



**REPUBLIC OF KENYA**

**THIRTEENTH PARLIAMENT – (THIRD SESSION)**

**THE SENATE**

**VOTES AND PROCEEDINGS**

**AFTERNOON SITTING**

**WEDNESDAY, OCTOBER 16, 2024 AT 2.30 PM**

1. The Senate assembled at thirty minutes past Two O'clock.
2. The proceedings were opened with a Prayer said by the Speaker.
3. **QUORUM OF THE SENATE**

The Speaker, having counted the Honourable Senators present at the commencement of the Sitting and confirming that there was a Quorum, invited the Clerk to call out the Orders of the day.

4. **COMMUNICATIONS FROM THE CHAIR**

The Speaker conveyed the following communications from the Chair-

**(i) Ruling on the Preliminary Objection on Conflict of Interest by a state officer in the matter of the proposed removal from office, by impeachment, of His Excellency Rigathi Gachagua, EGH, Deputy President of the Republic of Kenya**

1. Honourable Senators, this morning, at the commencement of the hearing for the removal from office, impeachment of His Excellency Rigathi Gachagua, the Deputy President of the Republic of Kenya, Legal Counsel for the Deputy President Mr. Ndegwa Njiru, Learned Counsel raised a Preliminary Objection on the legal representation for the National Assembly.
2. Learned Counsel opposed the appearance of Hon. James Orengo, Senior Counsel who is the serving Governor of Siaya County and therefore a State Officer.
3. Learned Counsel submitted that Honourable James Orengo, is a full-time serving state officer, as per Article 260 of the Constitution, as read together with Section 26, subsection (2), of the Leadership and Integrity Act, which bars a full-time state officer from engaging in any other gainful employment.

Counsel further submitted that it would be prejudicial to the Deputy President if the Senate allowed Honourable James Orengo, to represent the National Assembly in these proceedings. Counsel drew the attention of the Senate to the precedent set in the matter of the proposed impeachment of the Deputy Governor of Kisii County, Honourable Richard Monda, in which a decision was taken to bar the Honourable Sylvanus Osoro, Majority Whip of the National Assembly and Member of Parliament for South Mugirango in Kisii County, from appearing as Counsel for the Kisii County Assembly.

4. In his submissions, Counsel cited Article 77 of the Constitution and Section 26 of the Leadership and Integrity Act as well as the decision of the High Court in *Office of the Director of Public Prosecutions vs Orengo; Manduku & 2 Others (Interested Parties) (Constitutional Petition 204 of 2019) (2021) KEHC 456 (KLR) (27 April 2021) (Ruling)* where Honourable Justice Ogola found and ruled that the continued representation of the 1<sup>st</sup> Interested Party, Mr Manduku, by the Respondent, Honourable Senator James Orengo as he then was or any other State office is against the spirit of Chapter Six of the Constitution for failing to conform to the mandatory provisions of the Leadership and Integrity Act. The Judge ruled that in that case, there was an inescapable conclusion of conflict of interest in Senator Orengo representing the Petitioner highlighted by the fact that the Interested Party, Mr. Manduku, the Managing Director of the Kenya Ports Authority may at one time be summoned to appear before a Committee of the Senate to answer to some of the matters that the Petitioner was being investigated on.
5. In response, Mr. Eric Gumbo, Learned Counsel for the National Assembly submitted that Article 77 of the Constitution is the primary law that restricts activities of State Officers and it specifically prohibits a State officer from engaging in any other “gainful employment”. Counsel further relied on section 26 of the Leadership and Integrity Act which he submitted has defined gainful employment and in this matter no evidence had been led that Hon. James Orengo was participating in gainful employment.
6. Counsel referred the Senate to the decision of the High Court in Busia Election Petition 3 of 2013 where the court interpreted Article 77 of the Constitution and section 26 of the Leadership and Integrity Act, 2012.
7. Counsel also cited the decision of the Court in the Mwilu case which defined conflict as where one is confronted by two different interests where one is competing with the other.
8. Learned Counsel for the National Assembly submitted that no prejudice has been demonstrated that would arise or be occasioned to the Deputy President by the participation of Honourable James Orengo in these proceedings.

9. Learned Counsel for the National Assembly sought to distinguish the decision by Honourable Justice Ogola in *Office of the Director of Public Prosecutions vs Orengo; Manduku & 2 Others (Interested Parties) (Constitutional Petition 204 of 2019)* on the basis that the case turned on the fact that Honourable James Orengo was at the time a sitting Senator before whom the matters in respect of which his client was charged could potentially come for adjudication in the Senate and that no such possibility exists in the current matter with Honourable James Orengo as Governor of Siaya County.
10. In his rejoinder, Mr. Njiru, Learned Counsel submitted that Honorable Orengo is the serving Governor of Siaya County and therefore, a full-time State officer and by that fact is in violation of Article 77 of the Constitution.
11. Further, Mr. Njiru submitted that prejudice is not one of the applicable tests under Article 77 and section 26 of the Leadership and Integrity Act but that the only applicable test is whether or not Honourable Orengo is engaged in gainful employment. He argued that the National Assembly had not proved that Senator Orengo was providing pro bono services in this matter.
12. Honourable Senators, Article 77(1) of the Constitution provides that “a full-time State Officer shall not participate in any other gainful employment”.
13. Further, Section 26 of the Leadership and Integrity Act provides that “a full-time State Officer shall not participate in any other gainful employment” while Section 26 (2) defines “gainful employment” as- “*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 conflict of interest in terms of section 16.*”
14. Having considered the matter, it is important to state that a State Officer must inspire confidence. However, it is trite law that he who asserts must prove. In this regard I wish to observe that the Learned Counsel for the Deputy President did not adduce evidence to prove and demonstrate the allegation of gainful employment. In fact it is somewhat surprising that Counsel attempted to shift the onus of proving gainful employment to the National Assembly. That argument is untenable.
15. As to the Ruling of the Senate that barred Hon. Osoro from appearing for the County Assembly of Kisii in the impeachment proceedings of the Deputy Governor of the Kisii County Government, it is clear that what was objectionable was that Honourable Osoro was not only a Member of Parliament for a constituency in the same county whose Deputy Governor’s impeachment was in issue but was also a high ranking member of the leadership of the National Assembly and by extension, of the same Parliament before which the impeachment was being undertaken. It was ruled that in these circumstances, it was clear that in the minds of the

public, the fine distinctions of the bicameral Parliament would be lost and their confidence in the impeachment process would be entirely undermined.

16. In the same breath, as rightfully contended by Counsel for the Deputy President, it is true that in both Article 77 of the Constitution and section 26 of the Leadership and Integrity Act, no test of prejudice is expressly provided for. It therefore follows that both the contention of the Counsel for the Deputy President that his side would be prejudiced by the appearance of Senior Counsel James Orengo and the rebuttal by the National Assembly that no prejudice will be occasioned are moot.

17. Honourable Senators, ladies and gentlemen, having analysed the Preliminary Objection raised and for the reasons I have given, the Preliminary Objection raised on the appearance for the National Assembly by Senior Counsel James Orengo is hereby dismissed.

**(ii) Ruling on the Second Preliminary Objection in the matter of the proposed removal from office, by impeachment, of His Excellency Rigathi Gachagua, EGH, Deputy President of the Republic of Kenya**

“Honourable Senators, Ladies and Gentlemen,

1. The Second Preliminary Objection raised by the Counsel for the Deputy President was that the following documents which were submitted by the National Assembly on Monday, 14<sup>th</sup> October, 2024 were not part of the bundle of documents of the National Assembly that were served on the Deputy President on Wednesday, 9<sup>th</sup> October, 2024—

- (a) an affidavit sworn by Peterson Njomo Muchira; and
- (b) the document of the National Assembly marked as Volume 8(a): responses from various government agencies.

2. Counsel for the Deputy President stated that these documents prejudiced the Deputy President’s case and amounted to trial by ambush by the National Assembly. Counsel urged the Senate to bar the introduction of these two documents as they constituted new evidence in terms of Rule 20 of Part 1 of the Second Schedule to the Senate Standing Orders.

3. Counsel for the National Assembly opposed the preliminary objection raised by Counsel for the Deputy President.

Honourable Senators, ladies and gentlemen,

4. Rule 20 of Part 1 of the Second Schedule to the Senate Standing Orders provides that “*in presenting its evidence, the Assembly shall not introduce any new evidence that was not a part of the allegations against the President by the National Assembly as forwarded by the Speaker of the National Assembly to the Speaker of the Senate*”.

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5. As I indicated in my earlier communication, by a letter dated 8<sup>th</sup> October, 2024, I received a bundle of documents and records of the proceedings in the National Assembly in this matter. Thereafter, on 9<sup>th</sup> October, 2024, pursuant to rules 6 and 7 of Part 1 of the Second Schedule to the Senate Standing Orders, the Office of the Clerk of the Senate sent invitations to appear to both parties. The parties were required, amongst other things, to specify any other evidence to be relied on in the matter.
6. In response to this invitation, on Monday, 14<sup>th</sup> October, 2024, the National Assembly filed further documentation. Having analysed the documentation submitted against the grounds for the proposed impeachment I find that the documents objected to constitute evidence in support of the allegations made in the impeachment Motion as received from the National Assembly.
7. It is noteworthy that the parties were instructed when sending responses, to indicate any other evidence to be relied on. Accordingly, the documents being referred to do not constitute new evidence but form evidence in support of an allegation which was already made. That is why rules 6 and 7 of the rules of procedure permit the Senate to receive witness statements, list of witnesses to be invited and any other evidence to buttress an allegation already made. What is not allowed is to introduce new allegations or to introduce any evidence that is extraneous to the allegations made in the impeachment Motion.
8. In the event, it is my considered view that the affidavit and the document marked Volume 8(a) being referred to fall within the permissible documents under our rules of procedure.
9. I therefore rule that the objection is hereby dismissed.

5. **HEARING AND DETERMINATION ON THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HIS EXCELLENCY RIGATHI GACHAGUA, EGH, DEPUTY PRESIDENT OF THE REPUBLIC OF KENYA.**

Pursuant to Rules 17 and 18 of the Rules of Procedure for Hearing and Determination of the Proposed Removal from Office by Impeachment of a Deputy President, in Plenary, the Speaker invited the parties to make their opening statements for not more than thirty minutes each.

a) Opening statements by the National Assembly

Counsel for the National Assembly, Senior Counsel James Orengo, made the opening statement on behalf of the National Assembly on record.

b) Opening statements by the Deputy President

Counsel for the Deputy President, Mr. Elisha Ongoya made the opening statement on behalf of the Deputy President on record.

**6. Presentation of the case of the National Assembly.**

Counsel for the National Assembly presented the case against the Deputy President, by leading the following witnesses in testifying before the Senate –

**a) Hon. Eckomas Mwengi Mutuse**

The witness informed the Senate that –

- i.) he was a serving Member of the National Assembly representing Kibwezi West Constituency and an Advocate of the High Court of Kenya;
- ii.) the Deputy President had repeatedly suggested that the government of Kenya operates as a company. These statements undermine the sovereign unity of the Kenyan people, promote discrimination and exclusion, incite ethnic hatred and promote ethnic balkanisation of the Republic of Kenya. Further, the utterances were incompatible with the high calling and dignified status of the office of the Deputy President of the Republic of Kenya;
- iii.) the Deputy President had repeatedly made public statements that contradicted the President on critical matters. For instance, the Deputy President publicly opposed the Nairobi River Riparian Evacuation Orders as resolved by the Cabinet. As the principal assistant to the President, this behaviour amounted to insubordination;
- iv.) the Deputy President unlawfully interfered with the leadership of the Nairobi City County and its decisions by holding a public rally that incited citizens against the lawful directives of the Nairobi City County Government regarding the planning and relocation of markets;
- v.) the Deputy President interfered with the proper execution of county governments' constitutional functions concerning alcohol control and regulation. This undermined the principles of devolved government as enshrined in the Constitution;
- vi.) the Deputy President had amassed a property portfolio estimated at Kshs. 5.2 billion, primarily derived from proceeds of corruption and money laundering through proxy companies involving his close family members and associates. The Deputy President's acquisitions included Treetops Lodge in Nyeri County, Olive Gardens Hotel, Queens Gate Serviced Apartments in Nairobi County, and Vipingo Beach Resort in Kilifi County, as well as a parcel of land known as Ruguru/Kiamariga/1223 in Mathira East Constituency and 40 acres of land in Kakuret, Nyeri County;
- vii.) the Deputy President used his office to exert influence and collude with unscrupulous officials in the Ministry of Lands to issue an allotment

letter to Wamunoro Investments Limited, a company he owns, for the acquisition of LR. 209/12077 and LR 90923 in Embakasi, Nairobi;

- viii.) the Deputy President attacked Honourable Lady Justice Esther Maina in public, a judge of the High Court of Kenya, following her ruling in which the Deputy President was a party. In the judgment, she found that the Deputy President should forfeit Kshs. 200 million, which she determined to be proceeds of corruption and money laundering;
- ix.) His Excellency Rigathi Gachagua had used the office of the Deputy President to corruptly influence unnecessary and expensive renovation of his official residences in Karen and Mombasa; and
- x.) the Deputy President had continuously misled members of the public through false, malicious, divisive and inciteful remarks. For instance, he made statements against the National Intelligence Service, its Director General and officers, during moments of national crisis. This behaviour was reckless and disregarded the high responsibilities of the office of the Deputy President, as well as his membership on the National Security Council.

The witness was cross-examined by Counsel for the Deputy President.

Thereupon, Senators sought clarifications on the testimony, following which the witness was discharged.

**b) Mr. Andrew Mulwa – Immediate former Chief Executive Officer of the Kenya Medical Supplies Authority (KEMSA)**

The witness took oath and informed the Senate that-

- i) he is a medical doctor by profession and works in the Ministry of Health and that he is the immediate former Chief Executive Officer of the Kenya Medical Supplies Authority (KEMSA);
- ii) The Deputy President was involved in the KEMSA Kshs. 3.7 billion irregular procurement of malaria nets both directly and through proxies. His proxies were his son, Dr. Ikinu Rigathi and Shobikaa Impex Private Ltd;
- iii) on or around 11<sup>th</sup> July, 2023, the Deputy President used his office to pressure KEMSA to surrender to his proxy the original bid bond submitted by Shobikaa Impex Ltd for the procurement of malaria nets;
- iv) that Dr. Ikinu Rigathi, called him and sent him WhatsApp messages claiming to be acting for and on the instruction of the Deputy President and asked for Shobikaa Impex Private Ltd's original Bid Bond for the tender;

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- v) that based on the circumstances prevailing at the time, the telephone calls from the Deputy President and Dr. Ikinu Rigathi, were aimed at interfering with the investigations and covering a procurement irregularity in which Shobikaa Impex Private Ltd, which was a proxy for the Deputy President in the tender had belatedly sneaked the bid bond into its tender; and
- vi) given the status, power, threats and influence of the Deputy President in the matter, he was unduly influenced to surrender the original bind bond.

And the time being Twelve minutes past Eleven O'clock, the Speaker adjourned the Senate without Question put, pursuant to the Standing Orders, and in line with the Hearing Programme.

**SENATE ROSE** – at twelve minutes past Eleven O'clock.

**MEMORANDUM**

*The Speaker will take the Chair on  
Thursday, October 17, 2024 at 9:00 a.m.*