respondent herein is not allowed to engage in gainful employment especially where that engagement is likely to impair the judgment of the State Officer in the execution of the functions of the state office.
8. The applicant's case is that section 52 of the [Leadership and Integrity Act](#) subjects public officers to chapter 6 of the [Constitution of Kenya, 2010](#). Therefore, in the same way Judges and Magistrates are subjected to the law, so are members of the National Assembly and the Senate.
9. The applicant argues that at the very minimum, if the court is not persuaded to bar members of the National Assembly and Senate from practicing during their tenure in office, then the High Court should consider barring them from appearing in any matter where public interest conflicts with the private interest. In the applicant's view, the [Constitution](#) must be read as an integrated whole without any particular provisions destroying the other, but rather, each sustaining the other as is the jurisprudence that emerged in [Ferdinand Ndung'u Waititu alias Babayao v Republic](#) Nairobi Civil Appeal No 416 of 2019 and [Moses Kasaine Lenolkulal v Republic](#) Criminal Appeal No 109 of 2019. The Applicant avers that if members of parliament are not stopped from this practice, the court shall continue to witness Members of Parliament and Senators appearing for Public and State Officers whose sanctions are oversights by Parliament. This scenario is not tenable in a democratic Society like Kenya.
10. The 3rd interested party supported the application through a replying affidavit sworn by IP Moses Gituathi No 237924 (an investigator attached to the Director of Criminal Investigations (DCI)



Headquarters) on 29/9/2020. The 3rd interested party avers that the petitioner herein was charged before the Magistrate Anti-Corruption Court Milimani vide MCSC/E019/2020 on 28/8/2020. The petitioner was represented by among other counsel, Senator James Orengo, Nelson Havi and Julie Soweto. The 3rd interested party avers that the representation of the petitioner by Senator James Orengo is improper and amounts to conflict of interest and lack of impartiality within the arms of government since the petitioner may unfairly benefit from the position and public resources available to the Senator Minority Leader. The 3rd interested party further avers that on 28/8/2020, IP Moses Gituathi No 237924 noted that the respondent herein appeared at the Milimani Chief Magistrate's Court while being driven in his official motor vehicle GK B 178E, Toyota Prado, grey in color registered under the ownership of the National Assembly, and he proceeded to be on record for the petitioner in the criminal matter, thereby reinforcing the fear and perception that there may be a conflict of interest contrary to public interest.

The Response

11. The respondent opposed the motion through grounds of opposition dated 20/1/2020 and a replying affidavit sworn by James Aggrey Bob Orengo (the respondent herein) on 20/1/2020.
12. In the grounds of opposition, the respondent avers that the applicant is bound by article 10 of the [Constitution](#) which provides that the National Values and Principles of governance include equity, equality, social justice, human rights and non-discrimination and that articles 25 and 50 of the [Constitution](#) provide for the non-derogable right to a fair hearing which include the petitioner's right to be represented by an advocate of his choice. The respondent further avers that article 27 of the [Constitution](#) protects the respondent's and the 1st interested party's right to equal protection and equal benefit before the law.
13. It is the respondent's case that article 48 of the [Constitution](#) protects the petitioner's right to equality before the law. He further states that article 73(1)(a)(i) of the [Constitution](#) provides that the authority assigned to a State Officer is a public trust and article 73(2)(b) enjoins the applicant to exercise objectivity and impartiality in decision making, while ensuring that its decisions are not influenced by favoritism, or other improper motive or corrupt practices.
14. The respondent avers that while article 95 of the [Constitution](#) provides for the role of the National Assembly, article 96 sets out the role of the Senate, with sub-article 4 limiting the Senate's oversight role over State Officers to only considering and determining any resolution to remove the President or the Deputy President. Further that the allegations against the respondent on conflict of interest do not conform to section 16 of the [Leadership and Integrity Act, 2012](#) and that the definition of gainful employment under section 26 of the [Leadership and Integrity Act, 2012](#) does not fit the description of the respondent's employment as alleged by the applicant.
15. The respondent asserts that the [Advocate's Act](#) and the Law Society of Kenya have not barred a sitting member of Parliament who is also an advocate from practicing the law. He further asserts that he represents the petitioner as provided for under section 55 of the [Advocate's Act](#) and not in his capacity as a State Officer.
16. The respondent's case is that he has not breached any of the provisions set out in the code of conduct for Members of Parliament as set out in the fourth schedule to the [Parliamentary Powers and Privileges Act](#) (No 29 of 2017) and the Parliamentary Standing Orders. The respondent avers that article 77 of the [Constitution](#) does not define what full time engagement is with regards to a state officer. However, the said term was considered in [John Okelo Nagafwa v the Independent Electoral & Boundaries Commission](#)



§ 2 others [2013] eKLR where the court held that, article 77(1) is silent as to the meaning of the term “gainful employment” but it is defined in section 26 of the Act as we shall see hereunder.

17. The respondent further avers that he has not participated in any parliamentary debate or committee proceedings concerning the petitioner. He relied in Philomena Mbeti Mwilu v Director of Public Prosecutions & 2 others; Stanley Muluvi Kiima (interested party) [2018] eKLR where the court dealing with a similar issue held that, a party alleging a conflict of interest bears the burden of presenting clear evidence that the person said to be acting in conflict of interest is acting in a manner prejudicial to the interests of the other party.
18. In the respondent’s view, the applicant’s complaint is purely hypothetical and presumes that the petitioner’s matter in question would be brought before the Justice and Legal Affairs Committee or through a petition to the Senate under article 119 of the Constitution .
19. The respondent further states that the applicant has failed to meet the threshold set by courts in constitutional petitions as was held in Anarita Karimi Njeru v Republic [1979] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. The respondent avers that article 10 of the Constitution enjoins him to uphold the values of human dignity and human rights, which he has done through his representation of the petitioner. Further that article 22 of the Constitution empowers every person with the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, while article 50 on the other hand guarantees a petitioner’s right to a fair hearing, which includes the right to be represented by an advocate of his choice.
20. The respondent asserts that the investigations being carried out against the petitioner do not take away his rights to a fair hearing as guaranteed under article 25 and 50. That the right to an advocate of one’s choice is part of the right to a fair hearing in article 50 and is also part of absolute and non-derogable rights in article 25 of the Constitution .
21. The respondent’s case is that the applicant seeks to bar him from representing the petitioner based on his status as a legislator in contravention of article 27 of the Constitution , hence an attempt to impede the petitioner’s access to justice in violation of article 48 of the Constitution .
22. The respondent states that article 95(4) of the Constitution provides that the National Assembly appropriates funds for expenditure by state organs and exercises oversight over national revenue and its expenditure and that the Senate’s oversight role as provided for under article 96(3) and (4) is limited to oversight over national revenue allocated to the county governments and state officers by considering and determining any resolution to remove the President or Deputy President from office.
23. It is also averred by the respondent that the Public Investment Committee and the Public Accounts Committee are specific organs of the National Assembly and in exercising their oversight over the use of public funds, they are guided by the code of conduct for Members of Parliament and the Parliamentary Standing Orders, with provisions on conflict of interest.
24. The respondent states that in the case of Judges, Magistrates, State and prosecution counsels and other state legal officers and the state, there exists employer-employee relationship and hence those officers are barred from private practice of the law unlike legislators who are elected leaders and not employees of the State. The respondent referred the court to the Supreme Court of India decision in Writ Petition (Civil) No 95 of 2018, Ashwini Kumar Upadhyay v Union of India & another, a petition to debar legislators from practicing as advocates, where the court found that legislators are not employees of the government and declined to debar legislators from practicing as advocates.



25. The respondent avers that the present application also makes reference to other sitting legislators who are advocates and have allegedly been representing clients in detriment to public interest, yet the said legislators are not party to the application herein, and so this application is incompetent.

Submissions

26. The application was heard through oral submissions of counsel on January 10, 2020. Mr Alexander Muteti, learned counsel, appeared for the applicant; Ms Julie Soweto, learned counsel, appeared for the petitioner and the respondent herein Hon Senator James Aggrey Bob Orengo; while Mr Nguyo Wachira, learned counsel, appeared for the 2nd and 3rd interested parties.
27. Mr Muteti submitted that in the application before court, they seek to have Hon Senator James Orengo barred from appearing in these proceedings for the Petitioner by virtue of his position as a Senator for Siaya County. The application is brought under articles stated in application, key among them being articles 3, 10 and 73 of the Constitution. Counsel submitted that as a member of the Senate, Hon Orengo is under a duty to defend the Constitution and principles espoused in the Constitution especially regarding matters of integrity and management of public affairs. Counsel submitted that article 10(2) (c) of the Constitution emphasize good governance, transparency, and accountability as some of the key National Values and Principles.
28. Mr Muteti submitted that the Senate of Kenya as part of Parliament is the 3rd arm of government together with the National Assembly. That when the government commits itself to enforcing national values and principles, the three arms of government are expected to collectively uphold the Constitution. Counsel submitted that a State Officer shall respect the values, principles and requirements of the Constitution as provided for under section 3(2) of the Leadership and Integrity Act No 19 of 2012. Therefore, by virtue of Senator Orengo being a member of the August House, he is bound by this Statute. Section 8 of the Act provides that a State Office is a position of public trust; therefore a State Officer is expected to act in the best interest of the people of Kenya. Counsel submitted that it would be a great subversion of justice to people of Kenya who have elected and put in office MPs to have the same MPs defending suspects of economic crimes while they are still in office. Counsel submitted that the nature of investigations giving rise to this petition is of economic crimes.
29. Mr Muteti added that the mere fact that the EACC has not filed this application does not prevent the DPP under article 157(11) of the Constitution from moving the court to ensure that chapter 6 of the Constitution is given effect. Counsel referred to the Ferdinand Ndung'u Waititu case [2018] eKLR where the court held that the responsibility of giving effect to chapter 6 was not a preserve of EACC, and that other arms of government including courts have a role to play in enforcement of chapter 6. Mr Muteti referred to R v Ethics and Anti-Corruption Commission ex parte Nairobi City County Assembly Misc Civil Application No 383 of 2018 at page 71 and 72 where the court restated the duty of State Officers. That public officers and other officers are obliged to give effect to the core values of constitutionalism and must remain accountable whether in private or public dealings. Mr Muteti submitted that failure by a State Officer to condemn corrupt acts such as to appear for suspects charged with economic crimes is in contravention of article 73(1)(a)(ii)(iii) which provides that State Officers in their offices must demonstrate respect for the people.
30. Mr Muteti urged the court to adopt the presumptive role in interpretation of the Constitution and to find that even though members of parliament cannot aptly be described as employees of government, they nevertheless draw their funding and other facilities afforded to them at the expense of the public hence suggestion that they are not employees of the government is not correct. Counsel submitted that although members of parliament are not strictly employees, they remain agents of the people of Kenya



- who have donated their sovereignty to them under article 1 of the Constitution and they should lead in the fight against corruption.
31. Counsel submitted that by virtue of section 52(1) of the Leadership and Integrity Act, provisions of chapter 6 apply to all public officers as if they were state officers. It was further submitted that the said Act repeatedly makes reference to state officers, hence it requires an interpretation that contextualizes each and every provision as the court seeks to find the intention of parliament, and that had parliament intended the Leadership and Integrity Act not to apply to parliament, it would have expressly stated so. Counsel referred the court to the case of John Okello v IEBC & 2 others [2013] eKLR and urged the court to allow the application.
 32. Mr Nguyo in his submissions supported the application by adopting Mr Muteti's submissions. Counsel added that the issues of fact raised in the replying affidavit by Moses Githuathi confirm that Senator Orengo is conflicted in his role as Senator and leader of the Minority.
 33. Ms Soweto opposed the application, submitting that the same is incompetent, vexatious and a waste of court's time. Counsel referred to Anarita Karimi Njeru v Republic [1979] eKLR, and submitted that the application is brought under several articles but the main grievance is stated in prayer No 3 which seeks to bar Hon. Senator Orengo from appearing for the petitioner on account of conflict of interest. Ms Soweto submitted that in the entirety of Mr Muteti's submissions, the court was not shown what the conflict of interest is, and that the Leadership and Integrity Act is not before the court for consideration. Further, there is no allegation that Hon Orengo has breached the said Act. It was submitted that section 16 of the Leadership and Integrity Act sets up the instances in which conflict of interest by state officers can be inferred, and that Senator Orengo has not violated section 16 of the aforementioned Act.
 34. Ms Soweto submitted that the application is incompetent since it is speculative. That no facts have been pleaded that touch on the issues for determination. Counsel relied in the case of Samuel Muigai Ng'ang'a v The Minister for Justice, National Cohesion and Constitutional Affairs & another [2013] eKLR where it was held as follows;

“The role of court is to decide and enforce what the law is and not what it should be now or in the future.”
 35. Ms Soweto referred the court to Philomena Mbete Mwilu v Director of Public Prosecutions & 2 others; Stanley Muluvi Kiima (Interested Party) [2018] eKLR where conflict of interest was defined:

“A situation where one is confronted by 2 different interests so that serving one interest would be against the other interest.”
 36. Counsel further referred to Black's Law Dictionary which provides that conflict of interest is not an abstract notion, but is fundamentally a question of fact that must be demonstrated on the facts alleged. It was submitted that the fact that Senator Orengo is an elected Member of Parliament should not bar him from engaging in any other gainful employment or acting as it were in this case for the petitioner.
 37. Ms Soweto submitted that articles 95 and 96 delineate the roles of Senate and National Assembly and from the reading of the said articles, there is no possible conflict of interest because the state does not perform any oversight functions which would involve the petitioner. Ms Soweto further submitted that Senate has no oversight role over the roles performed by the petitioner as the Managing Director of Kenya Ports Authority and in the event a conflict of interest arises, a Senator can easily recuse himself from such proceedings.



38. In rejoinder Mr Muteti submitted that section 16 of the *Leadership and Integrity Act* makes it clear that a State Officer must avoid situations where there is a possible appearance of conflict of interest. The said conflict may be by way of a presumption and need not arise out of possible pecuniary interests pursuant to the provisions of section 16(6) of the aforementioned *Act*.
39. Mr Muteti urged the court to take judicial notice of the recent interrogation of KEMSA officials by the Senate, and while relying on *R v Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly* (supra) page 23, counsel submitted that the court had a duty to enforce highest standards of ethical conducts both in public and private spheres.
40. Mr Muteti submitted that the order they seek is in the nature of a declaration to manage an emerging culture where Public Officers are misbehaving and that the declaration will not affect other members of parliament who are not party herein.

Determination

41. I have carefully considered the application before the court and opposition to it. I have also considered submissions and authorities relied on by counsel. In my view below are the issues for determination.
 - i. Whether there exists a conflict of interest by virtue of Hon. Senator James Aggrey Bob Orendo representing the petitioner in the matter herein?
 - ii. Whether the continued appearance of the respondent or any other State Officer in these proceedings is against the spirit of chapter 6 of the *Constitution of Kenya*?

(i) Whether there exists a conflict of interest by virtue of Hon Senator James Aggrey Bob Orendo representing the petitioner in the matter herein?

42. Section 16 of the *Leadership and Integrity Act* of 2019 define conflict of interest as hereunder;
 1. A State officer or a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the State officer's or public officer's official duties.
 2. Without limiting the generality of subsection (1), a State officer or a public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of the State officer's or public officer's personal interests and the officer's official duties.
 3. A State officer or a public officer whose personal interests conflict with their official duties shall declare the personal interests to the public entity or the Commission.
 4. The Commission or a public entity may give direction on the appropriate action to be taken by the State officer or public officer to avoid the conflict of interest and the State officer or public officer shall—
 - (a) comply with the directions; and
 - (b) refrain from participating in any deliberations with respect to the matter.
 5. Notwithstanding any directions to the contrary under subsection (4), a State officer or a public officer shall not award or influence the award of a contract to—
 - (a) himself or herself;



- (b) the State officer's or public officer's spouse or child;
 - (c) a business associate or agent; or
 - (d) a corporation, private company, partnership or other body in which the officer has a substantial or controlling interest.
6. In this section, "personal interest" includes the interest of a spouse, child, business associate or agent or any other matter in which the State officer or public officer has a direct or indirect pecuniary or non-pecuniary interest.
 7. Where a State officer or a public officer is present at a meeting, where an issue which is likely to result in a conflict of interest is to be discussed, the State officer or public officer shall declare the interest at the beginning of the meeting or before the issue is deliberated upon.
 8. A declaration of a conflict of interest under subsection (7) shall be recorded in the minutes of that meeting.
 9. Subject to article 116(3) and (4) of the *Constitution*, a member of Parliament or a member of a county assembly shall declare any direct pecuniary interest or benefit of whatever nature in any—
 - (a) debate or proceeding of the body of which he or she is a member;
 - (b) debate or proceeding in any committee of that body; and
 - (c) transaction or communication which the State officer may have with other members of the body, State officers, public officers or government officers.
 10. For purposes of subsection (9), the Clerk of the Senate, the National Assembly or a county assembly shall maintain a register of conflicts of interest, which shall be open to the public for inspection.
 11. Every public entity shall maintain an open register of conflicts of interest in the prescribed form in which an affected State officer or public officer shall register the particulars of registrable interests, stating the nature and extent of the conflict.
 12. For purposes of subsection (11), the registrable interests include the interests set out in the Second Schedule.
 13. A public entity shall keep the register of conflicts of interest for five years after the last entry in each volume of the register.
 14. It shall be the responsibility of the state officer or public officer to ensure that an entry of registrable interests under subsection (11) is updated and to notify the public entity or the Commission of any changes in the registrable interests, within one month of each change occurring
43. Article 260 of the *Constitution* defines a state officer as a person holding a state office. It goes on to list state offices as hereunder;
- "State office" means any of the—
- (a) President;
 - (b) Deputy President;



- (c) Cabinet Secretary;
- (d) Member of Parliament;
- (e) Judges and Magistrates;
- (f) member of a commission to which chapter fifteen applies;
- (g) holder of an independent office to which chapter fifteen applies;
- (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;
- (i) Attorney-General;
- (j) Director of Public Prosecutions;
- (k) Secretary to the Cabinet;
- (l) Principal Secretary;
- (m) Chief of the Kenya Defence Forces;
- (n) Commander of a service of the Kenya Defence Forces;
- (o) Director-General of the National Intelligence Service;
- (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or
- (q) an office established and designated as a State office by national legislation.”

44. On the other hand, article 75 of the [Constitution of Kenya](#) provides as follows:

- “75. A State officer shall behave, whether in public and official life, in private life, (1) or in association with other persons, in a manner that avoids—
- (a) any conflict between personal interests and public or official duties;
 - (b) compromising any public or official interest in favour of a personal interest; or
 - (c) demeaning the office the officer holds.”

45. It is not in dispute that the respondent herein is a State Officer by virtue of him being the elected Senator for Siaya County. Article 77(1) of the [Constitution](#) provides that a full-time State Officer shall not engage in any other gainful employment. Gainful employment is defined under section 26 of the [Leadership and Integrity Act](#) as follows;

- (1) Subject to subsection (2), a state officer who is serving on a full-time basis shall not participate in any other gainful employment.
- (2) In this section, “gainful employment” means work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the State office or which results in the impairment of the judgement of



the State officer in the execution of the functions of the State office or results in a conflict of interest in terms of section 16.

46. Senator Orengo cannot be said to be a full time State officer given that there exists no employer-employee relationship between Senators, Members of Parliament and the executive. As such Members of Parliament are at liberty to engage in gainful employment in as long as the nature of the gainful employment is not inherently incompatible with their duties and/or functions as State Officers. The Constitution also accepts that some state officers may be engaged on part-time rather than full time basis and the Constitution allows this category to participate in any other gainful employment.

47. In John Okelo Nagafiwa v Independent Electoral & Boundaries Commission (IEBC) & 2 others, Election Petition No 3 of 2013, [2013] eKLR, the court in considering the appearance of a Senator for one of the parties before the election court, and after considering the Leadership and Integrity Act, 2012 and the Standing Orders of the Senate, held that a Senator was not on full-time employment; held that:

“It seems that even if a member of Senate was to be involved in other business of the House (eg Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00AM to 5.00PM. In respect to non-Parliamentary business, this court was unable to find any regulation governing the work hours. 27. The petitioner has not persuaded this court that Hon Orengo has used up public time in preparing for and participating in this election petition. No evidence has been shown to this court to demonstrate that counsel’s conduct this far is inherently incompatible or fundamentally in conflict with his role as a Member of Senate.”

48. It follows therefore that although the respondent is a state officer he is free to engage in gainful employment pursuant to the provisions of section 16 of the Leadership and Integrity Act. However, in pursuance of that gainful employment, the respondent is subject to the law and the Constitution .

49. The roles of the Senate are enumerated under article 96 of the Constitution of Kenya as follows:

- (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.
- (2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in articles 109 to 113.
- (3) The Senate determines the allocation of national revenue among counties, as provided in article 217, and exercises oversight over national revenue allocated to the county governments.
- (4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.

50. In International Legal Consultancy Group v Senate & another [2014] eKLR the court held that:

“In view of the foregoing, it is not in doubt that the Senate represents the Counties, and serves to protect the interests of the counties and their Governments at the National level. It is mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the Counties. The Senate also determines the allocation of National revenue among counties and exercises oversight over National revenue allocated to the County Governments. It also participates in the oversight of the Governors by considering resolutions with regard to their removal or impeachment under article 181 of the Constitution. In our considered view, the Senate and the County Governments



are constitutionally designed to work together in ensuring the fruits of devolution. It is therefore our position that the Senate, which is at the National level of Government, has a critical role in ensuring that the counties interests are protected at the National Level of Government.”

51. The respondent’s case is that pursuant to article 96(3) of the *Constitution*, the Senate’s oversight authority is limited to the national revenue collection concerning County Governments, and therefore the senate has no role over the roles performed by the petitioner. The respondent avers that he is a member of the Senate’s Justice and Legal Affairs Committee. This committee is tasked with admitting complains, listening to the same and summoning of the relevant persons to interrogate them on the complaints levelled against them and/or their institutions.
52. However, the applicant urged the court to take judicial notice of KEMSA proceedings in the Senate, where KEMSA officials are being interrogated by the Senate. In the present case, the respondent is required by law to sit in the committee that will interrogate the 1st interested party herein, in the event he is summoned by the Senate. In light of the above, there appears to be a conflict of interest since the respondent on the one hand shall be interrogating the 1st interested party on complains levelled against him and on the other hand he shall be representing him before a court of law on the same issues raised before the Senate. In my view, this is a tenuos scenario where there is a very thin difference between the interrogator and the advocate, hence against the principles of natural justice that:
 - a. No one should be a judge in his own cause.
 - b. Justice should not only be done, but manifestly and undoubtedly be seen to be done.
53. It is arguable that in the event of a possible conflict of interest, a Senator can easily recuse himself from such proceedings. This proposition is however a very simplistic way of reasoning, and cannot cure the mischief since as a matter of principle, the roles and/or functions of a State Officer as provided for by *Constitution* and the *Leadership and Integrity Act* among other statutes are binding on each and every State Officer and are not alienable. Further a decision by Senate is not only binding on the committee members who made that decision but on all Senators. Therefore, whether or not the respondent herein or any other State Officer sits in the committee interrogating a public officer does not exempt them from the provisions of section 26 of the *Leadership and Integrity Act*. The fact that there are no active proceedings in relation to the 1st interested party currently before the Senate’s Justice and Legal Affairs Committee does not in itself lessen the fact or perception of conflict of interest. Therefore, the applicant’s application is not speculative.
54. There is no denial that the 1st interested party is entitled to an advocate of his choice under articles 48 and 50 of the *Constitution*. It has been submitted that by allowing the application the court will be infringing on the 1st interested party’s right to choose an advocate of his choice. However in my view, there is no derogation to that right. In Kenya, there are over 10,000 advocates and the 1st interested party is at liberty to choose any of those advocates. In any event a public interest outweighs private interests of an individual. The 1st interested party has, in fact, no right to demand to be represented in court by a counsel who has oversight over the 1st interested party’s public role.

(ii) Whether the continued appearance of the respondent or any other State Officer in these proceedings is against the spirit of chapter 6 of the *Constitution of Kenya*?

55. The upshot to this application is this; there is no bar to Senator Orengo, or indeed to any other Member of Parliament from engaging in gainful employment. However, in pursuit of such gain, members of



parliament must strictly operate within the law and the Constitution . In regard to conflict of interest or appearance of conflict of interest see section 16(1) of Leadership and Integrity Act which states that;

1. A State officer or a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the State officer's or public officer's official duties.
2.
3. A State officer or a public officer whose personal interests conflict with their official duties shall declare the personal interests to the public entity or the Commission.

56. Article 75(1) of the Constitution of Kenya provides as follows:

“A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

- (a) any conflict between personal interests and public or official duties;
- (b) compromising any public or official interest in favour of a personal interest; or
- (c) demeaning the office the officer holds.”

57. Determining what is a personal interest will not always be easy, and will often be made on a case by case basis. The absurdity in the matter herein is as follows; it was alleged, and not refuted by the respondent that on August 28, 2020, the respondent herein Senator James Orengo appeared at the Milimani Chief Magistrate's Court being driven in his official government registered Motor Vehicle GKB 178E, Toyota Prado grey in color registered under the ownership of the National Assembly. The Senator emerged from his official motor vehicle and proceed to the court and appeared on behalf of the petitioner herein. Granted that the Senator is entitled to pursue private gain, what perception does the public get when the accused person who is charged with economic crimes and/or corruption, has as his counsel, a Senator, a State Officer, driven to court in his official motor vehicle bought for him by the public. He is driven by a driver employed to drive him by the government, and then in court he submits with the authority of a Senator. In my view, it does not require any taxing of the mind to find a glaring perception of conflict of interest. To the accused person he has the Senator as his advocate; driven to court in a State motor vehicle; chauffeured by a State provided driver; and the vehicle fueled by the State. To the accused, despite facing grave charges of economic crimes, his defence appears to have the blessings of the State. To the counsel, the unsaid story to the accused is that the accused has the best counsel, who appears to have State support, and therefore the accused needs not unduly worry since he is in good hands; to the public tax payer, he or she is confused, stands *a-kimbo* and wonders where the world is going: Why has the accused been charged when he is to be represented by a State Officer who arrives in court using state resources?

58. I must emphasize that none of the above perceptions is bad or is unlawful. But all of them create scenarios of possible conflict of interest, at least in perception. It is the duty of this court to interpret the Constitution wholesomely and in a manner to bring out the mischief intended to be cured by the Constitution. The sections of the law quoted above, together with the articles of the Constitution cited, leave no doubt that State Officers, ever when free to pursue employment for private gain, must avoid scenarios in which they are either conflicted, or in which they create perception of conflict of interest.

59. In this petition, the petitioner seeks orders to stop investigations and possible arrest over allegations of corruption, or economic crimes. Senator Orengo is the lead counsel for the petitioner. Although Senator Orengo has not been said to have arrived in this court in the manner and style he is alleged to



have done in Milimani Court while representing the same client in criminal charges, the perceptions on conflict of interest I have described in relation to the Milimani Court appearance are applicable. It is not in doubt in my mind that if the foregoing articles of the Constitution and Statute Law are applied to their natural end, it is inescapable to conclude that there exists conflict of interest in Senator Orengo representing the petitioner herein.

60. This perception is highlighted by the fact that the petitioner may at one time be summoned to appear before a Committee of Senate to answer to some of the matters the petitioner is being investigated on. Should this happen Senator Orengo will be in attendance. Even if he recuses himself from the Committee, that alone will not allay the perception of conflict of interest, or put bluntly, the perception that the petitioner has friends in the Senate. This would be very unfortunate. In interpreting the Constitution, a literal interpretation approach, which avoids all doubts and rhymes with the spirit of the Constitution takes priority.
61. Accordingly therefore, it is the finding hereof that the continued representation of the 1st interested party by the respondent or any other State Officer is against the spirit of chapter 6 of the Constitution of Kenya, for failure to conform to the mandatory provisions of section 26 of the Leadership and Integrity Act.
62. I allow the notice of motion dated January 10, 2020 and I direct that the 1st interested party/petitioner herein be and is hereby at liberty to engage the services of another advocate other than Senator James Orengo, SC, to represent him in the proceedings herein. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF APRIL, 2021

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Julie Soweto for Petitioner

Mr. Muteti for DPP

Mr. Makuto for Hon. Attorney General

Ms. Peris Court Assistant

