



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 8 OF 2014 (O.S)

REGINE BHUTT PLAINTIFF

- VERSUS -

HAROON BHUTT

AKHTAR BHUTT DEFENDANTS

RULING

1. The learned Counsel for the defendants, Mr Agwara, has raised an objection to the proposed appearance as lead counsel for the plaintiff of Hon. Peter Kaluma M.P., Member of Parliament for Homa Bay Town Constituency. Counsel urged the following grounds in support of his objection:
 - a. Prohibition under Article 77(1) of the Constitution for full-time state officers from participating in other gainful employment;
 - b. In terms of Article 75 of the Constitution, there is an apparent conflict of interest arising from the advocates duty as an Member of Parliament and appearing as a private advocate pursuing private rights before a judicial officer – the advocate would bring the office, powers and privileges to bear upon the judicial officer against whom as the National Assembly of which he is a member has control over the Judiciary by way of the budget, considerations of petitions on judges, with powers to summon and remove judges reliance being had to Articles 95 and 125 of the Constitution; citing ***Electoral Commission of Kenya v. Blasto*** (2008) 2 KLR 99, counsel argued that there would be embarrassment if the MP acts as an advocate; and
 - c. As a matter of integrity under Chapter six of the Constitution a sitting MP ought not to be allowed to pursue private litigant’s interests, as opposed to public interest litigation; counsel contended that the mischief to be addressed is allowing a state officer to bring his public office to bear in private matters.
2. Learned Counsel for the plaintiff, Mr. Miyare, opposed the Objection as a delaying tactic and urged, principally, the grounds of unfettered constitutional right to representation by an advocate of one’s choice pointing out that under Article 168 of the Constitution Parliament had no role in the process of removal or discipline of judges and that there was no basis for assuming that the presence of the MP was likely to bear on the mind of the Court. Citing ***John Okelo Nagafwa v. Independent Electoral & Boundaries Commission (IEBC) & 2 Ors.***, Election Petition No. 3 of 2013, (2013) eKLR, where Tuiyott, J held that a Senator was not a full-time state officer and he could therefore appear for a party before the court, Counsel contended that the law on the point is well settled that an MP is not a full-time state officer and that various courts agree that nothing bars a Member of Parliament from representing clients. As an illustration, counsel cited the recent case of ***Coalition for Reform and Democracy (CORD) & Anor. v. Republic of Kenya & Anor.***, (2015) eKLR, (***the Security laws case***) which challenged the security laws enacted as The Security (amendment) Act No. 19 of 2014, where the petitioners were represented, as shown at paragraph

26 of the Ruling of Odunga, J by “**Hon James Orenge Senior Counsel assisted by Mr. Antony Oluoch. In CORD’s legal team were Hon. Amos Wako, Senior Counsel, Hon. Moses Wetangula, Hon. Kalonzo Musyoka and Hon. Judith Sijeny.**” Save for Hon. Kalonzo Musyoka and Mr. Antony Oluoch, the rest of the members of the legal team are Senators. Counsel also referred to the cases of Commissioners Ahmed Nassir and Prof. OJienda who it was urged continued to practice before the courts notwithstanding their membership to the Judicial Service Commission. The authority of **ECK v. Blasto**, *supra*, cited by the Defendants’ counsel was distinguished as irrelevant having been made before the promulgation of the Constitution of Kenya 2010 with its chapter six provisions.

Issue for determination

3. The issue for determination by the court therefore is whether a Member of Parliament sitting in the National Assembly is prevented by the provisions of the Constitution from taking up representation of litigants in private disputes.

The Law

4. Article 75 of the Constitution is in the following terms:

“75. (1) 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.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and Oath of office of State officers. Conduct of State officers.

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.”

5. Article 77 (1) of the Constitution is in the following terms:

“77. (1) A full-time State officer shall not participate in any other gainful employment.”

The terms of the sub-Article are clear. For the bar to participation in an activity to crystallize –

- a. The person involved must be a ‘full-time state officer’; and
- b. The activity must be ‘gainful employment’.

Determination

6. In the context of the case, the issue for determination manifests itself in several questions as follows:
 - a. whether a member of the National Assembly, is a ‘full-time State Officer’;
 - b. whether the MP in this case is engaged on terms of ‘gainful employment’;

- c. whether in engaging in law practice for private parties the MP is in a position of conflict with his public duty or has compromised public or official interest; and
 - d. whether this conduct is demeaning of the office of the MP.
7. Article 260 of the Constitution defines a “State officer” as a person holding a State office, and lists the following offices as State of Offices:

“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.”

8. The Constitution accepts that of these state officers, some may be engaged on part-time rather than full time basis and the Constitution allows this category to participate in any other gainful employment. One may readily conceive that a member of commissions and holder of independent offices under chapter 15 of the Constitution may by the nature of their work be engaged on part-time basis. This appears to be the case of the Commissioner of the Judicial Service Commission, which therefore explains the participation of Commissioners Ahmed Nassir and Prof. Ojienda as advocates before the courts as submitted by counsel.
9. Tuiyott, J in ***John Okelo Nagafwa v. Independent Electoral & Boundaries Commission (IEBC) & 2 Ors.***, supra, considered the appearance of a Senator for one of the party’s 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, saying:

“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. Orenge 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.”

10. This Court did not have the benefit of submissions on the Standing Orders of the National Assembly. As with Tuiyott J., I did not – no doubt because of the impromptu manner that the proposal to have the MP appear as lead counsel was made necessitating the objection – receive full arguments as to whether an MP is a full-time state officer and, although the function and responsibility of the National Assembly is set out in Article 95 of the Constitution, I do not propose to make a finding based on in-exhaustive submissions.

11. I refrain to make the determination as to whether the MP is a full time state officer within the meaning of Article 77(1) of Chapter Six of the Constitution advisedly because I take the view that the issue in dispute may be resolved by reference to the Leadership and Integrity Act, 2012 which was enacted by Parliament to give effect to the provisions of Chapter Six of the Constitution. Section 26 of the Act echos the provisions of Articles 75 (1) and 77 (1) of the Constitution with an added benefit of defining the phrase “gainful employment” used in the Article. The term “full-time state officer” used in the Constitution and the phraseology of the Act “state officer serving on full time basis” may have different connotations but I was not addressed on the Act or any such inconsistency, and I am, therefore, bound to take the section as I find it. The definition of ‘gainful employment’ in the section also appears to enlarge over its natural meaning of profitable engagement notions of incompatibility, impairment of judgment of person and conflict of interest to make it a term of art.

12. Section 26 of the Leadership and Integrity Act, 2012 provides as follows:

“26(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 judgment of the state officer in execution of the functions of the State Office or results in a conflict of interest in terms of section 16.**”*

13. It appears from the provisions of Articles 75 (1) and 77(1) of the Constitution and section 26 of the Leadership and Integrity Act that a Member of Parliament, even if presumed to be a full-time state officer, is not barred from engaging in other gainful employment except where it is **“inherently incompatible with the responsibilities of the State Office or which results in the impairment of the judgment of the state officer in execution of the functions of the State Office or results in a conflict of interest in terms of section 16”** of the Leadership and Integrity Act. It is therefore upon the party objecting to the engagement of an MP as counsel in a court case to demonstrate that the exceptions exists and not on the party proposing to engage the MP to demonstrate that they do not exist.

14. The Court of Appeal in **ECK v. Blasto** (2008) 2 KLR 99 surmised that the Chairman of the Electoral Commission who was also an advocate may not have appeared as counsel as it would embarrass him but was free to appear in court in person for the ECK in his capacity as Chairman of the ECK. The Court held that had the chairman of the Electoral Commission of Kenya sought to appear as counsel for the Commission, there would have been merit in the trial judge’s court reasoning of embarrassment that it would be *“odious for a whole chairman of the Electoral Commission to descend into the arena of litigation since as a witness he may be subjected to embarrassing cross-examination and even though acting as counsel for the Electoral commission may be required as a witness of the Electoral Commission to stay out of the courtroom.”*

Obviously, **Blasto** was based on the rule against advocates appearing in cases where they may be witnesses of fact a matter addressed by the Advocates Act which prohibits by Rule 9 of the Advocates (Practice) Rules an advocate appearing as counsel in a matter in which he may be called as a witness.

15. From my reading of the constitutional provisions, the object of the Rule in Article 77(1) is three-fold, to –
 - a. ensure that the full-time state officers apply themselves and are engaged full-time in the performance of their constitutional functions;
 - b. eradicate avenues of moon-lighting for state officers who are on payroll of the state as full time employees; and
 - c. avoid the employment or use of the apparatchik, state resources and or clout in the discharge of non-state duties or functions, or in the pursuit of private interests.
16. Assuming that an MP is a ‘full time state officer’ or ‘a state officer serving on full time basis’ as provided under the Leadership and Integrity Act he may be engaged in an activity other than ‘gainful employment’ as defined under the Act. Even if the Court adopted the ordinary meaning of the words ‘gainful employment’, the MP may, in the circumstances of engagement as counsel before the court, act as advocate in a private or public matter on condition that it is on **pro bono** basis. Such may be terms upon which the Senators in the **Security Law** case appeared as counsel for the CORD to challenge in public interest the enactment of the security laws.
17. It has not been disclosed as to the nature of the retainer of the MP as lead counsel. However, a direction for pro bono appearance would address the mischief of unjust enrichment by taking up profitable employment in addition to the MP’s engagement as a full time state officer or state officer serving on full time basis.
18. There could be cases in which the engagement of an MP in a court case may have a conflict of interest with his position and office as a state or public office. However, the allegation of conflict of interest in this case was not proved. It was not shown how the representation of the plaintiff herein in her matrimonial property dispute could conflict with the MP’s state office. Neither was it shown in terms of the Leadership and Integrity Act that the participation of the MP in the dispute before the Court would impair his judgment in consideration of matters before the National Assembly. Nor was it demonstrated that the appearance before the court by the MP would demean his status, or indeed that of the court, or that such engagement is inherently incompatible with the responsibilities of an MP’s office.
19. Judges have security of tenure with a constitutional procedure for their discipline and removal which does not directly involve either House of Parliament. Moreover, Judges are by judicial oath sworn to uphold the Constitution in accordance with the Rule of Law and it cannot be supposed that their judgment will be swayed by the presence of an MP who seeks to bring his office to bear upon the judicial process. To be sure, all advocates appearing before the court are officers of the court and subject to the jurisdiction and discipline of the court in terms of sections 55 and 56 of the Advocates Act.

Orders

20. Accordingly, for the reasons set out above, the court allows the Honourable Member of Parliament to appear in the matter and act for the Plaintiff, whether as lead counsel or as part of his legal team, provided that the Advocate/Member of Parliament in writing undertakes that he shall not charge nor receive any payment for his services to the plaintiff and that he shall not seek, in the event that costs are awarded to the plaintiff, any certification for costs for two counsel as provided under Rule 59 of the Advocates’ (Remuneration) Order.
21. Costs in the cause.

DATED SIGNED AND DELIVERED THIS 23rd DAY OF JANUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Miyare for the Plaintiff

Mr. Agwaro for the Defendants

Mr. Murimi Court Assistant.