



**ANALYSIS OF CONFLICT OF INTEREST IN THE CASE OF ADVOCATE-  
LEGISLATORS IN KENYA**

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By

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### Declaration

I, SALLY NDUTA CHUI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



Signed: .....

Date: .....23/7/21.....

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed: .....

DR. ANTOINETTE KANKINDI

## **ABSTRACT**

*There are various laws in Kenya that bar public officers from engaging in activities that promote conflict of interest, mainly the Constitution, the Leadership and Integrity Act and the Public Officer Ethics Act. Despite the sufficient provisions provided by the legal instruments to curb advocate-legislators from pursuing their interests above the public's interest, such cases are still persisting. This study intends to assess the challenge of conflict of interest in the case of advocate-legislators in Kenya. It will also seek to analyse the legal framework governing legal representation and conflict of interest by advocate-legislators and examine whether the advocate-legislators are barred from engaging in other gainful employment. It will further seek to determine the basis for the state officers or legislators to legally represent other state officers while still holding elected office and identify recommendations that effectively prevent and curb conflict of interest by advocate-legislators. For the purpose of this research the agency theory will be used to make a comprehensive assessment of the problem. The study will employ qualitative analysis relying on statutes and case law, as well as secondary sources.*

**Key words:** Conflict of interest, Advocate-legislators, Public interest, Self-interests.

## **List of Abbreviations**

DPP- Director of Public Prosecutions

OECD- Organisation for Economic Cooperation and Development

AfriCOG- African Center of Governance

### **List of Cases**

*Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party)* [2018] eKLR.

*Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 216 others* [2017] eKLR.

*Republic v Mike Mbuvi Sonko Gideon & 16 Others* [2019] eKLR.

*Regine Bhutt v Haroon Bhutt & another* [2015] eKLR.

*Republic v Sospeter Odeke Ojamong* [2019] eKLR.

*Evans Odhiambo Kidero v Ethics and Anti-Corruption Commission & 3 Others* [2020] eKLR.

*Patrick Njuguna & 7 others v Wilson Sossion & 3 Others* [2019] eKLR.

*Ronald Kiprotich Tonui v Robert Nyabuto Obwoncha & Another* [2017] eKLR.



### **List of Legal Instruments**

Public Officer Ethics Act (No. 183 of 2009)

The Constitution of Kenya (2010)

Leadership and Integrity Act (No.19 of 2012)

## CHAPTER ONE: INTRODUCTION

### 1.1 Background of the study

The President of Kenya, during Jamhuri Day on the 12th of December 2019, addressed the issue of legislators appearing in court as counsels, representing other state officers, in cases that violated the integrity of their office.<sup>1</sup>The cause behind the President's mention of this subject, was the case in which Senators and Members of Parliament converged in legal teams, defending in court, other high ranking public officers in a legal suit against them.<sup>2</sup>According to news reports, Governor Sonko of Nairobi was charged with graft and abuse of office and had hired two senators who are advocates to represent him in court.<sup>3</sup> Other legislators such as Senator James Orengo have also engaged in the representation of accused state officers in court, like in the case of *Philomena Mbeti Mwilu v Director of Public Prosecutions* who was also charged with graft.<sup>4</sup>

According to the Kenyan Constitution, among the duties of legislators in both the Senate<sup>5</sup> and the National Assembly<sup>6</sup>, are the tasks of vetting other state officers in their recruitment and review of their conduct while in office to assess their performance and initiate their withdrawal process from such offices in case of mismanagement and abuse of office. Hence conflict of interest arises when these legislators, who have the oversight mandate of state officers, concurrently represent them in court while still legislators. Despite the fact that courts and the National Assembly are different arms of government, it is likely that the objectivity of the legislators will be compromised when they represent public officers in court and at the same time be called for the vetting process or performance review when checking whether they had abused office.<sup>7</sup>This is a problem because when lawyer legislators represent public officers as clients, the interest of their business conflict with interest of the public, especially in matters of mismanagement of public funds and abuse of office.

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<sup>1</sup>Author Archives: Government of Kenya- The Presidency <https://www.president.go.ke/>

<sup>2</sup>Author Archives: Government of Kenya- The Presidency <https://www.president.go.ke/>

<sup>3</sup>Kakah M, 'Senators representing Sonko in conflict of interest: Prosecution', 11 December, 2019. <https://nation.africa/kenya/news/senators-representing-sonko-in-conflict-of-interest-prosecution-231552/> on 13 June 2020.

<sup>4</sup>*Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party) [2018] eKLR*

<sup>5</sup> Article 96(4), *The Constitution of Kenya* (2010)

<sup>6</sup> Article 95(5), *The Constitution of Kenya* (2010)

<sup>7</sup> Cottrell G, 'Senators have shown little regard for their profession's ethics, constituents and constitution', 22 December 2019 <https://www.the-star.co.ke/siasa/2019-12-22-senators-have-shown-little-regard-for-their-professions-ethics-constituents-and-constitution/> on 13 June 2020.

Laws have been enacted to solve the aforementioned cases of conflict of interest to ensure that the legislators abide by their Constitutional mandate of promoting public interests including the use of public funds. The specific provisions governing conflict of interest in *The Constitution of Kenya (2010)*<sup>8</sup>, the *Leadership and Integrity Act (2012)*<sup>9</sup> and *Public Officer Ethics Act (2009)*<sup>10</sup> were formulated to prevent state officers, including legislators from engaging in cases that would conflict with delivery of service to the public. However, weak enforcement mechanisms of the legal instruments have contributed to the persistence of such cases. For instance, it appears that disciplinary procedures, as prescribed by the Constitution<sup>11</sup> have not been applied to hold the advocate-legislators accountable. Moreover, courts have abstained from questioning the professional misconduct of advocates,<sup>12</sup> when such matters have been presented before them. Their defence to refrain, is their avoidance to interfere with a different arm of Government to maintain the sanctity of separation of powers.<sup>13</sup>

Evidently, the inefficiency of mechanisms, the lack of a sense of immediacy for deterring the engagement of advocate-legislators in conflict of interest, and the refrain of courts to address the issues, have prompted the increment of such cases.<sup>14</sup> This is a problem that requires an investigation.

## **1.2 Statement of the problem**

According to *The Constitution of Kenya (2010)* a state officer, while in office, or in association with others, should avoid engaging in matters that put in conflict his personal interests and interests of the public.<sup>15</sup> The *Leadership and Integrity Act*<sup>16</sup> as well as the *Public Officer Ethics Act*<sup>17</sup> impose the same requirements as the Constitution.

Despite these existing provisions in the law, there is evidence that lawyer –legislators, as state officers, are engaging in cases of conflict of interest by representing other state officers who

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<sup>8</sup> Article 75, *The Constitution of Kenya*, (2010).

<sup>9</sup> Section 16, *The Leadership and Integrity Act*, (Act No. 19 of 2012).

<sup>10</sup> Section 12, *The Public Officer Ethics Act*, (Act No. 183 of 2009).

<sup>11</sup> Article 75 (2), *The Constitution of Kenya*, (2010).

<sup>12</sup> Lumumba P, 'The legal profession and crisis of ethics', in Ghai P, Cottrell J (ed) *The legal profession and the new constitutional order in Kenya* Strathmore University press, 2014,86, 5.

<sup>13</sup> *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 216 others* (2017) eKLR

<sup>14</sup> Lumumba P, 'The legal profession and crisis of ethics', 5.

<sup>15</sup> Article 75, *The Constitution of Kenya* (2010).

<sup>16</sup> Section 16, *The Leadership and Integrity Act*, (Act No. 19 of 2012).

<sup>17</sup> Section 1, *The Public Office Ethics Act*, (Act No. 183 of 2009).

have violated public integrity. Little has been done to address this challenge particularly in the case of advocate-legislators in Kenya. The fact that such cases have been persistent despite an adequate legal framework that attempts to curb present and future occurrences of conflict of interest involving advocate-legislators, indicate the need to investigate the problem. Therefore, this study will seek to analyse the conflict of interest in the case of advocate-legislators in Kenya.

### **1.3 The justification of the problem**

The study of this problem is justified by the need to restore public integrity by advocate-legislators in their public service delivery. The study will also aid in shedding more light for the promotion of ethics and integrity and restoration of public trust particularly in the office of advocate-legislators in the constituencies representing the people of Kenya.

### **1.4 The significance of the study**

The study has both academic and policy relevance. From the academic aspect, it seeks to contribute to the comprehension and interpretation of constitutional law, especially in cases of conflict of interest involving state officers within the Kenyan legal system.

Policy-wise, it could contribute to the development of laws, policies and jurisprudence concerning conflict of interest cases involving advocate-legislators, by the Kenyan Legislators and Kenyan Courts, in solving such cases. This will promote attainment of justice by improving public service delivery to the Kenyan people by the advocate-legislators.

### **1.5 The aim and objectives**

The aim of the study is to assess conflict of interest in the case of advocate-legislators in Kenya to reveal the need for prevention of such cases, for the promotion of ethical discharge of public duties by advocate-legislators for the protection and promotion of public interests.

The objectives of this study are to:

1. Investigate the concept of conflict of interest in relation to the legal framework governing legal representation and conflict of interest.
2. Examine the jurisprudence of Kenyan courts regarding conflict of interest in the case of advocates as Members of Parliament.
3. Propose recommendations that can pave the way of effectively solving the challenge of advocate-legislators engaging in conflict of interest.

## 1.6 Hypothesis

This research assumes that it is the inefficiency of prevention measures to curb cases of conflict of interests that gives rise to the enhancement of such cases, and the corruption of public office, specifically in relation to advocate-legislators.

## 1.7 Research questions

1. What is the understanding of the concept of conflict of interest, and existing preventive measures to curb conflict of interest in the case of advocate-legislators?
2. Which type of court precedent exist in relation to conflict of interest involving legislators?

## 1.8 Literature Review

Conflict of interest has been defined as ‘a situation in which interest of a person tends to interfere with the proper exercise of his judgement on another’s behalf.’<sup>18</sup> The interest in this definition is that it shows the impairment of judgment of someone when their personal interests interfere with the interests they are meant to protect and uphold in the society. According to Erhard Friedberg, the concept of conflict of interest has three key elements: the existence of different spheres of action, the idea of bridging and coordinating of positions that are at the intersection of these spheres of action; and the use of resources drawn from one sphere to gain influence in the other.<sup>19</sup> The significance of these elements illustrates how conflict of interest arises. Michael Davis and William Snead note that there are three kinds of conflict of interest as distinguished by the American Bar Association (ABA) code of Professional Responsibility.<sup>20</sup> They include actual conflicts of interests, latent conflicts of interests and potential conflicts of interests. These authors explain that actual conflicts of interests occur when the activities done by persons will certainly cause conflict of interest. They also explain that latent conflicts of interests occur where there is a reasonable probability that the activities done by someone, will cause conflict of interests, and lastly,

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<sup>18</sup>Davis M, ‘Conflict of interest’, in Chadwick R (ed), *Encyclopaedia of Applied Ethics*, 1 San Diego & London Academic Press, 1998, 589.

<sup>19</sup>Friedberg E, ‘Conflict of interest from the perspective of the sociology of organised action’, in Peters A, Handschin L(eds) *Conflict of interest in global, public, and corporate governance*’ Cambridge University Press, 2012, 41, 2.

<sup>20</sup>Davis M, Snead W, ‘Conflict of interest,’ 1(4) *Business and Professional Ethics Journal, Philosophy Documentation Centre*,1982, 19, 2.

potential conflicts of interests, where the conflict of interest may or may not arise, due to the activities done by someone.<sup>21</sup>

From the above distinction, it is clear that there would be conflict of interest in the case of advocate-legislators when as Members of Parliament, they can represent, as advocates, other state officers in graft cases. This is more so, when their clients are public office holders, they are meant to vet in the Legislature as per their mandate in the Constitution.<sup>22</sup>

Friedberg further states that the main problem, in solving conflict of interest cases, is controlling the behaviour of those who benefit from their position. He also mentions that it is important for lawmakers to define conflict of interest, in the perspective of which that conflict brings about inappropriate judgment.<sup>23</sup> This view is similarly held by Ndaka Angella Katee.<sup>24</sup>

George Carpinello suggests that advocate-legislators face distinctive problems compared to other legislators.<sup>25</sup> This is because, when the lawyer is elected to the legislature, his own interests, public interests, and the interests of his clients will certainly conflict, as similarly noted by Chapman C.<sup>26</sup> The problem is compounded, Carpinello adds, when the lawyer-legislator's clients recognise and seek to take advantage of the legislator's role in Government, for influential decisions to be made for their advantage<sup>27</sup>. This situation can be seen in Kenya, whereby state officers, who are to be vetted by legislators, choose the same legislators to represent them, in the cases of graft they are involved in. Thus, the legislator, while representing both the client's interests and the public good, will face undue influence, in supporting one party as opposed to the other.<sup>28</sup> Carpinello affirms that it is quite unrealistic for a lawyer-legislator, to receive an award from his client, and vote against the client's interests while being vetted in the Legislature.<sup>29</sup>

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<sup>21</sup>Davis M, Snead W, 'Conflict of interest,' 2.

<sup>22</sup>Article 95(5), *The Constitution of Kenya*, (2010).

<sup>23</sup>Friedberg E, 'Conflict of interest from the perspective of the sociology of organised action', 3.

<sup>24</sup>Ndaka A, 'Rethinking the conflict of interest policy in Kenya' *International Journal of Law, Humanities and Social Science*, June 2017, 59, 5.

<sup>25</sup>Carpinello G, 'Should practising advocates be legislators?', 41(1) *Hastings Law Journal*, 1989,94, 1.

<sup>26</sup>Chapman B, 'Conflict of interest and corruption in the states', *Southern Illinois University Carbondale*, 25 March 2014.

<sup>27</sup>Carpinello G, 'Should practising advocates be legislators?', 2.

<sup>28</sup>Carpinello G, 'Should practising advocates be legislators?', 2.

<sup>29</sup>Carpinello G, 'Should practising advocates be legislators?', 2.

Chapman C's opinion is that, it is quite difficult to remove the possibility of conflict of interest entirely in a representative democratic society.<sup>30</sup> He states that, generally, the legislator's interests and those of the public are indistinguishable, while other times they conflict.<sup>31</sup> He adds that, in some cases, the legislator may benefit significantly, compared to the public,<sup>32</sup> and more so, when the legislator happened to be a lawyer representing another state officer in court in a graft case.

Similarly, Ndaka Angella Katee is of the view that it is quite usual for interests of public officials and the public's to conflict due to living in a world of multiple interests and complexities.<sup>33</sup> It would appear that according to Chapman and Ndaka, the conflict of interest in the case of advocate-legislators is unavoidable.

However, despite the fact that circumstances leading to conflict of interests might look unavoidable, they should not be given a free way, as they cause violation of the integrity of the public office, when the public's interests are not upheld. The Organisation for Economic Cooperation and Development (OECD)'s report<sup>34</sup> states that existence of conflict of interest by itself is not corruption until it leads to corruption, for instance in the case of advocate-legislators where their private interests might collude with their constituency's interests or the national interests.

Conflict of interest is well defined by the principal -agency theory. Anne Peters uses this theory to explain the concept of conflict of interest involving state officers.<sup>35</sup> The theory avers that the agent has the legal power to take valid decisions on behalf of the principal.<sup>36</sup> In this case, the lawyer-legislator is the agent, who, as a representative of the people, makes decisions on their behalf. The agent also bears a fiduciary duty, which emanates from the law<sup>37</sup> to protect the interests of the principal. Therefore, when the agent pursues his self-

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<sup>30</sup>Chapman B, 'Conflict of interest and corruption in the states', *Southern Illinois University Carbondale*, 25 March 2014, 1, 2.

<sup>31</sup>Chapman B, 'Conflict of interest and corruption in the states', 1.

<sup>32</sup>Chapman B, 'Conflict of interest and corruption in the states', 1.

<sup>33</sup>Ndaka A, 'Rethinking the conflict of interest policy in Kenya', 4.

<sup>34</sup>Whitton H, *Managing conflict of interest in the public sector*, Organisation for Economic Cooperation and Development publishing, 2005, 96, 16.

<sup>35</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', in Peters A, Handschin L (eds), *Conflict of interest in global, public, and corporate governance*, Cambridge University Press, 2012, 6, 2.

<sup>36</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 3.

<sup>37</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 3.

interests, he is perceived to have gone beyond his mandate and abuses his power.<sup>38</sup>This vividly explains how advocate-legislators, go beyond their mandate of protecting public interests, to protect their personal interests by representing other state officers in graft cases. According to the theory, they are abusing their power.

The main legal framework governing conflict of interests is the Constitution of Kenya, 2010<sup>39</sup>, the Leadership and Integrity Act<sup>40</sup> and the Public Officer Ethics Act.<sup>41</sup> Despite the existence of legislation in defining conflict of interests, they seem that there are no effective preventive measures to discourage legislators from putting their private interests before the public's interests.<sup>42</sup>In attempt to remedy this weakness, a Conflict of Interest Bill was proposed to improve regulation of this matter in Kenya.<sup>43</sup>Unfortunately, this Bill is still in the public participation phase<sup>44</sup>, hence has not made much progress in its process of becoming a law.

A similar case is seen universally. Anne Peters comments that globally, the interest on expanding the legal framework on conflict of interest has been increasing significantly, due to the realisation of the need to have a well formulated regulatory and legal framework for the prevention of such cases, to promote good governance.<sup>45</sup> A comparative study was done, with regards to European Union member states, and the main findings were, that most states had under-regulation of conflict of interest, separate rules on conflict of interest for different institutions, and lacked specific conflict of interest rules applying to the entire government sector.<sup>46</sup>Also, countries such as France, were reported to lack a preventive aspect of ceasing conflict of interest cases.<sup>47</sup>

In discussing the nature and significance of the court's jurisprudence on matters of conflict of interest, scholars opine that the judiciary, as the traditional arbiter of legislative actions and as the constitutional articulator of the public conscience, would be the most appropriate branch

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<sup>38</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 3.

<sup>39</sup>Article 75, *The Constitution of Kenya*, (2010).

<sup>40</sup>Section 16, *The Leadership and Integrity Act*, (Act No. 19 of 2012).

<sup>41</sup>Section 12, *The Public Office Ethics Act*, (Act No. 183 of 2009).

<sup>42</sup>Ndaka A, 'Rethinking the conflict of interest policy in Kenya', 1.

<sup>43</sup>Office of the Attorney General and Department of Justice, Conflict of Interest Bill, 2019

<sup>44</sup>Office of the Attorney General and Department of Justice, Conflict of Interest Bill, 2019

<sup>45</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 7.

<sup>46</sup>Demmke C, Bovens M, Henokl T, Moilanen T, *Regulating conflicts of interest for holders of public office in the European union*, European Institute of Public Administration, 2008,4.

<sup>47</sup> Peters A, 'Conflict of interest as a cross-cutting problem of governance', 9.



of the government to provide an independent check on legislator's ethics.<sup>48</sup> Yet, the courts have in fact taken little responsibility.<sup>49</sup> Judicial hesitancy and abstention are commonly perceived when courts are evading to inquire into the motives of legislators or assume them to be wrongful<sup>50</sup>. A similar situation is experienced in the Kenyan legal discourse. Lumumba notes that courts have avoided deciding cases on professional misconduct of advocate-legislators, hence furthering the malpractice of 'advocate-legislators' engaging in conflict of interest in cases of corruption of the public office.<sup>51</sup>

Elected legislators involved in other professions holding governmental offices also attract conflict of interest, which then contributes to ethical misconduct, as stated by William Schuler.<sup>52</sup> He discusses that dual office may take the form of an elected official holding another elective office, or appointed offices in the government. He refers to this circumstance as 'soft corruption' by public officials in two respects: it creates conflicts of interest, and it generates many problems associated with patronage, such as favouritism practised by the public official when appointing his close ally to hold office. Chapman C similarly states that holding of dual offices, besides presenting potential conflict of interest, will also consolidate political power, which may in turn increase the likelihood of corruption.<sup>53</sup> The dual office situation is perceived in Kenya, whereby elected legislators, other than advocate-legislators, hold other governmental offices, which attracts conflict of interest between the two offices he holds.<sup>54</sup>

Due to the appalling effects of lawyer-legislator's implication in conflict of interest, the need to urgently resolve the contentious issues arises. This was comprehensively discussed by PLO Lumumba, in his chapter, 'The Legal Profession and Crisis of Ethics'.<sup>55</sup> He states that dissatisfaction and disappointment is experienced by the public, due to legal practitioners in state offices not upholding public interests, hence the need for penalizing them arises.<sup>56</sup> He

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<sup>48</sup> Harvard Law Review, 'Conflicts of interest of state legislators', 76(6) Harvard Law Review Association, April 1963,1214.

<sup>49</sup>Harvard Law Review, 'Conflicts of interest of state legislators', 1214.

<sup>50</sup>.Harvard Law Review, 'Conflicts of interest of state legislators', 1214.

<sup>51</sup> Lumumba P, 'The legal profession and crisis of ethics', 5.

<sup>52</sup>Schluter E, 'Conflict of interest', in Schutler E(ed), '*Soft corruption: How unethical conduct undermines good government and what to do about it*', Rutgers University Press, 2017, 109.

<sup>53</sup>Chapman B, 'Conflict of interest and corruption in the states', 2.

<sup>54</sup>*Patrick Njuguna & 7 others v Wilson Sossion & 3 others* (2019) eKLR

<sup>55</sup> Lumumba P, 'The legal profession and crisis of ethics', 77.

<sup>56</sup> Lumumba P, 'The legal profession and crisis of ethics', 77.

shows the under-regulation of conflict of interest in Kenya, by stating that the disciplinary tribunals for vetting and dismissing state officers in the legal profession are unresponsive to the public's complaints.<sup>57</sup> This furthers the malpractice of legal practitioners holding state offices, hence undermining public confidence in government.<sup>58</sup>

Eliot T. Tracz analyses a similar situation in the United States of America (USA).<sup>59</sup> He looks at the Model Rule of Professional Conduct and questions its scope and authority when applied to statements made by elected legislators who are advocates.<sup>60</sup> The author concurs with Lumumba's view of how advocates have been held in high trust by members of the public, making it imperative for establishing a code of ethics for advocates.<sup>61</sup>

Patrick argues that public officials, including legislators, are mandated to preserve the competence and legitimacy of government institutions.<sup>62</sup> He further suggested that conflict of interest rules are vital in leadership integrity to ensure independent quality judgement, free of bias, cronyism and corruption.<sup>63</sup> Bruno Speck, on a similar note, opines that neither positive codes of ethics nor prohibitions will be able to prevent legislators from engaging in activities that bring about conflict of interest.<sup>64</sup> Quentin Reed similarly states that overregulation and prohibitions on conflict of interest will be difficult to enforce, and also discourage political participation of leaders.<sup>65</sup> Hence, as Bruno comments, conflict of interest rules should be formed in a way that enables legislators to clarify their roles in society.<sup>66</sup> In relation to this study, the conflict of interest rules in Kenya, should ideally allow for legislators to define their role in Government and the society at large, in order to prevent them from embarking on other roles that may cause conflict of interest.

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<sup>57</sup> Lumumba P, 'The legal profession and crisis of ethics', 79.

<sup>58</sup> Harvard Law Review, 'Conflict of interest of state legislators', 1214.

<sup>59</sup> Tracz, E, 'Lies, liars and advocates as legislators: an argument towards holding attorneys accountable for violating the model rule of professional conduct 8.4(c) whilst acting in a legislative role', 43 *Southern Illinois University Law Journal*, 2018.

<sup>60</sup> Tracz, E, 'Lies, liars and advocates as legislators: an argument towards holding attorneys accountable for violating the model rule of professional conduct 8.4(c) whilst acting in a legislative role', 457, 3.

<sup>61</sup> Tracz, E, 'Lies, liars and advocates as legislators: an argument towards holding attorneys accountable for violating the model rule of professional conduct 8.4(c) whilst acting in a legislative role', 454, 2.

<sup>62</sup> Patrick J, 'The strategic advantage of conflict of interest laws', *Public Integrity*, 12 June 2017, 426, 14.

<sup>63</sup> Patrick J, 'The strategic advantage of conflict of interest laws', 426, 14.

<sup>64</sup> Wilhem B, 'Conflict of interest: Concepts, rules, practices regarding legislators in Latin America' *Universidade Estadual de Campinas*, 2006, 9, 3.

<sup>65</sup> Reed Q, 'Sitting on the fence: Conflicts of interest and how to regulate them', 4(6) *CHR Michelsen Institute*, 2008, 10.

<sup>66</sup> Wilhem B, 'Conflict of interest: Concepts, rules, practices regarding legislators in Latin America', 9, 3.

Erica Lee Nelson notes that internationally, there are four distinct ways of solving conflict of interest cases.<sup>67</sup> They include: asset and interest disclosure, incompatibility provisions, regulation of gifts and declarations of interests and recusal.

The author explains that asset and interest disclosure occur where legislators are required to declare their interests outside their mandate. She also explains that incompatibility provisions, which prohibit legislators from performing certain functions, engaging in certain activities, or holding certain positions that may attract conflict of interest. The author expounds on regulation of gifts whereby, legislators are to be restricted from receiving gifts or valuable services as an appreciation for their favour, and lastly declarations of interests and recusal, which require legislators to exclude themselves from participating in decision-making processes which may impair his judgment in making unbiased decisions, due to conflict of interest.<sup>68</sup> The definition of the different ways of solving conflict of interest, will be relevant to the study, in contributing to the recommendations and evaluating whether the proposed solutions will succeed in preventing conflict of interest in cases of advocate-legislators in Kenya.

## **1.9 Research Methodology**

This study is largely qualitative design and doctrinal research methodology. It relies on primary and secondary sources of information. The primary sources are statutes and case law while the secondary sources are textbooks, journals, reports and internet-source materials.

## **1.10 Scope of the study**

From the point of view of Article 75 of the Kenyan Constitution 2010, the Leadership and Integrity Act and the Public Officer Ethics Act, as well as jurisprudence from the courts, the study will attempt to analyse conflict of interest in the specific case of advocate-legislators in Kenya.

## **1.11 Limitations of the study**

The scarcity of concluded cases on conflict of interest involving legislators in general and advocate-legislators in particular will curtail the extent of this study.

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<sup>67</sup>Nelson E, 'Conflict of interest and parliament', 46 Economic and Political Weekly 19, 13 May 2011, 68.

<sup>68</sup>Nelson E, 'Conflict of interest and parliament', 68.

Another limitation will be relying on news reports and newspaper articles, showing the engagement of legislators in cases of conflict of interests. It is a limitation due to the difficulty in verifying the credibility of their sources for the purposes of this study.

### **1.12 Definition of Terms**

This research defines the following terms in the study for clarity purposes: conflict of interest, public interest, self-interests or personal interests, advocate-legislators, court.

- i) Conflict of interest- a situation that causes incompatibility between one's self-interests and one's public or fiduciary duties.<sup>69</sup>
- ii) Advocate-legislators- Advocates holding a seat in the Legislature.<sup>70</sup>
- iii) Public interest- the general welfare of the public that calls for recognition or protection. A state of affairs in which the public has a stake or an interest in, that justifies governmental recognition.<sup>71</sup>
- iv) Self-interest- the state of focusing on one's interests that diminishes the benefits of a larger group.<sup>72</sup>

### **1.13 Estimated Duration**

In accordance with the Law School's dissertation guidelines, this study will be submitted to the Dissertation Board in the month of January during the second semester of the fourth year of study. Having been assigned a dissertation supervisor in June, this study will approximately take six months.

### **1.14 Chapter Breakdown**

This study is structured into five chapters:

- This chapter is an introduction to the dissertation. It is composed of the background of the study, the problem statement, the objectives of the study, the research questions, the hypothesis, the justification of the research, the literature review and the research design.

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<sup>69</sup> Black's Law Dictionary, 3<sup>rd</sup> ed.

<sup>70</sup> Matter U, Stutzer A, 'The role of advocate-legislators in shaping the law: Evidence from voting on tort reforms', 58 The Journal of Law and Economics 2, February 2015, 2.

<sup>71</sup> Black's Law Dictionary, 3<sup>rd</sup> ed

<sup>72</sup> Black's Law Dictionary, 3<sup>rd</sup> ed

- Chapter two presents the theoretical framework which this study uses to analyse the challenge of conflict of interest involving advocate-legislators as state officers in Kenya.
- Chapter three examines the legal framework governing legal representation and conflict of interest in the case of advocate-legislators in Kenya.
- Chapter four investigates the available jurisprudence from the Kenyan Courts regarding conflict of interest in the case of legislators actively involved in other professional spheres to establish whether there is any significance precedence.
- Chapter five presents the findings, conclusion on conflict of interest in the case of advocate-legislators in Kenya and recommends possible ways of preventing it.

## CHAPTER TWO: THEORETICAL FRAMEWORK

### 2.1 Introduction

The agency theory is an economic theory, used by other disciplines, including Law, in the illustration of governance mechanisms. The theory explains the principal-agent relationship, whereby, both the principal and the agent have similar goals to achieve and aid each other through risk-sharing.<sup>73</sup> The agent is given the responsibility to act on behalf of the principal, and uphold his interests, when achieving these goals. Unfortunately, the agent might misuse the authority bestowed on him by the principal and pursue his own interests instead.

Applied in the topic of this study, the agency theory allows to illustrate the relationship between the legislator as the agent, and the public represented as the principal. When the legislator is a practising lawyer, his professional interests, in some instances, could be in contradiction with his duty in the pursuit of public interest. For instance, if as a lawyer the legislator represents other state officers involved in graft cases, he then goes against his duty of upholding the interests of his constituents. The agency theory is adequate in analysing the problem of advocate-legislators engaging in such conflict of interest, when they pursue their professional interests which conflict with the interests of the public.

### 2.2 The Agency Theory

The agency theory is a theory that explains and assesses the nature of the relationship of the principal and the agent.<sup>74</sup> The agency relationship as defined by the theory is one which comprises of a 'principal', who delegates authority to an 'agent' to act on behalf of the principal.<sup>75</sup> The agency theory has been suggested as a conceptual framework by scholars for examining the principal agent relationship between the Government, including state officers as agents, and the citizens as principals.<sup>76</sup> The citizens expect their representatives to promote

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<sup>73</sup>Bendickson J, Muldoon J, Liguori E, Davis P, 'Agency theory: background and epistemology', *22 Journal of Management History* 4, 2016, 4,5.

<sup>74</sup>Kiser E, 'Comparing varieties of agency theory in economics, political science, and sociology: An illustration from state policy implementation', *17 American Sociological Association* 2, July 1999, 146.

<sup>75</sup>Jensen M, Meckling W, 'Theory of the firm: Managerial behaviour, agency costs and ownership structure', *Journal of Financial Economics* 3, 1976, 308.

<sup>76</sup>Relly J, 'Testing vertical accountability: A cross-national study of the influence of information access on the control of corruption', *Rutgers University, Newark*, May 2011, 5.

their interests while they are in office, and in turn, the voters aid the legislators to retain power through voting in the succeeding elections.<sup>77</sup>

The theory further illustrates that, in addition to taking valid decisions on behalf of the principal, the agent also bears a fiduciary duty towards the principal.<sup>78</sup>The fiduciary duty emanates from the law, and it calls for agents to act in the best interests of the principal and owes loyalty to the principal. In Kenya, the legislator's fiduciary duty of upholding the interests of the public is expressed in *The Constitution of Kenya*, (2010).<sup>79</sup>

The relationship between the principal and the agent should be based on trust.<sup>80</sup>Trust here means that the principal relies on the belief that the agent will uphold the good of the people. The OECD guidelines similarly state that state officers are trustees to the state and the citizens.<sup>81</sup>This trustee nature of the relationship between the constituents and the legislator, confirms the relevance of the agency theory in the study.

Additionally, the agency theory is adequate to analyse the topic of the research because it suggests that an agent can materialise conflict of interest by either acting beyond his mandate or abusing his power.<sup>82</sup>Abuse of power is synonymised as corruption by Bayley.<sup>83</sup>In relation to corruption, Groenendijk explains two major elements that illustrate it in case of the agent, in the agency theory. The first element is the consideration of personal gain by the agent.<sup>84</sup>The assumption is that the agent will be promoting his own interests while in authority. The second element is the misuse of authority which includes unauthorised dealing with a third party, thereby indulging in corruption.<sup>85</sup>

Those who study the agency theory acknowledge that, it is difficult for the agent to always uphold the principal's interests, rather than their own.<sup>86</sup> The problem is caused by the fact

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<sup>77</sup>Groenendijk N, 'A principal-agent model of corruption', *Kluwer Academic Publishers*, 1997, 217

<sup>78</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 13.

<sup>79</sup>Article 73, *The Constitution of Kenya*, (2010).

<sup>80</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 6, 2.

<sup>81</sup>Whitton H, *Managing conflict of interest in the public sector*, Organisation for Economic Cooperation and Development publishing, 2005, 96, 16.

<sup>82</sup>Groenendijk N, 'A principal-agent model of corruption', 217.

<sup>83</sup>Bayley D, "The effects of corruption in a developing nation," 4 *Western Political Quarterly*, 1966, 720.

<sup>84</sup>Groenendijk N, 'A principal-agent model of corruption', 217.

<sup>85</sup>Kiser E, 'Comparing varieties of agency theory in economics, political science, and sociology: An illustration from state policy implementation', 154.

<sup>86</sup>Armour J, Hansmann H, Kraakman R, 'Agency problems, legal strategies and enforcement', in Armour J, Hansmann H, Kraakman R, Enriques L, Gerard H, Hopt K, Kanda H, Rock E (eds), *The anatomy of corporate law: A comparative and functional approach*, 644 Harvard Law School, July 2016, 2.

that the agent has better information than the principal about the important facts of a transaction that had occurred with a third party.<sup>87</sup> Such a case is evidently perceived when, for example, advocate-legislators represent other state officers in graft cases, knowing that they will benefit from the illicit transaction, unknown to the public. Consequently, the agent acts opportunistically, promoting his own interests and not the principal's, diverting to himself, what was promised to the principal.<sup>88</sup>

The agency theory is relevant to this research because it elaborates on the role of sanctions the principal can adopt against the agent. In the case of the legislator, such sanctions including vetoing rules or agency actions, reversing court decisions or voting them out of office, in order to prevent corrupt practices by agents, and instead commit to upholding the interests of the principal.<sup>89</sup>

### **2.3 Conclusion**

The above considerations justify the reason why the agency theory was chosen to investigate the topic of this study as it clearly explains conflict of interest. It will be applied to analyse such conflict in the case of advocate-legislators in Kenya, starting from the legal framework governing conflict of interest in relation to state officers.

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<sup>87</sup>Biswas P, Bhuiyan H, 'Agency problem and the role of corporate governance revisited', 52 *The Bangladesh Accountant* 25, September 2006, p 116.

<sup>88</sup> Armour J, Hansmann H, Kraakman R, 'Agency problems, legal strategies and enforcement', 2.

<sup>89</sup>Shapiro S, 'Agency theory', 31 *Annual Reviews*, 2005, 272.



## CHAPTER THREE: LEGAL FRAMEWORK GOVERNING CONFLICT OF INTEREST IN KENYA

### 3.1 Introduction

Before the promulgation of the current Constitution, the Kenyan Parliament had enacted the Public Officer Ethics Act (2009), that provided for a code of conduct and ethics, which would give guidance to public officers to discharge their duties ethically, for the promotion of public interest. For the purposes of implementing Chapter VI of the 2010 Constitution, Kenya enacted the Leadership and Integrity Act (2012) to decisively deal with conflict of interest involving state officers, specifically in its Section 16. Being state officers, legislators are governed by this provision. Despite the enactment of this legislation, cases of conflict of interest are still on the rise. Some include high profile legislators with other careers, especially those who are practising advocates.<sup>90</sup>

Chapter three of this study analyses three legal instruments: The Public Officer Ethics Act (2009), Chapter Six of the Constitution of Kenya (2010), and the Leadership and Integrity Act (2012). These legal instruments are relevant to a study on conflict of interest involving state officers because they promote integrity and, among other things, seek to curb them from promoting their own interests above interest of their constituents. Additionally, the relevance of these legal instruments is that they are applied in the examination of cases in which Members of Parliament who are advocates are at the same time the legal representatives of state officers accused of corruption. Such cases are likely to amount to conflict of interest.

The Anti-Corruption and Economic Crimes Act (2003) is not considered in this research because they do not expressly deal with conflict of interest in general. For instance, the Anti-Corruption and Economic Crimes Act provides for prevention of economic crimes and investigation of such cases committed by public officers.<sup>91</sup> The Ethics and Anti-Corruption Commission (EACC) Act (2011) is partially considered as its only significance to the study is the provision of functions of the Commission. The predominant function considered by the study is of promoting ethical practice of state officers including legislators.<sup>92</sup> It has been discussed as a recommendation in Chapter Five of the study. The following section analyses

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<sup>90</sup>*Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party) [2018] eKLR*

<sup>91</sup>Preamble, *Anti-Corruption and Economic Crimes Act* (Act No. 3 of 2003).

<sup>92</sup>Section 11, *Ethics and Anti-Corruption Commission Act* (Act No. 65A of 2011).

the legal framework governing conflict of interest in relation to advocate-legislators in Kenya.

### **3.2 Public Officer Ethics Act, 2009**

The Public Officer Ethics Act (2009), is a revised version of the legislation enacted by the Kenyan Parliament in 2003, ensuring that public officers observe the Code of Conduct provided by the Act, in order to discharge their duties ethically.<sup>93</sup>The Act was thus stated to have an intention of defining the basic values, principles and set boundaries of the right behaviour by public officials in Kenya.<sup>94</sup>The promulgation of the Act was further promoted by the National Rainbow Coalition (NARC) Government's anti-corruption strategy, seeking to curb and prevent corruption among public officers and restore confidence in the public service and state offices.<sup>95</sup>The Public Officer Ethics Act (2009) was unique as compared to previous legislations, such as the Prevention of Corruption Act (1956). Its uniqueness consisted in the fact that, for instance, it provided for a code of conduct and ethics to foster professionalism and integrity in the public service, rather than by threat of punishment,<sup>96</sup> as perceived in the Prevention of Corruption Act (1956).<sup>97</sup>

The Public Officer Ethics Act(2009) requires that a state officer should use his best efforts to avoid being in a position in which his personal interests would conflict with his official duties of serving the public,<sup>98</sup> therefore forbidding public officers from engaging in situations of conflict of interest.<sup>99</sup> Applying the agency theory to analyse conflict of interest in the case of state officers, it first establishes that there exists an agency relationship between the public and the state officer. The public assumes the role of the principal, who elects the state officer, to be the agent in the active service delivery, done on their behalf and upholding the interests of the principal. The agent, as a representative of the principal acquires a fiduciary duty of ensuring that they avoid engaging in any endeavours that would conflict with the interests of

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<sup>93</sup>Preamble, *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>94</sup>The National Assembly, Debates on the Public Officer Ethics Bill, March 13, 2003, 446 (statement by Hon. Murungi, Minister for Justice and Constitutional Affairs).

<sup>95</sup>Gathii J, 'Kenya's long anti-corruption agenda -1952-2010: Prospects and challenges of the ethics and anti-corruption commission under the 2010 constitution,' Legal Studies Research Paper Series 35, 27 November 2010, 42- [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718620) on 15 October 2020.

<sup>96</sup>Gathii J, 'Kenya's long anti-corruption agenda -1952-2010: Prospects and challenges of the ethics and anti-corruption commission under the 2010 constitution,' Legal Studies Research Paper Series 35, 2010-2011, 43- [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718620) on 15 October 2020.

<sup>97</sup>Preamble, *The Prevention of Corruption Act* (Act No. 65 of 1956).

<sup>98</sup>Section 12 (1), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>99</sup>Section 12 (3), *The Public Officer Ethics Act* (Act No. 183 of 2009).

the public.<sup>100</sup> Hence, he is expected to ensure that his private affairs do not hinder his mandate of promoting and delivering his service in line with the common good, for the purposes of fostering professionalism<sup>101</sup> and public confidence in the integrity of his office.<sup>102</sup>

The Public Officer Ethics Act (2009) defines legislators as public officers.<sup>103</sup> Consequently legislators are bound to abide by the Act's code of conduct especially, for the relevance of this study, in relation to its conflict of interest provisions. Cases of conflict of interest for legislators who are members of other professions would, for example, include businessmen, medical doctors, teachers and advocates. This study focuses on advocates as legislators. Therefore, these advocates as legislators are expected to avoid situations where their professional interests could conflict with their public duty of upholding public interests. This is for the prevention of diverting from their mandate of representing their constituents, for example when representing their private clients who might also happen to be public officers involved in corruption cases.

Therefore, a legislator who is an active lawyer, might be faced with conflicting interests between the duty to review the conduct of state officer who are alleged to be corrupt while at the same time, maintaining his professional interests of defending the public officer. Consequently, the mandate to safeguard the right use of public funds is obstructed. It therefore seems that by representing an allegedly corrupt state officer would be detrimental to upholding their duty of promoting the people's well-being. Acting on behalf of such a state officer, where the law dictates otherwise,<sup>104</sup> may be occasioned by the benefit a lawyer who is a legislator may acquire from the illicit act, causing him to act opportunistically, diverting to himself, what was promised to the public.<sup>105</sup>

The Act, in seeking to prevent public officers and by extension legislators from engaging in situations causing conflict of interest, requires them to declare their personal interests which are likely to conflict with their public duties, to a superior authority,<sup>106</sup> and refrain from

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<sup>100</sup>Peters A, 'Conflict of interest as a cross-cutting problem of governance', 13.

<sup>101</sup>Section 9 (a), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>102</sup>Section 12 (3)(a), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>103</sup>Section 2 (b), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>104</sup> Section 12 (3)(a), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>105</sup>Armour J, Hansmann H, Kraakman R, 'Agency problems, legal strategies and enforcement', in Armour J, Hansmann H, Kraakman R, Enriques L, Gerard H, Hopt K, Kanda H, Rock E (eds), *The anatomy of corporate law: A comparative and functional approach*, 644 Harvard Law School, July 2016, 2.

<sup>106</sup>Section 12(3)(a), *The Public Officer Ethics Act* (Act No. 183 of 2009).

participating in any deliberations concerning their personal interest.<sup>107</sup> This may connote, in the instance of legislators who are advocates, to avoid participating in performance reviews of their clients while in Parliament. Unfortunately, legislators, contrary to the law, continue to pursue their professional interests above their public duty, according to evidence in case law.<sup>108</sup>

### **3.3 The Constitution of Kenya, 2010**

Chapter Six of the *Constitution of Kenya* (2010) is the main source of law on the expected conduct of state officers including legislators.<sup>109</sup> The Constitution establishes integrity as the foundation of the responsibilities and accountability of leadership. Article 260 of the Constitution specifically includes Member of Parliament in the category of state officers,<sup>110</sup> which means that they are expected to abide by the provisions of Chapter Six.

The background to the inclusion of Leadership and Integrity's Chapter in the Constitution goes back to the draft constitution that was rejected on 21<sup>st</sup> November 2005 by referendum.<sup>111</sup> According to the African Center of Governance (AfriCOG) report, the repealed constitution lacked provisions that governed leadership and integrity, hence a reform was needed for the facilitation of ethical conduct of state officers.<sup>112</sup> The Constitutional Review Commission found that Kenyan citizens were looking forward to the improvement of public service, by having a set of laws fully established in the new constitution to promote leaders' accountability, and for repercussions to be met due to the violation of these laws.<sup>113</sup>

Migai Akech shows that the trend of a majority of public officers was to act in their own interests, irrespective of existing statutory requirements for the achievement of their short-term political goals.<sup>114</sup> He is of the view that public officers believed that they would not be held accountable for their actions, nor sanctioned, as there were weak public accountability mechanisms and lack of authoritative laws for prevention of corruption and impunity by these

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<sup>107</sup> Section 12(3)(b), *The Public Officer Ethics Act* (Act No. 183 of 2009).

<sup>108</sup> *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (interested party)* [2018] eKLR

<sup>109</sup> Chapter VI, *Constitution of Kenya* (2010).

<sup>110</sup> Article 260, *Constitution of Kenya* (2010).

<sup>111</sup> AfriCOG, '*Integrity in leadership? An assessment of Kenya's performance in enforcing constitutional values*', May 2015, 10.

<sup>112</sup> AfriCOG, '*Integrity in leadership? An assessment of Kenya's performance in enforcing constitutional values*', May 2015, 10.

<sup>113</sup> Constitution of Kenya Review Commission, '*The Final Report*', 2005, 223.

<sup>114</sup> Akech M, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?', 18 *Indiana Journal of Global Legal Studies* 1, 2011, 343.

leaders.<sup>115</sup> It would seem that there was a dire need of establishing standards of ethical conduct for the guidance of state officers when discharging their public duties which justified the inclusion of Chapter Six in the new Constitution.

The formulation of principles of leadership and integrity and the recommendation of penalties for breach of public office that were to apply to all state officers were proposed to be significant components of the chapter on leadership and integrity.<sup>116</sup> Moreover the Constitution formulated other provisions to ensure an effective administration that cuts across all leadership ranks.<sup>117</sup>

Article 10 of the Constitution expresses the values and principles that state officers need to adhere to for proper governance, including good governance, integrity, accountability and patriotism.<sup>118</sup> These values and principles form the standard of governance, which go hand in hand with the principles of leadership and integrity as stipulated in Chapter Six.

In terms of conflict of interest, the Constitution requires from state officers, the following: to avoid any conflict between personal interests and public or official duties, or compromise any public interests in favour of their own interests.<sup>119</sup> As mentioned above, legislators as agents, who are elected as representatives of their constituents, the principal, have the main responsibility of ensuring the represented principal's interests are upheld.

The legislators' duties, involve reviewing the performance and conduct of state officers when they have abused office and misused public funds, protecting public funds and initiating the process of removing them from office when found guilty.<sup>120</sup> Conflict of interest may arise, when these legislators represent state officers accused of graft in court, and at the same time are expected to review their performance and ensure public funds are not misappropriated. This seems to create a negative situation of an elected delegate of the people, supposed to promote and protect the interest of his constituents, defends the offender accused of embezzling public funds.

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<sup>115</sup>Akech M, 'Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?', 344.

<sup>116</sup> Constitution of Kenya Review Commission, *The Final Report*, 2005, 222.

<sup>117</sup> Article 10, *Constitution of Kenya* (2010).

<sup>118</sup> Article 10, *Constitution of Kenya* (2010).

<sup>119</sup> Article 75 (1), *Constitution of Kenya* (2010).

<sup>120</sup> Article 95(5)(a), Article 96 (4), *Constitution of Kenya* (2010).

The Constitution further stipulates that any state officer who contravenes Article 75, is to be subjected to applicable disciplinary procedure and be dismissed from office.<sup>121</sup> This study found that legislators who indulge in conflict of interest by representing other state officers in corruption cases in violation of this provision, have not been subjected to any disciplinary procedures, nor dismissals from their office. The outcome of it has been legislators continuing to represent the accused state officers in court, focusing on their interests as advocates instead of upholding their constituents' interests as per their mandate.

### **3.4 The Leadership and Integrity Act, 2012**

The Leadership and Integrity Act (2012) was passed by Parliament in 2012 to establish procedures and mechanisms for effective leadership and governance in light of Chapter Six of the Constitution of Kenya.<sup>122</sup> A state officer is expected to uphold, with respect to the Constitution, the national values and principles provided under Article 10 of the Constitution, the responsibilities of leadership provided under Article 73 of the Constitution and the principles governing the conduct of state officers provided under Article 75 of the Constitution.<sup>123</sup>

According to the Act, a state officer is required to exercise his authority, acting in the best interests of the citizens,<sup>124</sup> by avoiding to engage in situations that cause conflicts between his personal interests and his official duties<sup>125</sup> that would amount to abuse of office.<sup>126</sup>

The Act defines '*personal interests*' as interests of a spouse, child, business associate, agent or any other matter in which the state officer has a direct or indirect pecuniary or non-pecuniary interest.<sup>127</sup> The state officer is therefore required to register his personal interests that may conflict with his public duties<sup>128</sup>, such as remunerated employment<sup>129</sup> which may include acting as a practising lawyer to represent state officers as clients in court.

Part IV of the Leadership and Integrity Act (2012) provides for prevention mechanisms for the enforcement of its provisions, such as preventing state officers from pursuing their own

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<sup>121</sup>Article 75 (2), *Constitution of Kenya* (2010).

<sup>122</sup>Preamble, *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>123</sup>Section 3 (2), *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>124</sup>Section 8, *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>125</sup>Section 16, *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>126</sup>Section 13, *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>127</sup>Section 16 (6), *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>128</sup>Section 16 (11), *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>129</sup>Section 2, Second Schedule, *Leadership and Integrity Act* (Act No. 19 of 2012).

interests that hinder them from delivering of public service. The Act provides for sanctions against officers found to have breached the Act <sup>130</sup> in the form of either removal from the public office or be subjected to disciplinary proceedings that may be initiated by the relevant authority.<sup>131</sup>

Despite the preventive mechanisms and provisions in the Act, there are still cases of state officers pursuing their own interests instead of committing to protecting and public service delivery.

### **3.5 Conclusion**

Upon analysing the Public Officer Ethics Act (2009), Chapter Six of the Constitution of Kenya (2010) and the Leadership and Integrity Act (2012), this chapter concludes that they are adequate laws governing conflict of interest vis- à- vis public officers. The chapter also establishes that legislators are considered as public officers by the legal instruments. Consequently, as all public officers, legislators are subjected comply with all the norms preventing them from engaging in all endeavours likely to conflict with their responsibility for the good of the public. It appears that there is no reason in the law, for advocates as legislators, not to comply with the requirements as provided for in the legal instruments. Additionally, these laws should be interpreted purposively<sup>132</sup> when addressing cases in which advocates who are legislators happen to engage in matters that bring about conflict of interest. The next chapter examines the jurisprudence from Kenyan courts interpreting the above analysed legal framework in cases of conflict of interest involving legislators who are advocates in their private practice, while still in office.

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<sup>130</sup> Section 41(1), *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>131</sup> Section 41(2), *Leadership and Integrity Act* (Act No. 19 of 2012).

<sup>132</sup> Article 259, *The Constitution of Kenya* (2010).

## CHAPTER FOUR: EXAMINING THE JURISPRUDENCE FROM KENYAN COURTS REGARDING CONFLICT OF INTEREST IN THE CASE OF LEGISLATORS

### 4.1 Introduction

As established from analysing the legal framework governing conflict of interest involving state officers, the main contentious issue regards the interpretation of the above laws by the courts in cases against public state officers who are legislators. The cases have been instituted against them on grounds of conflict of interest between their responsibility as representatives of the people and their professional interests derived from their private practice as advocates. The cases selected for this chapter are:

- *Philomena Mbete Mwilu v Director of Public Prosecutions (DPP) & 3 others*, in this case, the defendant, accused of graft, was represented by a senator.
- *Republic v Mike Mbuvi Sonko Gideon & 16 Others*, in which the defendant, Governor of a county, accused of graft, was represented by two senators and one Member of Parliament.
- *Regine Bhutt v Haroon Bhutt & another* which involved the defendant being represented by a Member of Parliament.
- *Patrick Njuguna & 7 others v Wilson Sossion & 3 Others*, whereby the defendant was accused of conflict of interest between his professional interests and his public duty as a Member of Parliament.

### Analysis of Cases

#### 4.2.1 Cases Involving Graft

##### 4.2.1.1 *Philomena Mbete Mwilu v Director of Public Prosecutions (DPP) & 3 others*

In the matter, *Philomena Mbete Mwilu v Director of Public Prosecutions (DPP) & 3 others*,<sup>133</sup> Senator Hon. James Orengo, the county representative of Siaya County, and Senator Hon Okong’o Mogeni, the county representative of Nyamira County, acted for the petitioner, Philomena Mwilu, the current Deputy Chief Justice, accused of graft. The DPP as first respondent, in his application, sought to disqualify both senators from acting for the accused state officer.<sup>134</sup> Both senators as senior counsels serve as members of the Senate

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<sup>133</sup> [2018] eKLR.

<sup>134</sup> [2018] eKLR.



Committee on Justice, Legal Affairs and Human Rights, where discussions on the petitioner were held.<sup>135</sup> The DPP alleged that this would amount to conflict of interest between their roles as advocates for the state officer, and representatives of the public.<sup>136</sup> The DPP submitted that, for the interest of the public and justice, both senators should be barred from engaging in the case, especially because both parties failed to disclose their personal interest in the matter at the Committee.<sup>137</sup>

The courts stated that, for there to be conflict of interest, the DPP should provide evidence of incompatibility between the participation of the senior counsels as advocates and as members Senate Committee.<sup>138</sup> Once the conflict of interest is established, it would present prejudice to the to the course of justice.<sup>139</sup> The courts agreed with the contentions of the DPP stating that a conflict of interest may arise where both senior counsels would use the information obtained during the proceedings in court, causing their client to have an unfair advantage.<sup>140</sup> The courts submitted that the DPP's application was without merit, because it failed to prove the presence of conflict of interest involving the senators.<sup>141</sup>

Following the agency theory, there is actual conflict of interest because senators, representatives of the people as the principal, were at the same time representing a state officer accused of graft as contended by the DPP. To avoid the conflict of interest, they should recuse themselves from representing the state officer accused of graft. If they were to recuse themselves from the Senate Committee, it would not solve the problem, as they are meant to represent the people's say at the Senate. They would therefore be going contrary to their fiduciary duty of upholding the principal's interests overall.

#### **4.2.1.2 Republic v Mike Mbuvi Sonko Gideon & 16 Others<sup>142</sup>**

The defendant in this case, the Governor of Nairobi County, was charged with graft and was represented by the legislators Senator Hon. Mutula Kilonzo Junior, county representative of Makueni County, Senator Hon. Kipchumba Murkomen, county representative of Elgeyo-Marakwet County and MP Hon. Dan Maanzo constituency representative of Makueni.

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<sup>135</sup> [2018] eKLR.

<sup>136</sup> [2018] eKLR.

<sup>137</sup> [2018] eKLR.

<sup>138</sup> [2018] eKLR

<sup>139</sup> [2018] eKLR

<sup>140</sup> [2018] eKLR

<sup>141</sup> [2018] eKLR

<sup>142</sup> [2019] eKLR.

Neither the DPP nor the courts questioned the potential of conflict of interest, due to the representation of the accused by members of the National Assembly.

Similarly, in *Republic v Sospeter Odeke Ojamong*<sup>143</sup> and *Evans Odhiambo Kidero v Ethics and Anti-Corruption Commission & 3 Others*<sup>144</sup> both the Governor of Busia County and former Governor of Nairobi County respectively, accused of graft, were represented by Senator Hon. James Orengo. As in the previous case, the question of conflict of interest brought about by the fact that the defendants' lawyer is a legislator was neither raised by the DPP nor by the courts.

The lack of emphasis of the conflict of interest entailed in the representations of the accused of graft by state officers who are legislators, shows why there is a persistence of such cases. The courts appear to be failing to apply the accountability mechanisms embedded in the legal framework, to ensure the agents uphold the protection and promotion of public interests.

#### **4.2.2 Cases Unrelated to Graft**

##### **4.2.2.1 Regine Bhutt v Haroon Bhutt & another**<sup>145</sup>

The matter involved a matrimonial case, where the counsel for the plaintiff, Hon. Peter Kaluma is a Member of Parliament for Homa Bay Constituency. The defendant's representative raised an objection on the representation of the accused by an MP, arguing that there is conflict of interest since the MP is a private advocate representing private interests before a judicial officer.<sup>146</sup> Moreover the advocate, being a member of the National Assembly, has oversight over the Judiciary, in accordance to Articles 95 and 125 of the Constitution of Kenya (2010).<sup>147</sup> The defendant's counsel also referred to Chapter Six of the Constitution, arguing that a sitting legislator should be barred from pursuing professional interests in conflict with public interest. Hence, he should be dismissed from the case.<sup>148</sup>

In the application of Article 75 of the Constitution, the courts determined that a legislator should not be barred from pursuing professional interests except where it is incompatible with the responsibilities of the State office.<sup>149</sup> However, the court stated that private practice can

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<sup>143</sup> [2019] eKLR.

<sup>144</sup> [2020] eKLR

<sup>145</sup> [2015] eKLR

<sup>146</sup> [2015] eKLR

<sup>147</sup> [2015] eKLR

<sup>148</sup> [2015] eKLR

<sup>149</sup> [2015] eKLR

be allowed on condition that it is on pro bono basis. Hence Hon. Peter Kaluma was ordered by the courts not to receive payment based on his private practice.<sup>150</sup>

The court, according to the agency theory, submitted a valid decision in letting the agent, Hon. Kaluma, continue with his private practice. However, to avoid conflict of interest, he was obliged to offer his service pro bono.

#### **4.2.2.2 Patrick Njuguna & 7 others v Wilson Sossion & 3 Others<sup>151</sup>**

The case involved petitions filed against Kenya National Union of Teachers (KNUT) and the Registrar of Trade Unions for electing Hon. Wilson Sossion, a nominated Member of Parliament, as the General Secretary for KNUT. Petitions were also filed against him, for accepting the nomination, on knowledge that it is against Chapter Six and may cause conflict of interest, between his professional duties as a teacher and General Secretary and his public duty.

The Court, on reliance of Article 75 of the Constitution, stated that his nomination as a General Secretary is not in conflict with his nomination as a legislator.<sup>152</sup> This was contrary to the case *Ronald Kiprotich Tonui v Robert Nyabuto Obwoncha & Another*<sup>153</sup> where the defendant, Hon. Robert Nyabuto, a Member of Parliament and a nominee as the Assistant Treasurer of KUPPET, was barred by the Courts from holding the Treasurer's position.<sup>154</sup> The court averred that his responsibilities to the constituents would conflict with that of his position as Treasurer, in safeguarding the funds and interests of both his professional and public offices.<sup>155</sup> The court's findings in the latter case were in line with the agency theory, as it was able to determine the circumstances which private practice would interfere with their official duty as agents of the people. Justice was apparently upheld when the agent, Hon. Robert Nyabuto was barred from occupying a position that would conflict with his duties designated by the principal. In *Patrick Njuguna & 7 others v Wilson Sossion & 3 Others*, justice seems not to have been upheld, as the courts seemed to have failed to acknowledge an obvious case of conflict of interest.

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<sup>150</sup> [2015] eKLR

<sup>151</sup> [2019] eKLR

<sup>152</sup> [2019] eKLR

<sup>153</sup> [2017] eKLR

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<sup>155</sup> [2017] eKLR

### 4.3 Conclusion

This chapter has analysed cases involving the determination of legislators' conflict of interest. It is apparent that the jurisprudence from the courts is inconsistent. While some jurisprudence appreciates that there is conflict of interest<sup>156</sup>, in other cases<sup>157</sup> the judges do not acknowledge its presence. The apparent failure by some Kenyan courts to develop coherent jurisprudence when determining cases of conflict of interest, acts as a barrier to the effective discharge of public duty by the state officers.

As this research sought to analyse the problem of conflict of interest involving legislators, the next chapter presents the findings and the conclusion of the research questions, and recommendations for a potential solution.

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<sup>156</sup> *Ronald Kiprotich Tonui v Robert Nyabuto Obwoncha & Another*, [2017] eKLR.

<sup>157</sup> *Republic v Mike Mbuvi Sonko Gideon & 16 Others*, [2019]

## **CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This chapter serves as the conclusion of the whole study. With its three objectives outlined in Chapter one, the study commences by evaluating how the theoretical framework was used to analyse the legal regime on conflict of interest involving state officers. Secondly, it analyses jurisprudence emanating from the Kenyan Courts in the determination of conflict of interest cases. Thirdly, a summary of findings, conclusion and recommendations are set forth on possible ways of solving the research problem.

### **5.2 The Initial Problem**

The study started by demonstrating the need to investigate the problem of conflict of interest involving legislators as state officers acting as advocates. The need was occasioned by the persistent occurrence of such cases, that would undermine the integrity of public office. By using the agency theory, the study attempted to demonstrate how the fact of engaging in other professions by legislators would be a reason to prevent them from discharging public duties.

The Constitutional mandate obliges state officers to avoid situations that would cause a conflict between their personal interest and that of the public's.<sup>158</sup> There exists persistence of cases of conflict of interest involving legislators, demonstrates that they contravene the laws. The hypothesis of the study has been confirmed by the fact that there is a failure to enforce the prevention and accountability mechanisms existing in the law. It is apparent that disciplinary authorities fail to hold accountable the legislators liable of upholding their own interests. Therefore, this shows a disregard of the laws by both parties. As a result, public interest is undermined, and the integrity of the public office is corrupted.

### **5.3 Summary of Findings**

#### **5.3.1 Conflict of Interest and the Legal Framework**

This study found that the legal framework governing conflict of interest vis-à-vis public officers adequately provides for the prevention mechanisms to curb such practices. However, it seems that these cases are still recurring due to non-compliance with these laws by the legislators. The failure to enforce accountability mechanisms which are provided for in the

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<sup>158</sup> Article 75 (1), *Constitution of Kenya* (2010)

laws, also contribute to legislators' continuous pursuit of personal gains as opposed to promotion of the common good.

### **5.3.2 The Determination of Conflict of Interest Matters in Kenyan Courts**

This study found that, the jurisprudence from the Kenyan Courts has been inconsistent in determining cases of conflict of interest regarding legislators. It seemed that most courts did not appreciate the existence of conflict of interest in the cases brought before them. As perceived, some courts analysed conflict of interest using the legal framework. However, their orders did not bar the legislators from representing their clients in court, or from undertaking other professional positions, where it seemed there would be an obvious case of conflicting interests with their public duty.

## **5.4 Conclusion**

In conclusion, it seems that it is the contravention of legislators representing state officers accused of graft, that causes their persistent engagement on matters conflicting with their public duty. Furthermore, the fact that these legislators are not subjected to disciplinary measures nor accountability mechanisms after defying the law, undeniably promote such cases. Additionally, the application and interpretation of the laws governing conflict of interest by the courts fall short of adequately determining such cases, hence contributing to their frequent occurrence. Therefore, the problem of legislators upholding their professional interests to the public's is a prevailing issue that needs to be solved with urgency, for the restoration of integrity and public confidence in the public office. To address this situation, the following recommendations are made:

## **5.5 Recommendations**

### **5.5.1 The need to enhance accountability mechanisms**

Despite the existing laws cautioning against engagements in interests that subdue the public's, legislators continue to defy the laws without facing repercussions. The study hence recommends that disciplinary committees and authorities including the Ethics and Anti-Corruption Commission mandated to penalise such legislators, to take necessary action to curb such cases. The obligatory step is emphasized in Section 11 of the Ethics and Anti-Corruption Commission Act. It commits the Anti-corruption Commission to ensure that state officers including legislators, have maintained code of ethics and best practices in integrity and anti-corruption. To achieve the object, the study recommends the Commission to work in cooperation with courts to freeze accounts of advocates representing corrupt state officers.

The aim would be to bar the advocates from gaining any benefits from engaging in such cases. The Commission can also work with the Director of Public Prosecutor to investigate advocate-legislators representing corrupt state officers and arraign them to court. Should this solution be effective, the legislators would be held accountable for their actions that are contrary to the integrity of their office.

This research is cognisant of an existing attempt to enhance accountability mechanisms in form of a drafted bill, The Conflict of Interest Bill (2019). As it is in the public participation level, it is hoped that, once its enactment occurs, it may be able to curb cases of legislators engaging in matters that conflict with their public role.

### **5.5.2 The need for consistent jurisprudence**

As noted from the analysis of jurisprudence on cases of conflict of interest involving legislators, judges have produced contrasting decisions. Most decisions have failed to recognise on the seemingly obvious presence of conflict of interest. The legislators as representatives of other state officers accused of graft, or involved in other professions, have not been barred by the courts from upholding their professional interest contrary to their public duty. For the prevention of such cases, the courts need to apply the existing laws on determining such matters, taking the initiative to prevent legislators from undertaking other professional roles that would conflict with their public duty. The study also recommends the courts to prevent advocates representing the corrupt state officers from receiving their dues. Such an instance is perceived in the case of *Regine Bhutt v Haroon Bhutt & another*<sup>159</sup>. The verdict was that the legislator, acting as an advocate, was to receive no remuneration from representing his client. The reason for the decision was to ensure the advocate-legislator avoids conflict of interest from the matter he represented in court versus his public duty. With such sustained precedents, a coherent jurisprudence will be formed, to aid in curbing such cases.

### **5.5.3 Role of the Law Society of Kenya in reducing cases of conflict of interest.**

The Law Society of Kenya is a professional body corporate established by the Law Society of Kenya Act to oversee and administer the legal profession. Among the objects of the Society, according to Section 4 Act, is to maintain and improve the standards of conduct of the legal profession. Thus, the Society created codes of standards and professional practice and ethical conduct to achieve their objective as mentioned. The code allows them to oversee the conduct

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<sup>159</sup> [2015] eKLR

of persons in the legal profession and take disciplinary actions to advocates engaging in professional misconduct. According to the professional code of conduct, an advocate is expected to avoid situations of conflict of interest. The code defines a conflicting interest as one that gives rise to a risk of bias between the representation of a client and other duties to a third person. Therefore, a legislator in service of the public, representing a corrupt public officer as an advocate, creates a situation of conflict of interest. Thus, the Law Society is expected to take necessary action in disciplining advocates involved in such situations for instance, suspension or revocation of their licences.

The study also recommends the Society to suspend the private practice licenses of advocates as legislators till their end of term of service to the public. The step would be equivalent as to those of prosecutors whose licences have been suspended. The main objective is to enable the prosecutors to avoid conflicting interests of representing the public as plaintiffs versus representing or aiding the accused persons as their clients. A similar action can be done in the aspect of advocate-legislators to avert them from representing corrupt state officers and to focus on serving the public.

It is in the hope that the measures the study recommends will aid in preventing advocate-legislators to act for state officers accused of graft, against the public whose interests they are meant to serve. Curbing such acts enhances the professional conduct of advocates, promoting the goodwill of the legal profession in the eyes of the public. The public's confidence in electing legislators in the legal profession will be restored due to the better representation by their elects.



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