



REPUBLIC OF KENYA



**Ethics & Anti- Corruption Commission v Maitai & 13 others (Anti-Corruption and Economic Crimes Civil Suit 8 of 2020) [2025] KEHC 13643 (KLR)
(Anti-Corruption and Economic Crimes) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 8 OF 2020

LM NJUGUNA, J

OCTOBER 1, 2025

BETWEEN

ETHICS & ANTI- CORRUPTION COMMISSION PLAINTIFF

AND

CHARLES NDIRITU MAITAI 1ST DEFENDANT
CHARLES TANUI 2ND DEFENDANT
CHARLES OUKO 3RD DEFENDANT
FREDRICK OGENGA 4TH DEFENDANT
EMILIO MWAI NDERITU 5TH DEFENDANT
SAMSON ODOYO MIKWA 6TH DEFENDANT
NICHOLAS GITOBU 7TH DEFENDANT
PHILIP KIMELU 8TH DEFENDANT
BRAMWEL WANYALIKA 9TH DEFENDANT
FRANCIS MUTHAIGA MURAYA 10TH DEFENDANT
PETER MACHUA 11TH DEFENDANT
JANE NAKODONY 12TH DEFENDANT
ALLIED INSPECTION & TESTING 13TH DEFENDANT
AERO DISPENSER VALVES LIMITED 14TH DEFENDANT



RULING

1. This ruling is in respect of the application dated the 8th day of July, 2025 brought under Articles 1, 2, 3, 10, 20, 22, 23, 27, 28, 33, 47, 50, 73, 75, 77(1), 259 & 260 of *the Constitution* of Kenya 2010, Sections 16 & 26 of the *Leadership and Integrity Act* 2012, Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all the other enabling provisions of the law.
2. The application is based on the grounds on the face of the same and it is supported by the annexed affidavit sworn by JUSTUS WANGIA, on even date. Through the application, the applicant has sought the following Orders:
 - a. Spent.
 - b. This Honourable Court be pleased to issue an order barring Honourable Senator Professor Tom Ojienda, SC or any other State Officer from appearing for the 14th Defendant/Respondent or any of the parties in this matter on account of conflict of interest.
 - c. An order do issue directed to the 14th Defendant/Respondent to engage any other counsel who is not a State Officer to represent it.
 - d. This Honourable Court be pleased to find and hold that the continued appearance of Honourable Senator Professor Tom Ojienda, SC and or any other State Officer in these proceedings is against the letter and spirit of Chapter 6 of *the Constitution* of Kenya.
 - e. This Honourable Court be pleased to issue any other order that it may deem fit and just to grant.
 - f. There be no order as to costs of this application.
3. It is the applicant's case that, Prof. Tom Ojienda who is the elected Senator of Kisumu County is a State Officer in accordance with Article 260 of *the Constitution*, and by virtue of him being an elected Senator, he is a full-time State officer, and while not barred from engaging in private practice, such practice must not conflict with public interest, which he is constitutionally bound to uphold.
4. The applicant avers that under Article 10 of *the Constitution*, the Honourable Senator is obligated to promote good Governance, integrity, transparency, and accountability, and to exercise any authority conferred upon him in a manner consistent with the objects of *the Constitution*. Further, that Chapter Six of *the Constitution* mandates State officers to exercise authority in a manner that demonstrates respect for the people and brings honour to the Nation and dignity to the office. That though Article 50 guarantees the right to legal representation, the right is not absolute, particularly where there exists a demonstrable conflict between private representation and Public policy.
5. The applicant states that the matter under investigations relates to the alleged misuse of public funds in a State corporation, which is a subject of direct oversight by Parliament through its public Investment Committee (PIC) and Public Accounts Committee (PAC). That, consequently, Members of Parliament, including Senators, would be directly conflicted in representing individuals under investigations for such conduct, as they would be required to defend private interests contrary to their Public duty.



6. That under Section 26 of the *Leadership and Integrity Act*, full time State officers are barred from engaging in gainful employment that is likely to compromise their judgement in the execution of official duties.
7. The applicant also relied on Section 52 of the *Leadership and Integrity Act* that subjects all public officers, including Members of Parliament to Chapter 6 of *the Constitution* which requires the State officers to uphold, and are seen to uphold the highest Standards of integrity. Reliance was placed on the case of Director of Public Prosecutions Vs Orenge & 2 others (Interested Parties) (2021) KEHC 456 (KLR) Constitutional Petition 204 of 2029.
8. The applicant contended that *the Constitution* must be read as a whole, with no one provision undermining the other and that, if Members of Parliament continue to represent suspects in matters under Parliamentary oversight, such as economic crimes, it undermines the separation of powers and violates the principles of democratic governance. That the continued representation of the 14th defendant/respondent by the Honourable Senator, is inconsistent with the principles of impartiality among the arms of government.
9. The applicant further stated that it would be a subversion of justice to permit sitting legislators entrusted with public resources and oversight mandates to represent individuals accused of economic crimes, the nature of the case herein being one that relates directly to economic crimes and misuse of public funds.
10. That under Article 73(1)(a) (ii) and (iii) of *the Constitution*, State officers must demonstrate respect for the people and promote public confidence in the integrity of the office and failing to denounce corrupt acts including appearing for those accused of such acts is inconsistent with this duty. Further, that the 14th defendant shall not be prejudiced, as Articles 48 and 50 of *the Constitution* do not guarantee the right to a specific advocate, but rather to a fair hearing and legal representation generally.
11. In opposition to the application, the 2nd defendant filed Grounds of opposition dated the 15th July, 2025 as follows;
 - a. The 14th defendant has a constitutional right under Article 50 (2) (g) of *the Constitution* to be represented by an advocate of its choice.
 - b. The qualifications to practice law in our jurisdiction are provided for under Section 9 of the Advocates' Act (CAP 16). The applicant has not disputed Prof. Ojienda's qualifications under the said Act to practice law in our jurisdiction.
 - c. The Advocates' Act does not bar a sitting member of Parliament who is also an Advocate from practicing
 - d. The prohibition against engaging in other gainful employment Under Article 77 of *the Constitution* and Section 26 of The *Leadership and Integrity Act* 2012 only applies to full time State Officers. A senator is not a full time State officer.
 - e. Conflict of interest is an issue of fact which must be proved by way of evidence. The purported conflict of interest on the part of Prof. Ojienda is speculative. There is no evidence that he has participated in any parliamentary debate or parliamentary committee proceedings touching on the subject matter of this civil suit.
 - f. Any potential conflict of interest on the part of a legislator can be adequately addressed under the provisions of Section 16 (9) and (10) of the *Leadership and Integrity Act* 2012, as read with



the Fourth Schedule to the *parliamentary Powers and Privileges Act* (No. 29 of 2017), if and when it actually arises.

12. The 14th defendant/respondent filed a replying affidavit sworn by Beryl Khasinah Aluoch. She avers that the application is in breach of Article 50 of *the Constitution* in so far as it seeks Orders to bar the Honourable Senator, Prof. Tom Ojienda, SC while he is neither enjoined nor named as one of the recipients to be served. That the Order to bar any other State officer is Vague, ambiguous and cannot be granted in vain.
13. She avers that the applicant has misapprehended the case, in that, it is not Prof Tom Ojienda , SC who is on record for the 14th defendant, but the law firm of Prof Tom Ojienda & Associates, and that to her knowledge, Prof Tom Ojienda is acting pro bono as the lead counsel to Cecilia Misiati who is an advocate in the firm of Prof Tom Ojienda & Associates.
14. The 14th defendant/respondent states that courts have held that Senators are not full time State officers given that there is no employer- employee relationship between them and the executives, and as such, they are at liberty to engage in gainful employment in as long as the nature of such employment is not inherently incompatible with their duties and/or functions as State officers.
15. That for there to be conflict of interest, there has to be participation of the Senior Counsel in the Senate Committee in a matter that conflicts his role as a counsel for the respondent in the matter that must be inconsistent and incompatible bearing in mind the information he receives or that may come to his knowledge during the exercise of his oversight role over the respondent and which may be prejudicial to the course of justice.
16. That such participation, if any, in the Senate would not be general in nature but must go into specifics that would be prejudicial to the hearing of the matter at hand. In any event, the law permits a full time State officer to pursue other work (other than his State duties) for money or other form of compensation provided that work or its pursuit is;
 - a. Not inherently incompatible with the responsibilities of the State officer, or
 - b. Does not result in the impairment of the judgement of the State Officer in execution of the functions of the State office, or
 - c. Does not result in a conflict of interest in terms of the law.
17. That a party alleging conflict of interest bears the burden of presenting clear evidence that the person is acting in a manner prejudicial to the interest of the party, and that in this case, the applicant has not discharged this burden by failing to present any evidence that Prof. Ojienda has conflict of interest and/ or his continued representation of the 14th defendant/respondent in the capacity stated herein above, would be in conflict of interest and/or breach of *the constitution* or any other law.
18. In distinguishing the Manduku case from the case herein, the respondent averred that, Prof. Ojienda is acting Pro bono, has not used State resources in appearing in this matter and that, in that capacity, he has not been involved in any proceedings whereby the 14th respondent is the subject and specifically regarding the subject matter of the suit herein.
19. That contrary to the allegations by the applicant, the 14th respondent herein was charged but acquitted of the criminal charges and there are no other investigations pending. Further, that this matter is not under investigations by PAC with Prof. Ojienda sitting as such to lead to a perception of conflict of interest which will still be subject to the details of any such deliberations, if at all. The applicant has,



therefore, not approached this court with clean hands for failure to disclose material facts and that the application is an abuse of the court process.

20. The application was disposed of by way of written submissions.

Applicant's submissions

21. The applicant relied on Articles 10, 75 (1), 94 (4), 201 (a) and (d), 226 (5) and 260 of *the Constitution*, and Section 16 (1) of the *Leadership and Integrity Act* and identified one issue for determination to wit;
- a. Whether there is conflict of interest in Prof. Ojienda representing the 14th defendant.
22. The applicant reiterated the contents of its supporting affidavit and relied on the case of Uganda Vs Patricia Ojangole' Criminal case No. 1 of 2014 (High court – Uganda) in which the court stated that Conflict arises where there is incompatibility of interests, loyalties or there exists a clumsy situation. Conflict of interest must not only be avoided but must be seen to be avoided. The applicant also cited the case of Democracy Watch Vs Campbell, App (2020) 2FCR139 Canadian Federal Court of Appeal. The case of Regina Bhutt Vs Haroon Butt & another (2015) KEHC 6902 (KLR) was also relied on, and submitted that Pro. Ojienda's appearing for the 14th defendant in this matter engenders divided loyalties or conflicting obligations and present tensions between his duty and obligations to champion public interest and the representation of a person sued for misappropriation of public funds.
23. The 12th defendant filed submissions in support of the application.

12th Defendant's Submissions

24. The 12th defendant relied on Article 77 of *the Constitution* which restricts the activities the State officers can engage in, and averred that the provision is crucial as it aims to prevent conflicts of interest particularly when an officer's employment or office could conflict with their public duties. Article 74 of *the Constitution* was also relied on, which talks to the significance of the oath of office and submitted that the oath carries profound implications, binding the officer to uphold *the Constitution*.
25. Reference was also made to the Third Schedule to *the Constitution* 2010 on the oath for members of Parliament to wit; "I will bear true faith and allegiance to the people and the Republic of Kenya; that I will obey, respect, uphold, protect and defend *the Constitution* of the Republic of Kenya". The 12th defendant contended that the oath is solemn with serious consequences, a critical one being that a Senator cannot represent a litigant in a court case where a potential conflict of interest exists, especially when public funds are involved. That, it would be a mockery of the Constitutional principles and values that Prof Ojienda has sworn to protect and uphold for him to represent a litigant in this matter.
26. The 12th defendant further relied on the broad Constitutional Principles in Article 10, (1)(2), 20(1), 27, 77 and Article 159 (2) (e) of *the Constitution* which are high Constitutional principles for general application that binds all State Organs. Reference was also made to Sections 3, 16 and 26 of The *leadership and Integrity Act*.
27. Further reference was made to the following cases;
- a. Rogers Mogaka Mogusu vs George Onyango Oloo & 2 others Petition No. 96 of 2014.
- b. Fredrick Otieno Outa vs Jared Odoyo Okello.

Respondent's Submissions

28. The respondent relied on the following authorities in support of its case;



- a. Belvin Wanjiru Namu Vs National Police Service Commission & another, (2019) eKLR, HC (Nairobi) Const and Human Rights DIV, Pet No 96 of 2018.
 - b. Patrick Njuguna & 7 others Vs Wilson Sossion & 3 others (2019) KEELRC 727 (KLR)
 - c. Samuel M. Nganga Vs The Minister for justice, National Cohesion & Constitutional Affairs & another (2013) eKLR.
 - d. John Okello Nagafwa vs The Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR quoted in Nairobi HCC Petition No. 354 of 2012 Samuel M. Nganga vs Minister for justice, National cohesion & constitutional Affairs and Another (2013) eKLR.
29. The respondent identified three issues for determination which can be collapsed into only one issue;
- a. Whether the applicant has demonstrated that the Counsel's conduct is inherently incompatible or fundamentally in conflict with his role as a Member of The Senate.
30. It was submitted that no iota of evidence has been submitted by the applicant to demonstrate that counsel's conduct is inherently incompatible or fundamentally in conflict with his role as a member of the Senate. Further, that no investigations are pending relating to the 14th defendant/respondent and that the 14th defendant was acquitted on appeal.
31. It was also submitted that no evidence has been provided to demonstrate that the continued appearance by Prof Ojienda in the proceedings is against the letter and the Spirit of *the Constitution*, and that the applicant has not stated what Provisions of Chapter six of *the Constitution* the conduct of Prof Ojienda is against.

Analysis and Determination

32. This court has considered the application and the supporting affidavit, the replying affidavit and the submissions by the parties, and in my considered view, the only issue for determination is;
- a. Whether there is a conflict of interest in Prof Ojienda representing the 14th Defendant in this matter.
33. The application herein seeks to bar Prof. Ojienda from appearing for the 14th defendant/respondent or any other of the parties in this matter on account of conflict of interest. It is the applicant contention that his continued appearance in the matter is against the letter and Spirit of Chapter 6 of *the Constitution*.
34. The application has been largely brought under the provisions of *the Constitution* and that of the *Leadership and Integrity Act*, 2012. The main ground in support of the application is that Prof Ojienda is a full time State officer and while he is not barred from private legal practice, his representation of a defendant in an economic crimes case involving public funds poses a conflict of interest, as it undermines his constitutional duty to protect public interest and uphold integrity, transparency and accountability.
35. From the onset, it is not in dispute that Prof. Ojienda is an advocate of the High Court of Kenya and the sitting Senator of Kisumu. The conduct of practice for advocates in Kenya is governed by the *Advocates Act*, Cap 16 laws of Kenya.
36. Article 260 of *the Constitution* defines a "State officer" as any person holding a State office. The same Article lists the State offices and among them is that of a Member of Parliament, which in Kenya consists of the National Assembly and the Senate. It therefore follows that Senators are State officers.



37. Article 77 of *the Constitution* is on restriction of the activities of State officers. It provides as follows;
77.

- (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 party
- (3) A 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).

38. Section 26 (1) of the *Leadership and Integrity Act* 2012 defines gainful employment as;

26. Gainful employment.

- (1) Subject to subsection (2), a State officer who is serving on a full time basis shall not participate in any 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.

38. The issue whether a Member of Parliament is a full time State officer and whether such a Member can hold another position is not novel. There are several decisions where the courts have decided this twin issues. In the case of Regina Butt vs Haroon Butt and another (2015) eKLR, Muriithi J, while considering the question stated as follows;

“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 judgement 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 a counsel in a court case to demonstrate that the exceptions exist and not on the party proposing to engage the MP to demonstrate that they do not exist”

38. Further, in the case of John Okello Nagafwa v The independent Electoral & Boundaries Commission & 2 others (2013) eKLR, Tuiyot J (as he then was) while quoting the case of Samuel M. Ng’ang’a vs The Minister for justice, National Cohesion & Constitutional Affairs and another (2013), held that even if a Member of Parliament is deemed to be a full-time State officer, he could still engage in gainful employment, if the gainful employment does not result in the impairment of the judgement of the State officer or in conflict of interest under Section 16.



39. It is trite law that he who alleges must prove. The onus was on the applicant to demonstrate that Prof. Ojienda's position as a Senator is;
- a. inherently incompatible with his responsibility as a Member of the Senate.
 - b. will impair his judgement in execution of the functions of his office as a Senator or;
 - c. will result in conflict of interest in terms of Section 26 of the Act.
42. The applicant has not provided any evidence to this court to prove that Prof Ojienda's position is inherently incompatible with his responsibility as a Member of the Senate or it will impair his judgement in execution of the functions of his office as a Senator or that it will result in conflict of interest.
43. Conflict of interest must be real and incompatible with the State officer's work. Black's law Dictionary, Tenth Edition, defines conflict of interest as "a real or seemingly incompatible between one's public or fiduciary duties". Otherwise put, conflict of interest is a situation where an individual has interests or loyalties competing against each other. It involves dual relationships where a person in a position in one relationship is in another competing relationship in another position such that the person has conflicting responsibilities.
44. In the case herein, it was incumbent upon the applicant to prove through empirical evidence that there is a conflict of interest in Prof. Ojienda appearing for the 14th defendant. No such evidence was laid before the court but just general statements that were not substantiated and only relating to his office as a Senator and nothing more!
45. Under Article 50(g) of the Constitution which is on the right to a fair hearing, an accused person and by extension a party in a civil suit, has a right to choose, and be represented by, an advocate, and to be informed of this right promptly. The right to a fair trial is among the Fundamental Rights and freedoms that may not be limited under Article 24 of the Constitution. The respondent has a Constitutional Right to be represented by an advocate of his own choice and no good reasons have been advanced by the applicant as to why Prof. Ojienda should not continue to represent him.
46. Taking the above into account, and considering the facts and the circumstances of the case and the application before me, I am satisfied that the application has no merits and the same is hereby dismissed.
47. Each party to bear its own costs of the application.
48. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 1ST DAY OF OCTOBER, 2025.

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L.M. NJUGUNA

JUDGE

In the presence of:-

Mr. Waudu for the 2nd Defendant

Miss Misiati holding brief for Prof. Ojienda appearing with Mr. Okubasu and Mr. Miiru for the 14th defendant

Miss Shamalla holding brief for Mr. Odera for the 9th defendant

Mr. Omariba for the 10th defendant



Miss Aska holding brief for Mr. Alosa for the 7th defendant

Miss Nira holding brief for Mr. Oguttu for the 3rd and 5th defendants

Mr. Ondieki appearing with Prof. Migai Aketch for the 12th Defendants

Court assistant - Adan

