



REPUBLIC OF KENYA

High Court at Busia

Election Petition 3 of 2013

REPUBLIC OF KENYA

JOHN OKELO NAGAFWAPETITIONER

**AND
INDEPENDENT ELECTORIAL & BOUNDARIES**

COMMISISON1ST RESPONDENT

SAMSON OJIEM ORIEDO2ND RESPONDENT

PAUL OTUOMA NYONGESA3RD RESPONDENT

RULING

1) This Court is asked to determine the Petitioner's Notice of Motion dated 20th May 2013 which prays that the Response by the 3rd Respondent be struck out.

2) The Notice of Motion is premised on the following grounds as set out on the face of the Notice of Motion:-

- a) **There is no proper and valid response by the third respondent before the Honourable Court.**
- b) **In view of the clear provisions of Articles 77(1), 93 and 260 of the Constitution of Kenya, the response by the third respondent is incurably defective having been signed by an unqualified person and/or a full time state officer the Hon. James Aggrey Bob Orengo.**
- c) **The affidavit of one Otuoma Paul Nyongesa in support of the response is made and/or sworn in contravention of the salient and mandatory provisions of order 19 rule 4 of the Civil Procedure Rues, 2010.**
- d) **The notice of acceptance and the Response by the Third Respondent have not been presented, filed and served in accordance with the Elections Act, 2011 and the Election (Parliamentary & County Elections) Petition Rules, 2013.**

The Application

3) At the hearing of the application, Mr. Masika acting for the Petitioner, did not press the last ground which dealt with the presentation, filing and service of the Notice of Acceptance and the Response. In respect to the question as to whether the response by the third party was signed by an unqualified person, the argument made by counsel was that as a Member of the Senate, Honourable Orenge was a full time State officer who was barred by Article 77(1) of the Constitution from participating in any other gainful employment. In laying out the basis that a Member of the Senate was a State officer, Counsel drew this Court's attention to Article 93 of the Constitution which establishes Parliament as consisting of the National Assembly and the Senate. Under the Provisions of Article 260 of the Constitution, a Member of Parliament is a State officer and it would follow that a Member of Senate is a State officer.

4) It was the view of the Petitioner that a Senator is in fact a full time State officer. It was then argued that an Advocate, like any other professional, is ordinarily remunerated for services rendered to clients. It was submitted that by acting for the Petitioner, Honourable Orenge was not only in conflict with the provisions of Article 77 of the Constitution but also of Section 26(1) of the Leadership and Integrity Act (hereinafter referred to as the Act).

5) To fortify the argument this Court was asked to give regard to the Provisions of Section 23(1) of the Act. I was asked to find that Honourable Orenge had compromised the political neutrality of his office.

6) It was also pointed out to this Court that the Provisions of Article 73 on Responsibility of Leadership and Article 10 on the National Values and Principles of Governance are not mere words. They are values and aspirations of the people of Kenya which must be given full effect. It being argued, that fidelity to the Constitution required that this Court strikes down anything done in its contravention.

7) Turning to the Affidavit sworn by the 3rd Respondent, the Petitioner contended that it contravened the salient and mandatory Provisions of Order 9 Rule 4 of the Civil Procedure Rules 2010. This Court was told that the failure by the deponent to state his place of abode was a substantive omission that rendered his Affidavit fatally defective. It was emphasized that the Provisions of Order 19 of the Civil Procedure Rules are the only Rules of the Civil Procedure process which are expressly imported into the procedure of Election Petitions by the Election (Parliamentary and County Elections) Petition Rules 2013(hereinafter **the Elections (P & C) Petition Rules**). The emphasis was to demonstrate that the Provisions of Order 19 of the Civil Procedure Rules are an important feature of the procedure governing Election Petitions.

The Reply

8) Honourable Orenge thought that the question as to whether or not he was contravening the provisions of Article 77 of The Constitution and Section 26 of the Act was not a matter to be taken lightly. Serious consequences could flow from an adverse finding. One such consequence is that it could lead to a person's dismissal or removal from office (Articles 75(2) and (3)). It was therefore necessary that a full inquiry and articulation of all matters surrounding the question be made before such a decision is reached.

9) It was Counsels' suggestion that the answer to the issue at hand would be found in Section 26 (2) of the Act which defines the term 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 in terms of section 16.”

The Court was asked to find that the Senator's participation in these proceedings as Counsel for the 3rd Respondent was not gainful employment as contemplated by the Law.

10) This Court was told that even if it reached the decision that Counsel was in breach of Article 77 and Section 26 of The Act it could not grant the prayers sought by the Petitioner as Article 75(2) provides for the mechanism for dealing with a person who contravenes Article 77. That the answer did not lie in prejudicing the 3rd Respondent as the sins of Counsel should not be visited on a party.

11) Confronted with accusations, some of which were quasi criminal in nature, the 3rd Respondent was obliged to file a response. It was argument of Counsel that in the nature of the accusations and of an Election Petition, the Respondent should be afforded every opportunity to be heard. The Court was asked to bear this in mind in deciding whether the omission by the 3rd Respondent to state his place of abode in his Affidavit was fatal. It was pointed out that his address and particulars of his current job were given in the filed Response.

Determination

12) I find it convenient to start by addressing what must be the less contentious issue. It is in respect to the third Respondent's failure to state his place of abode in the Affidavit he swore on 7th of May 2013. Rules 12(6) and Rule 15(7) of the Election (P & C) Petition Rules are similar and provide as follows:-

“The provisions of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.”

Order 19 Rule (4) of the Civil Procedure Rules provides the particulars of a Deponent which must be stated in every Affidavit:

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.”

Undoubtedly, the 3rd Respondent's Affidavit is in breach of this rule. I was urged to follow the decision in **John Koyi Waluke –vs- Moses Masike Wetangula & 2 others – Bungoma High Court Election Petition No.1 of 2008(UR)** that the rule is couched in mandatory terms and any breach renders an Affidavit fatally defective. This Court was also asked to find that the irregularity was in substance and not form and could not be over-looked as a technical misadventure (Article 159(d) of The Constitution).

13) Order 19 Rule 4 of the Civil Procedure Rules is now part of the procedure governing Election Petitions and must be construed in that context. An Election Court should bear in mind two principles. First, it is required, in the exercise of its power under the Constitution and of the Elections Act or in the interpretation of the provisions of the Election Petition Rules, to give effect the over-riding objective specified in Rule 4(1) of the Rules;

“The over-riding objectives of the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.”

14) Secondly, as it has been previously pointed out, an Election dispute is not purely a private dispute. The words of Ojwang (SCJ) in his paper, **ELECTION DISPUTES AND THE JUDICIAL PROCESS: EMERGING LESSONS** will often be quoted and ring true. (see for example in the decision of Gikonyo J in **(Bungoma Election Petition No.1 of 2013 Milka Masingo –vs- Robert Wekesa Mwembe & 2 others)** Justice Ojwang said:-

....“no election is of *bona fide* interest only to the litigants; on the contrary, elections are of much more substantial interest to the voters and to the public at large”.

The people of Funyula have a keen interest in the hearing and out-come of this Petition. This is not to be ignored by this Court.

15) Applying these principles then, a fair question to be asked is, what injustice will the non-observance of the Rule visit on the parties? Although it was repeatedly argued by the Petitioner that the provisions of Order 19 Rule 4 are mandatory, I did not hear any argument by him as to the prejudice he would suffer by the deponent failing to state his place of abode. The circumstances here would be distinguishable from those in the **John Koyi Waluke** case (supra) referred to this Court in which the question of abode had a direct bearing on the issue there. In that decision, W. Karanja J. (as she then was) held as follows:-

“In my considered view a deponent must disclose his true physical abode(sic) and failure to do so renders his affidavit fatally defective. This is more so in situation like this where the issue of personal service is of paramount importance since the deponent may deliberately want to cover up his place of residence in a bid to show that he was not personally served.” (my emphasis)

In the Affidavit under attack, the 3rd Respondent has given his postal address and his current job. A Notice of Acceptance has also been filed on his behalf by his Advocates in which his address for service is given. In addition, the Petitioner will at the hearing have an opportunity of cross-examining him on any contested issues. What prejudice then is to be suffered by the Petitioner? This Court is unwilling to strike out the entire response merely because of an omission in the Affidavit that is not material to the controversy at hand. This would not be a just way of resolving this public interest dispute.

17) As far as I know there has been no Judicial pronouncement on the scope of Article 77(1) of The Constitution. In a sense the issues raised by the Petitioner are novel. But he has not broken new ground as the Court in **Nrb HCC Petition No.354 of 2012 Samuel M. Nganga –vs- The Minister For Justice, National cohesion & Constitutional affairs & Another [2013] e KLR** had to grapple with similar issues. That Court was asked to determine, *inter alia*,

- 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?

At the commencement of the hearing of the application I asked the parties to reflect on the decision of Lenaola J in the above matter. And although for good reasons stated therein, the Judge did not determine the issues, he nevertheless unpacked the relevant law. Useful lessons will be drawn from that decision.

18) There was common ground, and there could have been no difficulty on this, that:-

- a) Parliament consists of The National Assembly and The Senate (Article 93(1) of The Constitution)
- b) A Member of Parliament is a State officer (Article 260 of The Constitution).
- c) A Senator is therefore a State officer.
- d) Hon James Aggrey Bob Orenge is The Senator for Siaya County and therefore a State officer.

19) It was also common cause that the operative words in Article 77(1) of The Constitution and Section 26(1) of The Act are “**full time**” and “**gainful employment.**” Perhaps it helps to again reproduce these provisions. Article 77 (1) reads:-

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

While Section 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.”

20) Further this Court accepts the following proposition by Lenaola J in **Samuel Muigai Nganga** (supra)

“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.” (my emphasis)

21) It is now suggested that an answer to the question posed by that Court and by the arguments of the Petitioner herein entails a detailed and an all-embracing examination of *inter alia*, the following:-

- a) What is the role, duty and responsibility of a Member of Parliament?
- b) How much time should a Member of Parliament be engaged in the Parliamentary and non-Parliamentary functions of the office?
- c) The nature of remuneration, allowances and benefits of a Member.
- d) The experiences of other jurisdictions with similar systems of Government.

This list is possibly not exhaustive.

22) The parties did not place sufficient material nor did they articulate these issues in any particular depth. Those are the pertinent issues that would assist Court resolve the question one way or other. And I very much doubt that the application provided occasion for a more incisive debate. For that reason, this Court declines the invitation to determine the question whether or not a Senator is a full-time State officer. And that would have been the end of this matter, but the Court will assume, for a moment, that a Senator is a full-time State officer.

23) In its preamble, The Leadership and Integrity Act, 2012 states that it is a statute to **“give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes.”** And it is Legislation enacted pursuant to Article 80 of the Constitution. Article 77 of the Constitution on restriction on the activities of State officers is part of Chapter six of the Constitution. Article 77(1) is silent as to the meaning of the term **“gainful employment”** but it is defined in Section 26 of the Act. There being no suggestion that the meaning assigned to the term by the Act is inconsistent with the Constitution, the provisions of Article 77(1) of the Constitution and Section 26 of the Act will be read together.

24) It does no harm to reproduce Section 26 of the Act in its entirety.

“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 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.”

Read together, Section 26(1) and 26(2) permits a full time State officer to pursue other work (other than his State duties) for money or other form of compensation or remuneration provided that work or its

pursuit is:-

- i) not inherently incompatible with the responsibilities of the State office, or
- ii) does not result in the impairment of the judgement of the State officer in execution of the functions of the State office, or
- iii) does not result in a conflict of interest in terms of Section 16 of The Act.

25) As I understand it, the complaint against Hon. Orengo is pointed. It is a specific charge, that by acting as Counsel in this matter and by signing pleadings, Hon. Orengo is contravening the provisions of Articles 77(1) of The Constitution and Section 26(1) of The Act. The Court must examine Counsel's conduct in the light of the express provisions of Section 26(2) above. The onus was on the Petitioner to demonstrate that Hon Orengo's participation in these proceedings as Counsel:-

- a) Is inherently incompatible with his responsibility as a Senator or
- b) Will impair his judgment in execution of the functions of his office as a Member of Senate or
- c) Will result in a conflict of interest in terms of Section 16 of The Act.

26) It had been submitted that Counsel's participation here will keep him away from his office as a Senator. That he would not fully engage himself in the Senate. Article 96 of the Constitution sets out the role of the Senate as follows:-

“96.(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.”

Evidently, the work of a Member of the Senate involves both Parliamentary and non-Parliamentary business. The work-hours for Parliamentary business are regulated by the Standing Orders of the House. This Court has looked up those Standing Orders and in particular Standing Order 30.1 which provides:-

“(i) unless the Speaker for the convenience of the Senate otherwise directs, the Senate shall meet at 9.00a.m on Wednesday and at 2.30p.m on Tuesday, Wednesday and Thursday, but more than one sitting may be directed during the same day.”

It seems that even if a Member of Senate was to be involved in other business of the House (e.g. Committees), Parliamentary business may not engage a Member fully from Monday to Friday, 8.00a.m to 5.00p.m. 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 The Senate.

28) In bolstering his argument, the Petitioner had also referred this Court to Section 23(1) of The Act. It

reads:-

“23.(1) An appointed State officer, other than a Cabinet Secretary or a member of a County executive committee shall not, in the performance of their duties-

- a) **Furthering the interests of this Act: or**
- b) **Educational, research, literary, scientific of other purposes not prohibited by law.”**

It had been argued that by representing a party in an Election Petition, The Honourable Senator would be compromising the political neutrality of his office. I would not agree. Section 23 of The Act is a provision on political neutrality expected of appointed State officers. Hon. Orengo holds an elective position. Elected Members of Senate are politicians. The provisions of Section 23 do not apply to them. So, even if it was to be assumed that by representing the 3rd Respondent Hon Orengo is pursuing a political agenda that would not be inimical to his office as a Member of Senate.

29) It is now clear that the entire Application of 20th May 2013 is for dismissal. I do hereby dismiss it with costs.

DATED, DELIVERED AND SIGNED AT BUSIA THIS 5TH DAY OF JUNE, 2013.

**F. TUIYOTT
J U D G E**

IN THE PRESENCE OF:

**KADENYICOURT CLERK
.....FOR THE PETITIONER**

.....FOR THE 1ST & 2ND RESPONDENT

.....FOR THE 3RD RESPONDENT