



**Ng'ang'a v Minister for Justice, National Cohesion & Constitutional Affairs & another (Petition 354 of 2012) [2013] KEHC 6091 (KLR) (Constitutional and Human Rights) (1 March 2013) (Judgment)**

*SAMUEL MUIGAI NG'ANG'A v THE MINISTER FOR JUSTICE, NATIONAL COHESION & CONSTITUTIONAL AFFAIRS & another [2013] eKLR*

Neutral citation: [2013] KEHC 6091 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 354 OF 2012**

**I LENAOLA, J**

**MARCH 1, 2013**

**BETWEEN**

**SAMUEL MUIGAI NG'ANG'A ..... PETITIONER**

**AND**

**THE MINISTER FOR JUSTICE, NATIONAL COHESION & CONSTITUTIONAL AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL. .... 2<sup>ND</sup> RESPONDENT**

**High Court declines to rule on hypothetical matters as opposed to actionable claims.**

*This case concerned the interpretation of article 77 of the Constitution which restricted full-time state officers from engaging in other gainful employment. The petitioner sought clarity on whether Members of Parliament (MPs) and Members of County Assemblies (MCAs) qualified as full-time state officers and whether they could hold other jobs. The High Court ruled that MPs and MCAs were state officers under article 260, but not all state officers were full-time. The court found no legal restriction, other than parliamentary Standing Orders, regulating MPs' working hours. Additionally, the court declined to rule on a hypothetical issue since the petitioner did not present an actual dispute. The petition was dismissed, with the court emphasizing the separation of powers, stating that Parliament and County Assemblies must regulate their own affairs.*

Reported by Emma Kinya Mwobobia

*Statutes - interpretation of statutes - interpretation of constitutional provisions - interpretation of who was a full time state officer and what amounted to gainful employment - Constitution to be read as a whole - provision that full time state officers could not engage in other gainful employment - whether the Members of Parliament were*



*full time state officers and were therefore not allowed to engage in gainful employment - Constitution of Kenya, 2010 articles 260, 80, 73 and 77.*

### **Brief facts**

The petitioner filed the petition seeking an interpretation of article 77 of the Constitution, 2010 in relation to whether Members of Parliament or the County Assembly were full time state officers. He stated that he aspired to vie for a political office in the future and therefore approached the court to settle the issues he raised in his petition before he ventured into politics.

### **Issues**

- i. Who was a full time state officer?
- ii. What constituted gainful employment for the purposes of Article 77(1) of the Constitution?
- iii. Whether Members of Parliament and Members of the County Assembly could be said to be full time state officers.
- iv. Whether the petition had raised issues capable of being resolved by a court of law.

### **Relevant provisions of the Law**

#### **Constitution of Kenya, 2010**

#### **Article 77(1)**

*A full time state officer shall not participate in any other gainful employment.*

### **Held**

1. Article 260 of the Constitution defined what a state office meant and it also defined a state officer as a person holding any of the offices that had been outlined under the meaning of state office. Such persons included Members of Parliament and Members of County Assemblies.
2. Article 77 of Chapter Six of the Constitution provided for the restriction on activities of state officers wherein full time state officers should not participate in any other gainful employment.
3. Gainful employment was clearly defined under section 26(2) of the Leadership and Integrity Act as work that a person could pursue and perform for money or other form of compensation or remuneration which was inherently incompatible with the responsibilities of the state office or which resulted in the impairment of the judgment of the state officer in the execution of the functions of the state office or resulted in a conflict of interest in terms of section 16 of the Act.
4. The import of article 77(1) and article 250(5) of the Constitution was that not all persons defined as state officers were expected to work on a full time basis.
5. There was no law, save for the Standing Orders of Parliament that regulated when Members of Parliament could be engaged in parliamentary business. Article 126(1) of the Constitution provided that a sitting of either House could be held at any place within Kenya and could commence at any time that the House appointed.
6. Standing Orders were creatures of Parliament in a bid to regulate its business and the Constitution had donated to it the power to create hours for its sittings. They were provided for under article 124 of the Constitution where each house of Parliament could establish committees and make Standing Orders for the orderly conduct of its proceedings including the proceedings of its committees.
7. The court had no jurisdiction to deal with hypothesis and abstract issues as its jurisdiction in interpreting the Constitution was not to be exercised in the absence of a real dispute.
8. There was no controversy raised in the petition for the court to resolve and under article 165(3)(a) of the Constitution, the High Court could only invoke its mandate to interpret the Constitution if there was a real issue in controversy and not in a hypothetical or academic situation. The petition had only raised a hypothetical situation which the court could not frame as a real issue for resolution.
9. Parliament and County Assemblies had to regulate their own procedures including the times when their business was conducted. The court had to respect separation of powers and could not purport to direct the Legislature on how it should run its affairs.



*Petition dismissed.*

## **Citations**

### ***East Africa***

1. *Mwau & 3 others v Attorney General & 2 others* [2012] 1 KLR 73 - (Followed)
2. *Onyango, Patrick Ouma & 12 others v Attorney General & 2 others* Miscellaneous Application No 67 of 2005 - (Explained)
3. *Trusted Society of Human Rights Alliance v Attorney General & 2 others* Petition No 229 of 2012 - (Followed)

### ***United Kingdom***

*Blackburn v Attorney General* [1971] 1 WLR 1037 [1971] 2 All ER 1380;  
[1971] EWCA Civ 7 - (Followed)

## **Statutes**

### ***East Africa***

1. Constitution of Kenya, 2010 articles 73,77(1); 95; 96; 117; 124; 126(1); 165(3)(d); 250; 260 - (Interpreted)
2. Leadership and Integrity Act, 2012 (Act No 19 of 2012) section 2, 26 - (Interpreted)

## **JUDGMENT**

1. The Petition dated 13/8/2012 seeks the determination of the following questions;
  - a) Who is a full time State officer?
  - b) What constitutes gainful employment for the purposes of article 77(1) of *the Constitution*?
  - c) Whether Members of Parliament for the purposes of article 77(1) of *the Constitution* are full time State officers?
  - d) Whether Members of a County Assembly, for the purposes of article 77(1) of *the Constitution* are full time State Officers?
  - e) Any other question hinging on article 77(1) of *the Constitution* or any other provision of *the Constitution* that this Honourable Court may deem fit in the circumstances to determine during the course of the proceedings herein?
2. The Petitioner, in his Supporting Affidavit states that his interest in the interpretation of article 77 of *the Constitution*, 2010, stems from the fact that he aspires to vie for political office in the future and would like the Court to settle the above questions before he makes his leap into the waters of politics.
3. He also seeks the following Orders;
  - a) A Declaration that members of Parliament are not full time State officers for the purposes of article 77(1) of *the Constitution*.
  - b) A Declaration that Members of the County Assembly are consequently not full time State officers for the purposes of article 77(1) of *the Constitution* of Kenya.



- c) A Declaration that Members of Parliament and Members of a County Assembly can engage in other gainful employment whether private or otherwise in any other manner.
- d) That the cost of and incidental to the Petition herein be provided for.
- e) That the Honourable Court be pleased to grant such further orders, prerogatives and writs as it deems just and fit in the circumstances.”

### **Case for the Petitioner**

4. In his Affidavit in support and in Submissions by Dr Khaminwa, learned advocate for the Petitioner, the Petitioner’s case is that because there is no statute defining who a full time State officer is, it is imperative that the Court should do so and also shed light on what constitutes gainful employment. That because there are certain restrictions created by article 77 aforesaid, an answer to the questions posed above would assist persons who intend to enter State offices to appreciate those restrictions better.
5. In his Submissions, Dr Khaminwa conceded that subsequent to the filing of the Petition, the Leadership and Integrity Act, 2012 was enacted and the terms Public officer, State officer and gainful employment were defined.  
He however maintained that Members of Parliament and County Assemblies are not on full-time employment and so the provisions of the Act should not apply to them Case for the Respondent
6. The Respondent filed grounds of opposition on 22/10/2012 and they are the following;
  - 1) That the Constitutional Court while exercising its jurisdiction shall interpret the Constitution in a manner that clearly spells out the purpose, values and principles of the Constitution.
  - 2) That the Constitution by dint of article 260 defines a public officer to include a Member of Parliament and Members of the County Assembly.
  - 3) That further, the Constitution in article 73 has set out the qualities of a public officer and among other responsibilities they are to serve the people rather than to rule them; selfless service based solely on the public interest and commitment in service to the people.
  - 4) That therefore it is important that Members of Parliament and Members of County Assemblies fully dedicate their time and energy to Parliament and County Assemblies.
  - 5) That in any event the said positions are voluntary and therefore one must elect either to serve the people or engage in his private business.
  - 6) That the petition is otherwise an abuse of the process of this Honourable Court.
7. Mr Kamau, learned Principal State Counsel adopted the grounds as filed and further urged the point that public service is a full-time engagement and public servants must maximise their daily energies in pursuit of the ideals set out in article 73 of the Constitution merit and the Petition should be dismissed with costs.

### **Determination**

8. Having perused the Petition and the Submissions made, the answer to the question who is a State officer is not difficult to find. Article 260 of the Constitution provides that a “State office” means;



- (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 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;
9. A “State Officer” is then defined by the same Article as a person holding any of the above office. One such person is “Member of Parliament” and “Member of a County Assembly”.
10. The above definitions are reproduced at Section 2 of the *Leadership and Integrity Act*, 2012 which is “an Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of *the Constitution* and connected purposes”. Article 77 is one of the provisions within Chapter six of *the Constitution* and any reference to “State officers” in it must necessarily refer to the meaning assigned to the term by article 260 of *the Constitution*.

That article provides as follows;

- (1) ) A full-time State officer shall not participate in any other gainful employment.
- (2) Any appointed State officer shall not hold office in a political
- (3) A party retired State officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of—
  - (a) a company owned or controlled by the State; or
  - (b) a State organ.
- (4) A retired State officer shall not receive remuneration from public funds other than as contemplated in clause (3). ”



11. The provisions above would then lead me to the second question; what is the meaning of “gainful employment?”

Contrary to Dr Khaminwa’s initial suggestion, Section 26 of the *Leadership and Integrity Act* indeed defines the term. It provides as follows;

- “(1) Subject to sub-section (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 the execution of the functions of the State office or results in a conflict of interest in terms of section 16.”

12. The section is self-explanatory and needs no more than a literal interpretation and a casual reading of article 80 of *the Constitution* would point to the fact that the Act was enacted to operationalise Chapter Six aforesaid. None of its provisions have been faulted by the Petitioner as being unconstitutional and I will leave matters at that in respect of the second question.

13. The third question is a corollary to the second and to address the issue, one must read article 77(1) of *the Constitution* wholistically. Nowhere else in *the Constitution*, so far as I know, is the term “full-time state officer” used. Article 250(5) for example provides that members of Commissions created by article 248 “may serve on a part-time basis” and this obviously is the opposite of “full-time basis”. Members of those Commissions are also State officers within the meaning assigned to them above. The import of those provisions is that not all the persons defined as State officers are expected to work on a full-time basis and the next question would be whether Members of Parliament and Members of a County Assembly are also in the category expected to work on a full time basis.

14. In the book, *Constitutional & Administrative Law*, Eighth Edition by Hilaire Barnett at page 477, reference is made to a Committee in England established to: “examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and to make recommendations to ensure the highest standards of probity in public life”.

15. The Committee was chaired by Lord Nolan and with regard to Members of Parliament, in its first Report in 1995, Barnett wrote as follows:

“The Nolan Report recorded that the 1995 Register of Members Interests suggested that 26 Members had entered into agreements with public relations or lobbying firms. A further 142 members had consultancies ‘with other types of company or with trade associations’. The 168 members between them held a total of 356 consultancies. When ministers and the speaker are excluded from the analysis, almost 30 per cent of Members of Parliament held some form of consultancy agreement. In relation to associations with trades unions, a total of 184 members had sponsorship agreements, 27 had paid consultancies, and a further ten received some form of financial assistance from trade unions. Accordingly, the committee concluded that almost 70 per cent of Members of Parliament(excluding Ministers and the Speaker) had some form of financial relationship with outside bodies and added that;



“a Parliament composed entirely of full time professional politicians would not serve the best interests of democracy. The House needs if possible to contain people with a wide range of current experience which can contribute to its expertise.”

The committee was also concerned that a ban on outside financial interests would act as a deterrent to people who would otherwise stand for election to Parliament. The committee recommended, therefore, that Members of Parliament should continue to have the right to engage in outside employment. Having reviewed the early resolutions of the House, and the later resolution of 1947, and the rules regulating the registration of members' interests, the committee found that the Register had worked unsatisfactorily. The committee invited the House of Commons to review the statement of principle which governed the registration of interests.”

Later at page 487, the Committee stated as follows;

“The purpose of Parliamentary privilege (which is enjoyed by both Houses of Parliament), both collective and individual, is to protect the independence and integrity of Parliament from outside influence and interference. To protect the separation of powers, between the judiciary and parliament, the Courts may rule on the existence and scope of privilege, but once a matter is deemed to be within parliamentary privilege, the matter is left to Parliament to determine.”

The collective privileges include the right to determine its own composition and procedure, and to discipline its Members (but note the Parliamentary *Standards Act* 2009) individual privileges include freedom from arrest for civil matters for forty days before and after a parliamentary session, and most importantly, freedom of speech in proceedings in parliament which is protected under article IX of the Bill of Rights 1689.

Members of Parliament have always been permitted to have employment outside Parliament and to enter into contracts for services with outside bodies. In recent years, the issue of the financial interests of both Members of Parliament and Members of the House of Lords has caused damage to the integrity of Parliament. Most recently with the abuse of MPs expenses and allowances, Parliament finally agreed to establish an independent body and Commissioner to regulate Mps' pay and expenses, under the Parliamentary *Standards Act* 2009, as amended by the Constitutional Reform and Governance Act 2010.

16. The above conclusion is reminiscent of the Kenyan situation and the outcry whether Members of Parliament should be the ones to determine their own pay, a matter quite live both in the public domain and in the High Court. But reverting to the question at hand, in Constitutional and Administrative Law, 4<sup>th</sup> Edition by Pollad, Parpworth and Hughes, Oxford University Press, at page 219, it is written thus;

“Most MPs do not live solely on their parliamentary salaries and other expense allowances- the cost of maintaining more than one house (London and the constituency) and of paying for research and other secretarial staff over and above that covered by allowance means that other income has to be found, either from employment, professional earnings or sponsorship. It is known that a certain few members do live very frugally in bed and breakfast accommodation and exist only on their parliamentary salaries, but this does not appeal to many. The fact that our MPs are not full-time legislators explains some of the oddities of parliamentary procedure - why, for example, the real business of Parliament does not get under way until the afternoon when it may be assumed lawyer members will have



finished the day in Court. The outside pay of MPs, however, raises another issue; can their independence be compromised by the sources of their outside earnings”

All the above citations address the situation in England and relevant as they may, what is the situation in our jurisdiction?

17. As a matter of common knowledge, Members of Parliament in Kenya were and are known for their engagement in all manner of ventures; from sale of sugar and maize to dairy farming, horticulture and real estate. There were many cases of members who for five years would only make technical appearances in Parliament and spend the rest of their time elsewhere.

18. There was no law, save the Standing Orders of Parliament to regulate when they should be engaged in Parliamentary business. In the Standing Orders, 2008, a day is defined in Order No 2 which states thus;

“Sitting day means subject only to the special definition of “day” in Standing Order 146 (Definition of a day), any day on which the house sits”

Standing Order No 20 then defines hours of meetings (under part VIII - Sittings and Adjournments of the House) as follows;

“Unless the speaker, for the convenience of the House otherwise directs; the House shall meet at 9 00 am. On Wednesday and Thursday, but more than one sitting may be directed during the day”.

The Standing Orders therefore deliberately create no sittings on Mondays, Fridays and Tuesday mornings. More fundamentally, article 126(1) of *the Constitution* provides as follows;

“A sitting of either House may be held at any place within Kenya and may commence at any time that the House appoints.”

19. Standing Orders are a creature of Parliament in a bid to regulate its business and *the Constitution* donates to it the power to create hours for its sittings. Standing Orders are provided for under article 124 of *the Constitution* which provides that “Each House of parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings including the proceedings of its committees” and that joint Committees of both Houses shall be created to “jointly regulate the procedure of those committees”.

20. Article 117 of *the Constitution* also provides in furtherance of the above, “the powers, privileges and immunities of Parliament, its committees, the leader of the majority, the leader of the minority party, the chairpersons of committees and Members”.

21. The import of all these provisions is that they must be read together the context of the role of a Member of Parliament or Senate. These are persons who are elected from Counties and Constituencies and are obligated to those that have elected them and those that they generally represent. Those roles are defined in articles 95 and 96 of *the Constitution*.

22. I have merely set out the Law as in place and must now revert to the issues placed before me for determination.

## Conclusion

23. I have reflected deeply on whether this court has the constitutional duty to answer the questions posed by the Petitioner and two factors must be considered, the first is the issue of justiciability. The Petitioner



has crafted questions to which he seeks an answer but where is the dispute that I am supposed to resolve? Elsewhere above, I have merely set out the Law as applicable to the issues raised but what is justiciable about those issues?

Black's Law Dictionary defines 'justiciable' as "proper to be examined in courts of justice". It further goes on to define a 'justiciable controversy' as "a controversy in which a claim or right is asserted against one who has an interest in contesting it." The other definition given of a justiciable controversy is "a question as may properly come before a tribunal for decision".

In Patrick Ouma Onyango & 12 others v The Attorney General & 2 others, Misc Appl No 677 of 2005, the Court endorsed the doctrine of justiciability, as stated by Lawrence H Tribe in his book American Constitutional Law, 2<sup>nd</sup> Edition, p 92 that;

'In order for a claim to be justiciable as an article III, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also a part of the controversy itself-an aspect of the appropriateness of the issues for judicial decision and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

This Court has no jurisdiction to deal with hypothetical and abstract issues as its jurisdiction in interpreting *the constitution* is not to be exercised in the absence of a real dispute. This was the holding in John Harun Mwau & 3 others v Attorney General and 2 others, Petition No 65 of 2011 where the court stated thus;

"We also agree with the submissions of Prof Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret *the constitution* conferred under article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."

This Court has had occasion to deal with justiciability or the political question doctrine on several occasions. In Trusted Society of Human Rights Alliance v Attorney General & others Petition No 229/2012. The Court in that case differentiated a justifiable controversy (which is amenable to judicial review) and a policy decision by the political branches of government (which is a "political question" inappropriate for judicial review). The court stated thus;

"The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand."



In Patrick Ouma Onyango & 12 others v Attorney General and 2 others Nairobi, High Court Misc App 677 of 2005 (OS) [2005] eKLR the court asked whether it should interfere with a political or legislative process stated;

“The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters”.

The court in stating the above relied on Blackburn v Attorney General [1971] 1 WLR 1037 and particularly the decision of Salmon L J; who stated that;

“Whilst I recognise the undoubted sincerity of Mr Blackburn’s views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treatymaking power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The role and power of the court is to decide and enforce what is the law and not what it should be now or in the future”.

24. The decisions above, if juxtaposed with the issues raised before me, would only point to the fact that there is no controversy that I am to resolve and under article 165(3)(a) of *the Constitution* and this court can only invoke its mandate to interpret *the Constitution* if there is a real issue in controversy and not in a hypothetical or academic situation. It seems to me that the Petition is raising a hypothetical situation which I decline to frame as a real issue for resolution.
25. Secondly, elsewhere above, I have shown that Parliament and County Assemblies must regulate their own procedures including the times when their business is conducted. Court must respect separation of powers and should not purport to direct the Legislature in how it should run its affairs.
26. Having so held, it seems to me that there is little to be made of the Petition before me and it is dismissed.
27. As to costs, let each party bear its own costs.
28. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2013**

**ISAAC LENAOLA**

**JUDGE**

In the presence of:

Irene – Court Clerk

Ms. Kamande holding brief for Mr. Kamau for Respondent's

No appearance for Petitioner

Order

judgment duly delivered.

