PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

THE NATIONAL ASSEMBLY SPEAKERS' CONSIDERED RULINGS AND GUIDELINES

10TH PARLIAMENT

2008 -2012

PREPARED BY THE PROCEDURAL RESEARCH AND JOURNAL OFFICE
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The National Assembly Speakers' Considered Rulings and Guidelines

(10th Parliament)

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P.O. Box 41842-00100
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Tel: +254 20 221291, 2848000
Email: clerk@parliament.go.ke
www.parliament.go.ke

Prepared by:

Procedural Research and Journal Office (PRJ),
Directorate of Legislative and Procedural Services
The National Assembly

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PREFACE

The first collection of *Speakers' Considered Rulings* in the Parliament of Kenya was compiled in 2004. They were intended for the use of the Speaker, other presiding officers, and the Clerks-at-the-Table who are required to advise presiding officers on the rules and practices of the House. It focused on rulings made by Speakers Sir Humphrey Slade, Fred Mati, Prof Jonathan Kimetet arap Ng'eno, Kiprono arap Keino and Francis Xavier ole Kaparo between 1963 and 2007. Efforts are being made to compile rulings made by colonial presiding officers (who before 1948 included Governors) and Speakers of the Legislative Councils between 1907 and 1962.

This edition is a compilation of selected *'National Assembly Speakers' Considered Rulings and Guidelines'* issued by Speaker Kenneth Marende during the 10th Parliament. *The National Assembly Speakers' Considered Rulings and Guidelines* provides an easily accessible collection of rulings and other important precedents, often quite helpful when a matter arises in the course of a sitting. The rulings and guidelines provide an extract deemed useful in a readily usable form. It is not itself an authoritative source. That source instead resides in the pages of the Hansard.

This edition includes considered rulings given up to the dissolution of the Tenth Parliament. The rulings are grouped per Session. This edition is a full presentation of the text of the rulings as given by the presiding officers. And for ease of reference, we have included the dates the rulings and guidelines were issued, both in the Table of Contents for each Session and also in the text of each of the ruling or guideline. To ensure clarity and to ease search, we have also reviewed some of the titling of the rulings. We hope the future compilations of considered rulings and guidelines shall be serialized, indexed and where possible thematically grouped.

Michael R. Sialai, EBS
Clerk of the National Assembly
June 2017

FOREWORD

It is an important tradition for all deliberative bodies, Parliaments included, to make rules to regulate their business. The Standing Orders, the usages, forms, precedents, customs, procedures and traditions, Speakers' rules and orders form the complex body of parliamentary rules and procedures. The rulings and guidelines made by the Presiding Officers during the course of the proceedings of the House help clarify the rules, and provide valuable insights into the working of Parliament. Each House of Parliament makes its own rules and both Houses make Joint Rules. The Presiding Officers through their rulings and guidelines interpret the rules in a way that is consistent with parliamentary traditions and precedents established over a long period. Some of the rulings have great precedent value.

This is the first official edition of *The National Assembly Speakers' Considered Rulings and Guidelines* containing select rulings and guidelines covering the Tenth (2008-2012) Parliament. This edition only captures the text of the rulings or guidelines without attempting any interpretation, thematic or other form of classification. They are also *dated* for ease of reference from the Hansard. Future editions shall focus more on a thematic classification as we progressively review the style and format of delivering the rulings including their numbering and indexing for ease of search and reference.

I hope that Members of Parliament, academics, researchers and others, who are interested in the functioning of parliamentary institutions, especially the procedural matters, will find this publication useful.

I wish to thank the Office of the Clerk, and in particular the staff of the Procedural Research and Journal Office in the Directorate of Legislative and Procedural Services, namely Mr. Kipkemoi arap Kirui – Principal Clerk and Head of the Procedural Research and Journal Office, Mr. Samuel Kalama – First Clerk Assistant, Ms. Anne Shibuko – Third Clerk Assistant, Mr. Finlay Muriuki – Third Clerk Assistant and Ms. Rabeca Munyao – Secretary for their commitment in undertaking this important exercise.

The Hon. Justin B.N. Muturi, EGH, MP
Speaker of the National Assembly
June 2017

INTRODUCTION

A Ruling of the Speaker is usually necessitated by the need to guide the House on an emerging or ongoing issue of concern that requires clarity or direction. In making a ruling, the Speaker draws on a full range of procedural information and examines the precedents to determine how the rules of procedure have been applied and interpreted in the past.

The Speaker may be called upon to deal with situations not provided for in the Standing Orders, and may turn to parliamentary practice or tradition in other jurisdictions.

It is the right of the Speaker to interpret the Constitution and Rules, so far as matters in or relating to the House are concerned, and no one can enter into any argument or controversy with the Speaker over such interpretation[1].

The Speaker's rulings constitute precedents by which subsequent Speakers, members and officers are guided. Such precedents are collected and in the course of time, formulated as rules of procedure or followed as conventions. While good procedure requires that there be consistency in the interpretation of practice and in the application of the Standing Orders, Speakers are sometimes called upon to create new precedents when faced with an apparent contradiction between the Standing Orders and contemporary values. Accordingly, Speakers have declared past rules to be redundant and have invited the House to ponder the consequences of changing circumstances.

In other cases, Speakers may choose to rule in accordance with past practice but acknowledge that circumstances have changed, and suggest that the House may wish to address the matter by changing its rules.

The Speaker will often allow Members to address the issue raised to give them an opportunity to present facts that might help shed some light on the case at hand. In such cases the Speaker will often reserve his or her decision in order that he or she may reflect on the matter, request that further research be undertaken or seek further advice on the questions being raised. At other times, a ruling will be made immediately without Members' intervention. It is left to the Speaker to determine what method he or she will use.

[1] S. L. Shakdher: "Officer of Parliament" in the Indian Parliament, A. B. Lal, Allahabad, 1956, p. 32

All Speakers base their rulings on established practice; however, in many cases, their rulings build upon past precedent, and in some cases their decisions improve or clarify best practices.

The Speaker's rulings cannot be questioned except on a substantive Motion. A member who protests against the ruling of the Speaker commits contempt of the House and the Speaker. The Speaker's decision is binding. The Speaker is not bound to give reasons for his decisions. In commonwealth practice, Members cannot criticise directly or indirectly, inside or outside the House, any rulings given, opinion expressed or statement made, by the Speaker.

Challenging the Chair

The rules and practices for challenging the Chair differ somewhat from jurisdiction to jurisdiction. The ruling or decision of the Speaker has occasionally been challenged through a formal appeal, a substantive motion, criticism outside the House, disobedience, or even threats and intimidation or all of these approaches depending on circumstances prevailing at the time.

In the Canadian House of Commons, the ability to appeal a ruling of the Speaker ended in 1965. Most Canadian jurisdictions disallow appeal. The Speaker's decision is never a subject of debate or appeal.

Speaker Jean-Pierre Charbonneau in the Québec National Assembly in June of 2001 summed up the prevailing parliamentary law thus:

> *Our parliamentary law, in its wisdom, holds that one may not impugn the conduct of a Member unless it be by recourse to a formal procedure, to wit a substantive motion. [...] Parliamentary law is even more stringent when the conduct of a Presiding Officer is concerned. Not only is it forbidden to impugn the conduct of a Presiding Officer otherwise than by means of a substantive motion, but to do so may even place one in contempt of the Assembly.*

In other words, unless a Member is willing to give notice of and introduce a substantive motion in the House, any dissent from a ruling of the Speaker, or a reflection on his or her impartiality, is strictly forbidden. However, the prohibitions on appeals to the rulings of the Speaker do not necessarily apply to those occupying other chairs. This is likely a reflection of the lower standard of impartiality imposed on deputy speakers and the chairs of committees. In Committee of the Whole, for example, it is generally accepted that decisions of the Chair may be appealed to the House.

The Standing Orders of the National Assembly do not provide for a procedure to challenge or appeal the decision of the Speaker. It is also important to observe that appeals or avenues for challenging the decision of the Speaker have been abolished or restricted in most Westminster-styled legislatures. However, the rules and practices vary from jurisdiction to jurisdiction. In some jurisdictions, it is only the speaker's decision pertaining to the rules of the House that is not challengeable. In others, members have an avenue to appeal against a ruling made by the Chair.

In the US congress**,** an appeal from the decision of the chair is applied as a form of challenge to a ruling of the chair, but such appeals must be made immediately after the ruling. If debate has progressed, a challenge is not in order.

Previous Speakers of the National Assembly have by practice never entertained the challenging or appeal against the rulings of the Speaker. However, the Speaker has occasionally reviewed his decisions upon evidence that the decisions were based on an error.

Below are selected rulings issued by Speaker Kenneth Marende, EGH, MP during the 10th Parliament (2008 – 2012).

FIRST SESSION (2008)

Speakers' Considered Rulings, Guidelines and Orders (2008)

Contents

1. FORM AND CONTENT OF AN OATH AND THE ORDER OF SWEARING-IN CEREMONY

15th January 2008

Hon. Members, indeed, matters that have been canvassed beginning with the point of order by Mr. Orengo and supplemented by other points of order raised by hon. Members are very weighty, in as much as they pertain to matters that are constitutional and interpretation thereof.

In summary, three issues turned out for determination. I will not put them in any particular order, except as I conceived them. First, is the order of swearing in. The second issue is the form of the oath. The third issue is if the hon. Members can swear to the President which is part of the content of the oath. Indeed, as I intimated in my acceptance speech, we are under duty as Parliament to comply with the Constitution, our own Standing Orders and any other laws as may be in place.

Indeed, this afternoon, going by our Standing Orders, hon. Members are assembled here for two main purposes: First, to elect the Speaker and the Deputy Speaker, which you have done, and to be sworn in. Under Standing Order No.3, there is provision for the form and conduct of the swearing-in ceremony. Allow me to read out Standing Order No.3, which provides as follows:-

> *"On the assembly of a new House - as, indeed, we are a new House - pursuant to the President's Proclamation, the list of names of Members of the House shall be laid on the Table by the Clerk and the House shall thereafter proceed to the election of a Speaker. Immediately following the election, the Clerk shall administer the oath---"*

So, that provision deals with the first issue, pertaining to the order of swearing in. Standing Order No. 3 is categorical that the swearing-in shall be pursuant to the list of the names of Members of the House as laid on the Table by the Clerk. It is clear; it speaks for itself. The Clerk laid a list on the Table. It does not have to be in an alphabetical order. The Standing Order does not say so. We raised no objection to that list. We followed the list and, indeed, allowed the Member for Othaya to vote first, and the Member for Langata to vote second.

Hon. Members, it is also significant to note that previous Parliaments - I was privileged to be a Member of the Ninth Parliament - took the order of the oath in that manner. So, that should bring to rest the matter of the order of the Oath, because nothing will turn on it if you go by precedence and the clear provisions of Standing Order No. 3.

With regard to the form of the oath, yes, this is a weighty matter, but I have weighed it

carefully. There are a number of issues which have been ably canvased by Mr. Orengo. The first contention to the effect that Kenya is a sovereign Republic as provided in Section 1 of our Constitution is for granted. Yes, Kenya is a sovereign Republic. Sovereignty, therefore, by constitutional interpretation vests in the people of Kenya. There is no doubt that, that is correct.

I have also considered a contention which was ably articulated by Mr. Mutula Kilonzo with respect to the legislative authority of Parliament which, again, by express provision is not in doubt. Under Section 30 of our Constitution, it is clear that the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly, but that is as much as one can say and comment on the constitutional provisions. Perhaps, some of the matters that have been canvassed with respect as to whether or not, in fact, there is inconsistency between the Oath and the provisions of the Constitution, are matters that this House should flag and be prepared to deal with.

Hon. Members, it is worth of note that the form of the Oath which is to be taken by hon. Members tonight is provided for in an Act of Parliament, namely, the Promissory Oaths Act, which is Chapter 100 of the Laws of Kenya. You will bear with me hon. Members. Note that the commencement date for that Act was 19th August 1958. This House has, therefore, lived with that piece of statute all those years. Among other things, in Section 2, the Act provides as follows: -

> *"Subject to this Act, every person who is appointed to or to act in or assume the functions of any of the offices designated in the first column of the First Schedule shall, before entering upon the functions of that office, take before the person designated in relation thereto in the second column of that schedule, the oaths specified in relation thereto in the Third Column thereof"*.

Among persons covered in the First Schedule are the following:

(i) The Speaker of the National Assembly and,
(ii) Every Member of the National Assembly.

Hon. Members, therefore, by the provisions of this Act, Members of the National Assembly and the Speaker are bound to take an oath in the form that is provided in the Act. The form of the Oath is in the Second Schedule, which finds its anchoring in Section 3 of the Act. Section 3 of the Act provides as follows:-

> *"The oath specified in the Third Column of the First Schedule shall be taken in the forms, respectively, set forth in the Second Schedule."*

So, by the wording of Section 3, the form of that oath and the taking thereof is mandatory.

Hon. Members, it is worthy of note - and I think it was in some of the submissions that were made by hon. Members from both sides of the House - that, indeed, the Oath that has been taken by hon. Members during the swearing-in ceremony has been taken in this form since 1993. It, therefore, means that it was also taken in this form in 1998; it was taken in this form in the year 2003. The only exception brought to question in 1993 was that the name of the President was removed from the Oath. What was left was the institution of the Presidency. In a nutshell, therefore, this is an Act of Parliament that provides this form of Oath, and if it be inconsistent with the Constitution, then it should never have seen the light of the day. So, it will be the duty of this House, if it finds any contradiction whatsoever, within the provisions of the Statute and the Constitution to take the necessary action to ensure that the Act is amended or repealed or whatever else the House may deem appropriate to do.

Hon. Members, the Chair is under duty now to interpret the law as it is. My interpretation is that the form of this Oath has been validly enacted, provided for by the Statute, has been administered previously and we have no reason not to administer it tonight in the form it is.

The third issue which I am under duty to deal with is whether or not, I should proceed to swear in hon. Members tonight. In my interpretation of the Standing Orders, I do not find anything that would operate as a stopper or in any other manner whatsoever to restrain the Chair from swearing in hon. Members. It is important that you note that according to the Standing Orders, the swearing in ceremony tonight is to swear in hon. Members and not the President. That is expressly provided for under Standing Order No.5. Note the side note, which says, "Swearing in of Members." It is my privilege and honour to swear in the hon. Member for Othaya like any other hon. Members from other constituencies.

Hon. Members, that is the ruling of the Chair!

Order, hon. Members! We will now proceed with the swearing-in ceremony. From the ruling that I have delivered a little while ago, the list laid on the Table by the Clerk of the National Assembly begins with the name of Mr. Kibaki Mwai who is to be sworn in as the hon. Member for Othaya.

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2. REDUCTION OF PUBLICATION PERIOD OF A BILL CAN ONLY BE DONE THROUGH A PROCEDURAL MOTION

12th March 2008

Hon. Members, yesterday, Tuesday, 11th March 2008, you will recall that the hon. Member for Ugenya, Mr. Orengo, stood to move a Motion to reduce the publication period for the Constitution of Kenya (Amendment) Bill, 2008 and the National Accord and Reconciliation Bill, 2008, which Bills were published on 6th March 2008. The Minister for Justice and Constitutional Affairs thereupon stood to second the Motion but added that she was doing so on condition that the Motion was, in the judgment of Mr. Speaker, in accordance with the Standing Orders. You will recall that I deferred my ruling on the matter and undertook to give a considered ruling this morning. As I said, the issues for determination are the following:-

(i) Whether it is in order for an hon. Member to move a Procedural Motion not set down in the Order Paper; and,
(ii) Whether it is in order for an hon. Member to seek to reduce the publication period of a Bill that is not before the House.

On the first issue, the order of business of this House is governed by Part (7) of the Standing Orders. Standing Order No. 30 provides that the Order Paper showing the business to be transacted is to be prepared and circulated before the House meets. Standing Order No. 31 details the order in which this House shall transact its business. It provides that business shall be disposed of in the sequence in which it stands upon the Order Paper, or in such other sequence as Mr. Speaker may, for the convenience of the House, direct.

As a general rule, Standing Order No. 31 will appear to leave no room for any business to be attended to by the House other than that set out in the Order Paper. This rule appears to be qualified by a number of exceptions. Some of these exceptions and qualifications are to be found at Standing Order No. 45 which sets out the Motions that may be moved without notice. Among them, at Paragraph 45(g), is a Motion made in accordance with the Standing Orders governing the procedure as to Bills.

Hon. Members, the circumstances leading to the Motion by Mr. Orengo are well known to all of us. We all know that the Bills in question were published at a time when there was no House Business Committee (HBC) in place. The HBC could not, therefore, have met and decided to have this matter placed on the Order Paper. The question, however, is: Is this mandatory so that failure to do so is fatal and must lead to disallowance of the Motion? The point of principle is that a Member has a right to invoke Standing Order No.45 to move a Motion that the publication period of a Bill be

reduced. However, the House needs to know what it is being invited to do. The Order Paper is the agenda of the House and it will not be right for the House to be ambushed by being asked to reduce the publication period of a Bill without the matter having been listed as coming up before it.

Hon. Members, the matter of reduction of the publication period of the Bills is dealt with by Standing Order No.98. The Standing Order makes it clear that a Bill can be introduced in this House before the expiry of seven days or 14 days as the case may be, if the House so resolves. This has been done on many occasions previously by this House. It seems quite clear to me from a reading of Standing Order No.98 that the need to reduce the publication period can only arise before a Bill has been introduced in this House. There can be no point of seeking the reduction of the publication period of a Bill when the publication period has already run its course and the Bill has been read for the first time in this House. However, to do this, the matter must be put before the House in the Order Paper.

Hon. Members, from the foregoing, my ruling is that whereas Mr. Orengo's Motion was in point of substance in order, under our Standing Orders, the Motion could not be moved without the Bill being put in the Order Paper as this will amount to an ambush on this House. The House has to be seized of the Bill. It is so seized when the Bill is before it. Hon. Members, this matter has since been sorted out. The HBC discussed it last night and the relevant Procedural Motion is in the Order Paper for the morning sitting today.

Thank you.

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3. ADMISSIBILITY OF PROPOSED AMENDMENT TO MOTION ON VOTE ON ACCOUNT

25th June 2008

Order, hon. Members! The Chair has heard sufficient information on this matter as to be in a position to rule.

Hon. Orengo stood on a point of order and the Chair, therefore, got the impression that there was something out of order, or that there was a procedure which was being flouted, or which was under a threat of being breached. Having listened very carefully to Mr. Orengo, and subsequently to the Prime Minister and other hon. Members as have contributed on this matter, the Chair rules as follows. The matter, which has been raised by Mr. Imanyara, is a proposed amendment. Indeed, it is a Motion to amend the Motion by the Minister. As the Chair understands it, the Member for Ugenya did, in his point of order, go into the merits of the Motion. So, Mr. Orengo, you began to debate the Motion rather than point out what, in deed, was out of order!

It is my position that the views expressed by hon. Orengo should have awaited the seconding of that Motion, and at that point the Chair then would propose the amendment and Mr. Orengo would very well have legitimately raised those concerns, inclusive of the form that the amendment has taken. I have also heard the Prime Minister with his concerns, that the amendment, if at all, should have been specific. As I see the Motion, it proposes that this House approves an allocation of Kshs246, 434, 247, 840, which will be half of the Budget amount or the amount in the Printed Estimates, indeed, in accordance with Section 101 of the Constitution. As I see it, the Motion by Mr. Imanyara similarly carries a figure of Kshs123, 217, 123, 920. It is in the Motion that has been given to the Chair and the House.

Mr. Prime Minister, the proposed amendment is not generalised. It is specific in the sense that it cites the amount that it wants the House to approve. In those circumstances, I find the Motion, or the proposed amendment to the Motion, up to where we have come, valid.

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4. THE VICE PRESIDENT TO REMAIN LEADER OF GOVERNMENT BUSINESS UNTIL LAW IS CHANGED

3rd July 2008

Hon. Members, you recall that on June 26th, 2008, Mr. Imanyara rose on a point of order and sought the guidance of the Chair on the functions and duties of the Prime Minister in the House.

Mr. Imanyara stated that he sought the guidance because, in the Presidential Circular distributed to all Members of Parliament, the Office of the Prime Minister and the functions of the Office are defined. He stated that after the definition of the functions of the Prime Minister, which are the co-ordination and supervision of the execution of the functions and affairs of the Government, including those of Ministries, it ends with the words "accountable to Parliament" on the overall performance of the functions of the Prime Minister's office. Mr. Imanyara asked whether by being accountable to Parliament the Prime Minister was not, therefore, the Leader of Government Business in accordance with the Presidential Circular.

Hon. Members, as we all know, the Office of the Prime Minister was introduced into the Constitution recently under our Statutes. Section 15(A) of the Constitution provides for the functions of the Prime Minister to be provided for by an Act of Parliament. Section 4 of the National Accord and Reconciliation Act sets out the functions of the Prime Minister. None of the functions listed thereunder directly makes any reference to the Prime Minister's functions in the House. The section also provides that the Prime Minister shall perform such other duties and responsibilities of his office as may be assigned to him by the President or under any written law. The Standing Orders, as might be expected, make no mention of the Prime Minister as they were made when the office did not exist. The Standing Orders did not anticipate the establishment of the Grand Coalition Government.

Hon. Members, as the honourable Speaker ruled on 25th June 2008, it is expected, with the appropriate provisions in the Constitution or laws, that the Standing Orders shall be overhauled and will set out the role of the Prime Minister in the House. At the present, however, on the matter of the position of the Leader of Government Business, neither the Constitution, nor Standing Orders defines who the holder of this Office shall be, even though both documents use the term.

Hon. Members, it would appear that parallels are being drawn between the role of the Prime Minister in this House and the duties and the functions of the Prime Minister in other jurisdictions. The Prime Minister, in our context, is an extraordinary Office that came into being in circumstances which we all are familiar with. It is an Office which may have no exact equivalent in any other jurisdiction. It is an Office for which we

will have to evolve our own practice and traditions. If we take the Westminster model as an example, we find that in the United Kingdom, the Prime Minister is the political leader of the United Kingdom. He acts as the head of Her Majesty's Government and is the *de facto* wilder of executive powers in the British Government, exercising most of the executive powers normally invested in the sovereign. At Westminster, the Prime Minister and the Cabinet, which he heads, are accountable for their actions to Parliament, of which they are Members. There is, therefore, no doubt about who the Leader of Government Business is in the United Kingdom. A similar situation obtains in many jurisdictions with parliamentary systems.

The position in Kenya, of course, is that in terms of our Constitution, the President is both the Head of State and the Head of Government. He is in strict terms the Leader of Government Business, but delegates this function to a Member of the Cabinet. In these circumstances, it is not the place of this House or the Chair for that matter, to organise the Government side of the House, neither is it for that matter, the place of this House or the Chair to organise the business of the Opposition. The Leader of Government Business in this House is such person as the Government itself determines. Indeed, in the not so distant past, hon. Members will recall that the holder of the Office of Leader of Government Business alternated, in the Seventh Parliament, between several Ministers over a fairly short period of time. The organisation of Government, as set out in the documents issued by the Executive is not a matter for debate or interpretation in this House.

Hon. Members, in response to hon. Imanyara's request, it is the guidance of the Chair that in the current state of our laws and our Standing Orders, the Leader of Government Business is the person, whether it be the Vice-President, the Prime Minister or any other Minister, for the time being, designated by the Executive arm of the Government; none other than the President, because the President exercises executive powers in our country.

For purposes of the business of this House, this remains the position until such time as changes in the law designate a particular office holder as the Leader of Government Business.

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5. SECTION 39 OF THE CONSTITUTION ON THE EIGHT-SITTING-DAY RULE DOES NOT APPLY TO THE ATTORNEY GENERAL

15th July 2008

Hon. Members, before we move to the next Order, you will recall that on Thursday, 10th July 2008, the Member for Imenti Central, Mr. Gitobu Imanyara, sought to know whether the provisions of Section 39 of the Constitution applied to the Attorney General with regard to his absence from the House.

Further, the Member sought to know whether there is a procedure for communicating to the House the absence of the Attorney General whenever such absence has been permitted by the President pursuant to Section 39 of the Constitution. Section 39(1)(b) of the Constitution requires that a Member shall vacate his seat if without having obtained the permission of the Speaker, he has failed to attend the Assembly on eight consecutive days on which the Assembly was sitting in any session.

However, Subsection 4 of the same section categorically states that the section shall not apply to the Attorney General. Section 39 of the Constitution, therefore, does not apply to the Attorney General.

Hon. Members, the Attorney General does not lose his seat in the House on account of failure to attend the House for eight consecutive days without the permission of the Speaker. Indeed, the Attorney General does not require the permission of the Speaker to be absent from this House.

However, the Attorney General, like any other Member of this House, is required by Standing Order No. 173 to notify the Speaker of his intention to travel outside Kenya before he does so. Standing Order No. 173 requires Members intending to travel outside Kenya whether in an official or private capacity to give written notice to the Speaker to that effect indicating *inter alia* the destination to be visited, the dates of intended travel, the period of absence, their physical address while away and telephone contacts during their period of absence from Kenya.

Hon. Members, let me take this opportunity to remind all Members of the need to strictly comply with Standing Order No.173 when intending to travel outside Kenya and to notify the Office of the Speaker accordingly. I have directed the Clerk of the National Assembly to maintain a register wherein shall be indicated the appropriate information on Members travels. Hon. Members should additionally note that in terms of Section 39 of the Constitution, the permission of the Speaker must be separately sought if the Member will be absent from the House on eight consecutive sitting days in a session.

In respect of the specific question as to the procedure by which the House is notified of the absence of the Attorney General, Section 39 of the Constitution contains no provisions to that effect as implied by Mr. Imanyara. No such procedure is provided for. That notwithstanding, let me inform the House that the Attorney General had, in fact, vide the letter dated 3rd July 2008 notified the Speaker that he will be absent from the country on official business from 6th July 2008 to 13th August 2008 and had requested that Questions, Motions or Bills requiring his response be not listed during that period.

Hon. Members, the interest of the Chair in the Attorney General's actual presence in the House is to see to it that the business of this House is not disrupted on account of the absence of the Attorney General. It, therefore, behoves the Government to try to ensure that no business of this House is disrupted on account of the absence of any Member of the Government.

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6. DISTINCTION BETWEEN ORDINARY QUESTIONS AND QUESTIONS BY PRIVATE NOTICE

24th July 2008

Hon. Members, over the past several weeks, my attention has been drawn to apparent difficulties being encountered by Members with respect to making a distinction between ordinary Questions and Questions by Private Notice and the scope and form of Ministerial Statements. I would, therefore, like to provide the following guidance to assist Members to appropriately utilise the various processes in executing their mandate.

Hon. Members, Section 17(3) of the Constitution states as follows and I quote:- "The Cabinet shall be collectively responsible to the National Assembly for all things done by or under the authority of the President, or the Vice-President or any other Minister in the execution of his office" The House, through the Standing Orders, has devised mechanisms to ensure due performance of this function by the Government. One among this is the provision to Members to ask Questions. In this regard, I request hon. Members to familiarise themselves with the provisions of Part IX of the Standing Orders. Standing Order No. 35 (1), for example, states as follows:-

> *"Questions may be put to a Minister relating to public affairs with which he is officially connected to proceedings in the House or to any matter of administration for which he/she is responsible"*

The Standing Orders classify Questions into two categories, namely; Ordinary Questions and Questions by Private Notice. Ordinary Questions may seek either oral or written replies. The difference between these forms of Questions relate to the content and urgency of the matter. For Ordinary Questions, Ministers are allowed ten days to respond, whereas they are expected to answer Questions by Private Notice within two sitting days, following notice thereof, pursuant to the provisions of Standing Order No. 36(2) which states as follows:-

> *"Questions which in the opinion of Mr. Speaker are of an urgent character and relate either to matter of public importance or to the arrangement of business may also be asked of a Minister after private notice and shall be answered within the next two sitting days following such notice".*

I would like to specifically draw the attention of the House to the provisions of Standing Order No. 35(2). This is important, Members. Please, note that. It states:-

"A Question shall be of a genuinely interrogative character and its purpose shall be limited to seeking information or pressing for action. Standing Order No. 35(3) further

defines the scope of Questions as follows:-

> *" A Question shall not be made the pretext for a debate"*.

We appear to be doing this only too often. The Chair has had occasion to enforce this rule. For instance, on 6th July 1994, Mr. Speaker directed as follows:

> *"This is Question Time. You are supposed to rise, ask Questions and not to support or reject any philosophy. There is time for accepting or rejecting philosophy."*

The Chair, therefore, normally allows other Members to put supplementary questions to the Minister, arising from the answer he or she gave to the original Question. Members should, therefore, not use the opportunity given to them to ask supplementary questions and ask completely different Questions. Members shall also note that Question Time is not considered as part of the House Business. Therefore, the period spent in deliberating on Questions should be managed in such a way that it does not encroach on or eat into Business Time.

With regard to Ministerial Statements, the established practice is that they cover issues of a wider range that are both of urgent nature and require immediate urgent action, and that cannot, consequently, be dealt with through Questions aptly. These are normally issues that entail policy. Ministers also are at liberty to use the opportunity to brief the House and country on critical issues of policy, incidents or actions in order to place them on the official record or public domain. Consequently, Members are expected to ask for clarifications arising from the contents of the Ministerial Statement and not to question, oppose or support the Ministerial Statement *per se*.

Finally, while a Ministerial Statement may be requested by a Member or a Minister may, out of his or her own volition, furnish the House with one, a Question, whether Ordinary or by Private Notice, must be filed by a Member and put on the Order Paper.

It is further directed that Members seeking Ministerial Statements shall give indication before the Sitting commences. In other words, it is not expected that Members will approach the Chair, as you have been doing, to seek an opportunity to be accorded a chance to ask for Ministerial Statements. We have had a lot of this and it has been distractive on the Chair.

I hope that this information will be useful to Members.

7. ENGAGING IN DEBATE OUTSIDE THE HOUSE ON MATTERS THE HOUSE IS SEIZED OF IS DISCOURAGED

31st July 2008

Hon. Members, on Tuesday, 29th July 2008, the hon. Member of Parliament for Gem, Mr. Midiwo, rose on a point of order and alleged that the hon. Member for Kipipiri, Mr. Kimunya, had on Sunday, 27th July 2008 talked on matters touching on the Grand Regency Hotel, which matters are currently being investigated by the Departmental Committee on Finance, Planning and Trade, in a public rally during a thanksgiving ceremony organized by the hon. Member for Kinangop, Mr. David Mwaniki Ngugi. The hon. Member for Gem also sought to know from the Speaker whether he had given any assurances to Mr. Kimunya that the Motion censuring him, and which was debated on 2nd July 2008, had not been properly before the House.

I wish to confirm to the House that, indeed, I attended the aforesaid thanksgiving function following an invitation by Mr. Ngugi. The hon. Member for Kinangop is one of my long-time friends, whom I knew even before he was elected to this august House, both of us having worked in the private sector for many years, and more so in the Mombasa station. For the record, I have on different occasions attended other prayer and thanksgiving ceremonies on invitation by Members of Parliament whenever time has allowed me to do so. Indeed, I have also attended my own thanksgiving and prayer ceremony, to which hon. Members were invited and a sizeable number kindly graced the occasion.

From the outset, I want to assure the House that the Motion of censure moved by the hon. Member for Ikolomani, Dr. Khalwale, on 2nd July, 2008 on the then Minister for Finance was properly processed and brought to the House. Dr. Khalwale delivered a copy of the proposed Motion in writing to the Clerk of the National Assembly, who then submitted the same to the Chair and the Chair approved it pursuant to the provisions of Standing Order No.40. Subsequently, the Motion was presented to the House Business Committee, which allocated time for debate. The House may wish to note that Mr. Kimunya was, and still is, a Member of the House Business Committee while the Chair is not.

As Members may recall, on 8th July 2008, I directed the Departmental Committee on Finance, Planning and Trade which had been investigating the Grand Regency Hotel saga, to conclude its work within two weeks and I urged hon. Members to refrain from revisiting the matter, whether inside or outside the House, until the Committee presents its report to the House. The full text of my ruling as is relevant was as follows, and I quote:-

> *"As we move to close this matter for the moment, I want to take this*

opportunity to appeal to, and urge hon. Members that, in the light of the ruling which has been made by the Chair, that the Departmental Committee on Finance, Planning and Trade should continue its investigations into this matter, complete and compile a report for debate and adoption by the House. Hon. Members should restrain themselves from commenting on this matter outside Parliament. I will, therefore, expect that comments which have been made in the recent past, at funerals and homecoming parties will cease forthwith. Otherwise, the Chair will deal with that matter appropriately in the light of our Standing Orders and Powers and Privileges Act. Please note."

I have obtained and listened to the tape recording which contains the statement attributed to the Member for Kipipiri and other speeches made during the said function in order to ascertain the content of exactly what Mr. Kimunya said. For the benefit of the House, let me quote extracts from his speech which he gave in Kiswahili:-

"Ningetaka kusema asante kwa Spika kwa sababu hii maneno yote ilipotokea huko Bungeni, wengine walijaribu wakatafuta wakati Spika yuko ng'ambo, wakijua kama yeye angekuwa kwa hiyo kiti, hangekubalia upuzi kama huo".

Judging from the statement made by the hon. Member, there is no doubt that he took the debate outside the House and imputed improper motives on the Chair.

Previously, the Chair has asked Members not to take debate outside the House and to desist from dragging the Chair into any debate even within the House.

Hon. Members, on the 18th April 1995, the immediate former Speaker, hon. Francis ole Kaparo, made the following ruling on the matter, and I quote:

"Hon. Members, I seek the indulgence of the House to delve into the issue in greater length than usual. In parliamentary parlance, the procedure of Parliament encompasses far more than the codified rules. Indeed, its most indelible part is practice, which practice comprises tradition, convention, etiquette, decorum, standards, rulings of the Chair and so on. This understanding of parliamentary procedure has been universally acknowledged especially within the Commonwealth jurisdictions. Thus, whereas the quantified parts of procedure are specific and predictable, in situations unforeseen and thus not already provided for, Parliament reverts to the application of the uncodified part of procedure, that is, practice. In parliamentary traditions, such matters are resolved having regard to precedent. As regards specific request for guidance on the comments made outside this Chamber, I will state as follows: "On the 17th October, 1969, the National Assembly made a specific decision in a resolution to bar any continuation by Members of debates on matters before the House. However, prior to this resolution, the issue had been raised on 12th August, 1969 to which Mr. Speaker Slade in part responded as follows and I

quote Mr. Slade:

> *"As stated in my communication of 29th May, 1969 and the 24th June, 1969, it is definitely improper and contemptuous of this House for Members to carry on debates outside this House or to answer in the press or publicly elsewhere anything that has been said by hon. Members in this House. What I said about carrying debates outside applies only to debates on substantive Motions which result in a definite resolution. The subject matter of such debates, indeed, must not be discussed by hon. Members publicly outside the House while the debate is pending nor should there be any subsequent public comment by hon. Members outside the House which challenges the ultimate resolution of the House. Whatever the nature of the proceedings, things said by hon. Members in this House may only be answered by other Members in this House".*

As I continue to quote my predecessor:

> *"As, it can be done from the foregoing and given that, careful scrutiny of the journals of this House reveal that the rulings of this subject matter have neither been varied nor rescinded, I do rule with fear of possible contradictions that our present procedure and practice bar hon. Members from referring to, commenting or continuing debate outside this Chamber on substantive matters not yet disposed off by this House".*

I hasten to add that in debarring references, comments and debates outside the Chamber on substantive matters under debate here, it is similarly referring to matters of a Select Committee before the Committee tables its report as precluded by the provisions of Standing Order No.70 which prohibits anticipating discussion of substantive Motions already seized of this House." Hon. Members, taking debate outside the House no doubt lowers its dignity and brings into disrepute its proceedings. It behoves all of us to individually and collectively uphold the dignity of this House.

Secondly, by alleging that if the substantive Speaker was in the Chair, the Motion would not have been allowed, Mr. Kimunya cast aspersions on the integrity, capacity and independence of the Chair. Indeed, a Member would not be able to prejudge what the Chair will rule on a matter as the Chair considers many explanatory variables and consults widely before making a decision.

For a Member to allege that a person presiding over sittings of the House will make a decision that would be different if another Member was presiding is far fetched, speculative and unacceptable. The Chair as lawfully constituted executes its mandate in absolute solidity, cohesion and unwavering collectivity and vows to continue to do so without fear or favour and yet fairly and firmly.

Arising from the above, it will be observed that Mr. Kimunya conducted himself in a most disgraceful and unsatisfactory manner, to wit:

(i) Taking debate outside the House contrary to the Chair's ruling.
(ii) Casting aspersions on the Chair.
(iii) Being contemptuous of the House by revisiting matters that the House had made a resolution on, to proceed in a particular manner.
(iv) Using language unbecoming of an honourable Member and calling to question the conduct of the House.

Hon. Members, in view of the foregoing, the conduct, actions and unwarranted utterances by Mr. Kimunya amount to gross misconduct within the meaning of Standing Order No. 88, and the Chair strongly takes great exception to them. I, therefore, without any reservation, severely reprimand the hon. Member for Kipipiri for gross misconduct in the manner he has handled himself in this matter.

I believe the Committee has availed Mr. Kimunya the opportunity to state his position and, indeed, when the Committee tables its report in the House, the Chair will avail the hon. Member yet another opportunity to respond. Dragging the Chair into the matter under inquiry and debate was most unfortunate and deplorable. Using derogatory language in reference to this august House in terms such as "*upuzi*" is beyond any acceptable standard of conduct of any hon. Member.

Whereas I wish to have this matter come to an end, may it serve as a serious caution to the hon. Member that the Chair shall not, under any circumstances, tolerate such conduct. In the same vein, I would like to refer hon. Members to previous rulings by the Chair on continuation of debate outside the House contrary to laid down parliamentary conventions. Hon. Members will recall that, yesterday, hon. Shabesh, hon. Linturi and hon. Jirongo did raise issues with Ministers who, of late, have been responding to matters that have been brought to the fore in the House in fora elsewhere. I, therefore, appeal to Ministers not to discuss matters raised in this House, outside the House, as the Chair will always give Ministers time to respond to them in the House.

I would like to appeal to all hon. Members to maintain the dignity of this House individually and collectively, both in the House and outside. This nation looks upon you for leadership and guidance. The nation and Kenyans, at large, desire to be led by men and women of integrity that will help, *inter alia* to actualize Vision 2030 and to make this country eternally the best to belong to and live in.

I thank you.

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8. RULING ON JUDICIAL REVIEW: IN THE MATTER OF THE ELECTORAL COMMISSION OF KENYA (ECK) CHAIRMAN VERSUS THE ATTORNEY GENERAL

November 27, 2008

First, hon. Members, you will recall that on Wednesday, 12th November 2008, Mr. Olago, Member for Kisumu Town West, rose on a point of order to bring to the attention of the Chair, Nairobi High Court Judicial Review Petition, No.689 of 2008, Samuel Mutua Kivuitu and 22 others *versus* the Attorney-General. He tabled copies of the pleadings and ruling in the said case. The High Court had on 11th November, 2008, issued an order in the following terms:-

> *"A conservatory order be issued to restrain the Government of Kenya from taking or commencing any Executive or Legislative action or process to disband or abolish the Electoral Commission of Kenya (ECK) and/or remove its members from office pending the hearing and determination of this application"*.

Mr. Olago sought a ruling on whether this order amounted to a derogation from the Constitutional principle of separation of powers by the Judiciary. He asserted that the ruling of the High Court contravened Section 30 of the Constitution and amounted to a subjugation of Parliament by the Judiciary. The Chair undertook to give a ruling on Tuesday, 18th November 2008. However, on 13th November 2008, this House passed a Motion to adjourn the House until 25th November 2008. On 25th November 2008, hon. Olago Aluoch, rose on a point of order and sought to know when the directions and ruling would be issued. The Chair promised to issue the directions and ruling on Thursday, 27th November 2008, which I hereby do.

Hon. Members, I have now carefully read the pleadings and ruling tabled in the said High Court Judicial Review Petition No. 689 of 2008; Samuel Mutua Kivuitu and 22 others versus the Attorney General. It is clear from a perusal of the pleadings that the National Assembly is not a party to these proceedings. It is also clear that no orders have been made specifically, directed at this House. That notwithstanding, this House has been formally made aware of these proceedings by the tabling by hon. Olago Aluoch of copies of the pleadings and the order made by the Court. Furthermore, I am clear in my mind that a Member of this House is entitled to bring to the attention of the House an order made by a court and seek the directions of the Speaker on what, if any, is the effect of that order on the operations of this House. Let me, therefore, make it clear from the outset, that I am satisfied that the matter has properly been brought to the attention of the House and that the ruling of the Speaker has ben properly sought.

Hon. Members, I find it necessary to make some reference to the *Sub Judice* Rule to be found at Standing Order No. 74 of our Standing Orders and its application to the present matter. Standing Orders provide that no Member shall refer to any particular

matter which is *sub judice* or to any matter which is, in its nature, secret. Briefly stated, the essence of this rule is that this House should not debate any matter awaiting the adjudication of a court. To do so, in a manner that anticipates the decision of the court or expresses a view on the merits and demerits of the matter before the court, will be clearly out of order. In the present case, I am satisfied that the *Sub Judice* Rule does not apply. What is in issue is the effect on this House of an order that has already been made and that is subsisting. For now, the order is a *fait accompli*. I am, therefore, satisfied that the House is properly entitled to know how, if at all, its conduct of business is affected by that order.

Hon. Members, Chapter III of the Constitution enacts Parliament. Section 30 of the Constitution stipulates that the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly. Section 46 of the Constitution provides for the exercise of legislative power of Parliament, while Section 47 provides for the manner in which Parliament may alter the Constitution itself. Section 56 of the Constitution provides that the National Assembly may make Standing Orders regulating its procedure, while Section 57 allows for the provision of powers, privileges and immunities of the Assembly and its Committees and Members. Section 12 of the National Assembly Powers and Privileges Act, Chapter 6 of the Laws of Kenya states:-

> *"Immunity from legal proceeding: No civil or criminal proceedings shall be instituted against any Member for words spoken before or written in a report to the Assembly or a Committee or by reason of any matter or thing brought by him, therein, by petition, Bill, resolution, Motion or otherwise."*

Section 12 of the National Assembly Powers and Privileges Act states:- "No proceedings or decisions of the Assembly or the Committee of Privileges acting in accordance with this Act, shall be questioned in any court." Chapter II of the Constitution of Kenya establishes the Executive, which comprises of the President, Prime Minister, Vice-President, Ministers and the Cabinet. Executive powers are also provided for under Chapter II. Chapter IV of the Constitution establishes the Judicature, which includes the High Court, Court of Appeal and other subordinate courts.

Hon. Members, I have recapped the above provisions of the law to emphasize the constitutional basis for the principle of separation of powers. It is now a well-settled principle of Constitutional Law which finds anchor in our Constitution, that Government functions best when its powers are not concentrated in a single authority, but are instead dispersed among different branches. It is a prerequisite for a functioning democracy. The Legislature makes the law, the Executive enforces the law, while the Judiciary interprets the law. Power thus divided, prevents the absolutism of the Executive, the possible anarchy of Parliament or presumption of the Judiciary.

The operation of the principle, both separates and blends powers so that each branch serves as a check and balance on the powers of the other. It ensures the protection of the rule of law and secures the fundamental rights of the individual. The principle of separation of powers has a superficial simplicity, but is in reality, inherently complex. Each branch of Government must exercise its powers in a fine balancing act, to ensure that it properly and effectively carries out its functions, while at the same time, it does not infringe on the powers and responsibilities of the other branches of Government. Thus, Parliament enacts laws, but the Judiciary can review the constitutionality of such laws legislated if challenged, and can, indeed, declare a law made by this House to be unconstitutional or a nullity. The principle ensures that Parliament, as the representative of the people, cannot be prevented from giving voice to the will of the people. But, it also ensures that the Judiciary can scrutinize the legislation we make after we have made it, to ensure that we have been faithful to the Constitution.

To respond directly to the matters raised by hon. Olago Aluoch, it needs to be well understood that the legislative power of this House, under Section 30 of the Constitution, cannot be fettered by any person or authority outside this House.

Every hon. Member of this House has the unencumbered right, in accordance with the Constitution, to introduce a Bill for debate and enactment by this House. This right to bring a Bill before this House without obstruction by any person or authority is available equally to every hon. Member, whether such hon. Member be a private Member or Government Minister. No person or authority can fetter that right.

In the same vein, if a Bill is introduced by any hon. Member before this House, the House has the right to proceed upon that Bill in the manner provided for under our Constitution and the Standing Orders. I underline again that no person or authority can fetter this right.

Hon. Members, in answer to hon. Olago's question, I rule that the order of the court made in Nairobi High Court Judicial Review Petition No.689 of 2008 - Samuel Mutua Kivuitu and two others versus the Attorney-General - does not and, indeed, cannot prevent Parliament from carrying out its legislative functions.

Neither this nor any other order of a court can prevent any Member of Parliament from introducing a Bill before the National Assembly. It has been stated that next only to the privilege and immunity of free speech within the House, the most important privilege of this House is the right of the House to regulate its own procedure, free from intervention by the Executive or the courts.

Hon. Members, the House retains the right to be the sole judge of the lawfulness of its own proceedings. Accordingly, Parliament cannot be stopped or prevented from performing its legislative function. Any person or authority purporting to do so, would be acting in vain.

The Speaker of the National Assembly is under duty to protect the constitutional authority and role of Parliament. As your Speaker, I will diligently perform this role and jealously guard the constitutional authority of Parliament.

Thank you.

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9. SPEAKER MUST BE NOTIFIED BEFORE A PETITION IS LAID ON THE TABLE

Tuesday, 9th December 2008

Hon. Members, with regard to the Order on Petition, I have the following communication to make by way of a ruling of the Chair.

Hon. Members, you will recall that on Thursday, 4th December 2008, the hon. Member for Ikolomani, Dr. Khalwale, purported to petition the House on the fate of money frozen by the Central Bank of Kenya. The hon. Member had not given prior notice of the petition. You will recall, hon. Members, that I deferred the matter to today, Tuesday 9th December 2008 at 2.30 p.m.

The issue for determination is this: Should hon. Members give prior written notice of intended Petition to the Speaker? Otherwise put: Is notice to the Speaker a condition precedent to presentation of a petition to the House? The Question of presentment and procedure relating to public petitions is not new to this House. Considered rulings on related matters were delivered in this House on 11th June 1965, and 4th November 1993.

The Standing Orders, at Part XX, provide for public petitions. Standing Order No.164 is of relevance to this matter.

It reads as follows:- *"Every such petition shall be brought to the Table of the House, by the direction of Mr. Speaker who shall not allow debate, or any hon. Member to speak upon or in relation to such petition; but it may be read by the Clerk if required."* The words *"by the direction of Mr. Speaker"* are significant. These words, in themselves, make prior notification of the Speaker a requirement. This is a logical position. The Speaker as Chair of the House, cannot be subjected to ambush by Members seeking to make this or that petition. And neither should Members of the House be subjected to such ambush. Prior notification of a petition will surely be necessary. This is the rationale behind the preparation of the Order Paper. In this regard, Standing Order No.30 requires that:

> *"The Order Paper shall be prepared by the Clerk, showing the business to be placed before or taken by the House in the order in which it is to be taken, together with such other information as Mr. Speaker from time to time may direct to be shown therein; such Order Paper shall be circulated as early as possible before the House meets."*

Prior presentment also occasions the Speaker an opportunity to ensure that a petition by an hon. Member conforms to the requirements contemplated by the Standing Orders. On this, Standing Order No.165 provides as follows:

"Every Member presenting a petition shall take care that the same is in conformity with the usual practice of the House of Commons of Great Britain and Northern Ireland."

What then is the current law and practice on public petitions prevailing in the House of Commons? On this, Erskine May in the text *Parliamentary Practice* (20th Edition, on pages 811 to 822) sets out some guidelines and the style and contents of a petition. These guidelines are, by virtue of Standing Order No.165, applicable in Kenya *mutatis mutandis* as they apply in the House of Commons.

The guidelines provide as follows:

(i) A petition should be specifically and respectfully addressed to the House and should indicate clearly the origin and its author(s).
(ii) A petition should contain one or more paragraphs setting out the reasons why the petitioner or petitioners is or are petitioning the House.
(iii) A petition should contain a clear request to the House which is within its power to grant.
(iv) A petition should conclude with a prayer.
(v) Every petition must be respectful, decorous and temperate in its language.
(vi) A petition must be written by hand, not printed, photocopied, lithographed or typewritten.

Hon. Members, it is clear, from the above, that the petition by the hon. Member for Ikolomani fell short of the requirement of the Standing Orders, including the practice and procedure as set out above. That was the position as last week.

In particular, the petition did not meet the requirements of the Standing Orders with respect to prior notification of the Speaker. Thus, in accordance with the Standing Orders, the petition should be presented to the Clerk of the National Assembly to certify that it meets the requirements of the Standing Orders as I have set out in *extenso* above. The Clerk shall then notify Mr. Speaker that the petition is either in order or needs further scrutiny. The hon. Member would then be advised on its admissibility or otherwise.

Thank you.

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SECOND SESSION (2009)

Speakers' Considered Rulings and Guidelines (2009)

Contents

1. RESUMPTION OF THE HOUSE TO BE TREATED AS CONTINUATION OF SECOND SESSION OF TENTH PARLIAMENT

January 20, 2009

Hon. Members, Standing Order No. 7(1) provides as follows:- *"Whenever during a Session the House stands adjourned, whether or not a day that has been appointed for the next meeting, Mr. Speaker shall, at the request of the Government, appoint a day or, as the case may be, a day other than the day already appointed for the meeting of the House, and, such day, having been notified to the Members, the House shall meet thereon at such time as shall be appointed by Mr. Speaker."*

Pursuant to the provisions of this Standing Order, and in consultation with the Government, I appointed this day, 20th January 2009, for the meeting of the House. I wish to bring it to the notice of hon. Members that this is a continuation of the Second Session of the 10th Parliament as the House has not been prorogued by the President as provided for in Sections 58 and 59 of the Constitution of Kenya. The House shall transact its business as if it had been duly adjourned to this appointed day. A Session commences when the House first meets after its prorogation or dissolution and terminates when the National Assembly is prorogued or dissolved without having been prorogued.

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2. THE SPEAKER TO SERVE AS CHAIRPERSON OF HOUSE BUSINESS COMMITTEE

April 28, 2009

Hon. Members, please, bear with me. It was necessary that just apart from the communication from my office, I verify and confirm that it is still in the form that I crafted it. I have been able to do that verification and I have authenticated the communication. I have appended my signature to it and there is only one communication that I have signed. If any other document circulates, it will not be mine.

Hon. Members, on Thursday 23rd April 2009, just as the House was about to resume the interrupted debate on the Motion for approval by the House, of the names of Members nominated to serve on the House Business Committee (HBC), the Member for Kisumu Town West, Mr. Aluoch, stood on a point of order claiming to rise on an issue touching on the ability of this House to defend the Constitution. The hon. Member noted that the Motion for approval of Members of the House Business Committee had been brought by the Vice-President as Leader of Government Business (LGB). He, however, sought to know from the Chair, who under our Constitution is supposed to move the Motion? Citing the definition of the "Leader of Government Business" in the Standing Orders, which at Standing Order No. 2 defines the "Leader of Government Business" as "the Minister designated by the Government as the Leader of Government Business in the House", the hon. Member posed the question and I quote: -"Who is the Government in the context of the Kenyan situation?"

The hon. Member went on to argue that the "Government", in the context of the Kenyan situation is defined by the Constitution and the National Accord and Reconciliation Act, and that considering the functions of the Prime Minister as set out in the Constitution, the inference from the Constitution and the National Accord is that the Leader of Government Business and the Chairperson of the House Business Committee is a constitutional affair. It was the argument of Mr. Aluoch that the Leader of Government Business ought to be the Prime Minister and that it would be unconstitutional for any other person to be the Leader of Government Business or the Chairperson of the House Business Committee. Mr. Aluoch, therefore, sought a ruling from the Chair on these matters before the House could proceed.

The Chair took the view that the matters raised by Mr. Aluoch were weighty and decided to hear a few more contributions from Members before indicating the way to proceed. What followed was a barrage of learned and educated opinions by many hon. Members canvassing various positions on the issues raised. In the process, a number of hon. Members also raised new issues which merit consideration and comment by the Chair. Some of the hon. Members who gave their opinions or raised

issues include: Messrs. M. Kilonzo, Orengo, Imanyara, Dr. Machage, Messrs. Murungi, Ruto, Kenyatta, C. Kilonzo, Samoei, Nyambati, ole Ntimama, Bahari, Prof. Saitoti, Messrs. Okemo, Munya, Mrs. Ongoro, Dr. Shaban, Mr. Mbadi, Prof. Ongeri, Mr. Namwamba, Prof. Anyang'-Nyong'o; Messrs. Wakoli, Farah and Thuo.

Hon. Members, this list is not exhaustive neither is it intended to be. You will recall that at the end of all the contributions, I delivered a communication in which I, among other things, promised without prejudice to the ruling I undertook to deliver today, to seek direct audience with His Excellency the President and the Rt. Hon. Prime Minister with a view to bring the matter of the constitution of the House Business Committee, its Chairperson and Leader of Government Business to a speedy and amicable conclusion. I also undertook to make known to this House the result of that initiative. Indeed I will do so in the course of this communication.

Hon. Members, before I get to the heart of this ruling, let me remind you of what I said on Thursday, 23rd April 2009. I said then and I repeat now that the Office of the Speaker of the National Assembly of Kenya is singularly ill-equipped to advise on or determine for the Executive arm of Government and for that matter political parties, how they shall run their affairs. I further stated that the Speaker will limit himself to questions of constitutionality, statute and Standing Orders but only so far as this relates to the business and affairs of this House. Therefore, I want to make it very clear from the onset that subject to these qualifications that I have alluded to, I do not intend to traverse territory that is outside the province of my office.
Hon. Members, I have distilled the following issues from the points of orders and contributions made: -

a) What is the definition of the Government in the context of Standing Order No.2?;

b) Whether the Speaker, having recognized or allowed the Vice-President to appear before the House as Leader of Government Business is estopped from entertaining any questions as to the legality or propriety of his incumbency as such;

c) Whether the House has any role in the nomination or determination of the Leader of Government Business;

d) Whether the Constitution as read with the National Accord and Reconciliation Act provides for who shall be the Leader of Government Business in this House;

e) How any inconsistency between the National Accord and Reconciliation Act and the Constitution, or for that matter the Standing Orders, is to be resolved;

f) What the Speaker is to do in the event that he receives two different letters from the same Government designating different persons as Leader of Government Business in the House;

g) Whether the House can remove a Leader of Government Business and if so, through what procedure;

h) The procedure for the nomination of the chairperson of the House Business Committee and whether the nominee of Government for chairperson is to be part of the list submitted to the House for approval or is additional to that list; and,

i) Whether the House can proceed to approve the membership of the House Business Committee without regard to the question of who the Leader of Government Business or the chairperson of the Committee is.

Honourable Members, those are the issues. I seek your indulgence as the menu for determination is very long. Allow me to pronounce myself as concisely as I can on each of these issues, and I plead for your patience.

Honourable Members, the first and, probably, the most important issue is the question of who or what constitutes the "Government", for the purposes of the designation of a Minister envisaged under Standing Order 2. This issue was canvassed at length and is at the core of the present impasse. Various documents were cited as providing the answer; including the Interpretation and General Provisions Act; Chapter 2 of the Laws of Kenya, the Constitution and the National Accord and Reconciliation Act. The simple question being asked is this: When the Standing Orders provide for designation of a Minister to be the Leader of Government Business in the House by the Government, who is envisaged to make that designation?

Honourable Members, the position of Leader of Government Business exists in virtually all Parliaments in the Commonwealth. There are, however, no hard and fast rules as to who shall hold that office. In some jurisdictions, the matter is expressly provided for in the Constitution and, while in others, it obtains by the statute or by the standing orders. The following few examples shall illustrate this point:-

In the Republic of Ghana, the Leader of Government Business is not specifically provided for in the Constitution and the holder of that office need not be a Minister. In fact, as of today, the Leader of Government Business in the Parliament of Ghana is not a Minister. He is not a member of Cabinet and cannot lay a paper in the House on behalf of a Minister. In the Republic of Uganda, pursuant to Article 108A of the Constitution, the Prime Minister is designated as the Leader of Government Business in Parliament. In the United Republic of Tanzania, under the Constitution, the Prime Minister is appointed by the President and is the Leader of Government Business in the

National Assembly and has authority over the control, supervision and execution of the day-to-day functions and affairs of the Government. In the Republic of South Africa, the President appoints the Leader of Government Business in Parliament. In democracies with a longer history, such as the United Kingdom, and India, the Leader of Government Business is designated by the Prime Minister who is the Head of Government. There is, therefore, no universal rule of general application in this matter.

Honourable Members, in Kenya, the Office of the Leader of Government Business is recognized and defined only in the Standing Orders. I say that with emphasis. In Kenya, the Office of the Leader of Government Business is recognized and defined only in the Standing Orders. The position as defined in the Standing Orders must be construed, not generally, but only in the context of the National Assembly. The holder is the leader of the business of the Government only for the purposes of the House. The expression "Leader of Government Business" is not, to my knowledge, to be found anywhere in the Constitution or in the National Accord and Reconciliation Act. The position is not established by or under any other statute. It follows that neither the Constitution nor any statute has the provision on the appointment of the Leader of Government Business in the House. In providing that the Leader of Government Business shall be the Minister designated by the Government, I find that, in terms of how the House functions, the Standing Orders mean no more than that the Leader of Government Business is to be the Minister designated by the Government. It is that organ that is entrusted with the running of the Executive arm of the Republic of Kenya. I hope hon. Members have followed that!

The office of the Leader of Government Business in this House has been held by various persons since Independence. At some time, the office has been held by the Vice-President, while at other times, it has been held by a Minister. The one constant thread running through is that the decision about who shall be the Leader of Government Business has always rested with the Executive.

Honourable Members, a number of Members suggested that as the Speaker had "recognized" the Vice-President acting as Leader of Government Business at some point, the Speaker was, therefore, estopped from entertaining any queries on the legality or propriety of the Vice-President's incumbency as such. This is not so. The role of the Speaker, as is well known, is to act as a neutral arbiter. The Speaker is not a protagonist in the arena that is the House. The Speaker does not raise points of order on his own motion.

On 22nd April 2009, the Speaker had before him a valid Motion. At that time, the Speaker had received only one letter from His Excellency the President, designating the Vice- President as the Leader of Government Business. When I called out the Leader of Government Business to move the Motion, I was, therefore, acting on this basis; on the basis that I had received one letter from the Government, from His Excellency the

President. Indeed, the Motion was properly moved, seconded and proposed. As we speak, we have before the House a valid Motion. The view that since the Speaker had not raised issue about the legality of the situation, he is prevented from adjudicating on it when it is raised by any hon. Member is, therefore, not tenable. Similarly, the view that a Member cannot raise a point of order on the grounds that such a Member did not raise the point of order earlier is not correct. I rule that any Member can, at any time, raise a question on the constitutionality of any action or set of circumstances in this House and it is always open to the Chair to entertain and rule on the merits of such a question.

Hon. Members, on the question of whether the Constitution as read with the National Accord and Reconciliation Act provides for who shall be the Leader of Government Business in this House, I shall be brief. As I have said, the Leader of Government Business is defined only by this House through the Standing Orders. You will recall that when, as recently as 10thDecember, 2008, just four months ago, the House considered the question of who should be the Leader of Government Business, the House made its decision quite clear.

Hon. Members, when the House passed the new Standing Orders on 10th December 2008, the House was aware of the provisions of the Constitution and the National Accord and Reconciliation Act. It was also aware of the respective constitutional powers and functions of both His Excellency the President and the Right Honourable Prime Minister. Yet, this House, in its wisdom, the hon. Members present here, resolved that the Leader of Government Business shall be a Minister designated by the Government. There is, therefore, clearly no room for inferring that either the President or the Prime Minister or the Vice-President or any other person is *ipso facto* the Leader of Government Business. This is because the Standing Orders, which recognize and define this office, expressly provide for how the holder of the office is to be arrived at.

Hon. Members, I do not find that there is room for inference or implication on this question. I rule that the definition of Leader of Government Business as provided for in Standing Order No.2, must be understood in its plain and ordinary meaning, namely, that any Minister (and "Minister" is also defined under Standing Order No.2 to mean the President, the Vice-President, the Prime Minister, a Deputy Prime Minister or other Minister, and includes the Attorney-General, an Assistant Minister, and any person who holds temporarily any such office) can be designated by the Government to be the Leader of Government Business in the House. You will find that in black and white in the Standing Orders.

Hon. Members, the answer to the question as to whether this House has any role to play in the nomination or determination of Leader of Government Business is by now apparent. This House has only a very limited role in the matter. The office of Leader of Government Business is recognized and defined in our Standing Orders, but the onus

of designating the incumbent is placed on the Government. The role of this House is, therefore, limited through the Speaker, to receiving the name of the Minister designated by the Government and recognizing and facilitating that Minister to discharge his or her functions as Leader of Government Business in this House.

Hon. Members, I find after careful consideration that it will not be necessary to answer in any greater detail the question of how any inconsistency between the National Accord and Reconciliation Act and the Constitution, is to be resolved. I make this finding because in the present matter, that is, probably, a hypothetical question. I have not been able to find that there is any contradiction or inconsistency between the provisions of the Constitution and the National Accord and Reconciliation Act, or for that matter, the Standing Orders. This is because the Constitution itself anticipated this very question and answered it before it was asked. Section 3 of the Constitution makes it clear that if any law is inconsistent with our Constitution, the Constitution prevails and that other law shall to the extent of the inconsistency, be void. That is the general rule with which we are all very familiar. However, the same Constitution is quite clear at the same Section 3 that this general rule does not apply to the National Accord and Reconciliation Act, which is an Act made by Parliament pursuant to Section 15A(3) of the Constitution.

Hon. Members, those of you who are possessed of the Constitution now may want to look at those sections that I have referred to. The proviso to Section 3 of the Constitution stipulates that "the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to Section 15A(3)." This is spelt out firmly by that proviso.

Hon. Members, the Constitution has made it clear that the National Accord and Reconciliation Act is not any other law within the meaning of Section 3 of the Constitution and Questions of consistency with the Constitution cannot be raised in respect of any of its provisions. To remove all doubt about this position, the Constitution goes further at Section 15A(5) to provide as follows:

"The Act made pursuant to subsection 3 immediately following the commencement of this section (that is, the National Accord and Reconciliation Act) shall, while in force, be read as part of this Constitution." The dichotomy between the Constitution and the National Accord and Reconciliation Act is not real. The two are read as one. Indeed, we have only one Constitution of the Republic of Kenya.

With respect to the question as to whether the House can vary a designation of the Leader of Government Business made by the Government, the answer is in the negative. The appointment of the Leader of Government Business is the prerogative of the Executive. The appointment of the Leader of Government Business is the prerogative of the Executive. He or she stands in a similar position as that of a Minister

of Government, so that while the House might express dissatisfaction in him or her, and possibly even censor him or her, the ultimate decision whether to exit remains on the individual or the appointing authority.

Hon. Members, a number of contributions posed the question of what the Speaker should do in the event that he or she receives two different letters from the same Government, designating different persons as Leader of Government Business in the House. In ruling on this, let me, first, point out that the view that if the Speaker receives and possibly entertains one letter, he cannot entertain another letter cannot be sustained, because the power to designate a Leader of Government Business is not spent and exhausted by being exercised once. It is possible, and quite in order, for the Government to designate a different Leader of Government Business every other day and the Speaker is obliged to accept all such appointments, if they are properly made. The Speaker must, therefore, satisfy himself or herself that any designation he receives has been properly made.

In considering the matter of the two letters of designation, we need to address one fundamental question that is at the root of the present controversy. Once it is agreed that the proper authority to designate the Leader of Government Business has always been, and under the new Standing Orders remains, the Executive, the question we must address is whether the changes made in the Constitution with the introduction in it of the provisions of the National Accord and Reconciliation Act have any bearing on how the Executive should make the decision. There are three possible answers to that question. One option is to take the view that nothing in our constitutional dispensation has changed; that decision-making before and after the Coalition Government is the same; that the Executive shall make the designation the way it has always done and, therefore, the Speaker should receive and accept a designation of the Leader of Government Business if it accords with the practice and traditions of the House, and should reject any representations that do not accord with that practice.

Section 23, which deals with the executive authority of the Government of Kenya, and which was cited in the contributions that hon. Members made, and Section 24 of the Constitution, which, as hon. Members will recollect, deals with the constitution and abolition of offices for the Republic of Kenya, and Section 52, which deals with the powers of the President in Parliament, are all of relevance.

Hon. Members, the Second option is to take the view that under the Constitution, as it now stands after the recent changes in it, the mechanism for designation by the Executive Arm has changed, and it is for the Speaker to interpret and set out the new procedure by which the Executive Arm shall designate the Leader of Government Business. In terms of this option, the Speaker will then accept only such designation as accords with the new procedure. This option advocates the supremacy of the National Accord and Reconciliation Act over the rest of the Constitution.

The third option is a hybrid view that recognizes the fact that there is the established traditional procedure, but also recognizes that the new constitutional arrangement may have affected that traditional procedure. In terms of this option, the Speaker's hands would be tied, as he would have to await a resolution by the Executive itself of the question whether, and if so, how the traditional procedure has been affected. The Speaker would then be bound by any agreement that emanates from the Executive as to the choice of the Leader of Government Business in the House. This view advocates a purposive and holistic reading of the Constitution. That is, we must all, as hon. Members and Kenyans, read the Constitution as a whole, and not in parts or in piecemeal.

Hon. Members, I am persuaded that it will be a grave abdication of my duty, as your Speaker, if I were to take the first or second of these options. In my considered view, only the third option is in consonance with the Kenyan reality. That reality is that following the general election held in 2007, our country went up in flames and tottered on the precipice of anarchy. More than 1,000 innocent Kenyans lost their lives. Thousands fled their homes. Some of these are still displaced, to this very moment. We could have perished. We were saved by the mercy of God, through intervention by the international community. Standing out in this intervention is His Excellency Kofi Annan and the Panel of Eminent African Personalities to whom we are greatly indebted.

An Accord was painstakingly negotiated as the country waited with bated breath. On 28th February 2008, ululations rent the air. There was a collective sigh of relief. An agreement had been reached in the form of the Agreement on the Principles of Partnership of the Coalition Government. This agreement is now contained in our Constitution.

Hon. Members, allow me to quote some words from this agreement, which are found in the Schedule to our Constitution, as follows:-

> *"Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process. With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a Coalition Government, we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise.*
>
> *This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interest of the nation as a whole. It provides the means to implement a coherent and far- reaching reform agenda, to address the fundamental root causes of*

current conflict, and to create a better, more secure, more prosperous Kenya for all".

Hon. Members, these words were uttered before the whole nation; before the whole world. What do they mean? Do they mean anything? Did the signatories to them intend them to mean anything? Hon. Members, these words are now read as part of our Constitution. When we, in this House, unanimously voted to make them part of our Constitution, what did we intend? What was our intention? What was the mischief we intended to address? What ruling on the Speaker's part will address that mischief?

Hon. Members, the Speaker was also asked to rule on the procedure for the nomination of the Chairperson of the House Business Committee and whether the nominee of Government for Chairperson is part of this list or of, at least, 15 Members and not more than 21 Members as submitted to the House for approval or whether it is additional to that list.

The procedure for nomination of Chairperson of the Committee is to be found under Standing Order No.158. It is clear from a reading of paragraphs 1, 6, and 7 of that Standing Order that the Chairperson is one of the Members of the Committee in respect of whom the approval of the House is to be sought under Standing Order No. 158 (1). Standing Order No. 158(6) should be correctly construed. It does not say that any person that the Government nominates shall automatically be the Chairperson of the Committee. What it does say is that the person to be the Chairperson shall be a Member who is nominated by the Government. It is imperative to note that the words used are "nominated" and not "appointed by the Government."

In my considered view, this means that the nomination by the Government does not automatically secure the appointment. The nominee is subject to the approval of this House.

Standing Order No.158 as read with Standing Order No.162 opens two options to the Government; either to indicate on the list tabled for approval, the person the Government has nominated to be the Chairperson so that the House approves this when approving the list, or alternatively, if the Government does not do this, to have its nominee subjected to the election procedure under Standing Order No.162 (1). In such an election, no person who is not a nominee of the Government is eligible to vie to be the Chairperson.

Hon. Members, on the question of whether the House can proceed to approve the membership of the House Business Committee without regard to the question of who the Leader of Government Business or the Chair of the Committee is, I rule in the affirmative.

Hon. Members, there is no, so to speak, "Siamese twins" relationship between these

offices. There is no requirement in the Standing Orders or any other law that the Leader of Government Business be a Member of the House Business Committee or its Chairperson. It might be reasonable and convenient, but it is not a legal requirement.

Before I make my final ruling, let me make good my promise to report to the House the result of my initiative to seek audience with His Excellency the President and the Right Hon. Prime Minister with a view to reaching a consensual and amicable settlement to the matter of the membership and chairperson of the House Business Committee as well as the Leader of Government Business.

Hon. Members, before I do so, let me make it clear that the office of the President of the Republic of Kenya is a very high office and an institution deserving of every respect and courtesy. The President is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces of the Republic of Kenya. The office of Speaker will at all times accord to this office the esteem and respect that is owed to it. I further note that the office of the Prime Minister as enacted in the Constitution has important constitutional functions and is an office deserving of every respect and courtesy. Again, the Speaker shall accord to this office the esteem and respect that is owed to it. The organs and institutions of the Republic must be accorded due respect and dignity. It is, therefore, the earnest hope of the Speaker that this ruling and any other ruling or action of the Speaker in the exercise of the Speaker's functions shall not be construed as derogating from that esteem or respect.

Honourable Members, I seek the indulgence of this House to report only that the initiative which I undertook, has not, so far, met with success.

Arising from all of the foregoing, in making my pronouncements on the matters in issue, I wish to invoke Standing Order No.1 of our Standing Orders. That Standing Order stipulates that in all cases where matters are not expressly provided for by the Standing Orders or by other Orders of the House, procedural questions shall be decided by the Speaker. It further stipulates that in so doing, that the decisions the Speaker makes shall be based on the usages, forms, precedents, customs, procedures and traditions of the National Assembly of Kenya and other jurisdictions to the extent that these are applicable to Kenya. The Standing Orders clearly did not envisage nor provide for the current impasse.

Hon. Members, I now rule as follows: Firstly, that in the current state of our Constitution, the laws and the Standing Orders, the office of the Speaker of the National Assembly is not well suited to determine and therefore, declines to determine who the Leader of Government Business shall be. In a situation where the Speaker has received two letters; one from His Excellency the President and the other from the Rt. hon. Prime Minister, each designating a different Minister as the Leader of Government Business, I am clear in my mind that the Constitution and the National Accord and

Reconciliation Act contemplate only one indivisible Government of the Republic of Kenya.

Where the Speaker is faced with a situation eliciting uncertainty as to a designation made by the Government, such uncertainty is not for the Speaker to resolve. To endeavor to make a finding as to which of these letters is from the Government and which should be accepted is to miss the point with regard to the situation that we are in.

Hon. Members, with profound respect and much regret, I therefore, rule that the Speaker will await the name of one Minister consensually designated by the Government as the Leader of Government Business.

Hon. Members, it is the expectation of this House that the designation will be made in good faith through consultations and willingness to compromise within a reasonable time. In the interim, the Speaker shall do everything in his power to enable the business of this House to be transacted and to flow without hindrance.

The Speaker's role in this respect shall be limited to facilitation of the business of the House.

Hon. Members, during this interim period, those provisions of Standing Orders that require specific action by the Leader of Government Business such as Standing Order No. 36 (4) will remain suspended.

Hon. Members, I therefore, direct that the Clerk of the National Assembly shall publish and circulate the business of the House as approved by the House Business Committee (HBC).

Secondly, in the same vein, considering that the Speaker has also received the names of two different nominees of the Government for chairperson of the HBC, no approval or election of the chairperson of the HBC shall be proceeded with by the House. Instead, with much regret and reluctance, I rule that the Speaker of the National Assembly, who under the Standing Orders is an *ex-officio* Member of the Committee, shall serve as the chairperson of the Committee.

Instead, with much regret and reluctance, I rule that the Speaker of the National Assembly who is under the Standing Orders an *ex-officio* Member of the Committee, shall serve as the Chairperson of the Committee until such time as the Speaker shall receive the name of one Member consensually nominated by the Government for the position of the Chairperson of the HBC.

Hon. Members, let me emphasize that this is a purely interim arrangement dictated by the current situation and the Speaker will be happy to give way to the chairperson as soon as one is nominated. While serving as the chairperson of the HBC, the Speaker

shall have neither an original nor casting vote. The Speaker has no interest in any particular matter. The Speaker has no business of his own to bring before the House.

Hon. Members, in reaching this decision, I have considered the procedures and traditions of a number of jurisdictions with similar circumstances as those of Kenya. In Germany, which has useful lessons about coalition governments, the "Council of Elders" or the *Bundestag*, which is the equivalent of our HBC, is under Rule 6(1) of their Rules of Procedure convened by the equivalent of our Speaker. Similarly, in India and New Zealand, both commonwealth countries, the HBC Standing Order No.76 and the Business Advisory Committee (BAC) Standing Order No. 287 respectively, which are the equivalents of our HBC, are chaired by the Speaker.

Closer home in Uganda, Rule 128 of the Rules of Procedure of Parliament, provides that the Speaker shall be the chairperson of the HBC and shall preside over sittings of the Committee and in his or her absence, the Deputy Speaker shall preside.

Hon. Members, the same position obtains in Tanzania where under Rule 91 of the Rules of Procedure under the heading, in Kiswahili, the language in which the Rules are written: -

> *"Muundo wa Majukumu ya Kamati ya Uongozi*
>
> *1. (i) (ii) (iii)*
>
> *Kutakuwa na Kamati ya Uogozi itakayokuwa na Wajumbe wafuatao:- Spika, ambaye atakuwa mwenyekiti; Naibu wa Spika; Kiongozi wa shuguli za Serikali Bungeni ama mwakilishi wake";-- -*
>
> *Inaendelea hivyo mpaka Sera ya pili ambayo inasema: - "Katibu wa Bunge atakuwa ndie Katibu wa Kamati'*
>
> *Sera ya Tatu inasema:- "Majukumu ya Kamati ya Uongozi yatakuwa ni kufikiria na kumshauri Spika*
>
> *kuhusu mambo yote yanayohusu shughuli za Bunge kwa jumla, ikiwa pamoja na kuweka utaratibu utakaorahisisha maendeleo ya shughuli za Bunge au za kamati yake yoyote endapo itatokea haja ya kufanya hivyo"*

That is the Tanzanian position.

Finally, the duties of the Speaker are primarily to ensure that the business of the House proceeds. I, therefore, rule that immediately following this ruling, the House shall proceed with the Order on the Motion for the approval of the names of the Members proposed to serve in the House Business Committee so that, by tomorrow morning, the House can commence work on the legislative agenda set in the State Opening Address.

Hon. Members, we must unlock the business of the House.

Hon. Members, as I stated before this House on 23rd April 2009, extra-ordinary situations call for extra-ordinary measures. Hon. Members, I beg your indulgence to repeat that. As I stated before this House on 23rd April 2009, extra-ordinary situations call for extra-ordinary measures. I have taken these extra-ordinary measures in the firm belief that the extra-ordinary situation in which this House, and by extension this country, finds itself, calls for extra-ordinary measures. In so doing, I have been guided by what I believe to be in the best interest of this House and our nation.

Hon. Members, I urge all of us to resolve with one accord, in common bond united, that the important business entrusted to us by the people of Kenya shall not and shall never be allowed to stall.

I thank you.

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3. DRESS CODE FOR MEMBERS

May 7, 2009

On Thursday, April 30, 2009, the Member for Gem, Hon. Jakoyo Midiwo sought the guidance of the Chair on whether the Member for Kisumu Town West, the hon. Olago Aluoch was properly dressed in accordance with our rules. The said Member for Kisumu Town West was dressed in regalia commonly donned by officers of the court while attending court proceedings or when professionally engaged elsewhere in the practice of their trade. I undertook to give a ruling on this matter, which I am now pleased to deliver.

Hon. Members, having listened to the debate that ensued on the matter, I deciphered or isolated the following issues as requiring my consideration:-

(i) Whether or not it is proper for a Member to enter this Chamber while dressed in a professional outfit, inclusive of courtroom regalia?
(ii) What is the acceptable dress code for the Chamber?
(iii) Whether Hon. Olago Aluoch was properly dressed during that particular Sitting; and more remotely,
(iv) What is our national dress?

Hon. Members, before I deliver my communication on this matter, let me inform the House on the current requirements and practices obtaining in our National Assembly and even in other Parliaments. For the case of our National Assembly, the manner of dressing is provided for in Chapter 1 Rule 5 of the Speaker's Rules which provides, and I quote:-

> *"Members are required not to enter the Chamber, Lounge or Dining Room without being properly dressed."*
>
> *"Proper dressing" is defined as a coat, tie, long trousers, socks and shoes or service uniform, or decent national dress for men; and equivalent standard for women with hats optional."*

Debates have arisen in this House from time to time as to what constitutes all or part of the proper dressing described by this rule. As a matter of fact, a Motion was moved in the House on 18th July 1963 urging the Government to set up a dress committee to recommend the design and form of an official dress to be worn by Members of the House. I dare add, hon. Members, that from the record, the Mover of the Motion appears to have been wearing what could be described as a "traditional dress".

Rulings have also been made to uphold what seems, in my opinion, to be the

acceptable parliamentary dress code. For instance, on 16th April 1968, the Chair, while responding to an objection on the dressing of a Member, ruled as follows:-

> *"Honourable Members, as I have said on other occasions, we have no Standing Orders concerning dress, which I can enforce. It rests on the collective opinion of the House as to what is or is not proper dress. If Mr. Mbogoh does not meet with the approval of Hon. Members, he will doubtless hear about it."*

Similarly, on 24th March 1993, the Chair ruled as follows on the same subject, and I quote:-

> *"Honourable Members, this morning an issue arose as to whether hon. Shikuku, MP for Butere was properly dressed as per the Speaker's Rules regulating the conduct of Members of the National Assembly. The Hon. Member was dressed in long trousers, shirt, bow tie and a sleeveless outer garment."*

Was hon. Shikuku properly dressed when he wore a sleeveless outer garment?

I looked up the definition of a "coat" in the dictionary and it is defined as "a long outer garment with sleeves buttoned at the front". An outer garment without sleeves is not a coat and consequently, hon. Shikuku was not properly dressed within the meaning of the Speaker's Rules."

In digression, Erskine May, a source of authority in parliamentary practice and procedure states, and I quote:-

> *"It is traditional for men to dress formally in the Chamber. It is the custom for gentlemen Members to wear jackets and ties."*

In the UK House of Commons, the dress code is formal, with even requirements for neatness and tidiness. Men should wear a jacket, shirt, tie and long trousers in the Chamber as a mark of respect for both their colleagues and for the institution itself. Members are even not allowed to have their hands in their pockets. The Chair of the House of Commons is on record saying, and I quote:- "It is not appropriate to address the House without being properly attired." Similarly, in the Parliaments of New Zealand, Canada and Australia**,** dress code is also very formal.

Closer home in Uganda, the rules provide that:-

"All Members shall dress in a decent and dignified manner, that is to say:-

a) *A pair of trousers with a jacket, shirt and tie, a kanzu or a jacket or Safari Suit for male members;*

b) *A jacket, blouse and skirt or dress or Busuti (traditional wear) for lady members;*

and

c) *Military attire for members of the armed forces."*

The rules also provide that any Member intending to dress otherwise may do so with permission of Mr. Speaker. This is to provide for situations where circumstances such as medical requirements or one's faith may dictate his or her manner of dressing.

Hon. Members, moving forward, there has been clamour in the recent times for us to relax our rules on dress code and also allow traditional wear in the House, its Committees, the Lounges and Dining areas. Indeed, you will recall that this matter was debated at length during the all-Members retreat on review of the Standing Orders in August last year. It was unanimously resolved that there has not been a commonly accepted traditional dress for all. From the foregoing, I uphold the provisions of Rule 5 of the Speakers Rules and hereby rule that:-

(i) It is not proper for a Member to enter the Chamber dressed in attire meant for other jurisdictions such as the courts, hospitals, *et-cetera*. That is essentially why a Member of the House raised an objection due to what I referred to earlier as the collective opinion of the House."
(ii) The Hon. Olago Aluoch was, therefore, not properly dressed on that particular day.

Hon. Members, the essence of this communication is not restricted to the concept of proper dress code, but extends to capture a deep reflection on the need to uphold the dignity of the House, which we have jealously protected and defended over the years. Despite my spirited efforts, I have not been able to find an agreed position, codified or otherwise, as to what is our national dress. I, therefore, urge all Hon. Members to uphold the dignity of the House and observe Rule 5 of the Speaker's Rules on dress code, not only in this Chamber, but also in Committees, the Lounges and Dining areas. In the meantime, in line with the reforms being undertaken in the House, especially following the adoption of the new Standing Orders, I would request hon. Members with any suggestions on the mode of dressing in the Chamber to forward them to the Chair, so that the matter may be examined afresh in view of the concerns raised by the hon. Members. Thank you.

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4. INQUIRY INTO 2008/2009 SUPPLEMENTARY ESTIMATES

May 19, 2009

Hon. Members, you will recall that on Tuesday, 12th May 2009, I directed that a Joint Committee of the Finance, Planning and Trade and Budget Committees table, on

Wednesday 13th April, 2009, its Report on the inquiry into the Supplementary Estimates for the Fiscal Year, 2008/2009.

Indeed, I note with satisfaction that the Joint Committee tabled its Report as directed by the Chair. As you are aware, the House subsequently deliberated upon the Report and approved it on Wednesday, 13th April 2009, during the afternoon Sitting. Among the findings of the Joint Committee was:-

> *That, whereas errors were detected in the details contained in the Supplementary Estimates, they did not have any impact on the overall figure as appearing in the Printed Estimates laid on the Table of the House in June, 2008, and that the difference of Kshs. 10, 763, 446, 275 does not constitute any loss or misappropriation of public funds.*

Hon. Members, on 5th July 2005, the then Member of Parliament for Mandera Central, Mr. Billow Kerrow, had sought clarification on the format of the Printed Estimates for the Fiscal Year 2005/2006, which had changes in the classification of the "Item Code" and the description of the expenditure. The then Minister for Finance, hon. Mwiraria, stated, and I quote:-

> *"I wish to confirm that this matter has been sufficiently addressed by my office through the requirement that each Ministry provides district budgets with a detailed project list to the House to accompany the Revenue and Expenditure Estimates. Let me state that, as the Government, we are determined to maintain transparency and accountability."*

Following that assurance, the then Chair ruled, and I quote:-

> *"First, it is clear that it is the duty of this Parliament to authorize taxation and approve the utilization of the taxation. Secondly, for Parliament to be able to discharge that responsibility, it ought and must have sufficient details to enable it make an informed judgement on the allocation of the resources."*

The House then, as it is today, was concerned with the accuracy of the documents at its disposal in discharging its mandate. From the foregoing and arising from the adoption of the Joint Committee's Report by the House, I wish to make the following observations:-

(i) That, one of the main functions of the House is to approve the Estimates of Expenditure based on authenticated documents with adequate details to enable it make informed judgement;

(ii) I am satisfied that the matter touching on the discrepancies raised by hon. Imanyara has been attended to, save for further action as recommended by the

Joint Committee;

(iii) That, the Supplementary Estimates that were tabled by the Deputy Prime Minister and Minister for Finance on 22nd April 2009, had discrepancies which, however, did not impact on the overall figure of the Printed Estimates laid in the House in June, 2008;

(iv) That, the Joint Committee considered this matter and confirmed the same. That, once the Supplementary Estimates are corrected and resubmitted, pursuant to the House resolution when it approved the Report of the Joint Committee, such Supplementary Estimates will be taken to have been correct *ab initio*. That, the procedure in the House is supposed to facilitate the business rather than stifle it.

I wish, therefore, to direct as follows: -

a) That, the Deputy Prime Minister and Minister of Finance withdraws the Supplementary Estimates laid on the Table of the House on 22ndApril 2009, and re- submit the correct Supplementary Estimates.

b) That the Motion for consideration of the Supplementary Estimates for the Fiscal Year 2008/2009 approved by the House on 29th April 2009, pursuant to provisions of Standing Order No.156 (1), stands valid and that the House proceeds to transact Supplementary Appropriation Bill as appropriate.

I thank you.

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5. PROCEDURAL CHANGES DURING SUPPLY PROCEDURE

July 28, 2009

Hon. Members, you will have noticed from today's Order Paper that the Committee of Supply will commence this afternoon. Pursuant to Standing Order No.155, a maximum of 14 days are allotted for consideration in Committee of Supply of proposals in respect of the Annual Estimates. The House Business Committee, in consultation with the Liaison Committee, considered and approved the order in which the House will consider the individual Votes of the various Ministries as provided for under Standing Order No.153. Each Vote will be allotted not more than three hours for debate in accordance with the provisions of Standing Order No.155 Paragraph 2.

Hon. Members, taking into consideration that the Votes have been scrutinized by the relevant Departmental Committees, there is a possibility of debate taking less than the three hours. It is in this regard that two or more votes will be placed on the Order Paper on any Supply Day. The Minister responsible for the first Vote will move the Vote and, upon conclusion of debate and reply by the Mover, the second Minister will move his or her Vote. The Question "The Speaker do now leave the Chair" will be put at the end and if agreed to, the Speaker will the leave the Chair and the House will dissolve into Committee. The Committee of Supply will then consider the first Vote by going through the Sub-Votes and Heads and then consider the other Votes similarly. When the House resumes, the resolutions will be reported, starting with the first Vote, for adoption. The Minister will be limited to twenty minutes in moving and ten minutes in replying to the debate while the Chairman of the relevant Departmental Committee will be limited to 15 minutes. All other hon. Members will be limited to five minutes. This time limitation is contained in the Order Paper.

As regards to Reports of Departmental Committees on the Annual Estimates of Ministries under their mandate, the Provisions of Standing Order No.152 paragraph 2 are very clear. Departmental Committees are supposed to submit their reports to the House within 21 days after they were first laid before the House.

Hon. Members, I, therefore, order that any Chairperson of a Departmental Committee who has not tabled their Report should do so within the next seven days. It is important that you note that. Any Chairperson of a Departmental Committee who has not tabled their Report should do so within the next seven days.

Finally, Hon. Members, you resolved on Thursday, last week, to extend the sitting time of the House by two hours to 8.30 p.m. However, in order to comply with the provisions of Standing Order No.146, which defines a day as "any period of not less than three hours", it will be necessary to extend the sitting by an extra hour. The House

will, therefore, sit until 9.30 p.m. on Supply Days.

6. TABLING OF REPORTS OF COMMISSIONS OF INQUIRY AND TASK FORCE

July 29, 2009

On Thursday, 4th June 2009, the Member for Gichugu hon. Martha Karua, stood to ask Question No. 182 listed on the day's Order Paper by which she sought to know *inter alia*, the following from the Minister of State for Provincial Administration and Internal Security;

a. The qualifications of each of the members of the newly created taskforce on police reforms;
b. Why the taskforce was necessary considering that the Government had committed to implement the Waki Report on Police Reforms which was adopted by the House;
c. What became of the Report of the National Taskforce on Police Reforms launched by the Ministry in 2004, the members thereof and their respective qualifications;
d. How much money was spent in the 2004 taskforce, the Waki Commission and the amount budgeted to be spent by the new taskforce.

The Question was answered by the Assistant Minister, Ministry of State for Provincial Administration and Internal Security, Mr. Orwa Ojode and in the ensuing debate, the hon. Karua, in a supplementary question sought to have the Assistant Minister lay on the Table of the House reports of other taskforces and commissions of enquiry formed by the Government namely; the Report of the Kiruki Commission on the Artur Brothers, Report of the Cockar Commission on the sale of the Grand Regency Hotel, the Eng. Sharawe Report and the Report of the taskforce on the Police Reforms of 2004.

In response, Mr. Ojode, while declaring that the Government had nothing to hide undertook to lay on the Table of the House, if so required, any report which has been received publicly by the appointing authority but added that he could not lay a report which had not been received officially by the appointing authority. The Chair then directed the Assistant Minister to lay on the Table all the reports mentioned above.

Hon. Members, on Thursday, 5th June 2009, the issue of laying the reports on the Table was raised again when Ms. Karua stood on a point of order and drew the attention of the Chair to the fact that the reports that had been mentioned earlier had not been laid on the Table as directed by the Chair on 4th June 2009. She accordingly sought the directions of the Chair as to when the reports would be laid on the Table before the House. The Assistant Minister, once more, gave an undertaking that he would present the reports on Wednesday of the following week. The Chair, thereupon ordered, firstly, that the reports be laid on the Table as per hon. Ojode's undertaking and secondly, that the Assistant Minister be barred from transacting any business in the

House until those reports were laid on the Table.

Hon. Members, on Wednesday, 22nd July 2009, Ms. Martha Karua drew the attention of the Chair once more to the fact that the order made by the Chair on 25th June 2009 requiring the laying on the Table of the Reports as fore-mentioned had not been complied with. In his response, hon. Ojode, in an apparent departure from his earlier undertaking informed the House that the Commissions of Inquiry Act, Cap 102 of the Laws of Kenya, pursuant to which the Commission which generated the fore-mentioned reports were formed, bars anyone from compelling the President to release a report of any commission formed under the Act. Ms. Karua, in response to a question from the Chair as to whether there is any law that can compel the President to release those reports, informed the House that the public interest is, indeed, the law that would compel the President to do so. It is at this point that that the Chair undertook to study the HANSARD and give an appropriate ruling on the matter. The Chair has now studied the HANSARD and is in a position to give an informed ruling on the matter.

Hon. Members, Commissions of Inquiry are established under Section 3(1) of the Commissions of Inquiry Act which reads as follows:

> *"The President, whenever he considers it advisable to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum, of them to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest."*

It is clear from the provisions cited above that the Commissions of Inquiry are solely established to deal with matters of public nature and for which there is considerable public interest. Upon conclusion of an inquiry, a commission is under an obligation, pursuant to Section 7(1) of the Act to submit a report to the President. This provision reads as follows:-

> *"It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and, in due course, to report to the President in writing the result of the inquiry and the reasons for the conclusions arrived at, and also, if so required by the President, to furnish to the President a full record of the proceedings of the commission."*

The Act was meant to be an instrument for the Executive through which matters of considerable public interest would be inquired into. However, the existence of the Act does not preclude this House from carrying its own investigations into any matter of public interest even if such a matter is the subject of another inquiry being undertaken

by a commission established under the Act. The Chair has not found a provision in the Act on the production, into the public domain, of a report of a commission of inquiry. It can be argued as indeed, it has been done in this case very ably, by Ms. Karua, that public interest would require that such a report be released into the public domain. However, the Act does not specifically require the President to do so on such consideration or at all.

Hon. Members, when the Assistant Minister made an undertaking before this House that he would lay on the Table the reports requested by Ms. Karua, this House and the Chair had every reason to believe that proper consultations had been made within the Executive and that consensus thereby had been reached on the release of the reports to the public after a critical consideration of the applicable law. It is on this understanding that the Chair ordered the Assistant Minister to discharge his undertaking when the matter arose on 25th June 2009. It would now appear that when the Assistant Minister gave the initial undertaking on 4th June 2009, he may not have considered the provisions of the Act regarding the issue at hand but nevertheless gave an undertaking that he could not honour. This appears to be the case because on 22nd July 2009, the Assistant Minister informed this House that under the Commissions of Inquiry Act, the President could not be compelled to release such reports. Having found that under the law, as it stands, the President cannot be compelled to make public reports of commissions of inquiry subject to the Act, it is evident that the Assistant Minister made an undertaking to the House, which he does not have the capacity or ability to honour.

Hon. Members, no interest will be served in holding the Minister to his word in a situation in which it is not legally possible for him to fulfill the undertaking. This House, as I have repeatedly said before, should not act in vain. I, therefore, rule that the orders made by the Chair on 25th June 2009, requiring the Minister to produce the reports requested by hon. Karua and barring him from transacting business in this House until the reports are produced, be and are, hereby vacated forthwith.

Hon. Members, having said that, the Chair wishes, on behalf of this House, to register dissatisfaction with the manner in which this matter has been handled. Ministers of Government owe it to the people of Kenya, through their representatives in this House, to properly consider the law on every matter, and its implications, before making any undertaking. Let me, therefore, take this opportunity to put all Ministers on notice, that undertakings made before this House are binding and not to be taken lightly. No Minister will be heard to protest that an undertaking that has been made cannot be lawfully honoured.

In conclusion and, as the hon. Members are aware, the legislative authority of the Republic under the Constitution, is vested in this House. If it should appear to this House that the provisions of Commissions of Inquiry Act or, indeed, those of any other law, do not adequately answer to the public interest, the recourse for this House is to

amend that law.

Thank you.

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7. FAILURE BY THE EXECUTIVE TO HONOUR UNDERTAKINGS TO RELEASE REPORTS OF COMMISSIONS OF INQUIRY

12th August 2009

Hon. Members, you may recall that on Wednesday 29th July 2009, the Chair delivered a ruling on the failure by Mr. Ojode to honour an undertaking he had earlier made to the House to release reports of certain commissions of inquiry.

Ms. Karua thereafter sought the guidance of the Chair on the ruling claiming that there was an apparent contradiction between that ruling and an earlier ruling made by the Chair on an undertaking by the then Minister for Finance in relation to the Privatization Act, 2005. In the Privatization Act matter, the Minister for Finance gave an undertaking to the House that he would gazette the commencement date of the Act. When he defaulted, the Chair, in enforcing the undertaking, ruled that the Minister would not be permitted to transact any business in the House until he had discharged the undertaking.

Hon. Members, in a communication from the Chair on 12th September 2007, the Chair indicated that this House had granted the Minister for Finance the power to set a commencement date for the Privatization Act; a power which the House itself could have exercised, if it so wished. The undertaking by the Minister to appoint a commencement date for the Act was therefore based on something the Minister was both lawfully entitled to do and in fact legally required to do. As the Minister had the power and the obligation to discharge the undertaking, the Chair held the Minister to account for that undertaking.

Hon. Members, that case is clearly distinguishable from the matter in which Mr. Ojode gave an undertaking which in law he was not obliged nor compelled to do. As stated in the ruling on 29th July 2009, no public interest can be served in holding the Minister to his undertaking in a situation in which it is not legally possible for him to discharge the undertaking. The undertakings given by the two Ministers were therefore informed by two distinctly different situations, one in which the Minister was seized of the necessary powers to honour the undertaking and the other in which the Assistant Minister lacked the requisite powers to do so.

In the upshot therefore, hon. Members, there is no contradiction between the two rulings given by the Chair on the respective undertakings given by the two Ministers. Where the law confers a power or imposes an obligation on a Minister to perform some function or discharge some duty, and the Minister gives an undertaking to exercise that power or to perform that duty, the Chair will not hesitate to hold the Minister to the undertaking.

Ministers of Government, as I have said before, are duty bound to properly consider the law on any matter and its implications before giving any undertaking before this House.

Thank you.

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8. GOVERNMENT MINISTERS' RELUCTANCE TO TAKE PARLIAMENTARY BUSINESS SERIOUSLY

20th August 2009

Hon. Members, this communication has been necessitated by recent events that have taken place in the House.

Numerous points of order have been raised pertaining to, firstly, failure by Ministers to attend the sittings of the House to answer Questions asked by hon. Members. Secondly, failure by Ministers to answer Questions even when they are present in the House when the Questions are asked. Thirdly, unsatisfactory answers to Questions and, in some cases, apparent lack of seriousness by Ministers in answering Questions asked by Members or transacting other business of the House.

Similarly, this House has witnessed on a number of occasions failure by Ministers to deliver Ministerial Statements on the date they fall due.

Hon. Members, an illustration of the concerns I have expressed above is in the Question by Mr. Mungatana which appeared on the Order Paper on Tuesday 11th August 2009 and has appeared on the Order Paper this afternoon and Members witnessed what transpired. The Minister was not present and no explanation was given as to why he was not present. The Question has appeared on the Order Paper four times. On each occasion, the Question has gone unanswered either because the Minister responsible was absent from the House or when present, was inadequately prepared to answer it.

Hon. Members, you will agree that this state of affairs is unacceptable and ought to be brought to an end.

Hon. Members, the Executive has an obligation to account to the people of Kenya through their Members of Parliament who represent the people of Kenya in this House. Erskine May in his book *Parliamentary Practice* states as follows:-

> *"Ministers have a duty to Parliament to account and be held to account for the policies, decisions and actions of their departments. Ministers should be as open as possible with Parliament; refusing to provide information only when such disclosure will not be in the public interest".*

This imposes an obligation on Ministers to be available in the House at all times to answer Questions, provide Ministerial Statements and respond to Motions and provide such other information falling within their respective mandates as they may be called upon by the House to provide.

Hon. Members, Ministers of Government, as representatives of the Executive are charged with the responsibility of transacting business of the Executive in this House. This is their cardinal duty and should not be viewed as an act of charity to the House.

The business of the House must, therefore, take precedence in the priority of engagements by Ministers. It cannot be subordinated to attendance of such functions as agricultural shows or foreign trips, unless on House Business or commissioning of development projects even though these are important functions.

Hon. Members, Questions, Ministerial Statements and Motions before the House constitute devices by which, under our democracy, Parliament holds the Executive to account. These devices are designed to promote good governance and uphold the doctrine of separation of powers. They serve as the necessary checks and balances between the various arms of Government. In addition, these devices foster a mutually beneficial relationship between the various arms of Government. They help the Executive to become aware of or to forestall situations of crisis that could arise. For example, on such varied subjects as cholera epidemic, a looming famine, a national, food security crisis, an energy crisis and others.

This House blows the whistle in order to draw the attention of the Executive to the existence of a particular situation which requires appropriate action or a remedial action. If a given Minister is absent from the House when an issue touching on his Ministry is being canvassed, he loses the benefit of listening to the views expressed in the House on that particular issue and by extension the Executive loses an opportunity to deal with the issue as articulated in the House. If Hon. Members were to consult the official records of proceedings of this House as recorded in the HANSARD during the life of the present Parliament, it would become quite apparent that some of the crisis that now afflict our country were at one point or another the subject of a Question or a request for a Ministerial Statement. It is arguable that these events could have been forestalled, if the relevant Ministers had timeously attended to the concerns raised by this House.

Hon. Members, our Constitution under Section 17(3) provides that Ministers are collectively responsible to the National Assembly for all the things done by or under the authority of the President. Section 17(3) of the Constitution provides as follows:

> *"The Cabinet shall be collectively responsible to the National Assembly for all things done by or under the authority of the President or the Vice-President or any other Minister in the execution of his office."*

Ministers are collectively responsible to Parliament for the general conduct of the affairs of the Executive. Consequently, Ministers are called upon to step in on behalf of other Ministers who may be absent in the House in answering Questions or responding to Motions coming before the House. In this respect, it is worth noting and the Chair

recalls that during the Ninth Parliament, Dr. Mukhisa Kituyi and Ms. Martha Karua, to name just two Ministers of the time, would on occasion answer Questions put to other Ministers when they were absent from the House at a given time. It would be appropriate if Ministers in the current Parliament emulate that worthy precedent.

Hon. Members, the Chair recognizes that events may occur which will necessitate Questions appearing on the Order Paper or other business to be put off or deferred for legitimate reasons. If such a situation is contemplated, the Minister or Assistant Minister concerned should notify the Chair accordingly as soon reasonably possible.

Hon. Members, I wish, in this regard, to reiterate that such notification should only be made to the Chair by the Minister or Assistant Minister concerned and not by the Permanent Secretary or by other technocrats in the Ministries. Communications to the National Assembly by Permanent Secretaries or other technocrats of Government can only be addressed to the Office of the Clerk of the National Assembly. As a matter of fact, we have got to a situation where even Permanent Secretaries appear not to be available and we have had correspondence addressed to the Speaker by personnel officers and other persons at that cadre. We deem this as contemptuous.

The Chair wishes, on behalf of this House, to put all Ministers on notice that the business of the House must be accorded priority and be attended to with the seriousness it deserves. Appropriate action as laid down in the Standing Orders will be invoked by the Chair in the event of default. In particular, all hon. Members will no doubt be aware that failure to answer a particular Question by a Member constitutes disorderly conduct under Standing Order No.46 which provides:

> *"It shall be disorderly conduct for a Member to fail to ask or for a Minister to fail to answer a Question listed in the Order Paper without the leave of the Speaker."*

Standing Order No.97, paragraphs 1(f) and (j) are also relevant. They provide that:

> *"Conduct is grossly disorderly if the Member concerned deliberately gives false information to the House or acts in any other way to the serious detriment of the dignity or orderly procedure of the House."*

The consequences of misconduct by a Member and the sanctions, therefore, are well known to all of us. If it becomes necessary and in the interest of this House, the Chair will reluctantly, but firmly and consistently invoke the sanctions provided for in the Standing Orders against offending Ministers. Beginning forthwith, notice is served that the Chair, as it is permitted to by our Standing Orders, will deal with this category of disorderly conduct by taking action that will culminate in *inter alia*:

(a) Restriction from transaction of business in the House. I note that the

Minister for Trade is taking that very seriously because this sanction was applied against him and is not very comfortable. In the Ninth Parliament it was;

(b) Removal from the House and the precincts of the Assembly;

(c) Naming of the concerned Member. It will greatly assist this House and, I therefore, implore the Executive to assist the Chair so that it does not and, indeed, it is my sincere hope that it will not become necessary to take these actions.

I thank you.

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9. IMPLEMENTATION OF NEW STANDING ORDERS WITH REGARD TO SELECT COMMITTEES

20th August 2009

Hon. Members, my attention has been drawn to the operations and general management of select committees of the House, especially following implementation of the new Standing Orders which commenced with the third Session. I, therefore, wish to give the following guidelines on the matter.

The procedure for the establishment, management and mandate of select committees is set out in Part 22 of the Standing Orders. I would like to appeal to hon. Members to familiarize themselves with the provisions thereof.

As hon. Members are aware, the new Standing Orders in so far as they relate to management of select committees are purposefully designed and crafted to streamline the manner in which committees discharge their mandate and in particular to ensure that they are not only effective, but also efficient.

I am, however, informed and I have, as a matter of fact, witnessed that a number of committees have experienced operational hitches during meetings. For instance, some meetings have been adjourned due to failure to raise the requisite quorum within the stipulated time. In other cases, hon. Members fail to attend meetings for one reason or the other, without obtaining permission from the Chair.

In other instances, some hon. Members do not even take the trouble to notify the chairperson of their inability to attend meetings. Many explanatory variables have applied.

Hon. Members, allow me to draw your attention to the provisions of Standing Order No. 169(1). It says:-

> *"(1) If a member fails to attend four consecutive meetings of a Committee without the written permission of the chairperson of the Committee or the permission of the Speaker, if the member is the chairperson, the member or the chairperson, as the case may be, shall cease to be a Member of that Committee and the matter shall be reported to the Liaison Committee.*
>
> *(2) Upon receipt of a report under paragraph (1), the Liaison Committee shall report the matter to the House for replacement of the Member concerned."*

In my view, sending a verbal apology is not enough to discharge the duty imposed by this Standing Order. Committees and the chairs must as a matter of priority, devise practical mechanisms to bring this into effect.

I am happy to note that some Committees have already taken measures to comply with this rule.

Hon. Members, I am now putting all Members of committees on notice that from now henceforth, any apologies should be in writing and addressed to the chairperson of the Committee. Members who fail to attend four consecutive sittings without written apologies, will by operation of the Standing Order aforesaid, automatically cease to be members of the committee.

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10. MOTION ON ADOPTION OF REPORT ON MAU FOREST COMPLEX NOT SUB JUDICE

September 3, 2009

Hon. Members, before we move to the next Order, I wish to make the following Communication. You will recall that on Wednesday 12th August, 2009, the Report of the Government' Task Force on the Conservation of the Mau Forest Complex was laid on the Table of this House and a Notice of Motion given for its adoption. You will further recall that on Tuesday, 27th August, 2009 when this Motion was listed on the Order Paper as Order No.13, the Chair deferred the debate on it in order to permit perusal of documents presented to the Chair by Mr. Isaac Ruto on 27th August, 2009, in respect of High Court Miscellaneous Civil Course No.313 of 2008 and representations that the Motion should not be allowed on the ground that the matter is *sub judice*.

The documents presented to the Chair included a Chamber summons dated 2nd March, 2005; an affidavit sworn in support of the Chamber summons dated 1st March, 2005; Orders of the High Court issued in Nairobi on 3rd March, 2005 and a Notice of Motion dated 3rd March, 2005. High Court Miscellaneous Civil Course No.313 of 2005 relates to an application by seven individuals seeking the leave of the High Court to apply for orders of *certiorari* and prohibition to remove from the High Court and quash the decision of the Minister for Lands announced on or about 14th February, 2005 and published on 15th February, 2005, cancelling over 10,000 title deeds and in particular, the title deeds of the applicants.

The High Court, by orders issued on 3rd March, 2005 (a) granted leave to the applicants to apply for an order of *certiorari* to remove from the High Court and quash the said decision of the Minister for Lands and (b) granted leave to the applicants to apply for an order of prohibition, prohibiting the Minister for Lands and the Attorney-General from cancelling the applicants title deeds, evicting, trespassing or otherwise interfering with the applicants quiet occupation and enjoyment of their registered parcels of land.

Hon. Members, it is important to note that the grant of leave to the applicants by the High Court to apply for orders of *certiorari* and prohibition was to operate as a stay of the decision of the Minister for Lands to cancel the titles of the applicants until the hearing and determination of the judicial review proceedings or until further orders of the Court. The Court directed the applicants to file and serve the respondents and all interested parties with the substantive Motion within 21 days from the date of the order.

Hon. Members, the Court directed the applicants to file and serve the respondents and all interested parties with the substantive Motion within 21 days from the date of the Order. The matter will, thereafter be set down for hearing in terms of our civil procedure. The Court Order indicated that failure – underline the word failure – by the applicants to file and serve the substantive Motion will lead to an automatic lapse of the leave as well as the stay granted. The Order of the Court was made on 3rd March 2005 and if not complied with by the applicants, would have lapsed at the end of March 2005.

None of the documents presented to the Chair by Mr. Isaac Ruto indicate what subsequently transpired in this matter. There is nothing in the documents presented to the Chair to indicate whether or not, the applicants subsequently complied with the Orders of the Court or, in fact, the leave and stay automatically lapsed. In short, nothing in the documents presented to the Chair indicates the status of this matter at the moment and whether or not, it is still alive.

As the Chair has only recently ruled, the *sub judice* rule is not one to be invoked lightly. It cannot be used to prevent this House from discharging its constitutional mandate unless weighty reasons are advanced. The danger of prejudice to the due determination of justice must be clearly demonstrated. Standing Order No.80 (2) is categorical in providing thus:-

> *"A matter shall be considered to be sub judice when it refers to – underline – active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination."*

Standing Order No.80 (4) makes it clear that the onus of showing that a matter is *sub judice* lies on the Member alleging so. Such a Member is required to produce evidence that Paragraphs 2 and 3 of Standing Order No.80 are applicable. As to if the matters in Civil Course No.313 of 2005 are active within the meaning of Standing Order No.80 (3) (c) when it is not evident that arrangements for hearing have progressed such as setting down the case for trial have been made in a way that it can be ended by judgment or discontinuance is doubtful.

The documents presented to the Chair by Mr. Isaac Ruto on 27th August 2009 are more than four years old. As the Chair has earlier indicated, nothing in the documents provides any evidence that this case has ever been set down for hearing. Standing Order No.80 does not envisage it to be the role of the Office of the Speaker to make inquiries at the Court Registry to establish the status of matters before them. Where *sub judice* is alleged, unless there is good cause to the contrary, the Chair will consider only the evidence tendered to it.

To the extent that no evidence has been produced to the Chair that there are any active

criminal or civil proceedings rendering debate on the Motion relating to the Mau Forest Complex *sub judice*, I rule that the debate on the Motion on Adoption of the Report of the Government Taskforce on the Conservation of the Mau Forest Complex is not *sub judice,* and this House is at liberty to proceed with deliberations thereon.

Hon. Members, may I take this opportunity to urge that any hon. Member who wishes to raise an objection to the discussion of any matter by this House on grounds that it is *sub judice* carefully considers the detailed provisions of Standing Order No. 80, and be prepared to furnish adequate evidence in support of that objection.

Thank you.

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11. REAPPOINTMENT OF JUSTICE AARON RINGERA AS KACC DIRECTOR

8th September 2009

Hon. Members, on Thursday 3rd September 2009, the Honourable Isaac Ruto rose on a point of order and requested that the Chair directs that the Gazette Notice No.9300 of 2009 on the re-appointment of the Director of the Kenya Anti-Corruption Commission (KACC) be committed to the Committee on Delegated Legislation for scrutiny and that the Committee reports back to the House within seven days on its validity or otherwise. Following the request by the hon. Ruto, the hon. Minister for Justice, National Cohesion and Constitutional Affairs rose on a point of order and sought the guidance of the Chair as to whether the matter of the re-appointment of the Director of the KACC should be referred to the Committee on Delegated Legislation. Several hon. Members subsequently made their contributions on the matter.

Hon. Members, the Gazette Notice in question is Gazette Notice No. 9300 dated 26th August 2009 and issued on 31st August 2009 under the hand of His Excellency the President, in the following terms:-

> *"In exercise of the powers conferred by Section 8(4) and paragraph 3(2) of the First Schedule of the Anti-Corruption and Economic Crimes Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya re- appoint JUSTICE AARAON G. RINGERA to be the Director of the Kenya Anti- Corruption Commission for a period of five (5) years, with effect from 8th September, 2009."*

Dated the 26th August 2009, MWAI KIBAKI , President. Related to this notice is Gazette Notice No. 9301, bearing the same date and issued on the same day, re-appointing the two Assistant Directors of the Kenya Anti-Corruption Commission.

Hon. Members, from the request for directions made by the hon. Isaac Ruto and the contributions by hon. Members on this matter, the following three issues can be isolated for response:

- Do Committees of the House require the direction of the House or the Chair to proceed with an inquiry into a matter?
- Which Committee of the House will have the mandate to inquire into the matter of the reappointment of the Director of the KACC?
- Does the Gazette Notice No. 9300 dated 26th August 2009 reappointing the Director of the KACC fall within the definition of subsidiary legislation?

Hon. Members, the matter of whether Committees of the House require the direction of

the House or the Chair to proceed with an inquiry into any matter should not detain us for long. I have ruled before and I reiterate now that Committees of the House are creatures of the Standing Orders and do not require the authorization or direction of any person or body to inquire into matters that fall within their mandate.

Standing Order 198(3) empowers a committee to investigate and inquire into any matter falling within its mandate as it may deem necessary, or as may be referred to it by the House or a Minister. As I said in this House on Thursday 3rd September 2009, if a committee, in the interpretation of its mandate, comes to the conclusion that a particular matter falls within that mandate, it is open to such committee to commence an inquiry thereon. Some will argue that this view will give licence to committees to go beyond their terms of reference on the pretext that they perceive it to be within their mandate.

Such a fear is not founded. The committees are subordinate to the House and it is open to the House to rein them in if it should become apparent that they have gone on frolics of their own entirely removed from their legitimate mandate.

Hon. Members, the foregoing, in some way, answers the second question as to which committee will have the mandate to inquire into the matter of the re-appointment of the Director of the KACC.

Hon. Members, this question raises important constitutional issues regarding the functions of the Legislature. One of the key functions vested in the Legislature is oversight. By this oversight function, this House is entrusted with the key role of checking the activities of the Executive. An important instrument by which this House exercises this oversight role is through committees which are, by Standing Order 198(3), vested with a mandate that empowers them to-

a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;

b) study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;

c) study and review all legislation referred to it;

d) study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;

e) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House or a Minister; and

f) make reports and recommendations to the House as often as possible, including recommendations on proposed legislation. Hon. Members, through the Committee system, the House has established an elaborate system for interrogating the exercise of Executive powers. Further, our Constitution and our Standing Orders avail to this House adequate instruments by which the House is enabled to ensure that the actions of the Executive remain in consonance with the very law that this House has enacted and seeks to protect.

Hon. Members, the matter at hand has raised considerable interest, not only in this House, but in the entire country as well. Important questions have been raised about the legitimate interplay between the Executive, the Legislature and to some extent the Judiciary in the exercise of certain powers. These are important constitutional questions and the country looks to this House to provide leadership in the matter. The mandate of the Departmental Committee on Justice and Legal Affairs is set out in the Second Schedule of the Standing Orders as covering the subjects of:

> *"Constitutional affairs, the administration of law and justice, public prosecutions, elections, ethics, integrity and anti-corruption and human rights"*.

These are wide mandates and it is difficult to argue that the matter in issue does not concern "constitutional affairs" or "the administration of law and justice" or "integrity and anti-corruption." On the other hand, the mandate of the Committee on Delegated Legislation is established under Standing Order No.197 and entrusted with the mandate to ensure that statutory instruments are laid before the House as may be provided under any written law and to scrutinize such instruments to ensure that they are consistent with parent statutes. The committee is further entrusted with the mandate of recommending that the House resolves that any particular subsidiary legislation be annulled. Again, it will be a strenuous argument to make that the matter concerning the re-appointment of the Director of the Kenya Anti-Corruption Commission (KACC) is entirely outside the conceivable mandate of this committee.

Hon. Members, the mandate of committees need not be exclusive. All committees work for this House and for the country at large. Numerous precedents exist in which two or more committees have jointly undertaken inquiries into a matter. It is not, therefore, necessary for the Chair to rule that this matter be exclusively handled by one or other committee. It is clear that it is legitimate for both the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation, and possibly more committees, to inquire into the matter.

The final matter relates to the question as to whether Gazette Notice No.9300 dated 26th August 2009 reappointing the Director of the KACC falls within the definition of subsidiary legislation. This matter has arisen severally in the course of debate in this House. Although Parliament is the supreme law-making body, it often delegates

legislative power to the Executive by statute. However, even where legislative power is delegated, Parliament ensures that adequate mechanisms exist for the scrutiny of the Executive's power to make subsidiary legislation.

In this regard, Section 34 of the Interpretation and General Provisions Act, Cap. 2 of the Laws of Kenya requires that:-

1. All rules and regulations made under an Act shall, unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it, that rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done there under, or to the making of any new rule or regulation.

2. Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.

3. In this Section, "rules" and "regulations" mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be." The Standing Orders do not provide a definition of either delegated legislation or subsidiary legislation. Under Section 3 of the Interpretation and General Provisions Act, subsidiary legislation is defined to mean:-

> *"Any legislative provision, (including a transfer or delegation of powers or duties,) made in exercise of a power in that behalf conferred by a written law, by way of by-law, notice, order, proclamation, regulation, rule, rule of court or other instrument."*

It has been argued that by this definition, the re-appointment of the Director of the KACC, having been undertaken in exercise or purported exercise of a power conferred by this House, and the appointment having been made through the instrumentality of a Gazette Notice, it falls within the jurisdiction of this House to consider whether the power so delegated has been appropriately exercised and to take appropriate remedial action if it has not been so exercised.

A contrary argument is to the effect that the appointment or re-appointment of a person to a public office is, under our Constitution, the prerogative of the President and that unless express and unequivocal provisions exist requiring that a re-appointment be subjected to fresh approval by this House, no such approval is required and the exercise of the power of re-appointment is not a matter within the jurisdiction of this House to question. Linked to this argument is the view that the exercise of a power of

appointment or re-appointment is not legislative and is not, therefore, subsidiary legislation amenable to consideration by the House.

The reason that this House, through the Standing Orders, has established committees and appointed hon. Members to them is so that important matters that do not lend themselves to convenient consideration by the House in plenary can be given appropriate consideration in committee. To this end, Standing Order No.186 provides that committees may, with the approval of the Speaker, engage such experts as they may consider necessary in furtherance of their mandates.

Hon. Members, having found that it is open to any committee to commence an inquiry into a matter if in its interpretation of its mandate it comes to the conclusion that the matter properly falls within that mandate, and having further found that the mandates of the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation touch on the matters in issue, it does not appear to the Chair that a pronouncement from the Chair on the question of whether the re-appointment of the Director of the KACC constitutes subsidiary legislation within the meaning of the Standing Orders, would be the most appropriate or efficient way for this House to proceed. It is not the intention of the Speaker to pre-empt the findings of Committees of the House or to take over their mandate. Indeed, it is arguable that it is these very questions that these committees, with the assistance of the expertise at their disposal, will be considering and advising this House upon. In taking this position I am guided by precedents from other jurisdictions, including the House of Commons of the United Kingdom and the Indian Lok Sabha.

Although I have previously ruled that committees do not require the direction of the Chair or the House to proceed with their mandate, this is not to say that the Chair or the House, for that matter, is prevented, in appropriate circumstances, from directing that any committee undertakes any particular task falling within its mandate. In light of this, and considering the immense public interest generated by this matter, and the important constitutional questions in issue, I direct that the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation proceed, with dispatch, to consider the matter of the re-appointment of the Director of the KACC and to report to this House within two weeks of the date hereof.

Hon. Members, as you may be aware, this afternoon, a Report on this matter has been laid on the table of the House by the Chair of the Committee on Delegated Legislation. This development is not incompatible with the ruling that I have made.

Thank you.

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12. DEBATE ON MOTION FOR ADOPTION OF REPORT ON CONSERVATION OF MAU FOREST TO PROCEED

9th September 2009

Hon. Members, you will recall that on Thursday, 3rd September 2009, I delivered a Communication from the Chair concerning an issue raised by Mr. Isack Ruto, requesting that this House does not proceed to deliberate on a Motion for the adoption of the Report of the Government Taskforce on the Conservation of the Mau Forest Complex.

You will recall that in that ruling, I made it clear that no evidence had been adduced to show that High Court Miscellaneous Civil Case No. 313 of 2005 was active within the meaning of Standing Order No. 80(3) so as to make the matter *sub judice*. Following that ruling, the Hon. Isack Ruto claimed that he had in his possession, evidence showing that the case was active and undertook to furnish the Chair with such evidence. Hon. Ruto thereafter, presented further documents to the Chair.

Hon. Members, the documents presented to the Chair relate to High Court Civil Case No. 664 of 2005, an altogether different case from the original judicial review application previously presented to the Chair, and which was the subject of Hon. Ruto's claim that the Mau Forest Complex matter was *sub judice*.

This is a civil case in which some seven individuals sued the County Council of Narok, seeking, among other orders, a declaration that they are entitled to the exclusive and unimpeded right of possession and occupation of certain properties, and further seeking orders restraining the County Council of Narok by itself or by its agents from entering, remaining on or continuing in occupation, demolishing and burning the plaintiffs' property or in any manner whatsoever, interfering with the plaintiffs' quiet and peaceful enjoyment of their property. In this new case, orders were obtained, restraining the County Council of Narok as aforesaid.

Hon. Members, it is important to observe that in the new documents presented to the Chair, none of the parties in the judicial review application are parties to that suit, nor is the subject matter the same. More importantly, as I explained above, the suit is a private matter between the seven plaintiffs and the County Council of Narok. The orders obtained are orders binding only upon the parties to the suit and their agents and or servants.

The task that Hon. Isack Ruto undertook to discharge was to present evidence to the Chair that High Court Miscellaneous Civil Case No. 313 of 2005 was active. This task cannot be said to have been discharged by presenting papers relating to a completely different and unrelated suit between different parties and orders not binding on parties

other than those in that suit.

Hon. Members, in the light of the foregoing, I rule that no evidence, or further evidence, has been provided that debate on the Motion for Adoption of the Report of the Government Taskforce on the Conservation of the Mau Forest Complex is *sub judice*. The ruling I previously made on the matter, therefore, stands.

Thank you.

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13. REAPPOINTMENT OF JUSTICE AARON RINGERA AS KACC DIRECTOR

10th September 2009

Hon. Members, you will recall that on Tuesday 8th September 2009, the Chair directed the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation to proceed with dispatch and consider the matter of the reappointment of the Director of the Kenya Anti-Corruption Commission (KACC) and report back to the House within two weeks.

You will also recall that a report on the matter had been laid on the Table of the House earlier that afternoon by the Chair of the Committee on Delegated Legislation, and that, in my ruling of the same day I held that the tabling of the Report was not incompatible with my directions to the two Committees. Thereafter, the hon. Mutula Kilonzo, the Minister for Justice, National Cohesion and Constitutional Affairs rose on a point of order, requesting the direction of the Chair that the matter be held to be *sub judice* in terms of Standing Order No. 80.

In support of this proposition, the Minister tabled a number of documents among them a copy of petition No. 535 of 2009 filed on 7th September 2009 at the High Court in Nairobi. The petitioners in that matter are listed as the Nairobi Law Society and 15 other individuals, while the respondents are listed as the Attorney General and the KACC. Hon. Members, among the orders sought in the petition are a conservatory order stopping, or staying, the operations of Gazette Notices Nos. 9300 and 9301 of 31stAugust 2009, reappointing the Director and two Assistant Directors of the KACC, pending the inter-parties hearing of the petition. The petition further seeks temporary orders restraining, or prohibiting, the said officials from assuming office, or acting in such positions, pending the hearing and determination of the petition. The Minister informed the House that the matter would come up for hearing on 15th September 2009.

In addition to tabling the said document, the Minister made submissions urging the Chair to find that the House should not debate the Report until the court seized of the issue makes a determination. The Minister also advanced the view that if the House debated the Report, such a debate would go to the merits of the matter and undermine the citizens' right to a fair hearing. Several Members contributed to the ensuing debate, giving their respective positions on the matter. The House also benefited from the contribution of the hon. learned Attorney-General, who informed the House that he was himself a party to the case that was filed in court, and that in his view, the case was active because a hearing date had been set for 15th September 2009.

The Attorney-General argued that although it was not automatic that all matters that

are filed in court lead to invocation of the *sub judice* rule, the matter and issue was complex and required a careful balancing act of the roles played by the various organs of Government, so that no organ is seen to be interfering with the other, but all organs should work harmoniously to ensure that the country functions on the basis of constitutionalism. The Attorney General urged the Chair to consider in particular the danger of prejudice to the courts and took the view that although Parliament could render a non-binding opinion on the matter, only the courts could make a final determination on the issue, binding on all persons.

Hon. Members, the term *"sub judice"* can be translated loosely from Latin to mean "under judicial consideration". In the Commonwealth tradition, the *sub judice* rule arose out of a desire by Parliament to prevent its comment and debate from exerting an influence on courts and thus prejudicing the positions of parties and witnesses in such court proceedings. The doctrine is also premised on the constitutional principle of separation of powers by which Parliament should not be seen as trying to deal with matters that properly belong to the Judiciary. In Kenya, this principle has been observed for a long time. On 1st November 1966, for example, Speaker Humphrey Slade had this to say when a similar matter arose in the House:-

> *"I think the principle is that parliaments and courts of justice must respect each other and parliaments must not interfere with or prejudice, by their own discussions, the proceedings of a court of law any more than they expect (the courts) to interfere with the proceedings of Parliament".*

The *sub judice* rule is one imposed voluntarily by Parliament on itself and is exercised, subject to the discretion of the Chair, with the object of forestalling prejudice of proceedings in the courts. It is important to note that as relates to the National Assembly, the *sub judice* rule does not find expression in the Constitution or in any other law.

In the House of Commons of the United Kingdom, the *sub judice* rule provides that matters awaiting the adjudication of a court of law should not be brought forward for debate in the House, but this is subject to the discretion of the Chair and the right of the House to legislate on any matter or to discuss any matters. As a result, both Houses of the United Kingdom Parliament have adopted a qualification to the *sub judice* rule by which discussion is permitted on a matter relating to a ministerial decision as well as issues of national importance.

This House has recently re-considered the scope and application of the *sub judice* rule and the rule now finds expression under Standing Order No. 80 of our new Standing Orders. There are three main elements to the rule. The first is that for a matter to be *sub judice,* it should relate to active court proceedings. The second is that there must be a likelihood of prejudice to the fair determination of the matter by the reference to it in

the House. The third important element is that the Chair has discretion to allow reference to a matter notwithstanding that it is active and that there is a likelihood of prejudice to its fair determination by the courts.

Hon. Members, there are, therefore, three issues for determination by the Chair. These are:-

a) Whether Petition No. 535 of 2009, the documents whereof were tabled by Mr. M. Kilonzo, constitutes active court proceedings within the meaning of Standing Order 80(3);
b) If there are, indeed, active court proceedings, whether the discussion of the report by this House is likely to prejudice the fair determination of the case by the courts; and
c) Regardless of the answer to the first two issues, whether the Speaker should exercise his discretion in favour of allowing debate on the report of the two Committees of this House.

Hon. Members, civil proceedings are deemed to be active under Standing Order 80(3)(c) when arrangements for hearing such as setting down a case for trial have been made until the proceedings are ended by judgment or discontinuance. I have no doubt in my mind that a case has been filed relating to the matter of the re-appointment of the Director and two Assistant Directors of the Kenya Anti-Corruption Commission (KACC). However, despite the claims of both the Hon. Minister for Justice, Constitutional Affairs and National Cohesion and the Hon. Attorney-General that a hearing date had been set for 15th September 2009, no evidence was produced to this effect.

The Chamber Summons attached to the documents presented by the hon. M. Kilonzo is blank in the space provided for indicating the date on which all parties concerned should attend for hearing of the matter. No Hearing Notice or other evidence is provided. As I have recently ruled, Standing Order No.80(4) imposes a duty on a member claiming that a matter is *sub judice* to provide the requisite evidence. It may well be the case that there is, indeed, such evidence. However, at this point in time, no such evidence has been presented to the Chair.

On the question of the likelihood of prejudice to the fair determination of court proceedings, it is useful to note that the legal term "prejudice" finds expression in many areas of the law and may be described in a myriad ways. The concept is supposed to operate to prevent procedural and substantive injustices, not to create them. Allegations of prejudice must be scrutinized carefully. The specific allegations of likelihood of prejudice should be detailed with sufficient particularity to allow the Chair to make an informed decision on the merits of the allegation.

It must be noted, Hon. Members, that court proceedings are presided upon by judicial officers properly trained in law and who have taken an oath to discharge the functions of their office without fear or favour and without extraneous influences being brought to bear on their work. In the ordinary course of affairs, judicial officers of any repute are very unlikely to be swayed by what is said in Parliament. It does not inspire confidence in the able and learned men and women who serve in our Judiciary if we allow the propagation of a view that the Judiciary are always looking over their shoulders at what Parliament has said or at the view that Parliament may take on a matter before making their determinations. It will, probably, itself be an affront on the principle of separation of powers if one arm of Government were to take such a view of another arm of Government. In my considered view, in a properly functioning democracy with a sound and professional Judiciary, the burden of the evidence required to show that there is a likelihood of prejudice to the fair determination of any matter by the courts should be set very high indeed. I do not see that this has been proved.

Hon. Members, it is important to distinguish the capacity in which the Judiciary and the Legislature operate. This House, by virtue of the mandates bestowed on it by the Constitution, has powers of legislation, oversight and representation. These are the capacities in which the House functions. The Judiciary, on the other hand, neither legislates nor represents nor has oversight over other arms of Government. Its functions are adjudicatory. This distinction is important in understanding the different capacities in which the two organs of the Government operate.

Hon. Members, it will be recalled that this House was first seized of the matter of the re-appointment of the Director of the Kenya Anti-Corruption Commission (KACC) on Thursday, 3rd September, 2009 when the Mr. Isaac Ruto raised the issue in this House. At that time there was no known pending court case regarding the matter. I take the view that as a general proposition, this House, in line with precedents from other similar jurisdictions, should not abandon a matter over which it is seized on the ground only that the matter has become the subject of litigation in a court of law. Indeed, as my learned predecessor, Speaker Kaparo, had occasion to say on 13th April 1995, inter alia :-

> *"The effectiveness of the National Assembly will be seriously undermined if Members should pre-empt debate on matters before the House by resorting to Court."*

If this House, as happened in the present case, begins to consider any matter before it is the subject of litigation, the House will not give up jurisdiction of the matter easily or at all, for the reason only that some litigation has subsequently commenced on the matter. To hold otherwise would be to invite every person who is apprehensive of the action that this House might take on any matter to rush to court and thereby gag the

House from further deliberation on the matter. This surely cannot have been the intention of the rule. The Chair will guard carefully against the abuse of the procedures of this House in that manner.

Hon. Members, from my pronouncements above, it has become clear that although the case to which the House has been referred by the honourable Minister for Justice, National Cohesion and Constitutional Affairs, may subsequently be shown to be active by production of evidence to that effect, this has not been done at this point in time. It has also become clear that the Chair is not persuaded by the argument that the deliberations of this House on this matter will cause the judicial officer or officers who have to determine any case to which the matter might relate to be unable to determine it fairly and will, therefore, prejudice its fair determination.

I wish to conclude this Communication by reference to Standing Order 80(5) which vests, in the Speaker, a discretion to allow reference to any matter whether or not the matter would otherwise be *sub judice*. My determination on this question may have a bearing on the significance to be attached to my findings on whether there are active court proceedings and also on the question of the likelihood of prejudice.

In this regard, let me at the outset emphasise that I hold the firm view that the discretion given to the Speaker should be exercised with the utmost caution and must not be resorted to except where exceptional circumstances so require. I am guided in determining whether to exercise my discretion in terms of the Standing Orders, by the words of Sir Fredrick Jordan, Chief Justice of the New South Wales, who in a 1937 case had the following to say:-

> *"The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant."*

I am clear in my mind that in a matter of immense public interest, where there is a doubt, unless sound grounds are advanced, a presumption should exist in favour of allowing debate in the House as opposed to the application of the *sub judice* rule to suppress debate. I am also clear in my mind that it is not consistent with the purposes for which parliaments are established that at a time of intense public concern over a matter calling into question important constitutional principles and the legitimate inter-play between the Executive and the Legislature on the appointment of the person to superintend the anti-corruption machinery in the country, this House should be the only place in Kenya, where the matter cannot be debated. If, however, in the course of

debate it should become clear that any Member is clearly foraying into a domain outside what is legitimately the province of this House, it will still remain open for the Chair to call them back to line.

I want to repeat that. If, however, in the course of debate it should become clear that any Member is clearly foraying into a domain outside what is legitimately the province of this House, it will still remain open for the Chair to call them back to line. Hon. Members, in exercise of the discretion conferred upon the Chair by Standing Order 80(5), I rule that, notwithstanding any provisions of Standing Order 80(1), (2), (3) and (4), I do hereby allow debate on the Report of the Joint Sittings of the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation on the Appointment of the Director and Two Assistant Directors of the Kenya Anti-Corruption Commission laid on the Table of the House on 8th September 2009.

Thank you.

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14. TABLING OF UNSIGNED DOCUMENTS IS NOT ADMISSIBLE

10th September 2009

Order, Hon. Members! Hon. Members, I have taken time to peruse the documents tabled yesterday by the Minister for Justice, National Cohesion and Constitutional Affairs. I have found that according to the practice and directions that have been given in this House on admissibility of documents, the following documents are not authentic and their source cannot be verified as they are unsigned:-

(i) Schedule Title Cases filed by the KACC for Recovery of Embezzled funds; 76 cases – the schedule is unsigned.

(ii) A document with the heading, "Department of Public Prosecutions Recent Convictions in Corruption and Economic Crime Cases as at 31st August 2009" – the paper is unsigned.

(iii) A schedule titled – "Cases filed by KACC for Recovery of Public and Illegally or Corruptly Acquired 293 Land Cases" – the paper is unsigned.

So, those, I am afraid are inadmissible and they will not be allowed to go into the records of this House.

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15. CONSIDERATION OF THE CONSTITUTION OF KENYA (AMENDMENT) BILL TO BE GUIDED BY STANDING ORDERS

December 2, 2009

Mr. Deputy Speaker:

Hon. Members, I wish to remind you that consideration of the Constitution of Kenya (Amendment) Bill before us is guided by both the Standing Orders and the provisions of Section 47(2) of the Constitution. Standing Order No.68 (a) provides that before a vote is taken on a Constitutional amendment Bill, both at the Second and Third Reading stage, the perquisite numbers of 65 per cent of 222 Members must be present in the House. Specifically, Standing Order No.68 (a) states:-

> *"In every instance where the Constitution lays down that a fixed majority is necessary to decide any question, the House shall not proceed to a Division on that question (Constitutional Amendment) unless and until a number of Members equivalent to such fixed majority is present at the time for directing the Division".*

The rules on Division are clearly set out under part 14 of the Standing Orders. Therefore, hon. Members as we take Order No. 8, bear in mind that the Second Reading will only be taken if the perquisite number prescribed by both the Standing Orders and the Constitution are ascertained to be present in the House.

In terms of numbers, 65 per cent of 222 adds up to 144.3 Members which is rounded upwards to 145 Members since the words used are, "Not less than 65 per cent of the Members of the Assembly, excluding *ex-officio* Members". This House will accordingly not proceed to division unless there are at least 145 Members present in the House at the time of directing the Division.

Hon. Members, please, note further, that if the Division on that question results in a majority of "Ayes' but less than 145 Members and the "Nos" have not numbered 78 Members or more, Mr. Speaker may direct one further Division within seven days.

Thank you.

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16. PRIME MINISTER'S TIME IS MANDATORY AS PER THE STANDING ORDERS

9th December 2009

Hon. Members, I have heard the presentations made by the five hon. Members present in the House this afternoon led by hon. Ethuro. I have heard the response on behalf of the Prime Minister by the hon. Orwa Ojode. My directions are as follows: - First, the business of this House and conduct thereof is governed and regulated by the Standing Orders. The Order Paper is simply one of the products that emanate from the application of the Standing Orders. In which case, then, if there is a conflict between the Order Paper and the Standing Order, then the Standing Orders will prevail. The Standing Orders provide under Standing Order No. 40 for there being Prime Minister's Time provided to be at 3.00 p.m. on every Wednesday. It is actually in mandatory terms that; "There shall be Prime Minister Time "on every Wednesday at 3.00 p.m." So, the expectation which is implicit if not expressed from this provision is that the Prime Minister will be present to take his time and discharge the responsibilities expected of him at 3.00 p.m. on every Wednesday. In his absence, one of the two deputies will hold brief and take responsibility on behalf of the Prime Minister.

It is for that reason that I took cognisance of the fact that we must move on to Prime Minister's Time at 3.00 p.m., which we did. I know that the Prime Minister is not here because he notified the Office of the Speaker that he will be away and he was granted leave to be away from Parliament. However, the two Deputy Prime Ministers have not been given leave to be away. So, it is actually disorderly conduct for the two of them to be away. They are away on a presumption that no matter will arise pertaining to the Prime Minister's Office which may call for a reaction or response from the Prime Minister. So, that is disorderly.

What would have been expected of them and I so direct is that they will be present in the House and when this order is called as has been called, they will then have an account which they will give to the House and, for example, state that the Prime Minister has no statement to issue or the Prime Minister has no question to answer or he is not ready to answer those Questions which Mr. Speaker, may have approved.

That is how we will conduct business this time. So, I will expect that the two Deputy Prime Ministers will have an explanation to offer to the House when they show up as to why they were not here this afternoon. This House does not operate on presumptions; this House operates on the basis of law as set out in the Constitution, other statutes and the Standing Orders.

THIRD SESSION (2010)

Speakers' Considered Rulings and Guidelines (2010)

Contents

1. CLARIFICATION OF THE STAGES OF DELIBERATING ON THE DRAFT CONSTITUTION OF KENYAAS PROVIDED UNDER THE CONSTITUTION OF KENYA REVIEW ACT (2008)

24th February 2010

Hon. Members, you will recall that yesterday, Tuesday 23rd March 2010, shortly before the Motion on the Draft Constitution was moved by Mr. Abdikadir, the Member for Chepalungu, Mr. Ruto, stood on a point of order and sought the clarification of the Chair on two issues. Firstly, the stage at which we are in the Constitution review process in accordance with the Constitution of Kenya Review Act (2008) and secondly, the nature of the document that is currently before the House.

Mr. Ruto advanced the view that the House is currently at the stage provided for in Section 33(4) of the Constitution of Kenya Review Act (2008) and also that the business before the House is a Motion by the Chairman of the Parliamentary Select Committee (PSC) on Review of the Constitution. It was the view of Mr. Ruto that even though it has been described as a Draft Constitution in the Act, the document currently before the House is not the Draft Constitution to which Section 33(5)(a) refers and is, therefore, not subject to the procedure provided for at Section 47A(2)(b) of the Constitution. To bolster his argument, Mr. Ruto argued that it was not by mistake that Section 33(5)(a) applies the procedure at Section 47A(2)(b) to only Sub-section 5 and not to Sub-section 4. He further argued that the document before us cannot be a Draft Constitution as it has emanated from a group of seven persons. There has been no representation in its discussion to this stage. It was his argument that the document is being discussed by a representative body for the first time.

A number of Hon. Members made some interventions on the issues raised by Mr. Ruto. They were Mr. Mungatana, Dr. Khalwale, Dr. Machage and Mr. Orengo. Hon. Members, although Mr. Ruto did not expressly say so, the effect of his point of order is to question the appropriate procedure which this House should utilize in the disposal of the Motion presently before it. The stage at which we are and the nature of the document before us determines the procedure the House should invoke. In particular, these issues determine the number of votes required to approve or amend the document before us. It is, therefore, important that I make a clear ruling on these questions.

Before I do so, allow me, Hon. Members, to put the process of constitutional review in perspective. Let me state, at the outset, that I have no doubt in my mind that this process is the single most important national project ever undertaken by this House since Independence. For close to two decades now, the people of Kenya have sought a new constitutional order. Indeed, at this moment, I am certain that the eyes of the entire country are on this House.

We carry the hopes, aspirations and fears of an entire nation. It is a solemn trust that we must discharge with honour and responsibility. The history of the constitutional review process is well known to all of us. I need not repeat it here.

It is a process governed both by statute and by the Constitution of Kenya. The statute governing the review process was enacted by this House, so was the constitutional amendment that inserted a new Section 47(a) to specifically provide for the procedure, hitherto, non-existent of replacing of the Constitution of Kenya. I want to repeat that for emphasis. The Statute governing the review process was enacted by this House. So, was the constitutional amendment that inserted a new section 47(a) to specifically provide for the procedure hitherto non-existent of replacing the Constitution of Kenya. There was provision for amendment; there was no provision for replacement. That is why I am emphasizing that part.

Hon. Members, a proper reflection on the constitutional review process makes it clear that it is a process entirely different from the ordinary process of law making. It is a process that was carefully crafted to respond to the experiences of the past. It is also a process that was carefully calculated to learn from the mistakes of the past. These are important points to note.

Section 5 of the Review Act establishes the organs through which the review process is to be completed and the National Assembly is one of those organs. The other organs are the Committee of Experts, the Parliamentary Select Committee and the Referendum. Additionally, Section 6 of the Act sets out the guiding principles binding these organs in the discharge of their functions. The organs of review are required to, inter alia be guided by the principle of stewardship and responsible management. Most importantly, all organs of review are required to ensure that the outcome of the review process faithfully reflects the wishes of the people of Kenya.

Hon. Members, it is important and it cannot be emphasized enough that the review process was carefully tailored to remove it from the ordinary processes of law making. Instead of this House as the sole driver of the process, the National Assembly and its committee, the Parliamentary Select Committee, were made to be participants in a consultative and people-driven process. Instead of Parliament as the determinant of whether the process lives or dies, that prerogative has been recognized in Section 47(a)(2), paragraph (a) of the Constitution as vesting in the people of Kenya collectively and as being exercisable by the people of Kenya through a referendum.

Hon. Members, allow me to commend the Member for Chepalungu for his vigilance and industry, for bringing to the fore, the matters that are the subject of this communication.

In response to the questions raised by the Member for Chepalungu, I therefore, rule as follows:

1. This House is currently at the stage set out in Section 33(4) of the Constitution of Kenya Review Act. There should be little dispute on this score. The House is currently seized of the documents tabled by the Parliamentary Select Committee on the Review of the Constitution on 2nd March 2010. These documents are: The final Report of the Committee of Experts and the Revised Draft Constitution.

2. Arising from Item 1 above, the document currently before the House in terms of Section 33(4) of the Review Act is, therefore, the draft Constitution submitted to the Parliamentary Select Committee by the Committee of Experts. It is not a document authored by seven people. It is the culmination of a comprehensive process of the review of the Constitution by the people of Kenya. It is a document that is a product of a process in which the National Assembly has been adequately involved at all stages.

Hon. Members, although some doubt may appear to be created about the procedure to be applied in disposing of the Draft Constitution by the failure of Section 33(4)(a) to refer to this stage, I am satisfied that any such doubt is removed by the provisions of the Constitution at Section 47(a)(2), paragraph B. The section makes it clear that whenever a draft constitution proposing the replacement of the Constitution has been introduced in the National Assembly, no alteration can be made to it unless such alteration is supported by the votes of not less than 65 percent of all the Members of the Assembly excluding the ex-officio Members.

The words used are "a draft constitution". The application of Section 47(a)(2) paragraph B is, therefore, clearly not limited to a specific draft constitution or to only some types of draft constitutions. It is also not limited to some stages of consideration by the National Assembly draft constitution.

Hon. Members, I am, therefore, quite clear that Section 33(5)(a) ought properly to have made reference to Section 33(4) as being subject to the procedure stipulated in Section 47(a)(2) paragraph B of the Constitution.

I am also clear that failure to so refer is not fatal as the provision of the Constitution clearly overrides those of an ordinary statute in case of conflict. To that extent, it may indeed be argued that even the reference in Section 33(5)(a) of the Act to the application of Section 47(a)(2) paragraph B of the Constitution is unnecessary. The constitutional provisions on the disposal by this House of a draft constitution apply because the Constitution says so. It matters not whether an Act of Parliament also says so or even purports to repudiate that position.

Hon. Members, I am fortified in these findings by a careful reading of both the Constitution and the Review Act. I am particularly certain that any interpretation that the document before us is not a draft constitution or that Section 47(a)(2) paragraph B

of the Constitution is inapplicable at this stage, will not be consistent with either the letter, spirit or intention of the Constitution or the Review Act.

Such a finding will amount to this House arrogating to itself a higher pedestal than the other organs of Review. It does not appear to me that there can have been any intention that this House, having enacted the Constitution (Amendment) and the Review Act, and having set out a very elaborate consultative process, will wish or even allow itself to easily by a simple majority vote subject to quorum, overturn all preceding agreements.

The threshold to amend a draft Constitution was deliberately set high to ensure that only in the most meritorious of circumstances could this happen. This is a stage where the National Assembly is provided with yet another opportunity to input in the process by which the people of Kenya seek to exercise their sovereign right to replace their Constitution.

Finally, in consequence of this Ruling, the Communication I delivered yesterday, in particular on the procedure that I explained, still stands.

Thank you

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2. PROCEDURE FOR CONSIDERATION OF THE DRAFT CONSTITUTION

March 23, 2010

Hon. Members, you will recall that the Chairperson of the Parliamentary Select Committee on the Review of the Constitution tabled the Report and the Draft Constitution submitted by the Committee of Experts (CoE) on Tuesday the 2nd March 2010 pursuant to Section 33(3) of the Constitution of Kenya Review Act, 2008. He further gave Notice of Motion for the House to approve the Draft Constitution.

The House is expected to consider the Draft Constitution and do either of the following as required by Section 33(4) of the Constitution of Kenya Review Act:-

(a) Approve the Draft Constitution without amendments and submit it to the Attorney General for publication; or
(b) Propose amendments to the Draft Constitution and submit the Draft Constitution and proposed amendments to the Attorney General, who shall, within seven days, submit them to the CoE for consultation and re-drafting.

Consequently, I would like to guide the House on the procedure that will obtain with regard to the consideration of the Draft Constitution.

There are certain precedents that have been set in the past that could be useful in the present scenario, which it must be noted, is very unique. On the 27th October 1964, when the House of Representatives was debating the Constitution of Kenya (Amendment) Bill which led to the creation of the Republican Government in Kenya, the amendments were introduced in the House in the form of a Bill. The House then, as it is today, was embarking on a very important constitutional debate and changes. Whereas the House then carried a major review of the Constitution in the form of a Bill, in our present case, the House is required by law to approve the Draft Constitution, with or without amendments.

A situation like the present case occurred on the 30th June 2005 when the House was deliberating on a Report of the Select Committee on Review of the Constitution of Kenya on contentious issues identified in accordance with Section 27(1) (b) and Section 27(2) of the Constitution of Kenya Review (Amendment) Act, 2004 (now repealed), laid on the Table of the House on the 29th June, 2005. The House passed the Motion which culminated in the 2005 Referendum. This Motion was treated like any other Motion in the House.

Hon. Members, in view of the above, I direct that the considerations of the Draft Constitution by the House shall be done in the plenary through a Motion to be moved

by the Chairperson of the Parliamentary Select Committee on the Review of the Constitution as indicated in order No.8 in the Order Paper.

Once the Motion has been seconded and the Question proposed, the Motion will be debated pursuant to provisions of Standing Order No.53. Thereupon, any Member who wishes to propose amendments to the Draft Constitution may do so, provided that the amendment shall relate to a specific Article or Schedule contained in the Draft Constitution.

In order to have an orderly consideration of the Draft Constitution, any proposed amendments will be framed in the following manner:-

> *"That, pursuant to the provisions of Section 33(4) of the Review Act, this House approves the Draft Constitution submitted by the Committee of Experts and laid on the Table of the House on the 2nd March, 2010 subject to deletion or insertion of the following words, article, clause or schedule as the case may be."*

Every proposed amendment shall be signed by the proposer and handed over to the Clerk pursuant to the provisions of Standing Order No.54 commencing after the question of the Motion has been proposed. The amendments will then be handed over to the legal counsel for drafting and harmonization with other provisions in the Draft Constitution.

In order to abide by the practice established by the House on consideration of a Bill, any such proposed amendments once approved, will be annexed on the Order Paper.

Hon. Members, for the convenience of the House, I direct that all proposed amendments that will have been received by the rise of the House on Wednesday the 24th March 2010 afternoon sitting, be appended to the Order Paper for the House to begin considering them from Thursday, 25th March, 2010.

In the meantime, Members contributing to the Motion will restrict themselves to the general debate. To allow Members who will have already spoken to the Question to move amendments, I order that the provision of Standing Order No.74 relating to speaking more than once to a Question shall not apply to them and will, therefore, be permitted to move their amendments.

Hon. Members, your attention is drawn to Section 47A(b) of the Constitution which states inter alia:-

> *"No alteration can be made to the Draft Constitution tabled unless such alteration is supported by the votes of not less than 65 per cent of all the Members of the National Assembly (excluding Ex-Officio Members)".*

Consequently, whenever there is a proposed amendment to the Draft Constitution framed as aforesaid, the House must proceed on a Division. However, the House shall not proceed to a Division unless and until it has requisite numbers; this is 145 Members pursuant to the provisions of Standing Order No. 68 (1). Any amendment which fails to obtain the requisite numbers shall be deemed to be negatived.

While considering the amendments, the Chair will take into account the chronological order of the Articles in the Draft Constitution.

Hon. Members, your attention is drawn to the provisions of Standing Order No.55 (2) which states that:-

> *"No amendment shall be permitted if in the opinion of the Speaker, it represents a direct negative of the question proposed"*

It should not be too complicated. Those of you who will find it difficult, we will give you direction every time you have any difficulty at all. Apart from amendments, any other procedural question proposed in the consideration of the Draft Constitution, such as adjournment Motions, will be determined by a majority of the votes of the Members present and voting, pursuant to Section 54(1) of the Constitution.

If any amendment is carried, the motion will then be debated as amended. When debate on the Motion is concluded, the Mover will reply. The Chair will then put the Question of the Motion in its original form if no amendment is carried. If any amendment is carried, the Chair will put the Question of the Motion with the amendments agreed to. The Draft Constitution shall stand approved by the House unless the Motion for approval is negative by votes of not less than 65 per cent of all the Members of the National Assembly (excluding the ex-official Members).

In addition, I wish to bring to the attention of the Members that Section 47 (2), paragraph (c) of the Constitution requires the House to conclude its debate on the Draft Constitution within 30 days of its introduction in the House. In view of the fact that the report was tabled on the 2nd March 2010, the House must conclude the debate on or before Thursday, the 1st April 2010.

3. RESPONSIBILITY OF THE MEDIA TO ADHERE TO PROFESSIONAL STANDARDS IN THEIR COVERAGEOF THE HOUSE

30th March 2010

Hon. Members, you will recall that on Thursday the 25th March 2010, the Member for Wajir North, Mr. Gabbow stood on a point of order under Standing Order No. 34. The Member drew the attention of the Chair to Regulation 5 paragraphs 2 and 3 of the Standing Orders which has the heading "Protection of the Dignity of the House". The two paragraphs aforesaid provide as follows:-

> *"(2) Shots designed to embarrass unsuspecting Members of Parliament shall not be shown.*
>
> *Recordings of Parliamentary proceedings may not be used for purposes of political party advertising, ridicule, commercial sponsorship or any form of adverse publicity"*

Mr. Gabbow complained that The Standard had contravened this provision and supported his contention by laying on the Table of the House a picture carried on page six of its Crazy Monday pull-out showing the uncovered body parts of some lady Members of this House.

A number of hon. Members contributed on the matter. They included Ms. Martha Karua, Dr. Sally Kosgei, Mr. Washiali, the Rt. Hon. Prime Minister, Ms. Milly Odhiambo, Ms. Rachel Shabesh, Mr. Mwiru, Dr. Shaban, Mr. Wetangula and Prof. Kamar. Most of these were in support of the contention of Mr. Gabbow that the picture in question contravened the rules of this House and was sexist and demeaning to the women Members of this House.

After allowing that level of canvassing, I undertook to make a comprehensive finding and give directions on Tuesday the 30th March 2010 in the afternoon.

Hon. Members, I have looked at the picture in question as laid in the Table of the House. I have also perused a copy of The Standard of Monday the 22ndMarch 2010. It would appear that The Standard daily newspaper publishes a weekly pullout dubbed Crazy Monday in its Monday Edition. In the largely comical weekly pullout, the newspaper usually runs a teaser column christened "Eye Identify".

Wherein the newspaper publishes shots of prominent people's eyes and challenges the readers to identify the owner of the eye. On 22nd March 2010, at the same column, a similar publication was run albeit with a change. This time the puzzle involved some uncovered body parts as opposed to eyes.

Under the heading which was "politically incorrect/a skewed look at the political scene" and the caption, "Below the hem" the newspapers carried the picture complained of with the following explanatory note:

> *"Elsewhere in this pull out, we have the eyedentity quiz which is predicated on the assumption that people's eyes have a distinct personality. Nobody has ever thought of running a legdentity quiz though. A prize for whoever can correctly identify the owners of these pairs of legs. Clue: The picture was taken in Parliament."*

Hon. Members, the question on which I have to rule is whether the picture in question and the manner in which it was carried by the newspaper amounts to a violation of our Standing Orders and if so, the action to be taken by this House against the newspaper. In arriving at these findings, I have made some assumptions. The first assumption, and this does not appear to be in context, is that the picture in question was in fact taken in Parliament. The newspapers itself asserted so and if this were to be false, perhaps different considerations will apply. The second assumption is, of course, that the images in the pictures complained of, are those of the body parts of hon. Members of this House. Again, this has neither been denied nor disputed.

Hon. Members, the purpose of media coverage of Parliamentary proceedings as envisaged in the Standing Orders and Broadcasting regulations and as would be reasonably expected is to relay fair and responsible presentation of parliamentary proceedings to the public. This seems, to me, to be straightforward enough. It is not clear to me how the taking and publishing of pictures of uncovered body parts of lady Members will amount to fair coverage of Parliamentary proceedings. That the picture was published in a comic magazine is particularly instructive. It shows a clear intention that the pictures were to serve as a comic tool or object. It was an object of fun and amusement. This, certainly, without doubt is not in keeping with purposes for which journalists are invited or permitted into this House.

Hon. Members, the spirit behind the provisions permitting media coverage of Parliament is really no more than that the public is entitled to follow the proceedings and conduct of their representatives in the Legislature. Media coverage should not be used to serve any other purpose. That is why Regulation 3 of the Broadcasting Regulations restrict the camera's scope in television broadcasting. The camera is required to focus on the Member recognised by the Chair until the Member has finished speaking. Group shots and cut-aways should only be taken for purposes of showing the reaction of a group of Members to an issue raised on the Floor and wide angle shots of the Chamber can only be used during voting and division.

Hon. Members, to draw a conclusion on the propriety of the publication, we have to be guided primarily by what the Standing Orders provide as regards Parliamentary

reporting. This matter falls under the purview of the Standing Order No.34 addressed together with the First Schedule of the Standing Orders which embodies the broadcasting regulations. Standing Order No.215 is also germane. The Standing Orders prohibit the showing of shots designed to embarrass unsuspecting Members of Parliament. They also provide that recordings of Parliamentary proceedings may not be used for the purpose of political party advertising, ridicule, commercial sponsorship or any form of adverse publicity. While this provision appears to dwell more on television broadcasting, I am satisfied that it equally applies to pictures published by newspapers as in the current case.

Hon. Members applying the Standing Orders and also the test of a reasonable person, I have no difficulty in finding that the publication does not meet the minimum standards of responsible reporting of Parliamentary proceedings. Not only does it overlook the need to uphold the dignity of the House and its Members, but it also amounts to an abuse of the privilege vested in the Fourth Estate in covering Parliamentary proceedings. Indeed, looking beyond Parliamentary reporting, I take the view that this publication may well be a contravention of the Code of Conduct for the practice of journalism as provided for under Section 35(2) of the Media Act, 2007. That Code requires journalists to "present news with integrity and decency and respect the dignity and intelligence of the audience as well as the subject of news." In my view, the publication of that picture neither shows respect for the dignity or intelligence of the subjects, nor even for the readers. The Code requires journalists to stick to issues and avoid intrusions into individuals' private lives without their consent unless public interest is involved. Clearly, the picture went out of the domain of any legitimate public interest in concerning itself with the body parts of Members of this House. More importantly, women and men are required to be treated equally as news subjects and news sources.

It does not feel right for me to leave this matter at this finding. Considering the totality of the circumstances, I think that this was a piece of bad judgment on the part of the newspaper. I say this because I believe I express the earnest hopes of this House and indeed of the whole country that this was an aberration, a lapse rather than any properly defined and agreed to editorial policy of the Standard Group. I want this House to enjoy the benefit of that doubt. This is a country where women complain of definite and systematic discrimination or chauvinism of deep seated negative attitude of subtle and not so subtle sexism. This publication does not help to dispel this concern. It tends to confirm that women are not free from being hassled even if they are Members of Parliament.

Thirdly, it also appears to convey the message that this assault will follow women wherever they go even to the Floor of this House. Coming from an organ as powerful as the media, it sends a wrong message. Far from being funny, I think and I hold that the publication complained of undermines the dignity of the National Assembly and

was demeaning and embarrassing to a section of its membership.

Hon. Members, before pronouncing myself on the appropriate recourse, I wish to note that I have become aware that on page 6 of The Standard edition of yesterday, Monday 29th March 2010, in the same Crazy Monday pullout, the following words appear under the heading Clarification: *"In view of the sensitivity that has arisen following the publication of a picture on a light touch in last week's issue of Crazy Monday, the editor wishes to assure those concerned that it was in no way meant to disparage the character of hon. Members of Parliament. The editor, therefore, regrets any embarrassments that may have been caused."* I think that is the correct decision by The Standard. Although I was going to, and, indeed, hereby reprimand the newspaper for this publication, I am in the same breath prepared to accept that this constitutes a satisfactory apology and mitigation without prejudice to bring this matter to a close. Let me conclude by calling on all media houses to stay focused and maintain the amicable partnership that has existed with this House, particularly at this time when the attention of the whole country is fixed on the all important constitutional review process.

Thank you!

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4. PROCEDURE FOR HANDLING AMENDMENTS TO THE DRAFT CONSTITUTION

31st March 2010

Hon. Members, I have considered that aspect of the matter in the light of the number of amendments that we have as it appears on the Order Paper. I have decided to give direction as follows:-

Every Mover of an amendment will endeavor to move it within a period of three minutes. If there is a spill over, then it will not go above five minutes. We will strictly endeavor to observe that timeline. Hon. Members who will be seconding or contributing to the amendments will be restricted to a period of a maximum of three minutes so that as much as possible, from our computation, each amendment should last just about five or at most seven minutes. The Division Bell, as and when a Division is called, will be rung for four minutes instead of the standard eight minutes as provided for under the Standing Orders. You will notice that under the Standing Orders, there is provision that the Speaker will direct the bell to be rung for eight minutes. But for purposes of this constitutional debate, I am directing that the Division Bell will be rung for four minutes so that we are practical, to be able to accommodate all the amendments as they appear on the Order Paper.

Please stand guided accordingly.

(Various members stood on points of order to seek further clarifications. In his response, the Speaker directed as follows)

Order, Hon. Members!

I have heard all your concerns and issues raised by the points of order that I have admitted this morning beginning with the one by the hon. Member for Garsen and finalizing with the one by the hon. Member for Mbita. I have considered them very carefully. I have also weighed them very carefully. There are important things that I must say even as I give these directions. First, last week I issued a Communication at the commencement of this debate. In that Communication, I indicated the procedure that we shall adopt for the purposes of steering this Motion through the House.

Hon. Members, I want to reiterate the contents of that Communication and, indeed, assert that I stand by the directions which I gave, which were within the law, in as much as I took into account the provisions of our constitution as amended.

Hon. Members, it is important for us to note that even as we go through this exercise which is critical, important, and, indeed, historical, that we must do so constitutionally. We must bring about a new constitution if we do, or even play our part in the process

constitutionally.

Hon. Members, what is before the House, as we speak this morning, is not a Constitutional (Amendment) Bill. What is before the House is a Motion urging this House to approve the Draft Constitution. That has to be clear. So, obviously, there is a distinction between a Constitutional (Amendment) Bill and a Motion which incorporates a Draft Constitution as is before the House at the moment. Secondly and significantly, the procedure that will govern the debate and conduct of business with respect to this Draft Constitution is provided for, not just by our Standing Orders, but significantly by the Constitution itself as amended. The Constitution carries an amendment under Section 47(a) which tells us what to do with this Draft Constitution. Section 47(b) provides as follows: —Notwithstanding anything to the contrary in this Constitution. Therefore, if you assume for a moment that something, perhaps something in Section 47 which preceded Section 47(a) is in contravention with Section 47(a), then that notwithstanding, this will apply.

That is the correct position that would be given even by those who among us are my learned friends. Notwithstanding anything to the contrary in this Constitution; (b) when a Draft Constitution proposing the replacement of this Constitution has been introduced into the National Assembly, no alteration shall be made in it, unless such alteration is supported by the votes of not less than 65 percent of Members, and note, by the votes and not by the presence. So we will ascertain whether or not we have the right strength as we move to vote. We will then ascertain whether or not we have, in fact, 65 percent of the Membership of the House present to cast votes that will carry an alteration. So I stand by my first direction that we will proceed with debate on the amendments. When the Division Bell is rung, we will ascertain if we have the requisite numbers to meet that constitutional threshold.

Hon. Members, with respect to the attempt by the hon. Githae to talk about a Motion that he wanted to introduce on procedure this morning, I am afraid that does not appear on the Order Paper. It is not part of our business this morning. Apart from the fact that I am not aware of any such Motion, it has not been drawn to my attention.

Hon. Members, please, bear in mind that we have in excess of 120 proposed alterations.

5. CONSIDERATION OF *SUPPLEMENTARY PRESIDENTIAL MEMORANDUM* ON OFFICES OF MINISTER BILL

1st April 2010

Hon. Members, you will recall that last week on 24th March 2010 the Chair issued a communication regarding the consideration of a Supplementary Memorandum from His Excellency the President on the Offices of Minister Bill in exercise of powers conferred upon His Excellency the President by Section 46, Subsection 3 and 4 of the Constitution of Kenya. Members will no doubt also recollect that the Chair directed the Clerk to circulate the Supplementary Memorandum to all hon. Members and further that it be placed on the Order Paper for Wednesday, 31st March 2010. I believe each hon. Member was supplied with a copy of the Memorandum and that all have acquainted themselves with its contents.

As Hon. Members will note, the Memorandum was not on the Order Paper for Wednesday, 31st March 2010 due to the agenda before the House namely; Consideration of the Draft Constitution. With the indulgence of the House and the hon. Member for Turkana Central, I direct that the Memorandum be placed on the Order Paper for Thursday 8th April 2010 and the House will proceed and consider the **Supplementary Memorandum** in accordance with Section 46, Subsection 5 of the Constitution.

6. APPLICATION OF GUILLOTINE PROCEDURE TO PROCESS AMENDMENTS TO THE DRAFT CONSTITUTION

1st April 2010

Hon. Members, before we proceed with the rest of the amendments, I have the following Communication to make. As hon. Members are aware, the Chair made a Communication on Tuesday 23rd March 2010, regarding the procedure of considering the business currently before the House, namely, Motion to approve the Draft Constitution submitted by the Committee of Experts. For the benefit of Members, I will refer the House to the provisions of Section 33(4) of the Constitution of Kenya Review Act, 2008, which states:-

> *The National Assembly shall within 30 days of the tabling of the Draft Constitution under sub-section 3 debate it and (a) approve the Draft Constitution without amendments and submit it to the Attorney General for publication or (b) propose amendments to the Draft Constitution and submit the Draft Constitution and proposed amendments to the Attorney General who shall within seven days submit them to the Committee of Experts for construction and redrafting.*

Hon. Members, the Draft Constitution was laid on the Table of the House on Tuesday, 2nd March 2010, and pursuant to the foregoing provision, the House must conclude debate and any amendments on the draft by the end of today, Thursday, 1st April 2010, coincidentally, the Fools Day. The current process, as you all appreciate, is very unique and our procedures may not be entirely suited to address the situation and that is one of the reasons the Standing Order No. 1 is included in our rules, which empowers the Speaker to decide in all cases where matters are not expressly provided for by the Standing Orders.

Hon. Members, the House has considered the Draft Constitution now up to Article 89 of the total 264 Articles and six Schedules, which must be considered and disposed of. The House must, therefore, expedite the process of considering the draft. I now direct that with effect from 4.15 p.m., the House applies the Guillotine procedure for the consideration of the remaining parts of the draft. This means that any Member with a proposed amendment will be called upon to move his or her proposal and make a two minute speech on the merits of the proposed amendment. Members may also decide to move the Motion without making a speech. The proposal will be seconded and thereafter, the question will be put forthwith. The process of establishing whether or not there is the requisite number of Members will ensue. About half an hour before the end of the sitting, the Chairperson of the Parliamentary Select Committee will be called upon to reply and the Question will thereafter be put.

Hon. Members, let me remind the House that to defeat the approval of the Motion will require the support of at least 65 per cent of all Members of the Assembly. Approval of the draft will, however, require the support of a majority of the Members present and voting. I urge the House to be guided accordingly.

Hon. Members, note that, therefore, beginning from 4.15 p.m., those of you who are inclined to support our effort to steer through the balance of the amendments may move their amendment by referring to it —as it is on the Order Paper, but you have the option. Those who feel that they must read through will be at liberty to do so.

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7. CONSIDERATION OF PRESIDENTIAL MEMORANDUM ON OFFICES OF MINISTER BILL

April 15, 2010

Mr. Deputy Speaker:

Hon. Members, I wish to make this Communication regarding the matter you have to dispose of in Order No. 10.

Hon. Members, before we proceed to Order No.10 which is the Committee of the whole House to consider the Presidential Memorandum on the Offices of Minister Bill, 2009, I wish to take this opportunity by way of a reminder to set out the procedures applicable to the deliberations on the Memorandum from His Excellency the President submitted in terms of Section 46(3) and 46(4) of the Constitution.

Hon. Members, you will recall that after the House passed the Offices of the Minister Bill, 2009 on 9th December 2009, His Excellency the President, in exercise of the powers conferred upon him by Section 46(4) of the Constitution, declined to give assent to the Bill. His Excellency the President submitted a Memorandum to the Office of the Speaker dated 20th January 2010 giving reasons for declining to assent to the Bill.

Subsequently, His Excellency the President submitted a Supplementary Memorandum dated 15th March 2010 and which has since been circulated to all hon. Members indicating a specific provision of the Bill which requires to be reconsidered by the House.
Section 46(5) of the Constitution provides as follows:-

> *"The National Assembly shall reconsider a Bill referred to it by the President taking into account the comments of the President, and shall either-*
>
> *(a) approve the recommendations proposed by the President with or without amendment and submit the Bill to the President for assent; or*
>
> *(b) refuse to accept the recommendations and approve the Bill in its original form by a resolution in that behalf supported by votes of not less than sixty-five per cent of all the Members of the National Assembly (excluding ex-officio members) in which case the President shall assent to the Bill within fourteen days of the passing of the resolution."*

Hon. Members, in the Supplementary Memorandum, His Excellency the President recommends that Clause 8 of the Bill be amended in Subclause (b) by inserting the words "subject to the Constitution" immediately after the word "shall".

The House will, therefore, be required to reconsider Clause 8 of the Bill in accordance with Section 46(5) of the Constitution and approve the recommendation proposed by the President with or without amendments, or refuse to accept the recommendation and approve the Bill in its original form by a resolution supported by votes of not less than 65 per cent of all Members of the National Assembly, excluding the ex-officio Members.

Hon. Members, 65 per cent of 222 translates to 144.3 Members, which is rounded upwards to 145 Members since the words used are *"not less than 65 per cent of all Members of the National Assembly, excluding the ex-officio Members."*

On the reporting procedure, the Bill will not be read a Third Time as this was actually done and the Bill passed on 9th December 2009. It is, therefore, enough that a resolution of the House adopting or rejecting the Report of the Committee of the Whole House, in accordance with Standing Order No. 121(3) read together with Standing Order No. 119(1) and (2), which state inter alia *"That the House do agree with the Committee in the said Report"* would satisfy Section 46(5) of the Constitution and will be in conformity with the rules of procedure on re-committal of Bills as amplified by Standing Order No.121(1) and (2).

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8. SUSPENDED ASSISTANT MINISTER ASKING QUESTIONS

1st July 2010

Having said that, you will recall that on 29th June 2010, while the House was conducting business under Order No.6, Question Time, Dr. Machage sought to ask a Question during debate on Ordinary Question No. 183 of that day. Dr. Machage's question was directed to the Minister for Education. Mr. Mbadi rose on a point of order seeking direction from the Speaker as to whether it was procedural for Dr. Machage, a suspended Assistant Minister, to ask Questions in the House. In response to that, Dr. Machage noted that, as a suspended Assistant Minister, he had no duties assigned to him by the Executive and he could, therefore, exercise his mandate as the hon. Member for Kuria while in the House; which mandate would include asking Questions.

The Chair undertook to give directions on the matter yesterday afternoon. As the Speaker indicated, however, the communication, though ready on time, was not in its final form. Hon. Members, parliamentary practice the world over has always made a distinction between Members of Government and those not in Government. Those not in Government are commonly referred to as Backbenchers. Both categories of hon. Members are critical for the proper functioning of any democracy. Members in Government are tasked with the responsibility of initiating and defending Government policies, decisions and actions.

Erskine May in the text on Parliamentary Practice 23rd Edition page 74 while discussing the question of Ministerial accountability to Parliament, further notes that Ministers have a duty to Parliament to account and to be held to account for the business of their Ministries. Conversely, Members not in the Government play the critical role of keeping the Government in check. For the proper functioning of the Legislature, the distinction between the two categories of Members must be clearly drawn and maintained. Hon. Members, the Question that has arisen relates to the status of a suspended Assistant Minister. To which category does such a Member belong for the purposes of the business of the House? Is such a Member considered as a Member representing the Government, or owing to the suspension, as a Member representing his constituency and Kenyans at large in checking the Government?

Hon. Members, as to whether a suspended Assistant Minister should be considered as a Member representing the Government, allow me to comment by citing Standing Order No. 2 of our Standing Orders which defines a Minister as the President, the Vice-President, the Prime Minister, the Deputy Prime Minister or any other Minister. That includes the Attorney General or an Assistant Minister or any person who holds--- The Prime Minister, Minister or any other Minster including the Attorney General, an

Assistant Minister or any other person who holds temporarily any such office. Although the Standing Orders do not make a distinction between a serving Minister and one under suspension, it is clear from the spirit and intent of the Standing Orders that a Member is either a Minister or not for the purposes of conduct of the business of the House. A Member cannot fall within both categories. Then, under what category does a suspended Minister fall?

Hon. Members, the Oxford Advanced Learners Dictionary defines suspension as an act of delaying something for a period of time until a decision has been taken. A suspension is further defined as a temporary state of affairs pending a conclusive decision. It is, therefore, my finding, hon. Members, that for the purposes of the business of the House, a Member who falls within the definition of a Minister under Standing Order No.2 remains a Minister as long as he continues to hold such office and has not been terminated by due process of the law, whether or not has been assigned duties or has, in fact, been suspended from performing his duties. The assignment of duties or lack of assignment of duties by the Executive to its Ministers is a matter that falls within the ambit of the internal administrative arrangements of the Executive.

Hon. Members, the question as to whether a suspended Minister can represent his constituency and Kenyans at large in checking the Government is one that would apply not just to suspended Ministers, but to all the Ministers as a whole. It is a questing that goes to the core of the doctrine of separation of powers. While the Executive and the Legislature are bound by the doctrine of separation of powers intended to be separate and independent entities, some confluence is to be found in the fact that hon. Members of our Legislatures are privileged to serve as Ministers in the Executive. Although such Ministers are responsible to their constituents, our practice, and that which establishes similar jurisdictions, dictates that Ministers, as Members of the Executive, cannot participate in questioning the same Executive that they serve. However, that does not preclude and, indeed, has never precluded such Ministers from deliberating or making contributions to bi-parliamentary business that has a bearing on the constituencies that they represent.

In light of that, hon. Members, I find Dr. Machage, though a suspended Assistant Minister, remains, for the purposes of this House, a Minister in terms of Standing Order No. 2 and, cannot, therefore, seek to interrogate the same Parliament that he represents through Parliamentary Questions.

9. TAKING DEBATES OUTSIDE THE HOUSE

21st July 2010

Hon. Members, I want to deliver a Communication regarding a matter, which has twice been raised in this House in a period of as many weeks. This matter was first raised by hon. David Musila, Assistant Minister, Ministry of State for Defence.

While standing on a point of order on Tuesday, 6th July 2010, hon. Musila expressed concern that a practice was emerging of hon. Members avoiding debates on Motions and even Bills in the House, and going to funerals and other public fora to express their views. He cited the case of an hon. Member who, in a referendum campaign rally in Machakos, had alleged that the decision to adopt the Akiwumi Report had been intended to bribe Members of Parliament to take a certain position in the forthcoming referendum. Hon. Musila sought the guidance of the Chair, claiming that the dignity of the House had been dented, and that action was required to save the dignity of the House.

A number of other hon. Members contributed, citing other incidents in support of the point of order raised by hon. David Musila. The hon. Members who contributed lamented that the integrity of the National Assembly was being put at stake by hon. Members commenting adversely on matters either still pending consideration by the House or that have been disposed of one way or the other by the House. After hearing those hon. Members, the Chair undertook to give a Communication on the matter.

On 15th July 2010, the Member of Parliament for Ikolomani, Dr. Bony Khalwale, rose on a point of order, seeking the guidance and direction of the Chair on:

(a) the constitutional implications of the Executive arm of Government defying a resolution of the House;
(b) the options available to the House if the Minister for Finance makes remarks outside the House that he will not introduce a Bill to amend the National Assembly Remuneration Act, Chapter 5, Laws of Kenya, notwithstanding that he has an opportunity to make such remarks in the House.

Dr. Khalwale further requested that the Chair, when giving the guidance sought, clarifies to the country that when the Chief Whip was moving the Motion of Adjournment, the onus was on a Member of the Government side, and not a Back-Bencher, to second the Motion. He claimed that the impression had been created that Members of the Back Bench had refused to second the Motion, and that this could bring to disrepute, not just the Members of the Back Bench, but also the House as a whole. Again, the Chair undertook to give a ruling on the matter on Tuesday, 20th July 2010.

Hon. Members, as I said, the points of order raised by the two hon. Members, with the support of other hon. Members, bring forth the following issues for determination:-

(a) whether it is in order for a Member of this House to comment adversely on matters still pending consideration by the House or which have been disposed of one way or the other by the House;
(b) whether, and if so, what the recourse of the House is when the Executive does not abide by a resolution passed by the House;
(c) the options available to the House if the Minister for Finance makes remarks outside the House, that he will not introduce a Bill to amend the National Assembly Remuneration Act despite having the opportunity to make such remarks in the House; and,
(d) whether a Motion of Adjournment requires to be seconded by a Member from the Government side.

Hon. Members, on the first issue, because of the public interest involved and the context in which the matter arose, I find it necessary to go into some background.

A tribunal headed by Retired Justice Akilano Akiwumi was appointed by the Parliamentary Service Commission vide Gazette Notice No.699 of 23rd January, 2009 to review the terms and conditions of service of Members of Parliament and staff of the Parliamentary Service.

Hon. Members, the tribunal was appointed pursuant to the provisions of Section 45A (5)(h) of the Constitution, and Section 23 of the Parliamentary Service Act.

Section 23 of the Parliamentary Service Act (Act No.10 of 2003) empowers the Parliamentary Service Commission to, from time to time, appoint an independent body of experts to review the terms and conditions of service of Members of Parliament and employees of the National Assembly, and upon receipt of the report of the experts so appointed, to transmit the report together with its comments thereon, if any, to the National Assembly.

The tribunal presented its report to the Speaker of the National Assembly on 12th November 2009 and thereafter, on Wednesday, 30th June 2010, the hon. Member for Kitutu Masaba, Walter Nyambati, who is the Vice-Chairman of the Parliamentary Service Commission, tabled before the House during the morning session, the Report of the Tribunal with the comments of the Commission. In the afternoon sitting of the same day, the House adopted the Report of the Tribunal, together with the comments and recommendations of the Commission on a Motion that urged the Deputy Prime Minister and Minister for Finance to introduce the Draft Bills attached to the Report to

give legal effect to the Report and the Commission's recommendations within the next seven days.

Hon. Members, therefore, with respect to the first issue regarding adverse comments on a matter before the House, a distinction needs to be made between pending matters and those matters which the House has concluded. In respect of pending matters, Standing Order No.77 is relevant. Under that Standing Order, it is out of order to anticipate the debate of a Bill which has been published as such in the Gazette by discussion upon a substantive Motion or an amendment or by raising the subject matter of the Bill upon a Motion for the Adjournment of the House. Similarly, it shall be out of order to anticipate the debate of a Motion of which notice has been given by discussion upon a substantive Motion or an amendment, or by raising the same subject matter upon a Motion of the Adjournment of the House. The Chair has time and again ruled, and I reiterate here, that it is unbecoming conduct for any Member to make pronouncements outside the House on any matter relating to any business pending before the House.

Hon. Members, the matter is somewhat different when the comments and pronouncements are made in respect of business that has been concluded by the House. Members, like other citizens, are not prevented from holding their separate views about decisions made by the House whether or not they were in the House or whether or not they were party to the decisions. These are the workings of democratic practice. It must be left to the judgment of the discerning public what they make of a Member who having the opportunity to debate and vote in the House chooses to forego that opportunity and, instead, takes his case to the public gallery. The public and other, Members will similarly be left to judge for themselves what they make of a Member who having argued his case in the House and been unable to persuade his or her colleagues in the House, resorts to the court of public opinion to disparage the House.

The national record has entries of the fate that has befallen Members who have engaged in this kind of conduct; if, however, the comments made outside the House are defamatory of other Members as, for example, alleging that other Members have been guilty of receiving bribes or other forms of corruption, it must be noted that different considerations apply. As hon. Members are aware, parliamentary privilege does not extend to such remarks when made outside this House, and any Member who does this proceeds at his or her own peril as to the possible legal consequences.

I now wish to address the matter of the recourse of the House when the Executive does not abide by a resolution of the House. In this matter, the view of the Chair is, and has always been, that it is of utmost importance that both the Executive and the Legislature understand clearly their respective fears and the fact that they work in partnership for the common good. The common good is achieved by consultations rather than

confrontation and by co-operation rather than antagonism. In this respect, the Chair is aware that following the resolution of the House, there have been high level consultations among various departments of Government with a view to determining the best way to proceed. Without prejudice to the resolution of the House, it is the view of the Chair that such consultations and efforts should be encouraged.

Hon. Members, the broader question of the remedies available to the House when the Executive does not abide by a resolution of the House remains unanswered. In this respect, hon. Members may wish to note that Standing Order No.196 mandates the Committee on Implementation to scrutinize the resolutions of the House and recommend appropriate action for non-compliance. The Committee scrutinizes resolutions and examines whether or not such decisions and undertakings have been implemented, and where implemented, the extent to which they have been implemented and whether such implementation has taken place timeously. The Committee is further empowered to propose sanctions to the House on any Minister who fails to implement resolutions of the House.

Additionally, the House, as hon. Members are aware, has at its disposal and can invoke its recognized instruments of oversight over the Executive. This brings us to the issue of options available to the House if the Deputy Prime Minister and Minister for Finance makes remarks outside the House that he will not introduce a Bill to amend the National Assembly Remuneration Act, Chapter 5 of the Laws of Kenya, although he has not been denied an opportunity to make such remarks in the House.

I have already addressed myself to the consequences of utterance and comments outside the House respecting the business of the House. In the particular case of the resolution of the House on the Akiwumi Report, careful thought needs to be given to the question of whether the matter can be said to be pending or to have been disposed of by the House. While it is common knowledge that the Motion was passed, it is also clear that the publication of a number of Bills was required to follow and that this is still pending. However, it is also true that as the Bills have not been published, no such Bills are pending consideration by the House. The hon. Member for Ikolomani did not provide any indication as to the specific dates when the Minister for Finance is alleged to have uttered the statement complained of. This occasioned some difficulty to me as the Speaker is not to be expected to independently seek out such information. The Chair, as is known, should similarly not rule on hypothetical questions.

Considering the importance of this matter and the public interest generated by it, however, I am prepared to find that despite the paucity of the information provided, the Executive owes the nation a duty to ensure that the Legislature executes its triple mandate. If the Legislature resolves that certain Bills be published, it is incumbent on a Minister, and in this case, the Deputy Prime Minister and Minister for Finance to facilitate such publication.

Hon. Members, if on the other hand, as is perfectly possible, there are serious legal or public policy considerations that stand in the way of such publication, I will hold the firm view that the appropriate forum for the Minister to express this position would be the Floor of this House. I think that it is a legitimate expectation of this House that the Bills will be published or that otherwise some explanations will be forthcoming on the Floor of this House. The point cannot be over-emphasized that for the good of this country, it is important that the three arms of the Government operate in harmony. In the context of law-making, this harmony entails the legislative process that is subscribed to by both the Executive and the Legislature. It is not right that there should be a limbo or a stand-off between this House and the Executive. In this particular case, it would appear that the Legislature has done its part and now awaits the necessary complementarity by the Executive. It is the view of the Chair that there is time yet for the right things to be done in this matter.

The final issue of whether a Motion of Adjournment requires to be seconded by a Member from the Government side should not detain us for long. An adjournment is a Motion like any other and may be seconded by any Member of the House. That Member need not be a Member of the Government or the Government side. That Member also need not be from the Back-Bench or the Opposition side. There is adequate precedent in the practice and traditions of this House, where adjournment motions have been moved by the Leader of Government Business and seconded by a Minister or a Back-Bencher or by a Member of the Opposition side.

Indeed, the nature of such a motion is that, in the ordinary course of events, it will be expected that an adjournment motion will be consensually agreed to and it may be indeed, the good practice that the motion be seconded by a Back-Bencher or a Member of the Opposition.

I thank you.

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10. APPOINTMENT OF THE LEADER OF GOVERNMENT BUSINESS

12th August 2010

Hon. Members before we proceed to the next Order, I have the following Communication to make.

You will all recall that in April 2009 this House was faced with the matter of determining the Leader of Government Business and by extension the Chair of the House Business Committee (HBC) in a situation where the Speaker had received two letters; one from His Excellency the President and the other from the Right Honorable Prime Minister. Each of the letters designated a different Minister as the Leader of Government Business and the Chairperson of the HBC pursuant to the provisions of Standing Orders Nos. 2, 11 and 158 which provide for the appointment of the Leader of Government Business in the House and the nomination of the Chairperson of the HBC.

Hon. Members, you will further recall that on 28th April 2009, I ruled that by the provisions of our Constitution, pertinent laws and the Standing Orders, the Office of the Speaker of the National Assembly had no mandate to determine who should be the Leader of Government Business and that the onus to do so rested solely with the Executive. I, in the same Communication found that the Government, as underscored inter alia in our Standing Orders, must be conceptualized and understood in consonance with both the Constitution and the provisions of the National Accord and Reconciliation Act of 2008.

Hon. Members, I consequently thus ruled that I will await the name of one Minister consensually agreed by the Government as the Leader of Government Business and that in the meanwhile, the Speaker of the National Assembly who is under the Standing Orders an ex-officio Member of the HBC shall serve as the Chairperson of the HBC until receipt of the name of one Member nominated by the Government.

On 9th August 2010 I received a joint communication from His Excellency the President and the Right Hon. Prime Minister appointing the Vice-President and Minister for Home Affairs, hon. Stephen Kalonzo Musyoka as the Leader of Government Business in the House and the Hon. Dr. Sally Kosgei, Minister for Agriculture as the Deputy Leader of Government Business.

Hon. Members will recall that in my ruling of 28th April, 2009 I had suspended some provisions of the Standing Orders in order to allow the House to proceed with business. In the light of the new development, the suspension imposed on those provisions of Standing Orders that require specific action by the Leader of Government Business such as Standing Order No. 36(4) is now lifted.

On the question of nomination of the Chairperson of the HBC, I had ruled that in accordance with the Standing Order No.158, the Chairperson is one of the Members of the Committee in respect of whom the approval of the House is to be sought under Standing Order No. 158(1). It is noted that on 28th April 2009 immediately after my ruling, the House proceeded to appoint the Members of the HBC. Amongst the Members appointed by the House to serve in the HBC was the hon. Kalonzo Musyoka.

From the foregoing, I am satisfied that the appointment of the Vice-President and Minister for Home Affairs jointly by His Excellency the President and the Right Hon. Prime Minister fully accords with the provisions of the Constitution, the National Accord and Reconciliation Act, all other relevant laws, the Standing Orders and that it complies with the directions given by the Speaker as I have recaptured herein above. Henceforth, therefore, the Leader of Government Business shall be the Vice-President and Minister for Home Affairs who will also serve as the Chair of the HBC, having been duly appointed by the Government. The Vice-President and Minister for Home Affairs shall be deputized in both capacities by Dr. Sally Kosgei, the Minister for Agriculture.

Hon. Members, in conclusion, may I take this opportunity to commend His Excellency the President and the Right Hon. Prime Minister for resolving the matter satisfactorily and living within the spirit of our Constitution. I sincerely thank this House for all the support and co-operation extended to me during the period that I served as the Chair of the HBC.

Thank you.

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11. DELAY IN FILING RETURNS ON BILLS PASSED BY THE HOUSE

18th August 2010

Mr. Deputy Speaker: Hon. Members, as you are aware, this House has, in the recent past, passed a number of Bills which are now awaiting assent and subsequent application as law. The procedural timelines for assent to a Bill upon its passage by the House are found in both the Standing Orders and the Constitution of Kenya.

First, Standing Order No.125 (3) requires the Clerk of the National Assembly to present a Bill passed by the House to the Attorney General within 14 days of its passage by the House. Secondly, Standing Order No.125 (4) requires the Attorney General to present the Bill to the President within 14 days of receipt of the Bill from the Clerk of the National Assembly. Thirdly, Standing Order No.125 (5) requires the Attorney General, at the expiry of the 14 days, to file a return to the Speaker indicating the time and date when the Bill was presented to the President for assent.

Hon. Members I have received enquiries from hon. Members on the status of certain Bills which were passed by this House and, in respect of which, returns are due from the Attorney General in terms of Standing Order No. 125(5).

These are:-

(i) The Indemnity (Repeal) Bill, 2010 which was passed by the House on 14th April 2010.
(ii) The Price Control (Essential Commodities) Bill, 2010 which was passed by the House on 23rd June 2010.
(iii) The Commission of Inquiry (Amendment) Bill, 2010, which was passed by the House on 15th June 2010.
(iv) The Alcoholic Drinks Control Bill, 2009, which was passed by the House on 29th June 2010.
(v) The Animal Technicians Bill, 2010, which was passed by the House on 8th July 2010.
(vi) The Counter-Trafficking Bill, 2009, which was passed by the House on 20th July 2010.

Hon. Members, no returns have been received by the Speaker from the Attorney-General in respect of the foregoing Bills in terms of Standing Order No.125 (5). I, therefore, direct the Attorney General to file the relevant returns or otherwise report progress on this matter within the next seven days.

12. GUIDANCE ON SWEARING-IN OF MEMBERS

27th August 2010

Hon. Members, it is important to note that this special sitting is a sitting of the House like any other except that it is convened in order to transact a special extra-ordinary business required by the new Constitution. As I, your Speaker, have already taken and subscribed to the oath of allegiance to the new Constitution, I will now proceed to administer the same to all hon. Members beginning with the hon. Deputy Speaker who is also the Member for Lagdera.

The hon. Deputy Speaker will be followed by His Excellency the President and Member for Othaya, then the Rt. hon. Prime Minister and Member for Langata and thereafter, the Vice-President and Member for Mwingi North, in that order if they are present in the Chamber.

Hon. Members, thereafter, I will administer oath to the rest of the Members. The Clerk of the National Assembly will read out the names in clusters of five in alphabetical order in which they appear on the list as tabled in this House on the 15th January 2008 when the Tenth Parliament first met and as updated thereafter.

Once called out, hon. Members, you will proceed to take the oath for affirmation and then append your signature in the Oath Book to my left. It is expected that this process will not be interrupted by any Motion, debate or adjournment until I have administered the oath or affirmation of allegiance to the last Member. In this regard, those who may want to take tea as the ceremony proceeds may do so outside the chamber. Arrangements have been made for this.

Hon. Members, I have received a number of requests from Members asking that they be allowed to leave the chamber at some point during this ceremony, either to break the fast in the case of our Muslim brothers and sisters or to attend to other swearing-in ceremonies in the case of a number of Cabinet Ministers. I, therefore, wish to state that Members who have such important callings to attend to, may after evaluating the tempo and estimated time that the ceremony may take, leave the chamber but return to be sworn in at the appropriate time.

Hon. Members, for this purpose, I have directed that after we have gone through the list for the first time, we shall do a second and final round in order to accommodate these requests.

The final matter relates to Members who will not take the oath today. I do recognize that the Constitution also recognizes the possibility that a Member may be prevented by illness or other extra-ordinary cause from being present at this ceremony today. Let

me make it clear that I am satisfied that it is in keeping with the letter and spirit of the Constitution to administer the oath or affirmation at the earliest opportunity on any subsequent day to a Member who, because of illness or other extra-ordinary cause, is not able to be present in the House today. It must, however, be noted that no such Member will be eligible to participate in any business of this House or its committees until the Member has taken the oath. It should be noted that this includes the exercise of any functions or duties pertaining to the office of Member of Parliament.

Thank you.

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13. ALTERATION OF CONTENTS OF REPORTS AFTER TABLING, DEFERMENT OF ORDER NO. 9 AND ORDER NO. 10

19th October 2010

Hon. Members before we move to the next Order, Order No. 8, I wish to direct as follows:

That business at Order No. 9 will stand deferred because both the Minister for Agriculture and the Chairperson of the Committee on Agriculture as well as Members of that Committee have not been able to get up to transact that business. I, however, want to direct the Minister to note that soon after a report of a Committee is tabled, that matter is presumed to be fully investigated. So, it will not be a reasonable ground for the Minister to want a postponement on the basis that there is need for consultation to take place. If anything, those consultations ought to have taken place as the Committee proceeded with its investigation or inquiry. It will, therefore, not be tenable ground for deferment so that the Minister has time to consult the Committee or even for that matter, to prepare a response. It is expected that the Minister will prepare a response contemporaneously as the matter is debated in the House. So, please, note those directions, Minister.

For the Committee, note, because you have also put these sentiments on paper. You require time to consult with the Minister; and you also require further time for Committee Members to get ready. Obviously, those are not tenable grounds. You must carry out your consultations and investigations before you put the Report in final form. The moment you table a report in the House, there is a presumption that you have concluded that matter, and that the Committee is ready to move the report.

If the Chairman of the Committee is unable to move the report, then any other Member of that Committee can move the report. So, you will not be permitted to carry out further investigations or consultations after a report is tabled.

A very dangerous indication in your communication to the Speaker's Office is that some changes to the Report are envisaged. You cannot make changes to the Report after it is tabled in the House. The House takes custody of it, and the House may deal with the report either by adoption or rejection or amendment.

So, please, be directed accordingly.

For the moment, Order No. 9 is deferred to a later date and the House Business Committee will determine time that will be suitable for it.

14. RECORDING OF HOUSE PROCEEDINGS BY STRANGER IN THE GALLERIES

4th November 2010

Mr. Deputy Speaker:

Hon. Members, on Tuesday 2nd November 2010, hon. Duale, rising on a point of order, drew the attention of the House to the fact that a stranger seated in the Public Gallery, was recording the proceedings of the House, contrary to the provisions of the Standing Orders. The Chair immediately directed the Sergeant-At-Arms to ascertain the claims.

The Sergeant-at-Arms carried out investigations and the following facts have been established:-

1. That it is true that the person who was seated in the Press Gallery had a recording equipment which he used for recording proceedings of the House;
2. That the stranger is a journalist working with the Nation Media Group, who is accredited by the Kenya National Assembly; and,
3. That the journalist informed the Sergeant-at-Arms that, indeed, he had recorded the proceedings and that he was not aware that it was not allowed without authorization.

Hon. Members, Resolution 6(4) of the Broadcasting Regulations provides inter alia that no camera or other recording or broadcasting equipment shall be allowed in the House without authorization. Further, Resolution 6(5) states that accredited journalists shall be allowed access to designated areas for purposes of following the proceedings and taking notes, and any journalist so allowed, shall observe the Standing Orders and these regulations.

From the foregoing, I find it that the said accredited journalist had breached the broadcasting regulations and provisions of the Standing Orders. In the circumstances, I order the Sergeant-at-Arms to have the information recorded fully erased and the Nation Media Group to offer an appropriate apology for the gross breach of the House Standing Orders and Regulations.

Let me take this opportunity to ask all accredited media practitioners to ensure that they do not infringe on the Standing Orders or regulations governing the work in the Chamber. It would help if accredited journalists carried themselves with the dignity they deserve while executing their professional duty within the Chamber because, as a House, we appreciate their positive role in informing our electorate of what we do here.

15. ADMISSIBILITY OF MOTION ON REPORT PROPOSING APPLICATION OF GEOGRAPHIC DIMENSION IN ALLOCATION OF CDF/DEVOLVED FUNDS

4th November 2010

Mr. Deputy Speaker:

Hon. Members, on Wednesday, 3rd November 2010, during the morning sitting, the Chair undertook to give a ruling on the admissibility of the Motion by the Member for Rangwe, hon. Martin Ogindo. The Motion, among other things, calls upon this House to resolve that the Government continues to use the geographic dimension of wellbeing in Kenya Report published in 2005 in allocating CDF monies in the financial year 2010/2011 until a more objective and consultative survey is carried out.

Following the Moving of the Motion, hon. Ethuro rose on a point of order under Standing Order No. 47(3) and specifically, paragraphs (b), (d) and (e), which require the Speaker to rule to be inadmissible, a certain proposed Motion, or rule that notice of such Motions be not given without such alteration as the Speaker may approve.

It was Hon. Ethuro's contention that the Motion was inadmissible on three grounds. First, it is unconstitutional on account of being discriminatory in its effect, on account of the adverse effect it would have on some areas of the country by requiring that the survey in the words of the hon. Member, "was not comprehensive to be used in disregard of a more comprehensive survey."

Secondly, that it had the effect of amending the Statistics Act No.4 of the year 2006, which creates the Kenya Bureau of Statistics, which is the sole organ of the Government with the mandate of being the gatherer and custodian of data by requiring the use of data other than that collected by the legitimate statutory organ.

Thirdly, that the Motion was framed in terms that are inconsistent with the dignity of the House to the extent that it requires the House to resolve on a matter which Parliament has already delegated to another authority under the Constituencies Development Fund (CDF) Act.

A number of Members contributed to the points of order raised by hon. Ethuro. These included hon. Peter Munya, hon. Martha Karua and hon. Jakoyo Midiwo. Hon. Munya argued that the Motion was not inadmissible on the ground that it was merely questioning the accuracy of the survey. The crux of hon. Karua's contribution was that the Motion was inconsistent with Sections 19(b) of the CDF Act which requires that the funding to be given be based on the National Poverty Index and the Motion could not, therefore, ask that the most current National Poverty Index released by the Ministry of State for Planning, National Development and Vision 2030, be disregarded in favour of

an earlier one. To her, the recourse, if dissatisfied with the current survey, was to have another one undertaken. Hon. Midiwo agreed with hon. Munya's contention that that the Motion was in order.

Hon. Members, the sole point for determination, as I see it, is the admissibility of the Motion by hon. Ogindo. If this is so, some of the contentions raised by hon. Members appear to go to the merits of the Motion rather than the pure technical point of the admissibility of the Motion under our Standing Orders. The admissibility of a Motion is to be seen through the provisions of Standing Order No. 47(3) which provides as follows:

"If the Speaker is of the opinion that that any proposed Motion:-

(a) is one which infringes, or the debate on which is likely to infringe any of these Standing Orders; or
(b) is contrary to the Constitution, without expressly proposing appropriate amendment of the Constitution; or
(c) is too long; or
(d) is framed in terms which are inconsistent with the dignity of the House; or
(e) contains or implies allegations which the Speaker is not satisfied that the Mover can substantiate; or
(f) calls for the commitment of public funds for which no provision is made in the annual estimates as adopted by the National Assembly;

the Speaker may direct either that the Motion is inadmissible or that notice of it cannot be given without such alteration as the Speaker may approve"

As I have indicated, in accordance with the Standing Orders, a Motion is not admissible if it is contrary to the Constitution. After the passage of the new Constitution, it is important that its full implications be appreciated. In particular, Article 10 of the Constitution sets out the national values and principles of governance which bind all State organs, including this House, when they apply or interpret the Constitution or any law or make or implement public policy decisions. These values include among other things the rule of law. The rule of law in its most basic element means that all persons are bound to obey the law.

Hon. Members, this House is bound by the laws it makes. Indeed, this House is as much bound by the laws it makes, as all other persons. If any Member of this House should be unhappy with the state of the law, it behooves that Member to bring an amendment to that law. When this House vests a particular function in an organ by statute, this House cannot take away that function otherwise, than by statute.

Hon. Members, in these premises, I rule that the Motion by the hon. Ogindo is

inadmissible in that it be not proceeded with to the extent that it calls on this House to make a resolution, the effect of which would be in conflict with the provisions of the CDF Act and would, therefore, be in contravention of the statute. I rule also that the Motion is inconsistent with the dignity of the House in that it calls on the House to make a resolution that will be in conflict with the law that the House has itself made.

Hon. Members, I, therefore, order that the Motion shall be not proceeded with and that notice of it be not given again without such alterations as the Speaker shall approve.

Thank you.

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16. RE-TABLING OF REPORT ON CONDUCT OF 'ARTUR BROTHERS' AND ASSOCIATES

24th November 2010

Hon. Members, I have received a Notice of Motion from Hon. Gitobu Imanyara, MP calling upon the House to adopt the Report of the Joint session of the Departmental Committees on Administration, National Security and Local Authorities and, Administration of Justice and Legal Affairs on the investigation into the conduct of the "Artur Brothers" and their Associates, laid on the Table on 27th September 2007 in the last Parliament.

As Members may have noted, the Report was tabled in the last Parliament and a Notice of Motion to adopt it was in fact given on the 27th September 2007. Before I approved this Notice of Motion by Mr. Imanyara, I addressed myself to two issues namely:-

- Can a report of a Committee which was tabled in one Parliament be deliberated upon by a succeeding Parliament?
- Can a Member who was not a Member of the Committee that compiled and tabled a report in a previous Parliament, table such Report and give Notice of Motion for its adoption? Hon. Members, the main role of Parliamentary Committees is to carry out functions which the House itself, due to its nature of composition, cannot practically do; like finding out the facts of a case, examining witnesses, analyzing evidence adduced and drawing reasoned conclusions to enable the House make an informed decision on a matter.

The power of the House to appoint Committees is anchored on the provisions of the Constitution and, in particular, Section 56 of the Old Constitution as saved under Section 3 of Schedule Six of the new Constitution which inter alia states:-

> *"(1) Subject to this Constitution, the National Assembly may –*
>
> *(a) make standing orders regulating the procedure of the Assembly (including in particular orders for the orderly conduct of proceedings);*
>
> *(b) subject to standing orders made under paragraph (a), establish committees in such manner and for such general or special purposes as it thinks fit, and regulate the procedure of any committee so established".*

The Committees are thus creatures of the House to which they must report back their findings. Once a Committee has tabled a report on its findings, the report together with the Minutes of the proceedings of the Committee and with such note or record of any

evidence taken become the Journals and Records of the House. It, therefore, follows that such reports remain under the custody of the House whether the House is dissolved or not.

In the British House of Commons, Erskine May, an authority on Parliamentary practice and procedure, in his book Parliamentary Practice 23rd Edition, states:

> *"A report, once made to the House and ordered to be printed cannot be withdrawn except by a further order of the House."*

Indeed, in our case, the House has deliberated on reports that were tabled in previous Parliaments. On 17th October, 2002, the Eleventh Report of the Public Investments Committee on Accounts of State Corporations was tabled and a Notice of Motion to adopt it given by the Chairman of the Committee. Upon dissolution of that Eighth Parliament and commencement of the Ninth Parliament, the report was re-tabled on 3rdJuly, 2003 and a notice of Motion for its adoption given on even date by the Chairman.

As to whether a Member, who was not a Member of a Committee of a previous Parliament that compiled and tabled a report, can table the report again and give notice of Motion for its adoption, we have precedents in our Parliament which are close to the situation at hand. This relates to the tabling and deliberation of the Reports of the Public Accounts Committee on the Government of Kenya Accounts for the years 2001/2002; 2002/2003 and 2003/2004.

The Reports were tabled on 17th October, 2007 and upon dissolution of the Ninth Parliament, were re-tabled on 22nd April, 2008 in this current Tenth Parliament. The Notices of Motions for adoption of the Reports were given by Hon. Ekwee Ethuro for the 2001/2002 Report and hon. Fahim Twaha for the 2002/2003 and 2003/2004 Reports. The two Members, who were re-elected had served in the respective Committees in the previous Parliament and that is why they moved the Motions of adoption.

Hon. Members, the notice of Motion given by Mr. Imanyara relates to a report of a Joint Committee which made inquiry into a specific matter and made a report on it. By all means a Joint Committee is an ad hoc committee which ends its mandate with the tabling of its report in the House.

I wish to once again quote Erskine May. On pages 718 and 719, of his book on Parliamentary Practice, he posits:-

> *"All Committees cease to exist at the dissolution of Parliament. The culmination of the work of an ad hoc committee, appointed to undertake a parliamentary*

inquiry and to report thereon to the House, is the report which it makes to the House and the report brings the Committee's existence to an end."

From the foregoing, it is evident that the Joint Committee that investigated the activities of the "Artur Brothers" and their associates discharged its mandate and concluded its work. What is left is for the House to deliberate on the Report.

In view of the above, I find that it is proper for a Parliament to deliberate on a Report of a previous Parliament and that there is nothing that can bar a Member of Parliament from re-tabling a Report and giving notice of Motion for its adoption, notwithstanding the fact that the Report was compiled and tabled in a previous Parliament and that the Member was not a Member of that Committee. I, therefore, allow Mr. Imanyara to table the report and give notice of Motion for its adoption.

Thank you.

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17. REQUIREMENT TO PRODUCE REPORTS OF COMMISSIONS OF INQUIRY

8th December 2010

Hon. Members, we have an unusual situation where I have a Communication to make. The main stakeholder who is the Member for Gichugu is required to be at a different place on a very urgent matter not later than 3.00 p.m. Therefore, I will interrupt Question Time just to deliver this Communication.

Hon. Members this pertains to the production of Reports of Commissions of Inquiry. You will recall that on Thursday, 25th November 2010, the Member for Gichugu, hon. Martha Karua sought for the production of the following Reports by the Minister of State for Provincial Administration and Internal Security:

a) The Report of the Kiruki Commission of Inquiry on the Artur Brothers.

b) The Report of the Cockar Commission on the Sale of the Grand Regency Hotel.

c) The Report of the raid on Archbishop Gitari's house in Kirinyaga on 21st April 1999.

d) The Report of the Akiwumi Inquiry on Tribal Clashes.

e) The Report of the Chesoni Commission of Inquiry into the Kirinyaga/Embu Land Dispute.

Hon. Members, you will further recall that the Chair deferred this matter in order to give directions as to the issues as hereunder, which arose by way of various points of order.

(i) What the fate of reports by commissions of inquiry ought to be.
(ii) Whether or not the appointing authority can decline to make those reports public
(iii) Whether or not the provisions of the new Constitution compel the appointing authority to make the reports public.

Hon. Members, commissions of inquiry are appointed under the Commissions of Inquiry Act, Cap.102 of the Laws of Kenya which I shall herein-after, refer to as the Act. For the period prior to 30th August, 2010, commissions of inquiry were obligated to report only to the President as the appointing authority, pursuant to Section 7 of the Act which then provided as follows and I quote in extensor; Section 7(1) says:-

> *"It shall be the duty of a commissioner after making and subscribing the prescribed oath to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with*

the directions contained in the commission and in due course to report to the President in writing, the result of the inquiry and the reasons for the conclusions arrived at and also if so required by the President, to furnish to the President a full record of the proceedings of the commission."

However, the said Section 7 as amended by the House through the Commissions of Inquiry (Amendment) Act, Act No.5 of 2010, which imposed on a commissioner an obligation to report to the President as well as Parliament currently provides as follows, and again I read in extensor.

Section 7(1) says:-

"It shall be the duty of a commissioner after making and subscribing the prescribed oath to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry to report to the President and to the National Assembly in writing the result of the inquiry and the reasons for the conclusions arrived at."

Hon. Members, the amendment to Section 7 of the Commissions of Inquiry Act came into force on 30th August, 2010 and I note that there was no provision in the amending Act backdating its coming into force. Consequently, by virtue of Section 23(3) of the Interpretation and General Provisions Act, Cap.2 of the Laws of Kenya, the amending Act did not have retrospective effect. The said Section 23(3) of the Interpretation and General Provisions Act provides as follows:-

"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not (a) revive anything not in force or existing at the time at which the repeal takes effect or (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed or (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed."

A commissioner is, therefore, under duty to report to the National Assembly only with respect to those commissions of inquiry which concluded their work after 30th August, 2010. The procedural requirement for tabling the report before the House cannot, therefore, be applied retrospectively.

Hon. Members, you will, however, recall that the new Constitution came into effect on 27th August, 2010. Article 35 of the new Constitution provides for access to information as follows:-
Article 35(1) says:-

"Every citizen has a right of access to (a) information held by the State; and, (b) information held by another person and required for the exercise or protection of any right or fundamental freedom."

Article 35(2) says:-

"Every person has the right to the correction or deletion of untrue or misleading information that affects the person."

Article 35 (3) says:-

"The State shall publish and publicize any important information affecting the nation."

On the issue as was raised as to whether the Minister in failing to produce the requested reports has acted contrary to the new Constitution, I will address myself to it as follows. Whereas the new Constitution guarantees the right to information at Article 35, it goes further to provide for a mechanism for redress in the event of a breach of a provision in the Bill of Rights. Article 22 of the Constitution provides as follows:-

"31(1): "Every person has the right to institute court proceedings claiming that a right or fundamental right in the Bill of Rights has been denied, violated or infringed or is threatened."

Article 23 of the Constitution then confers upon the High Court the power to make a determination as to whether a provision in the Bill of Rights has been infringed and to grant appropriate remedy. The Article provides as follows. Article 23(1) says:

"The High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of or threat to the right or fundamental freedom in the Bill of Rights."

Article 165(2) is not relevant for our purposes. Article 165(3) says:-

"In any proceedings brought under Article 22, the court may grant appropriate relief including (a) a declaration of rights (b) an injunction (c) a conservatory order (d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24 and (e) an order for compensation; (f) an order of judicial review."

Order, hon. Members! I will have to pause again to allow those Members at the bar to come in.

It is clear from the foregoing that the determination of a breach and the enforcement of the Bill of Rights has been left in the purview of the High Court by the Constitution of the Republic of Kenya. Whereas the House must appreciate the need to interrogate and apply the spirit of the new Constitution, it must also be careful to engage in such interrogations within the confines of the limits imposed by the same Constitution. The House must not be seen as taking over the roles which the Constitution expressly confers on other bodies. In the circumstances, I find that up and until 30th August, 2010, the discretion to release and publicize a report of a Commission of Inquiry rested with the President. This being so, the position with respect to the five reports whose production is sought is as follows, and this is how I find:-

a) The Kiruki and Cockar commissions were appointed and operated under the regime of the Act as it stood before 30th August 2010. Under that regime, the President was not obligated by the Constitution or any other law to make public the findings of a Commission of Inquiry. The reports of these two commissions were presented to the President on 28th August 2006 and 24th November 2008, respectively. This is as far as the law in force at the time required. The same fate applies to the other reports requested in respect of inquiries undertaken prior to 30th August 2010.

b) The Akiwumi Commission of Inquiry into Tribal Clashes was appointed in 1998 and reported in 1999. Following an order of the High Court, the report of this Commission was made public in 2002. This report is, therefore, in the public domain. Please, note that the release and publication of the Akiwumi Report followed a High Court order.

Hon. Members, let me conclude by emphasizing that as I have pointed out, under the law as it now stands, it is the duty of a Commissioner after making a full and faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in a commission and on completion of the inquiry, to report to the President and to the National Assembly in writing, the results of the inquiry and the reasons for the conclusions arrived at.

Apart from the remedies available in the courts, this House, as Members are aware, is not short of lawful avenues to enforce the compliance with the Constitution and the laws by the Executive.

That is the Communication which incorporates my findings and I thank you.

POINTS OF ORDER FOLLOWING THE RULING

Mr. Olago: On a point of order, Mr. Speaker, Sir. I wish to thank you for that very reasoned Communication from the Chair. But as the Speaker will recall, the Bill to

amend Section 7 of the Commissions of Inquiries Act was drawn and filed by myself. The spirit of that amendment was to make available to the House both future and past commissions of inquiries reports. In view of that spirit, and in the reading of the Constitution that the Speaker has referred to very ably, I have the request for leave for the Chair to reconsider the ruling, so as to make available to the House, even past reports.

Dr. Khalwale: On a point of order, Mr. Speaker, Sir. I would like to applaud you in your ruling, in which you have made sure that you are very fair and consistent with the law. What disturbs me is that the Cockar Commission was a matter of great public concern in view of the fact that the Grand Regency Hotel was a property that was not owned by any individual. I, therefore, find that having been pushed by a very patriotic Kenyan who has made it possible for me to have a copy of the Cockar Report, which has found that hon. Kimunya and Prof. Ndung'u were recommended to take personal responsibility for the questionable manner in which the hotel was disposed, I would like to table the Cockar Commission Report, so that the country can have an opportunity to see it.

(Dr. Khalwale laid the document on the Table)

Mr. Speaker: Order! Member for Ikolomani, I will want to look at the document which you have tabled? Is it a photocopy or what is it?

Dr. Khalwale: Mr. Speaker, Sir, it is an entire reproduction of the full report in its original form.

Mr. Speaker: May I have an opportunity to look at it?

Ms. Karua: On a point of order, Mr. Speaker, Sir. While respecting your ruling, I just wish to remind the House that I had sought for these reports sometime last year when you ruled that you had no power to compel the Executive. Now, there is the Constitution with which you could have compelled the Executive. I seek your direction; will questions of this Parliament be henceforth addressed to the courts of law where now I have been referred to go and seek direction? In the three arms of Government, Parliament is supreme. Are we going to henceforth direct questions of this House to courts of law? I sought information as a Member of the House and on behalf of Kenyans and with the force of Section 35 of the Constitution. Are we henceforth going to extend questions to the other arm of Government, namely, the Judiciary? I am not seeking interpretation of the law. It is information from the Government, which the Constitution enjoins me to audit in its action.

Mr. Imanyara: On a point of order, Mr. Speaker, Sir. I have listened to your ruling and I do not wish to refer to it. My concern is that the Assistant Minister had given an undertaking to the House to produce the reports. What becomes of the undertaking of

him under the circumstances where he has stood on the Floor of the House and told Kenyans that he undertakes to bring these reports to the House and then fails and hides behind the cover of Presidential prerogative?

Mr. Speaker: Very well! I will address myself to the points of order raised. However, with respect to the one raised by the Member for Imenti Central, I want to hear from the Assistant Minister. Did you give that kind of undertaking?

The Assistant Ministry, Ministry of State for Provincial Administration and Internal Security (Mr. Ojode): Mr. Speaker, Sir, I have said and I want to repeat that reports which had already been received by the appointing authority and disposed of for public consumption, I will not hesitate to lay them on the Table. However, I am being forced to bring reports which have not been received by the appointing authority. I advised my colleagues in this House that they have to amend the Commission of Inquiries Act, which they went ahead and amended. There is no way a law can be used retrospectively. It is not possible. I have told them so, but they are not listening. I want to agree with your ruling.

Mr. Speaker: Order! Order, hon. Members! With respect to the spirit of the amendment which is now part of our law that has been alluded to by the Member for Kisumu Town West, my mind is clear and I did say so in my Communication. I went to the length of reading out in extenso the provision of Section 7 as amended. The spirit is something that is implicit and incorporated in, perhaps---

(Mr. Michuki entered the Chamber while Mr. Speaker was on his feet)

Order! Order! Order! The Member for Kangema, you are out of order! You are an old Member of this House. Indeed, I think this is the fourth time that you are representing a constituency in this House. Your conduct is tantamount to gross disorder. It is clear, and we have pronounced ourselves on this matter severally; that when the Speaker is on his feet, no Member will walk in or walk about; you will freeze! So, Member for Kangema, with the utmost respect, I am afraid you will have to leave for the balance of business.

(Mr. Michuki stood up in his place)

Order, Member for Kangema! If you do not leave voluntarily, I will be compelled to force you!

(Mr. Michuki walked to the Bar, bowed to the Chair and resumed his seat)

Order! The Member for Kangema, I have directed that you withdraw from the proceedings of the House for the rest of the day and I am entitled to do so under the Standing Orders which you are well aware of! So, you must voluntarily leave or you will be forced to do so!

The Minister for Environment and Mineral Resources (Mr. Michuki): Mr. Speaker, Sir, it was not out of disrespect. I will obey what you have said.

Mr. Speaker: Order, Member for Kangema! As things stand now, you are a stranger in the House. Please, comply!

(Mr. Michuki withdrew from the Chamber)

Order, hon. Members! I was addressing myself to the points of order raised, first, by the Member for Kisumu Town West. My response to that point of order by the Member for Kisumu Town West is that the express provisions of Section 7 of the Act are as I have read out. Short of the Member for Kisumu Town West giving me a different version of those provisions, I am afraid I consider my expression on the Section to be correct.

With respect to the point of order raised by the Member for Imenti Central as to whether or not, in fact, there was an undertaking by the Minister that he would table those reports, I will want to acquaint myself with the record of the HANSARD and pronounce myself on the matter. If, indeed, the Minister gave an undertaking, then he is under duty to do the honourable thing, which is, to comply with his own undertaking because it was not forced out of him, as I want to believe.

Hon. Members, with respect to the point of order raised by the Member for Ikolomani, Dr. Khalwale, I have received the photocopy of the document tabled by him. I will want to ascertain the authenticity of the report. I will have wanted him, perhaps, to go a little further, which I will invite him now to do, on how he obtained this document.

With respect to the point of order raised by the Member for Gichugu, I must admit that it has caused me considerable agony. Even before I made the Communication as I have this afternoon, I juggled with that and wondered whether or not I can actually enforce the provisions of the Constitution as the Speaker of the National Assembly. At the end of the day, I determined that, that prerogative rests with some other organ rather than the Office of the Speaker or for that matter, the Legislature. This is because Section 22 which I referred to and read out is, in fact, clear on what should happen if a right under Chapter 4 of the Constitution is infringed. Section 23 then provides for enforcement of a right. Again, I read out Section 23 of the Constitution and in my considered opinion, I am satisfied that I have given the correct interpretation to both Sections 22 and 23 of the Constitution. I have gone further in the concluding paragraph of my Communication to assert that there may be other remedies available to the House away from the courts. But for the Speaker to compel the Minister to table that report, in the light of the law that I have pronounced myself on, I am afraid that, that would be my Communication.

Mr. C. Kilonzo: On a point of order, Mr. Speaker, Sir. I know that you have asked my good colleague to reveal the source of the documents. To protect whistle blowers---

Most of the documents which come to the Back Bench do originate from the Government. Will I be in order to make a suggestion to the Chair that you talk to the appointing authority to give you the original documents, so that you can compare the genuine document with this particular document?

Mr. Speaker: Order, Member for Yatta! Leave that to me. I have indicated in my preliminary directions that I will ascertain the authenticity of the document. Ascertaining authenticity entails checking the originality of this document. So, please, rest assured that I will go to that length.

The Member for Ikolomani, I wanted you to address me on the matter such that I will have to take into account what you said even as I give other directions. Before I hear the Member for Ikolomani, I give the Floor to Mr. Imanyara.

Mr. Imanyara: In the same spirit that hon. C. Kilonzo raised the issue of whistleblowers, I am looking at this spirit against the Witness Protection Act and knowing that we need to protect these witnesses and sources, whether it is right or proper that you would compel the Member to disclose how he obtained the information. In the same spirit that you are not able to compel the Ministers to supply you a copy, the same reason should apply so that you do not compel a Member of Parliament to explain how he has obtain the copy, otherwise it will be very dangerous on the dependence of the Back bench to gather information and, therefore, play our role as the oversight branch of the Legislature.

Mr. Speaker: Order! Order! Hon. Members, I fully acknowledge the value of what you are saying. But that notwithstanding, what I had asked the Member for Ikolomani to do is to supply information as much as is in his possession that will help me to give directions on this matter. You will note that this kind of situation is unprecedented and I need to lay the ground on what will happen in future and I must be able to do so exhaustively. So I need that view.

Dr. Khalwale: Mr. Speaker, Sir, so that I do not look like I am engaging in an altercation with you, may I with utmost respect, inform you that I feel constrained by the law; the Witness Protection Act. It does not allow anybody to compel me to disclose the source of my information. And what is more, this is not the first time.

Mr. Speaker: Order, Member for Ikolomani! There is no point of going to that kind of situation. My question to you was fairly straightforward and simple; say how you obtained these documents. I did not ask you to tell me who you obtained it from. How did you obtain it? That is all.

Dr. Kalwale: I obtained these documents from a patriotic Kenyan who felt that Parliament must be empowered to practice its oversight role.

The Assistant Minister, Ministry of State for Provincial Administration and Internal Security (Mr. Ojode): Mr. Speaker, Sir, sometime in the last Parliament, I also tried to table in this House the Kiruki Report which I was also given by a patriotic Kenyan. I was thrown out with that document by the then Deputy Speaker, Hon. Musila. So, it depends on the Chair; whether you are going to accept this one as an authentic document because I was equally thrown out with a document which was similar to the one I thought---

Mr. Speaker: Order, hon. Members! This matter must come to an end. I am not certain that the circumstances pertaining to the time that the Assistant Minister may have been thrown out still prevail today. So, please, accord me the opportunity, indeed the privilege and honour to make a decision on the matter, independent of whatever may have happened in the past.

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18. FURTHER RULING ON THE REQUIREMENT TO TABLE REPORTS OF COMMISSIONS OF INQUIRY IN THE HOUSE

9th December 2010

Hon. Members, yesterday Wednesday 8th December 2010, during the afternoon Sitting, you will recall that I made a ruling on a request by the Member for Gichugu, hon. Martha Karua, that certain reports of Commissions of Inquiry be produced in this House by the Minister of State for Provincial Administration and Internal Security. After I had delivered my ruling, a number of points of order were raised seeking certain clarifications on the effect and ramifications of my ruling.

Hon. Members, I wish to assert for the record that it is not the intention of the Chair or a practice that I want to encourage that the Chair explains the meaning and implications of rulings made. I have, however, chosen to clarify the points raised in this particular case because of the important constitutional questions which are in issue.

Hon. Members, the first of the clarifications sought was by the Member for Gichugu who sought directions about whether the import of my ruling was that Questions of this Parliament will henceforth be addressed to the courts of law. The Member argued that she had sought information as a Member of the House and on behalf of Kenyans with the force of Article 35 of the Constitution and wondered whether Parliament will henceforth, extend its Questions to another arm of Government, namely, the Judiciary. It was her point of view. She was not seeking interpretation of the law, but merely demanding information from the Government, which the Constitution enjoins her to audit.

Hon. Members, the second point of clarification was sought by hon. Gitobu Imanyara, the Member for Imenti Central, who sought to know what will become of an undertaking allegedly made by hon. Orwa Ojode, the Assistant Minister, Ministry of State for Provincial Administration and Internal Security, to produce the reports in issue in the light of my ruling. The Member sought to know what would become of the undertaking under circumstances where hon. Ojode stood on the Floor of the House and undertook to bring these reports to the House, and having failed to do so, sought to hide behind the cover of Presidential prerogative.

Hon. Members, on the request for clarification sought by the Member for Gichugu, I invite Members to peruse the HANSARD and study closely my ruling and in particular, the closing words of that ruling in which I indicated that, and I quote: "Apart from the remedies available in the courts, this House, as Members are aware, is not short of lawful avenues to enforce compliance with the Constitution and the laws by the Executive."

My ruling draws a distinction which to my mind is crucial between those constitutional rights for which the procedure for vindication is specifically provided for in the Constitution and other constitutional rights whose procedure is not similarly ordained and which can be vindicated and addressed in a multiplicity of ways and by various state organs. The crux of my ruling is that where there is provision in the Constitution or the law specifically requiring that a document be produced in this House, the Speaker shall so rule and so require. However, where reliance for the document or information sought is on provisions of the Constitution, which themselves have inbuilt mechanisms for enforcement, those mechanisms must be allowed to operate. That distinction is important and hon. Members ought to follow that.

Hon. Members, where the Constitution specifically recites a right of freedom and specifically provides for the manner, place and the functionary responsible for providing a relief when such right has been transgressed or is threatened with transgression, there is no place for the Speaker of the National Assembly or Senate for that matter or any other person, to usurp that mandate on the ground only that a constitutional right is at stake. Such usurpation will itself be a violation of the Constitution. In particular, I had made it clear in my ruling that the Bill of Rights, which is Chapter 4 of the Constitution, is clear at Articles 22 and 23 about how the rights contained in the Bill of Rights are to be enforced; and that it is in the authority of the courts to uphold and enforce the Bill of Rights.

Hon. Members, in the circumstances, the closing words of my ruling must be understood in perspective. They mean no more than that whereas there is a province for the courts of law, Parliament is not left without recourse. The recourse available to Parliament has been enhanced rather than constrained by the new Constitution. All the traditional avenues through which information is sought from the Executive remain available and open to this House and to individual hon. Members. All that I have said in my ruling and which I reiterate is that this House and the Office of the Speaker are not substitutes for the jurisdiction of the courts clearly stipulated in Chapter Four of the Constitution. The courts remain available but so are the constitutional devices open to the Legislature. I trust this should lay this matter to rest.

Hon. Members, on the point raised by the Member for Imenti Central on the status of the undertaking by the Assistant Minister to table these reports, I have found that this matter has already been disposed of by the Chair by a ruling delivered in this House on 29thJuly 2009, which I invite Mr. Imanyara to revisit. In that ruling, the Chair, while expressing dissatisfaction that the Assistant Minister had been unable to honour his undertaking, determined that no interest would be served in holding the Minister to his word in a situation where it was not legally possible for him to fulfill the undertaking. The Chair, in that ruling, discharged Mr. Ojode from the undertaking and vacated previous orders requiring him to produce the reports and barring him from conducting the business of the House until the reports are produced. As matters, therefore, stand,

there is no subsisting undertaking which Mr. Ojode owes this House. With these clarifications, the Chair rules that the matter of the tabling of the reports of commissions of inquiry has been adequately addressed now and in previous communications from the Chair and stands fully disposed of.

Thank you.

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FOURTH SESSION (2011)

Speakers' Considered Rulings and Guidelines (2011)

Contents

1. ADMISSIBILITY/AUTHENTICITY OF HON. KABOGO'S DOSSIER ON DRUG TRAFFICKING

18th January 2011

Hon. Members, you will recall that on Wednesday, 22nd December 2010, during the Afternoon Sitting, the Member for Juja rose on a point of order and tabled the following three documents:-

(i) a letter dated 20th December 2010 from the said Member of Parliament, addressed to the Minister of State for Provincial Administration and Internal Security, and Acting Minister for Foreign Affairs, Prof. George Saitoti;
(ii) a document titled "Classified Information in the United States"; and,
(iii) a document which the hon. Member described as "dossier" containing the names of hon. Members said to be involved in drug trafficking.

Following the tabling of the documents, I undertook to acquaint myself with the documents and establish their authenticity, and thus the admissibility or otherwise of the same. The Chair has often had occasion to set out standards required to be met for the purpose of establishing the authenticity of documents. The standards include requirement for signatures on documents and some form of certification where a document other than the original has been tabled.

Hon. Members, the first document, which is the letter dated 20th December 2010 and captioned "Secret" bears a name and signature purporting to be those of the Member for Juja. Indeed, the document was laid on the Table of the House by the hon. Member himself. The letter further has the letterhead of the hon. Member, and is stamped as having been received by the Minister of State, Office of the President, on 20th December 2010. With this information, I have no reason to doubt the authenticity of the document and I, therefore, find that it is admissible.

However, I have had some difficulty with the other two documents tabled by the hon. Member. The first of these documents appears to be a download dated 17th December, 2010 from the website "Wikipedia", which, as the hon. Member would be aware, is a free online encyclopedia, which, unlike the orthodox encyclopedia, employs an open editing model, permitting any person to edit anonymously any posted article. The articles on the Wikipedia are not owned by any person, nor does any person vouch for their veracity. It is also known that when changes to an article are made they usually become available immediately before undergoing any review, even if they contain errors or are misguided. The value to be attached to an article on the Wikipedia is, therefore, minimal.

Be it as it may, the admissibility of documents is another matter altogether, and while the Chair may wonder what value is to be attached to a Wikipedia article, which, as in the instance case, clearly indicates that it is an outdated article requiring to be updated to reflect recent events or newly available information; the Chair, nevertheless, finds that to the extent that the publisher of the document is known, and to the extent that the article is freely in the public domain, the document is admissible.

Hon. Members, the final document is titled "Secret/Real Kenya". It is not dated, and there is no indication who the author is, or to whom it is addressed. On a number of pages, it bears what appears to be a stamp of the Kenya Anti-Corruption Commission (KACC), but does not indicate the date on which the stamp was imprinted, and the person who did stamp it. There is no signature or other identification of source or ownership. I have further perused the document with a view to ascertaining its source and admissibility but find that the document, whatever may be its value or use outside this House, does not speak for itself in any of the crucial aspects pertaining to the admissibility under our rules and is therefore, inadmissible.

Hon. Members, arising from all the circumstances including the precedence we have set on the admissibility of documents, I rule that the following documents laid on the table of the House on Wednesday the 22nd December 2010 by the Member for Juja; namely, the letter dated 20th December 2010 from hon. William Kabogo addressed to Prof. George Saitoti, the Minister of State for Provincial Administration and Internal Security and Acting Minister for Foreign Affairs and the document titled "Classified Information in the United States" being a download from the Wikipedia website are admissible.

I further rule that the document described by the Member for Juja as a dossier containing the names of hon. Members involved in drug trafficking is inadmissible and that it be and is hereby expunged from the records of this House. It follows, and I accordingly so order that the references to Members of this House purportedly named in that so called dossier are out of order and that the said references to the hon. Eugene Wamalwa and the hon. Simon Mbugua by the Member for Juja in the context of that document be expunged from the records of the House. Note that it is in the context of that document.

Thank you, hon. Members.

2. CONSTITUTIONALITY OF NOMINATION OF JUDICIAL OFFICERS BY THE PRESIDENT

3rd February 2011

Hon. Members, on Tuesday, 1st February 2011, the Member for Imenti Central rose on a point of order to seek the assurance, guidance and direction of the Chair on what hon. Members of the National Assembly should do where incidents of gross violation of the Constitution occur, instigated by either Members of this House, the Executive or the Judiciary.

Mr. Imanyara drew the attention of the Speaker to the provisions of Article 3(1) of the Constitution enjoining every person to respect, uphold and defend the Constitution. He further drew the attention of the Chair to, and tabled a statement attributed to the Judicial Service Commission (JSC), among other things "expressing grave concern and misgivings about the nomination of the Chief Justice made by His Excellency the President" and calling for a re-think of the matter, putting the country first, that would entail a withdrawal of the nominations and a fresh start.

Mr. Imanyara went on to cite the Judicial Service Commission as having held the view that in order to give the process of appointing judicial officers legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Judicial Service Commission must play an integral part in the process as contemplated in Article 172 as read together with Article 166(1) and Section 24 of the Sixth Schedule to the Constitution.

Hon. Imanyara also cited and tabled a statement by the Commission for the Implementation of the Constitution (CIC) which stated, *inter alia*, that the process of appointment of the Chief Justice should commence with recommendations by the Judicial Service Commission to the President who, in turn, should consult the Prime Minister, after which the President should forward the name of the nominee to the National Assembly for approval before final appointment by the President. It was the further position of that Commission that the role of the Judicial Service Commission should be respected and the Judicial Service Commission should be allowed to undertake the function reserved to it by the Constitution. Mr. Imanyara claimed to be aware that the Right Honourable Prime Minister had written to the Speaker and tabled a copy of the said letter in which the Prime Minister disassociated himself from the nomination process. In the Member's view, there was a clear attempt to undermine the Constitution, creating a dangerous trend which, to his mind, would lead back to the old days and thus, defeating the essence of the long crusade for a new Constitution in this Republic.

Mr. Imanyara concluded by seeking the directions and guidance of the Chair on how the House should proceed, bearing in mind the provisions of Standing Order No. 47 which empowers the Speaker to direct that any proposed Motion that is contrary to the Constitution, without expressly proposing appropriate amendment of the Constitution, to be inadmissible.

What followed were a number of interventions by 17 Members rising on substantive points of order and providing various perspectives on the matter of the nomination of certain constitutional office holders by His Excellency the President. Hon. Members, I permitted considerable ventilation on this matter and I am glad that I did because deep and profound reflections on the nature, character, letter and spirit of our Constitution were proffered.

From those submissions, which were too numerous and varied to be cited and attributed individually, I have filtered the following issues:-

1. Whether or not the Speaker is competent to make a pronouncement or determination on the matter of the constitutionality of the nominations and their propriety for transmission to and disposal by this House or whether conversely, this would be a matter for other constitutional organs and in, particular, the Judiciary.
2. Is Parliament properly seized of the matter of the nominations?
3. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this?
4. Do the provisions of the Constitution require the involvement of the Judicial Service Commission in the nomination process and, going hand in hand, if the Constitution dictates that the process be participatory, competitive and transparent?
5. Were there consultations between the President and the Prime Minister as contemplated by Section 26(2) of the Sixth Schedule to the Constitution; tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally, there is the further point of what was intended by the drafters of the Constitution in providing for consultation as they did.
6. What is the import of making the consultations subject to the National Accord and Reconciliation Act? What does it denote?
7. Is a serving member of the Judiciary constitutionally eligible to be nominated and appointed as Chief Justice?
8. Do the nominations meet the constitutional requirements of regional balance and gender parity?
9. Do the questions raised on the nomination of office-bearers amount to a dispute within the meaning of the Political Parties Act?
10. And finally, whether or not the correct approach to the questions raised on the propriety of the nominations can be resolved by a vote in this House to approve or disapprove the nominees.

I undertook to give a ruling today, Thursday 3rd February 2011.

Hon. Members, I wish to begin by pronouncing myself on the matter of the jurisdiction of the Speaker to determine the questions raised as the answer to this question is a pre-requisite to proceeding with the other issues raised. Hon. Members will recall that I indicated, at the onset, on Tuesday 1st February 2011, in promising to give this ruling, that I had no doubt in my mind that the Speaker has jurisdiction to rule on this matter. Indeed, I have previously ruled on various occasions that it is settled law in the Commonwealth and beyond that every independent Legislature is the sole judge as to how it shall conduct its own affairs. The Speaker, as the Leader of the House and the manifestation of the authority of the House, is mandated and obligated to safeguard and jealously protect its sovereignty within the Government, to determine what it shall or shall not do, and when and in what manner it shall do those things without interference from any other person or authority.

Hon. Members, this position is recognized in parliamentary practice and traditions and in both the former and the present Constitutions. This is what the Constitution means when it vests the legislative authority of the Republic in Parliament and provides that Parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty. This is also the essence of the separation of powers that I have every so often pronounced myself upon from this position.

The view that it can fall to another organ, whether the Executive or the Judiciary, to determine for Parliament a matter before Parliament is, to my mind, constitutional heresy; which I would urge that every person in this country and more so, in this House, completely purges and disabuses themselves of. This disposes also of the question of whether or not the Speaker can properly interpret the Constitution or that this function belongs to the Judiciary. The answer, of course, is that in so far as a constitutional question arises before the House, within the conduct of the business of the House, it is the constitutional duty of the Speaker to interpret the Constitution to that extent and for that purpose alone, so as to enable the House to proceed with its constitutional functions.

I emphasize the following, hon. Members. It is not fathomable and it would be a grave negation of the Constitution that the House should adjourn or otherwise suspend its business and seek the directions of another body or organ before it can proceed. I want all of us to note that emphasis. I think that it is time to debunk and demystify, for all time, the question of the interpretation of the Constitution.

It is not the intention of our Constitution and, indeed, the Constitution does itself make it clear in various Articles including Article 10(1) and Article 20(4), among others, that the interpretation of the Constitution is not the exclusive property or preserve of any particular organ, person or authority. Article 10(1) in particular, binds every State

organ, State officer, public officer and all persons to the national values and principles of governance when they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions. I invite all Members of this hon. House to acquaint themselves with Article 10(1) as well as Article 20(4).

It is clear that the interpretation of the Constitution is as much the mandate and obligation, in their respective capacities, of a forestry officer, a labour officer, a magistrate, the Board of a public school, a police officer, the Director of Public Prosecutions or the President of the Republic. Each of these persons is bound to administratively interpret and apply the Constitution in their actions and functions. To do so, they must interrogate and understand what the Constitution means and how it applies to any particular situation in which they find themselves.

Article 3(1) of the Constitution to which hon. Imanyara referred this House, in obligating every person to respect, uphold and defend the Constitution, would have no meaning if the individual is not permitted to interpret the meaning and application of the Constitution. This is, of course, not to say that the courts no longer have jurisdiction to interpret the Constitution. It is to say that it is not a jurisdiction exclusive to the courts. It is important that interpretation of the Constitution for the purpose of its application be distinguished from the exercise of judicial authority as provided for in Article 159(1) of the Constitution. It is important that we understand that distinction.

There is probably no way that this House could possibly function if the Speaker could not interpret the Constitution. Standing Order No. 47, in particular, in requiring the Speaker to rule to be inadmissible a Motion which, in the Speaker's opinion is unconstitutional, would naturally be unconstitutional because the Speaker would be prevented from forming that opinion. In forming that opinion and in all other interpretations of the Constitution, the Speaker is not acting in a judicial capacity within the meaning of the Constitution. Judicial interpretation is the preserve of the judiciary.

Hon. Members, having settled the question of jurisdiction, I now move to address myself to the issues raised. As will become apparent presently, it may not be necessary to pronounce myself on all of the issues which I have set out as having been raised. In this regard, it is important, at the outset, to emphasize that the primary question, the mother of all the points of order, as it were, in respect of which the guidance and directions of the Speaker were sought and promised, was the point of order by hon. Imanyara, the essence of which was to invoke Standing Order No.47 to urge the Speaker to find that the nomination process, having been done contrary to the Constitution, was not admissible before this House or any of its organs and could not properly be considered by either this House or any of its Committees.

Before I make this determination, I think it is important to consider the provisions of Standing Order No. 47. The Standing Order No. 47(3), which is the relevant provision, presupposes the existence of a Motion or a proposed Motion in respect of which the Speaker can form an opinion that it is contrary to the Constitution. I invite you once again to acquaint yourselves with Standing Order No.47 (3). In the present case, clearly, we are not at the point where there is either a Motion or a proposed Motion. I think it is quite clear that Standing Order No. 47 is inapplicable in the present circumstances and cannot be relied on by the Speaker for the guidance sought by hon. Imanyara.

A related issue, therefore, must be the question whether the House is properly seized of the matter in respect of which hon. Imanyara sought guidance. Is there a matter before the House in respect of which the Speaker is being invited to find that there has been contravention of the Constitution? To answer this question, I wish to call the attention of hon. Members to the procedure and practice that have evolved in this House in relation to the vetting of persons for approval by the National Assembly. One of two procedures is available.

In the first case, the responsible Minister tables a list of names proposed for appointment as a Paper Laid and the Speaker thereupon commits the matter to the relevant Committee for deliberation and report to the House. The Committee is then responsible for considering all aspects related to the suitability of the candidates proposed as well as the constitutionality or legality of the processes by which the nominees have been arrived at. The matter is thereafter brought to the House on a Motion by the Chairperson of the relevant Committee asking the House to resolve that it approves or does not approve the nominees or some of them. It is then open to the House to approve or disapprove the Motion. It is also open to any member of the House to raise any objection, including an objection under Standing Order No. 47(3), that the Motion is a contravention of the Constitution.

Hon. Members, in recent times, the more prevalent practice and procedure, which is the second, has been for the Minister or other nominating authority to write a letter to the Office of the Speaker, forwarding the proposed names of persons to be vetted for approval and requesting the Speaker to transmit the Communication to the House for vetting and approval through its recognized organs, namely, the relevant Departmental Committees. This is the procedure that has been adopted in respect of a long list of recent nominees, including the Commission for the Implementation of the Constitution, the Commission on Revenue Allocation, the Judicial Service Commission, the Privatization Commission, and the Advisory Board of the Kenya Anti-Corruption Commission, among others. Members of the House will respectively remember this.

By this procedure, the role of the Speaker usually consists of receiving and transmitting to the relevant Committee the names of the nominees received for the Committee to exercise its mind on behalf of the House to determine if the law has been complied with in all respects and whether or not additionally, the persons nominated are suitable for recommendation to the House for approval. To reach this determination, the committee may call for evidence in the usual manner, including summoning the nominees to physically appear before it for vetting, summoning witnesses to assist it in making findings both of fact and of law and receiving representations from the public on the legality of the process or the suitability or otherwise of particular nominees.

Hon. Members, from the foregoing synthesis, the question whether or not this House is properly seized of the matter of the nominees for the purpose of enabling the Speaker to make the determination he has been called upon to do becomes central and key to this matter. The question at hand is as follows: When a nominating authority sends the names of nominees to the Speaker, what is the legitimate role of the Speaker in respect of the correspondence transmitting the names? Is the correspondence addressed to the Speaker as Speaker or as a conduit to the House?

What role does the Speaker have in regard to that correspondence before it goes to the House in plenary or to a committee of the House? Is the Speaker permitted to process the correspondence and form a judgment and make a determination as to whether or not it should get to the House? Is it permissible for the Speaker, administratively in his Chambers, to determine, for example, that the nominees do not qualify for appointment and that therefore the relevant statute or the Constitution has been contravened and decline to transmit the correspondence to the House or its committees?

Hon. Members, these questions are relevant because in the present case, the Speaker received a letter from the Office of His Excellency the President on 31st January 2011, averring that he was forwarding the names of nominees in accordance with the Constitution for processing by the House. At the point at which the Honourable Imanyara sought the guidance of the Chair, the letter had neither been tabled before the House nor been received by a committee of the House. Subsequent to the receipt of the letter from the Office of the President, the Speaker did also receive, on 1st February 2011, a letter from the Right Honourable Prime Minister making certain representations as to the validity and constitutionality of the earlier correspondence received.

Two important questions arise: Firstly, whether the Speaker could rule that nominations were unconstitutional before the House had formally become aware of the nominations and, secondly, whether it would be proper for the House to deal with the correspondence of the Prime Minister before the preceding correspondence from the

Office of the President, to which it related, had been formally brought to the attention of the House.

Hon. Members, before I pronounce myself on whether the House is properly seized of this matter, I wish to indicate that I have not been able to find any precedents of this House in which the Speaker intercepted correspondence addressed to the House and unilaterally made a determination as to its legality or validity, and returned it to the nominating authority. I further wish to urge the House to recollect that in the course of the points of order that were raised on Tuesday 1st February 2011 in this House, the Speaker, this House and the nation at large was taken through the elaborate detail of the events preceding the submission of the names of the nominees to the Speaker. I would think that some hon. Members of this House may have had questions they would have liked to ask of both the Vice-President and Minister for Home Affairs, and of the Prime Minister.

Possibly, some hon. Members may have had information relating to those events, which they would have liked to bring to the attention of the House. Members of the public may have had their own thoughts which they would have liked to share with this House on these matters. Constitutional organs like the Judicial Service Commission (JSC) and the Commission on the Implementation of the Constitution (CIC) were mentioned and certain claims made in relation to them. Certain statements were attributed to these bodies. I have no doubt in my mind that these bodies would have had something to say in relation to those claims.

Bodies like the Law Society of Kenya (LSK), the International Commission of Jurists (ICJ) and the Federation of Women Lawyers (FIDA) have come out in the public domain asserting certain positions, which they contend would assist the country in arriving at a lawful and fair determination of the matters in issue. These are important matters to note, because, as hon. Members are no doubt aware, if there is any matter relating to the conduct of public affairs in general, and to the Legislature in particular; that the Constitution has comprehensively addressed, it is the matter of the centrality of the rule of law, democracy, transparency, accountability, inclusiveness and the participation of the people.

Hon. Members, as I have indicated, the issues I have set out as requiring determination entail both matters of law as well as matters of fact. I acknowledge and appreciate the learned interventions made in the House in support or opposition of an array of propositions. The importance of questions posed and the critical ramifications that may have to follow the overall implementation of the new Constitution are such that a more collegiate and participatory process is required not only as a matter of natural justice and sound conduct of public affairs but also as a requirement of the Constitution. As your Speaker, I do not feel that the points of order raised, and the forum at which they

were raised, afforded me adequate opportunity to make a summary determination without a full hearing; either that the Constitution was contravened or that it was complied with. If I were a judge sitting on the Bench in a court of law, and not on the Speaker's Chair, I would rule that the matter proceeds to hearing and that the objections raised be heard and determined at that stage.

In parliamentary parlance, the forum for a full hearing entailing adducing and rebuttal of evidence, examination and cross-examination of witnesses, is the Committee of the House. The Standing Orders, recognizing that the plenary is unsuitable for a detailed examination of important matters, has made provision for committees to precede plenary consideration of such matters.

Hon. Members, I do recognise, of course, that the point has been made that the matters complained of, being unconstitutional, they do not merit even transmittal to the committee. With respect, in the present case, I disagree. The role of a Committee in the vetting process is to consider all aspects of the proposed nominations, including compliance with the Constitution and all relevant, enabling and incidental laws. In answer to the question I have previously posed, I do find, and I therefore so rule, that in conformity and consonance with the precedents and practice developed and embraced by this House, the proper role of the Speaker when he receives nominations, and particularly those made pursuant to the provisions of the Constitution, is that, the minimum he will do, as a first mandatory step, is to convey these to the relevant organs of the House.

It is also the role of the Speaker to see to it that the Committees of the House do consider any forwarded nominations, observing constitutional requirements as to public participation and due process and report to the House their findings both as to the constitutionality and other propriety of the nominations as well as their recommendations for action by the House. If this is not done, I am of the considered opinion that the Legislature shall not meet the requirements of the Constitution.

Hon. Members, let me clarify that reference of the correspondence so far received both from the Office of His Excellency, the President and the Right Hon. Prime Minister to the relevant Committees of the House does not amount to a finding or determination that these nominations were or were not constitutionally made. Nothing can be further from the truth. It is merely a pronouncement that it is inopportune at this stage for the Speaker to make such a determination because the House is not yet substantively seized of the matter, and further that other players whom the Constitution recognizes as having a role in the matter have not had opportunity to formally participate in the process in a manner that would enable the Speaker or indeed the House to make that determination from a point of full knowledge. In a manner of speaking, these stakeholders have not been consulted. It may very well be that at the end of this

exercise, the relevant Parliamentary Committees as they are obligated to, having delved into the matter, there will be a Motion or proposed Motion as presumed by Standing Order No. 47 that the House shall deal with.

Hon. Members, from my pronouncements above it should become apparent that all the other issues raised requiring determination of facts or law have not crystallized because of my finding that from a constitutional, legal and procedural point of view a summary and preliminary determination of the matter is neither possible nor desirable.

I, therefore, rule that as at where we are, it is not appropriate and I accordingly decline to make a determination as to whether or not the nominations transmitted to my office by the Office of His Excellency the President were or were not constitutionally arrived at nor whether there was or was not consultation within the meaning of the Constitution nor whether or not ethnic diversity and gender equality were observed. It follows that I accordingly withhold any determination or comment on the veracity and weight to be accorded to the letter received from the Rt. Hon. Prime Minister. I will repeat that so that it is clear. It follows that I accordingly withhold any determination or comment on the veracity and weight to be accorded to the letter received from the Rt. Hon. Prime Minister. I further direct that the two letters be forwarded to the Departmental Committees on Justice and Legal Affairs and Finance, Planning and Trade according to their respective mandates for disposal as provided for in the Standing Orders and the law. Given the urgency of the matter and the Constitutional deadlines, I direct that the Committees shall carry out the requisite inquiries and table their reports in the House on or before Thursday, 10th February 2011.

Hon. Members, this is particularly important because as hon. Members shall recall the House is in special sittings convened to discharge this business. As hon. Members are aware, a Committee of the House collects evidence and makes findings to help the House arrive at an informed decision. A Committee does not of itself finally determine a matter for the House. Additionally, it must be noted that questions of constitutionality and observance of the law are not matters to be determined only by the vote of either the Committee or indeed of the House. To this end without pre-emptying the findings of any of the Committees of the House or any action of the House, it is important that the House remains alive to the Speaker's mandate when timeously obligated to give guidance and direction sought by Mr. Imanyara. Needless to say, the window remains open and it is to be hoped that developments may occur that make this important nomination process uncontested on the basis of either constitutionality or otherwise and thereby render such guidance as may be expected from Mr. Speaker and directions unnecessary.

Hon. Members, permit me to make a few concluding observations on this matter. In legal balance this would be *obiter dictum/dicta*. I wish to echo the observations of Mr.

Abdikadir Mohamed, the Member for Mandera Central who called for the cultivation of the culture of constitutionalism without which the Constitution becomes a mere paper. Constitutionalism can be broadly defined as the bundle of ideas, attitudes and patterns of societal behaviour which shows a subscription by that society to, and a belief by it, in the principle that all authority of the Government derives from and is limited by the Constitution and exists to advance the common good and welfare of that society.

Hon. Members, I want to plead with all of us, the leadership and the people of this country that we all imbibe from the fountains of constitutionalism so that it becomes part of our lives and our adherence to the Constitution ceases to be laboured legalistic and minimalist.

Painful as the memories maybe, I think it bears reminding that three years ago almost to the day, this country was at war with itself in circumstances not so dissimilar. We were on the brink of the precipice because a dispute relating to an election was not referred to the judiciary because of a lack of faith in it. It is this very judiciary whose head is now sought to be appointed by a process entrenched in the new Constitution resoundingly enacted by the people of Kenya for themselves. It is nothing short of heartbreaking to the people of this country that this process that should herald a new beginning and inspire a new confidence and legitimacy in this crucial organ of state should take off to such a rough start. It is the kind of process that Mr. Abdikadir has described as a "zero- sum" game.

Hon. Members, few countries have had the opportunity of a second chance as we have. Events around the world in recent days are a testimony as to how situations that may have been easily avoided, or acted upon while there was an opportunity can rapidly deteriorate and become unmanageable.

Hon. Members, to my mind, it will be a pity and a severe indictment of our collective leadership if in time to come history shall record of our country in general and of our leadership in particular that we learned nothing from history.

Thank you.

3. SERVING OF COURT PROCESSES TO MEMBERS WITHIN THE PRECINCTS OF PARLIAMENT

8th February 2011

Hon. Members, I have this brief Communication to make about certain developments that have been brought to my attention today and which developments have implications on the powers and privileges of this House.

I have been reliably informed that a number of persons have sought or otherwise gained entry into the precincts of the National Assembly purportedly to serve court processes. I have been further informed that some persons have, indeed, gone so far as to purport to serve court processes within the precincts of the Assembly on individual Members of this House at a time when Committees were sitting.

These developments are worrying as they are in violation of the National Assembly Powers and Privileges Act, the Standing Orders and the Speaker's Rules. I, therefore, wish to take this opportunity to invite all persons who may wish to interact with the National Assembly in the manner aforesaid to familiarize themselves with the provisions of the National Assembly Powers and Privileges Act, Cap. 6 of the Laws of Kenya.

I wish to draw particular attention to the provisions of Sections 4, 5, 6, 7, 8, 12, 13 and 29 of the said Act. Let me reiterate that Committees enjoy only the delegated authority invested in them by the House. They do not have a separate life of their own from the House.

For these reasons, it is useful for all persons to know that service of process intended for the House should be directed at the House itself, represented by the Speaker or the Clerk of the National Assembly who has authority to accept service. Such process should be served personally on the individuals occupying the two offices.

Other persons, be they Members or chairs of Committees, have no capacity to be served with or to accept such process; neither do they have the authority of the House.

In order to stem what is a practice that must not be allowed to set root, I am hereby directing the Office of the Clerk of the National Assembly, the Serjeant-at-Arms and all other relevant officers of the House to abide by and ensure strict compliance with all the laws relating to the powers and privileges of the House.

4. SUBJUDICE: HIGH COURT RULING ON CONSTITUTIONALITY OF NOMINATION OF STATE OFFICERS BY THE PRESIDENT

10th February 2011

On Tuesday 8th February 2011, the Member for Kisumu Town West, hon. John Olago Aluoch, rose on a point of order to seek the direction and guidance of the Chair on what he described as an issue galvanizing the attention, not just of the House, but also of the country. Mr. Olago sought to know how the twin doctrines of *sub-judice* and injunction apply to the proceedings in Committees of the House dealing with the nominations to Judicial and Finance Offices by His Excellency the President. Mr. Olago drew the attention of the Chair to and tabled a ruling of the High Court

delivered by hon. Justice Musinga on 3rd February 2011, in Nairobi High Court Petition No.16 of 2011, Centre for Rights Education and Awareness and Others versus the Attorney General. He similarly tabled an order extracted on 7th February 2011, from that ruling and a letter addressed to the Deputy Registrar of the High Court in Nairobi by the counsel for the respondent. In the letter, the Counsel requests the Deputy Registrar to place the matter before the Judge for directions on a hearing date for the petition and suggests 9th February, 2011, if that date is convenient to the court.

It was the assertion of Mr. Olago that arising from the documents tabled, he had established that the High Court Petition No.16 of 2011, was active. Mr. Olago claimed that at the time the Speaker delivered his ruling on 3rd February 2011, referring the matter of certain constitutional nominations to the Committees of the House, his attention had not been drawn to the ruling of the High Court on the same matter and that the Speaker's attention now having been drawn to it, it was appropriate that the Speaker determines whether or not it will be proper for the Committees to proceed to consider nominations to those offices in view of the orders of the court.

The Chair allowed a number of interventions on the point of order raised by Mr. Olago. Hon. James Orengo, Minister for Lands and the Member for Imenti Central, Mr. Gitobu Imanyara, urged the Speaker to find that the matter was *sub-judice* while hon. M. Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs and hon. Amos Kimunya, Minister for Transport, were of the opposite view. The Minister of State for National Heritage and Culture, hon. ole Ntimama, also spoke to the matter. He was concerned at the manner in which the relevant Committees were going about their work, decrying certain statements from Members of those Committees indicating the pursuit of an ethnic and/or partisan agenda.

Hon. Members, as I was undertaking to make a ruling on the point of order raised by hon. Olago, hon. George Nyamweya rose on another point of order seeking guidance on whether it was in order for a Member of a Committee to raise in the House an issue which he could raise in the Committee and thereby leaving other Members of the Committee unable to respond or deal with it. I also undertook to give directions on this.

Hon. Members, aside from the point of order raised by Mr. Nyamweya, the issues I have to determine are two, namely:

(a) whether the matter of consideration of the nominees for the positions of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget is *sub judice* and whether, therefore, the House should suspend all action on it until it is finally determined by the court; and

(b) what effect, if any, the ruling of the court and its orders have on the proceedings of this House and its relevant Committees in consideration of the matter of the nominees.

As hon. Olago pointed out in canvassing his point of order, the Chair has previously, more so on 27th November 2008, ruled on a matter which was almost identical to the present one. On that occasion, the same hon. Member sought a ruling as to whether or not conservatory orders issued by the High Court in Judicial Review Petition No. 689 of 2008 – Samuel Kivuitu and 22 others versus the Hon. Attorney-General – amounted to a derogation of the constitutional principle of separation of powers by the Judiciary.

Hon. Members, in that case, the High Court had, on 11th November 2008, issued an order restraining the Government of Kenya from taking or commencing any Executive or Legislative Action or process to disband or abolish the defunct Electoral Commission of Kenya and or remove its members from office, pending the hearing and determination of the application. Mr. Olago, in fact, asserted that the ruling of the High Court contravened Section 30 of the Constitution and amounted to a subjugation of Parliament by the Judiciary.

Looking at the point of order raised on that occasion and the arguments made and my ruling then, I have been struck at how amazingly identical the issues are. On that occasion, as on this occasion, my ruling identified the issues for determination as the applicability of the rule on *sub judice* as well as the effect of a purported injunction on Parliament. I have read with some amusement, if not disbelief. Hon. Members may wish to re-visit the HANSARD of the time and read the arguments made in support or opposition of the various positions advanced. The arguments are virtually the same as those made here on Tuesday, 8th February 2011, but with one major difference: Some hon. Members haveadvanced completely opposite arguments on the issue on this occasion from the positions they took in November, 2008. Of course, an hon. Member or, indeed, any other person has the right to change their minds, and it may very well be that three years is a long time.

I must caution that the conduct of Parliamentary business requires respect for the procedure, traditions, practice and precedents established by the House. The Chair represents the institutional memory of the House to ensure that this is so. The Chair, therefore, does not enjoy the luxury of changing positions and departing from practice and precedents unless the circumstances can be shown to be distinctly the same.

Hon. Members, the subject of the rule of *sub judice* in the context of the business of the National Assembly is one upon which the Speaker has ruled severally in recent times and is now firmly established in this House. It does not appear to me that the

matter merits a lengthy discussion on this occasion because all the precedents are available to both Members of this House and to the country at large.

The rule of *sub judice* is one which the House has imposed on itself, and which is espoused in Standing Order No. 80(1). The essence of this rule is that, subject to the Speaker's discretion to allow reference to any matter before the House or a Committee of the House, it is not permitted for an hon. Member to refer to a matter which is the subject of active criminal or civil proceedings if discussion of such a matter is likely to prejudice its fair determination.

Hon. Members, Standing Order No. 80(4) makes it clear that the onus of showing that a matter is *sub judice* lies on the hon. Member alleging so. Such an hon. Member is required to produce evidence that Paragraphs 2 and 3 of Standing Order No.80 are applicable.

On the matter of *sub judice* in the present case, therefore, the role of the Chair is to determine:

(a) whether or not there are active court proceedings;
(b) whether or not there is likelihood of prejudice to their fair determination; and
(c) whether or not the answer to (a) and (b) is in the affirmative.

The Speaker will nonetheless exercise his discretion in favour of allowing references to those matters. If the answer to (a) and (b) is in the negative, it will be necessary for the Speaker to exercise his discretion.

Hon. Members, Standing Order No. 80(3)(c) provides *inter alia*; that civil proceedings shall be deemed to be active when arrangements for hearing such as setting down a case for trial have been made and until the proceedings are ended by judgement or discontinuance. In order to show that this provision is applicable, hon. Olago, as I indicated earlier, tabled a letter addressed to the Deputy Registrar of the High Court by Counsel for the respondent, requesting the Registrar to place the matter before the Judge for directions on a hearing date for the petition and suggests the 9th of February 2011, if that date was convenient to the court.

Hon. Members, a request for a hearing date is clearly not the same thing as setting down of a hearing date. It follows that as at when Mr. Olago sought to rely on the *sub judice* rule, a hearing date had not been set down. This requirement is important as it ensures that the House does not suspend business without proof that the matter will proceed on a known future date. For this reason, Mr. Olago did not establish that the proceedings were active.

I, therefore, find and rule that on this score, the matter is not *sub judice* within the meaning of Standing Order No. 80(3)(c).

Hon. Members, as I have previously ruled, the *sub judice* rule is not one to be invoked lightly. A claim of a likelihood of prejudice of the fair determination of a matter is similarly not to be invoked without circumspection. I have ruled before and I reiterate that gagging this House and preventing it from discharging its constitutional mandate requires tangible reasons to be advanced. The danger of prejudice to the due administration of justice must be clearly shown.

Speaker Snedden of the Australian House of Representatives held similar views when in 1976 he stated as thus: "There is the long line of authority from the courts which indicates that the courts and judges of the courts do not regard themselves as such delicate flowers, and they are likely to be prejudiced in their decisions by a debate that goes on in the House."

Hon. Members, even if it had been shown – which it was not – that the proceedings were active within the meaning of our rules, I am not prepared to find that in the present circumstances, there was or there is, a likelihood that the debate in this House would prejudice the fair determination of the matter.

Hon. Members, the ruling of the High Court was, in fact, rendered after a fairly robust debate in this House in which all the questions which the court was determining had been argued. Additionally, I have perused the ruling of the court and the order extracted therefrom and found that I agree with Mr. M. Kilonzo that there is finality to the declaration of the unconstitutionality of the nominations. That leaves very little in respect of which the court, or the parties, can be prejudiced by the actions of this House.

Hon. Members, maybe you will want to look at that ruling; the prayers before the ruling was made were for conservatory orders. The ruling delivered by the judge actually went on and declared conclusively that the nominations were unconstitutional. I want you to read that and you will find that there is meaning in what I am saying.

Having found that the matter is not *sub judice* it is almost an academic exercise to consider how I will have exercised my discretion, whether or not to allow reference to the matter in the House and in the Committees, if the matter had qualified as being *sub judice*. However, I do think that it will aid the House to know that in a matter such as this, a matter that has occupied newspaper headlines and editorials, extensive television coverage and topical discussions in the streets and places of refreshments, it would be very odd, indeed, and hardly in keeping with our Constitution if some rule in

our Standing Orders could be construed as making the National Assembly the only place where the matter could not be discussed.

Nor could a rule in our Standing Orders be construed as preventing the National Assembly from proceeding with an approval process ordained by the Constitution. It is my position that where, as in the present case, the public interest is for an open and detailed discussion of a matter, the Speaker will invoke Standing Order No.80, paragraph 5 to overrule any objections founded on the *sub judice* rule.

Hon. Members, on the matter of the effect of the orders of the High Court on this House and the Committees, I, again, find that I addressed this matter adequately on 27th November 2008, and again just last week on 3rd February 2011.

Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya, and shall be exercised only in accordance with the Constitution. It further provides that the people may exercise their sovereign power either directly or through their democratically elected representative. Chapter 3 of the former Constitution which is preserved by the new Constitution is still in force, and it enacts Parliament. Section 30 of the Constitution stipulates that the legislative power of the Republic vests in the Parliament of Kenya. Section 46 of the Constitution provides for the exercise of legislative power of Parliament. Section 56 of the Constitution provides that the National Assembly may make Standing Orders regulating its procedures, while Section 57 allows for the provision of powers, privileges and immunities of the Assembly, and its Committees and Members. Section 12 of the National Assembly Powers and Privileges Act, Chapter 6 of the Laws of Kenya, states as follows:-

> *"Immunities from legal proceedings – No civil or criminal proceedings shall be instituted against any Member for words spoken before or written in a report to the Assembly or Committee or by reason of any matter or thing brought to him therein by petition, Bill, resolution, Motion or otherwise"*.

Hon. Members, that is significant; go and acquaint yourselves with that provision in the Powers and Privileges Act, Chapter 6 of the Laws of Kenya. I have just read it out.

Section 12 of the National Assembly (Powers and Privileges) Act, states as follows:-

> *"No proceedings or decision of the Assembly or the Committee of privileges acting in accordance with this Act shall be questioned in any court"*.

Section 29 of the same Act, in fact, removes from the jurisdiction of the courts the acts of the Speaker and officers of the Assembly by providing as follows:-

"Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders".

Chapter 10 of the Constitution establishes the Judiciary and provides in Article 159 that the judicial authority in derived from the people and vests in and shall be exercised by the courts or tribunals established by or under this Constitution. The Article requires the judicial authority to be exercised in a manner that promotes and protects the purpose and principles of the Constitution. These provisions emphasize the constitutional basis for the principle of separation of powers that is a prerequisite for a functioning democracy. The operation of the principle, as I have had occasion to hold, both separates and blends the powers so that each branch serves as a check and balance on the powers of the other. It ensures the protection of the rule of law, and secures the fundamental rights of the individual. Each branch of Government must exercise its powers in a fine balancing act to ensure that it properly and effectively carries out its functions while at the same time it does not infringe on the powers and responsibilities of the other branches of Government. Thus, this House is the Assembly of the people. It represents their will. It enacts laws and deliberates on and resolves issues of concern to the people. The Judiciary can review the constitutionality of legislation or other actions taken by the National Assembly, if challenged and can, indeed, declare a law, or other action taken by the House, to be unconstitutional and to be a nullity.

Hon. Members, in my understanding, which I have stated severally before from this Chair, what the Judiciary cannot do under our Constitution is to stop or prevent the National Assembly from undertaking its Constitutional mandate.

Hon. Members, neither can the Judiciary compel any action to be undertaken by Parliament. The principal ensures that Parliament, as the representatives of the people, is not prevented from giving voice to the will of the people. An attack on this principal is an attack on the sovereignty of the people. In my estimation, it is a grave attack on the Constitution.

Hon. Members, no one outside Parliament, not the Executive and not the Judiciary, tells Parliament in a compulsive manner what to do or not to do, when to do it and how to do it.

Hon. Members, this is not new jurisprudence. Our courts are themselves aware of the respective spheres of operation of Parliament and the Judiciary as evidenced by a number of decisions of the superior courts of this country, which I have had the opportunity to read. The courts have recognized that next only to the privilege and

immunity of free speech within the House, the most important privilege of the House is the right of the House to regulate its own procedure, free from intervention by the Executive or the courts.

The courts recognize that this privilege of the House can visit no harm on their authority or on the administration of justice, because the courts retain the residual constitutional and judicial authority to declare any act or omission of any person to be unconstitutional.

Hon. Members, for the reasons I have advanced the orders of the High Court, or any other court, in whatever form they may be worded must be construed to have been made with the intention to abide by the Constitution and will be so interpreted by the Speaker for the purposes of this House. That is the essence of the oath of office of the Speaker. I, therefore, rule, in answer to hon. Olago, that the orders of the court made in Nairobi High Court Petition No. 16 of 2011, Center for Rights, Education and Awareness and others versus the Attorney-General, on 7th February 2011 were not addressed to this House, and were not intended to, and have no effect on the exercise by this House of any of its constitutional functions. The orders have no effect on the work of this House or its Committees, and the same will proceed as I have previously directed.

Hon. Members, it must however, be noted that it is a binding decision of the court, and unless varied by the court or by an appellate court it may have a bearing on the outcome of the processes undertaken.

Hon. Members, Mr. Olago thought that it was an omission on the part of the Chair not to consider the effect of the ruling of the court after delivering his ruling. It was not. In fact, it was a celebration of the doctrine of separation of powers that both the High Court's ruling and that of the Speaker were made on the same day, and within hours or minutes of each other without either the Judge of the High Court or the Speaker finding any need to wait and see what the other will rule.

Hon. Members, this is as it should be. The two institutions are distinct and separate and have separate constitutional mandates. None is beholden to the other. The final matter which I must address is the point of order raised by Mr. Nyamweya. In answer to Mr. Nyamweya, I wish to advise that it is courteous and good practice, which the Chair will encourage, that any matters arising in Committees be raised, handled and disposed of in the Committees. In fact, to this end, Standing Order No. 78 prevents reference in the House to the substance of matters in Committees. Committees are, however, agents of the House. A Member does not lose the right of audience in the House if he or she has a matter which can properly be addressed in the House. I note that in the present case, the guidance sought by Mr. Olago was a matter applying to more than one

Committee, and occasioning anxiety in the broader membership of the House. I am, therefore, prepared to find that the action of Mr. Olago was in order, but hasten to add that it should not be seen to create a precedent.

Thank you!

5. NOMINATIONS OF CHIEF JUSTICE, ATTORNEY GENERAL, DIRECTOR OF PUBLIC PROSECUTIONS AND CONTROLLER OF BUDGET

17th February 2011

Hon. Members, on Tuesday, 15th January 2011, in compliance with my directives given on 10th February 2011 extending the time allowed to complete work and table a report, the Member for Nambale, Mr. Okemo, the Chairman of the Departmental Committee on Finance, Planning and Trade laid on the Table of the House the Report of the Committee on Nomination to the Office of Controller of Budget. The Report of the Departmental Committee on Justice and Legal Affairs which was also expected to be laid on the Table was not laid and the Speaker, at the request of the Chairman of that Committee, the Member for Budalang'i, Mr. Namwamba, gave authority for extension of time to the Committee to table their Report not later than 12.30 p.m. on Wednesday, 16th February 2011. The Departmental Committee on Justice and Legal Affairs did not meet this deadline. However, yesterday, at about 3.30 p.m. the Chairman of the Committee, Mr. Namwamba, accompanied by about five other Members of the Committee presented the Report of the Committee to me in my chambers and the Report has since been laid on the Table of the House earlier this afternoon.

Subsequent to the laying of the Report of the Departmental Committee on Finance, Planning and Trade by its Chairman, when the Order "Notices of Motion" was read, I explained that by standard procedure, it would have been expected that Mr. Okemo would give Notice of Motion for the adoption by the House of the Report he had just tabled at that point. I, however, informed the House that I had received the proposed Motion only that afternoon and that I needed to acquaint myself with its substance and will speak to the proposed Motion on Thursday, 17th February 2011 at 2.30 p.m.

As all hon. Members are aware, in terms of Standing Order No. 47, the Notice of Motion for the adoption of the report of the Committee cannot be given and the Motion cannot be moved unless the Speaker has approved. For the avoidance of doubt, the text of the Motion proposed to be moved by Mr. Okemo reads as follows:

> *"THAT, this House adopts the Report of the Departmental Committee on Finance, Planning and Trade on the nomination to the Office of Controller of Budget laid on the table of the House today, Tuesday, 15th February 2011."*

By this Ruling today, I will give directions whether in terms of Standing Order No. 47, I approve or do not approve the giving of notice and the moving of the proposed Motion by Mr. Okemo. As I had indicated earlier this afternoon, my ruling on the admissibility of the proposed Motion of the Committee on Finance, Planning and Trade will apply

equally to that of the Committee on Justice and Legal Affairs. In order to make this Ruling, it is necessary that I commence with some background and context.

Hon. Members, you will recall that on Thursday, 3rd February 2011, I ruled on a point of order raised by the Member for Imenti Central, Mr. Imanyara and canvassed by a number of other hon. Members. Mr. Imanyara had sought to invoke Standing Order No.47 to urge the Speaker to find that the nomination process of the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget had been undertaken contrary to the Constitution and that it was, therefore, not admissible before this House or any of its organs and could not properly be considered by either the House or any of its Committees.

Mr. Imanyara relied for his claims on statements which he tabled, attributed to the Judicial Service Commission (JSC) and the Commission for the Implementation of theConstitution (CIC) both of them taking the position that the nominations forwarded through the National Assembly by the Office of the President were arrived at by a process that contravened the Constitution. Additionally, Mr. Imanyara stated that the process was unconstitutional because he claimed to be aware that the Right Hon. Prime Minister, who under the Constitution is to be consulted prior to the nominations, had written to the Speaker disassociating himself from the said nominations process.

Hon. Members, you will recall that I indicated that the issues raised by Mr. Imanyara and other Members required the determination both of matters of law as well as matters of fact and I asserted that as Mr. Speaker I did not feel that the points of order raised and the forum at which they were raised afforded me adequate opportunity to make a summary determination, either that the Constitution was contravened or that it was complied with.

I expressed the view that the importance of questions posed and the critical ramifications that they have to the overall implementation of the new Constitution were such that a more collegiate and participatory process was required and that in the context of the National Assembly, the forum for a full hearing entailing adducing and rebuttal of evidence, examination and cross-examination of witnesses is the Committee of the House. I stated that the role of a committee in the vetting process was to consider all aspects of the proposed nominations, including compliance with the Constitution and all relevant enabling and incidental laws.

Hon. Members will recall that from the presentations of Mr. Imanyara as well as the submissions of other hon. Members, I filtered ten issues as having arisen and calling for determination. Of the ten issues, I disposed of two; namely, issue number one on the question whether or not the Speaker was competent to make a determination on the constitutionality of the nomination process as sought by Mr. Imanyara and issue

number ten on the question whether or not the propriety of the nominations could be resolved by a vote in this House to approve or disapprove the nominees.

On the former issue, I ruled that it is within the competence of the Speaker to determine the constitutionality of a matter before the House while, on the later, I ruled in the negative finding that the matter in which the question is whether nominations were arrived at through a constitutional process could not be resolved by a vote of the House.

On that occasion, I found that it was not necessary for me, at that time, to rule on the following remaining eight issues *(Note that I have retained the original numbering of the issues as appeared in my previous Ruling for ease of reference)*

1. Is Parliament properly seized of the matter of the nominations?
2. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this?
3. Do the provisions of the Constitution require the involvement of the Judicial Service Commission in the nomination process (of the Chief Justice) and going hand in hand, if the Constitution detects that the process be participatory, competitive and transparent?
4. Were there consultations between the President and the Prime Minister as contemplated by Section 29(2) of the Sixth Schedule to the Constitution? Tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally, there is the further point of what was intended by the drafters of the Constitution in providing for consultations as they did.
5. What is the import of making the consultations subject to the National Accord and Reconciliation Act?
6. Is a serving member of the Judiciary constitutionally eligible to be nominated and appointed as Chief Justice?
7. Do the nominations meet the constitutional requirements of regional balance and gender parity?
8. Do the questions raised on the nominations of office-holders amount to a dispute within the meaning of the Political Parties Act?

Hon. Members, in referring the matter of the nominations as well as the letters received both from the President and the Prime Minister to the respective committees to consider and report on or before 10th February 2011, the crux of my Ruling was, firstly, that I could not determine that a Motion or proposed Motion was unconstitutional when there was no Motion or proposed Motion before the House. Secondly, that I did not have the information necessary to enable me make such a determination even if there had been a Motion or proposed Motion.

Hon. Members, between the time when Mr. Imanyara first raised the matter and now, I have had the benefit of considering a range of material addressing the various aspects of the matter. Specifically, I have benefited from among others, the position given by the Judicial Service Commission, the Commission on Implementation of the Constitution and the Law Society of Kenya. I have also carefully read and considered the ruling of the High Court relating to the matter of nominations which was delivered on 3rd February 2011. The first three of these bodies are constitutional or statutory and their views on matters of the law, though not binding on this House, are of significant, persuasive value.

Hon. Members, as for the ruling of the High Court, despite my re-statement of the constitutional relationship between the Legislature and the Judiciary, I have repeatedly emphasized that subsisting judicial decisions, while they cannot restrain the Legislature from the discharge of its functions, are of binding effect and may have a bearing on the products emanating from this House. The learned hon. Justice Musinga in his ruling in the above case, found that nomination of the Chief Justice was unconstitutional for it was not according with Article 166 of the Constitution as read with Section 24(2) of the Sixth Schedule to the Constitution. He stated as follows:-

> *"On the basis of the concession made by the Attorney-General, who is the respondent in this petition, it must be accepted that the said nomination did not comply with the constitutional requirements of Article 166(1) (a) as read together with Section 24(2) of Schedule Six of the Constitution. To that extent, the petitioners have proved that the nomination was unconstitutional."*

Hon. Members, the learned Judge further found that Article 27(3) of the Constitution was violated regarding equal treatment of men and women.

He, therefore, concluded that:-

> *"In view of the violations to the letter and spirit of the Constitution as shown hereinabove, even without considering other relevant provisions of the Constitution like Article 10, which spells out national values and principles of governance, I am satisfied that the petitioners have demonstrated that they have a prima facie case with a likelihood of success."*

Justice Musinga, therefore, concluded as follows:-.

> *"Consequently, and in view of the court's findings regarding constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it would be unconstitutional for any State officer or organ of the State to*

carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28th January, 2011."

The quote by Justice Musinga continues to say:-

"That will have to await the hearing of the petition or further orders of this court."

Hon. Members, although I have read that, this court decision does not stop the National Assembly from proceeding with its work and cannot determine for the House how to proceed, it must be noted, as matters currently stand, any decision made by this House on the nominations, though perfectly procedural from the point of view of the Legislature, outside the Legislature, it is to the extent that it does not accord with the ruling of the court, null and void, for all purposes. Note least of all, the Chair has had the benefit of reading the Reports of both the Departmental Committee on, Finance, Planning and Trade and the Departmental Committee on Justice and Legal Affairs. In this respect, I wish to remind the House that the function and rationale of committees is to assist the House to reach an informed decision on matters referred to them. This role is best discharged when Committees conduct their affairs in an amicable atmosphere that upholds the dignity of the National Assembly. Appropriate procedures exist in our Standing Orders for dealing and disposal of any issues that may arise in the course of the work of the committees.

With the benefit of all these material, I am now able, and in the course of the present Ruling, I will beg indulgence to address and rule not only on the spirit of the Motion but also on all other outstanding issues. I have in particular considered and I am now in a position to rule summarily on at least four of the outstanding issues. I will proceed to do so as follows:

On issue No. 2, hon. Members will recall that I had ruled that Standing Order No.47 was inapplicable and could not be relied on by the Speaker for the guidance sought by Mr. Imanyara because there was neither a Motion, nor a proposed Motion before the House as contemplated by Standing Order No.47. In light of the developments that have since occurred, I now rule that the National Assembly is seized of the matter of nominations because it was received by the appropriate organs of the House and a Motion has been proposed, thereon by a Committee of the House.

On Issue No. 3, as I have already stated, I rule that the pronouncements of the Commission on the Implementation of the Constitution on a matter such as the present matter have relevance and are of persuasive value and should be considered carefully

by the National Assembly and the Speaker. But as I have ruled before in the context of the Judiciary, the opinion of a body or organ outside the National Assembly cannot rise to such a level as to be construed to bind the National Assembly to any particular action or inaction in the discharge of its constitutional mandate.

On Issue No.7, I rule that it is not unconstitutional for a serving judicial officer to be nominated for appointment as the Chief Justice if he or she is qualified under Article 166, notwithstanding that he or she has not undergone vetting as provided by Section 23 of the Sixth Schedule to the Constitution. We have, in fact, set a precedent in this House by approving serving judicial officers to the Judicial Service Commission before they were vetted under the Constitution. All that this means is that if any of these judicial officers should be found to be unsuitable to serve as such when the vetting process is undertaken, they will have to leave office and a vacancy will arise in their respective offices.

On Issue No. 9, I rule that the questions raised on the nomination of office holders do not amount to a dispute within the meaning of the Political Parties Act as questions relating to the constitutionality of these appointments and any dispute thereon affect and relate to the country at large and not any particular party or parties. This is not a dispute between political parties or for that matter, individuals who may be members of parties.

Hon. Members, before I proceed to rule on the remaining issues, allow me to re-visit some of my pronouncements when I last ruled on this matter. Referring the nominations to the relevant Departmental Committees, I declined to make a determination as to whether or not the nominations transmitted to my office by the Office of His Excellency the President, were or were not constitutionally made, nor whether there was or was not consultation within the meaning of the Constitution, nor whether or not ethnic diversity and gender equality were observed. I also withheld any determination or comment on the veracity and weight to be accorded to the letter I had received from the Right Hon. Prime Minister urging that the House declines to consider the nominees because the process for their nominations had not been observed.

I made it clear that the reference of the correspondence received, both from the Office of His Excellency the President and the Right Hon. Prime Minister, to the relevant Committees of the House did not amount to a finding or determination that these nominations were or were not constitutionally made. I promised to rule on that question if an objection under Standing Order No.47 was to be raised again when the Committees, having delved into the matter, propose an appropriate Motion. I cautioned the House to remember that despite the work of the Committees, questions of constitutionality and the observance of the law are not matters to be determined exclusively by the vote of either Committee or, indeed, of the House. This is the reason

that Standing Order No. 47(3) makes the admissibility of a Motion subject to the opinion of the Speaker. That opinion, must, of course, be reasonable and befall justly and judiciously.

Hon. Members will recall my passionate plea that the window remained open, and my hope that developments would occur that would make this important nomination process uncontested on the basis of either constitutionality or howsoever and thereby render my guidance and direction as requested by hon. Imanyara unnecessary. This was not to be. Indeed, what was an unsatisfactory position at the time has grown by leaps and bounds in the past one week or so to become the source of considerable anxiety in the whole country. The Speaker's efforts to contain the escalation of differences were clearly unsuccessful and the time has, therefore, now come to make difficult decisions. The Speaker takes much solace, however, in the widely reported commitment of both His Excellency the President and the Rt. Hon. Prime Minister to accept, respect and abide by the outcome of the Parliamentary process.

One of the main reasons I had hoped that I would not have to rule on contestations on the constitutionality of the Motion or proposed Motion by the Department Committee was the effect of such a Ruling on the work of any such Committees and of this House. This is because if I were to rule that the proposed Motion is unconstitutional because the nomination process did not accord with the Constitution as sought of me by Mr. Imanyara, it would follow that at *ab initio,* there were never really any nominations capable of consideration by the Committees or by this House and, accordingly, any Motion seeking the approval or disapproval of the nominees by the House cannot proceed. It will mean that despite all the hard work done by the Committees; the House will not have the opportunity to debate their Reports at all. This would be so even though the Reports of the Committees may themselves contain evidence and findings on the very questions in respect of which I shall have ruled. On the other hand, a Ruling by the Chair that the Motion may proceed, does not prevent the questions of unconstitutionality still arising in the course of the debate of the Reports. Be that as it may, the Speaker must now make this determination in the context of whether or not to approve the proposed Motion.

Hon. Members, I have reflected on issue No. 3, on whether provisions of the Constitution require the involvement of the Judicial Service Commission in the nomination process of the Chief Justice, and whether going hand in hand with that question, if the Constitution dictates that the process be participatory, competitive and transparent. I have read all the arguments that I could find on the subject. Without going into a lengthy discussion on the matter, I recognize the two contesting argument: The first demanding a participatory, competitive and transparent process that involves the JSC, in terms of Articles 166 and 172, and Sections 24 and 29 of the Sixth Schedule to the Constitution; and the second, to the effect that the in this transitional period,

Articles 166 and 172 of the Constitution have no application. Considering all the circumstances, and in particular, Article 259(1), I am personally more persuaded by the first interpretation that entails an open and transparent process that involves the JSC. Considering the history of our country and the reasons why we have adopted a new Constitution, I find the argument that there should be lower constitutional standards during this delicate period of transition and implementation of the Constitution to be untenable. I have, as a matter of fact, not been able to find any language in the Constitution excluding either expressly or by necessary implication, the application of Article 10 or Article 73 of the Constitution to the nomination of the Chief Justice, or the other three offices.

Issue No.7 on whether the nominations meet the Constitutional requirements of regional balance and gender parity needs to be considered in the broad context of all constitutional appointments available, and not on one or two appointments being made at any particular time. It is difficult to establish at this time whether the four nominations accord with requirement for giving a fair deal to all the diversities of Kenya. Considering the emotion which a feeling of unfair treatment has, or may evoke in sections of our society, I see no harm, and it is would probably assist the country very much if important nominations were accompanied by some memorandum explaining how the nominating authority has addressed itself to such constitutional requirements. I concede that this is not an express constitutional requirement, but it is not unconstitutional and I have previously urged against dry, technical and uncreative interpretations of the Constitution. On the face of it, however, and in the present case, considering that there has been no set of Constitutional appointments, so far, in which the majority of the appointees were women, it is hardly inspiring, and it is quite understandable that the argument has been made that the nominations are unconstitutional for discriminating against women contrary to Article 27 of the Constitution.

Hon. Members, on Thursday, 10th February 2011 when ruling on the point of order raised by Mr. Olago on whether or not in the light of the ruling of the High Court delivered by Hon. Justice Musinga on 3rd February 2011 in Nairobi High Court, Petition No.16 of 2011, Centre for Rights, Education and Awareness (CREAW) & Others Vs. the Attorney-General, the matter of the nominations was *sub judice,* I remarked about how identical the issues raised on that occasion were to those raised by the same hon. Member on the 12th November 2009, when he asked the Chair to rule as to whether or not conservatory orders issued by the High Court in Judicial Review Petition No. 689 of 2008 (Samuel Mutua Kivuitu & 22 others – versus - the Attorney-General) amounted to a derogation from the Constitutional principle of separation of powers by the Judiciary.

Hon. Members, I cautioned the House that the conduct of Parliamentary business requires respect for the procedure, traditions, practice and precedents established by the House. I emphasized that the Chair represents the institutional memory of the House to ensure this, and that the Chair could not, therefore, indulge in the luxury of changing positions and departing from practice and precedents, unless the operational circumstances can be shown to be distinctively different.

I say this because once more, I note that we have a precedent which may have some relevance to issues Nos. 5 and 6 on whether there were consultations between His Excellency the President and the Prime Minister as contemplated by Section 29(2) of the Sixth Schedule to the Constitution, and the related questions of what the minimum threshold of consultations should be; whether consultation denotes concurrence, consensus or other measure of agreement, and the import of making the consultation subject to the National Accord and Reconciliation Act.

The matter of the interpretation of the Constitutional provisions of the National Accord and Reconciliation Act was dealt with at length in a Ruling from this Chair on 28th April 2009. As matters would have it, this Ruling was also delivered at the request of Mr. Olago, who had on 23rd April 2009 sought the guidance of the Chair in respect of a dispute that had arisen on the choice of the Leader of Government in this House. Among the issues for determination then, which bear a semblance to the present matter were how any inconsistence between the National Accord and Reconciliation Act and the Constitution was to be resolved, and what the Speaker was to do in the event that he received two different letters from the same Government designating different persons as Leader of Government Business in the House.

Hon. Members, on that occasion I observed that the Speaker acts as a neutral arbiter, not a protagonist in the arena that is the House, and that any Member may at any time raise to the Speaker a question on the constitutionality of any action or set of circumstances in this House and it was always open to the Chair to entertain and rule on the merits of such questions. I made it clear that the National Accord and Reconciliation Act was an integral part of the Constitution of Kenya and quoted some words for it, which you will bear with me as they warrant recitation:-

> *"Given the current situation, neither side can realistically govern the country without the other. There must be real power sharing to move the country forward and begin the healing and reconciliation process. With this agreement, we are stepping forward as political leaders to overcome the current crisis and set the country on a new path. As partners in a coalition Government, we commit ourselves to work together in good faith as true partners through constant consultation and willingness to compromise. This agreement is designed to create an environment conducive to such a partnership and to build*

mutual trust and confidence. It is not about creating positions that reward individuals; it seeks to enable Kenyan political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far reaching reform agenda; to address the fundamental root causes of recurrent conflict and to create a better, more secure and more prosperous Kenya for all".

I ruled then that in considering the matter of multiple letters received by the Speaker designating two different individuals in the position of Leader of Government Business, that the House and the country at large needed to understand that the changes made in the Constitution with introduction in it of the provisions on the National Accord and Reconciliation Act had fundamentally altered the nature and character of Executive decision making in this country. As hon. Members are aware the Constitution of Kenya, promulgated on 27th August, 2010 saved and continued the National Accord and Reconciliation Act until the first elections are held.

Hon. Members I have noted, and so have you, I am sure, that a good part of the debate on the constitutionality of the nomination process has centered on whether or not His Excellency the President consulted the Right Hon. Prime Minister on the nominations, the duration and extent of consultations and whether there was or there was required to be any concurrence. Section 9(2) of the Sixth Schedule has been much quoted in the contributions in the House. Although it is quoted in my write up, I will not read it.

Because of this sub-section, there have been a number of suggestions on the meaning of consultations. Numerous precedents have been cited from the Commonwealth and beyond. I acknowledge with much appreciation that I have been referred by friends and well-wishers and very well meaning ordinary Kenyans, to learned commentaries and opinions on how courts and tribunals in various jurisdictions have interpreted the phrase "after consultation". Having considered all these, I do think that the over-emphasis on the meaning and scope of consultation can lead to a blurring of the larger picture on this matter. I also think that the matter is probably not nearly as complex as it has been made out. In legal circles, it is said that precedence should not be invoked unless they are *pari materia* with the matter being dealt with. This means that you must compare only comparable situations and circumstances.

Hon. Members, the consultation required of the two Principals in our Constitution is subject to the National Accord and Reconciliation Act. With respect, I have been unable to find, because there have to exists, a precedent from anywhere in the world where "consultation" is made subject to an identical standard as our National Accord and Reconciliation Act. The threshold of consultation and its parameters are demarcated in the National Accord and Reconciliation Act as cited above. After careful consideration of this matter, doing the best I can, weighing one thing against another, it

is my considered opinion that the required standard of consultation is not so high as to mean concurrence or agreement and thereby become a recipe for deadlocks and brinkmanship. In my estimation, considering Article 259 (1) of the Constitution and the events that led to the Accord, I am convinced that the minimum consultation expected and required by Section 29 (2) of the Sixth Schedule to the Constitution is one that results in "compromise".

Indeed, hon. Members, willingness to compromise is the center piece of the National Accord.

In my ruling of 28th April 2009, I held that in the current state of our Constitution, the office of the Speaker of the National Assembly was not well suited to determine and, therefore, I declined to determine who the Leader of Government Business was to be in a situation where I had received two letters from His Excellency the President and the Prime Minister respectively.

Hon. Members, may I, with your indulgence, reaffirm that the Chair remains faithful to the oath of allegiance I took on 2003.

Hon. Members, I thank you.

6. SECOND READING OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION BILL TO PROCEED

26th April 2011

Hon. Members, you are aware that Committees of this House are constituted by the House at the commencement of the relevant Sessions. The House Business Committee brings to this House a Motion which is then endorsed by the House to constitute different Committees. The Committee on Justice and Legal Affairs was constituted in that manner. If the House wishes to disband the Departmental Committee on Justice and Legal Affairs, then the same process will have to be followed. I did give directions to the effect that the Speaker will not disband or reconstitute a Committee. I want this re-emphasized and made absolutely clear. There is a process, precedence, practice, tradition and custom by which this House has constituted Committees and the Speaker will not do so.

Hon. Members, with respect to committal of a Bill to a Committee, I did address this matter as recently as last week. Standing Order No. 111(1) provides very clearly and the hon. Member has referred to it, that a Bill after it is read the First Time stands committed to the Committee. That is what has happened in this case. The Bill, even as we speak in the House this afternoon, stands committed to the Departmental Committee on Justice and Legal Affairs. As to whether or not that Committee is functioning, I am afraid, I am a stranger to that position. Until I am informed by the Committee through normal, usual and regular channels that the Committee is dysfunctional, I will not accept that to be the position.

With respect to a vote of no confidence against the Chair of the Committee, that is a matter that is clearly provided for and anticipated by the Standing Orders.

Standing Order No.175 provides for a Vote of no confidence in the chairperson or vice-chairperson of the Committee. Standing Order 175(1) states as follows:-

> *"By a resolution supported by a majority of its Members, a Committee may resolve that it has no confidence in the chairperson or vice-chairperson and such a resolution shall be reported to the Liaison Committee which shall, as soon as it is practicable, arrange for the election of a new chairperson or vice-chairperson as the case may be."*

It says that the vote of no confidence shall be by a resolution supported by the majority of its Members. This, therefore, presupposes that the Committee will have a meeting at which a majority of its members are present and they will resolve that they have no confidence in their chairman or vice-chairman.

What I did receive in my office, just copied to me, was a notice which was addressed to the Clerk of the National Assembly saying that eight Members of the Committee on Justice and Legal Affairs are unhappy and have no confidence in their chairman. It is a notice to the chairman and it is asking the Clerk to convene a meeting of the Committee.

The Clerk went ahead and convened a meeting of the Committee, but the meeting did not conclude. So, there is no resolution of the Committee. There has to be a resolution with minutes indicating that the Committee has so resolved. So, until such time that we have that resolution of the Committee, the chairperson of the Liaison Committee cannot convene a meeting for the election of another chair.

I wanted to bring the House up to speed on this matter because there has been a bit of a blame game and playing of ping pong; you know one person hitting the ball that way and the other hits it the opposite way. That will not do. Let us follow the Standing Orders as they are, indeed, as I have referred to them.

In the meantime, we will proceed to take the Second Reading of this Bill or any other Bill that may come, for that matter, because we have previously done so. It is, therefore, a practice of this House that where a Committee delays in filing its report, then the House will continue with the Second Reading. But the report of the committee will be taken on board as and when it comes before the Committee of the whole House. It is during the Committee of the whole House that Bills are amended. That is the way to proceed because it is practical. The business of this House must continue. As much as possible, all of us ought to co-operate to ensure that this House executes its mandate.

Even the Standing Orders, for that matter, are supposed to be facilitative. They are supposed to be enabling; not obstructive. I urge all hon. Members to please be kind to this nation. Let us do what we must do because Kenyans have entrusted us with legislative authority. I direct that we proceed with the Second Reading.

7. REFERRAL OF IEBC BILL TO CIOC IN PLACE OF COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

11th May 2011

As you are all aware, the Departmental Committee on Justice and Legal Affairs has had some challenges that have adversely affected its operations. Despite my previous rulings and pronouncements from the Chair on this state of affairs, the issues facing the Committee have yet to be resolved and the timely passage of the legislation required under the Constitution, and which should be considered by the Committee, will inevitably be affected.

The House Business Committee (HBC) during its sitting held yesterday, Tuesday 10th May 2011, expressed concern on the inability of the Departmental Committee on Justice and Legal Affairs to consider Bills referred to it and other matters within its purview and requested the Speaker to explore other ways of facilitating business in the House, including the study and review of the Independent Electoral and Boundaries Commission (IEBC) Bill which has not been attended to by the said relevant Committee. In the light of the above, and after consultations with and the concurrence of the HBC, pursuant to Standing Order No. 1, I direct that the Independent Electoral and Boundaries Commission (IEBC) Bill, 2011 be committed to the Constitutional Implementation Oversight Committee (CIOC) for study and review and that the Committee should report to the House not later than 23rd May 2011.

In taking this decision, I have taken cognizance of the fact that the CIOC is charged, amongst other things, with addressing any impediments to the process of implementing the Constitution pursuant to the provisions of Section 4 of the Sixth Schedule of the Constitution. Given that the number and Membership of the Committee is constituted as it is, I have no doubt that the Committee will address adequately issues pertaining to the Bill. I once again request all Members who may wish to propose amendments to the Bill to now submit them to the CIOC for consideration along with the ones that had earlier been submitted to the Office of Legal Counsel.

I thank you.

8. VETTING OF NOMINEES FOR POSITIONS OF CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND DIRECTOR OF PUBLIC PROSECUTIONS

2nd June 2011

Hon. Members, you will recall that on 18th May 2011, I informed the House that His Excellency the President had, after consultations with the Right Hon. Prime Minister, nominated persons for approval by the National Assembly for the positions of the Chief Justice, the Deputy Chief Justice and the Director of Public Prosecutions, pursuant to the provisions of Articles 166(1)(a), 262 and 157(2) read together with Section 24(2) of the Sixth Schedule of the Constitution.

The House Business Committee (HBC), during its meeting held on Tuesday, 31st May 2011 observed that while efforts were being made to address the matter of the Departmental Committee on Justice and Legal Affairs, the option of having appointments considered by the Constitutional Implementation Oversight Committee (CIOC) should be explored. The Committee requested the Speaker to consider the proposal and give appropriate directions in keeping with the letter, spirit and intent of the Constitution, in particular the provisions of Article 259(1).

In dealing with this matter, I wish to address the role of Committees in Parliamentary business and the need for Parliament to discharge the responsibilities bestowed upon it by the Constitution. Hon. Members, Parliamentary Select Committees perform specific functions which the House itself, by reason of the manner it is set up and how it deliberates its business, is not suited to do, like examining witnesses and sifting evidence. Committees are creatures of the House from which they derive their authority. The House appointed Members of the CIOC to perform certain tasks on its behalf pursuant to the provisions of Section 4 of the Sixth Schedule to the Constitution.

Hon. Members, while we acknowledge that some Members of this Committee are Cabinet Ministers, it is worth noting that they were appointed by virtue of being Members of Parliament and not in their capacities as Cabinet Members to perform a specific constitutional duty for the Legislature and not the Executive (that is emphasized).

By practice, Ministers have not normally served on Committees other than the Procedure and House Rules Committee; the Speaker's Committee; the Committee on Privileges; and the Pensions Management Committee. However, we are aware that Ministers have served in the previous Parliamentary constitutional review committees where they did commendable work on behalf of the House. Thus, it is my considered view that notwithstanding the presence of Members of the Executive in the CIOC, this

Committee has mandate and responsibilities as spelt out under Section 4 of the Sixth Schedule of the Constitution to ensure full implementation of the Constitution.

In light of the above and with the concurrence of the HBC, I direct that the three nominees, namely, Dr. Willy Munywoki Mutunga for Chief Justice, Ms. Nancy Makokha Baraza for Deputy Chief Justice and Mr. Keriako Tobiko for Director of Public Prosecutions together with their curriculum vitae be referred to the CIOC for consideration.

Given the provisions of Standing Order No.180 which allows public access to Committees' proceedings and, in order to comply with the provisions of Article 73(2)(d) of the Constitution which underscores accountability to the public for decisions and actions taken, the Chair urges members of the public who may wish to submit memoranda to the Committee in respect of the three nominees to do so not later than Tuesday, 7th June 2011.

Due to the urgency of the matter, the Committee should table its recommendations in the House by Wednesday, 8th June 2011.

9. FINANCE MINISTER TO PRESENT 2011/2012 FINANCIAL STATEMENT AS A MINISTERIAL STATEMENT

7th June 2011

Hon. Members, on 31st May 2011, hon. Martha Karua rose to seek guidance of the Chair on the application of certain provisions of the Constitution and, in particular, Section 2 of the Sixth Schedule to the Constitution, relating to the suspension of certain provisions of the Constitution which are recited at that Section. Hon. Karua asserted that, to her mind, the provisions of Article 221 of the Constitution relating to Budget Estimates and the Annual Appropriation Bill was not one of the provisions that was suspended and that, in her view, the Deputy Prime Minister and Minister for Finance could not read the Budget to Parliament because under the provisions of the new Constitution, which now apply, there will be no more reading of the Budget. Hon. Karua contented that despite this, she had seen that the Deputy Minister and Minister for Finance had publicly stated that he would be reading the Budget on 8th June, 2011. Hon. Karua, therefore, sought the ruling of the Chair on whether it was in order for the Deputy Prime Minister and Minister for Finance to contemplate reading the Budget in the House and the attendant fanfare and ceremony. The Chair sought to hear some views on the matter and the same were put forward by a number of Members including Mr. John Mbadi; Mr. G. Nyamweya; Dr. Machage; Mr. Gitobu Imanyara; the Minister for Justice, National Cohesion and Constitutional Affairs, Mr. M. Kilonzo; Mr. Abdikadir; Mr. Namwamba; the Minister for Education, Prof. Ongeri; the Minister for Transport, Mr. Kimunya and the Minister for Lands, Mr. Orengo. In summary, the following propositions were urged. May I state at the outset that I make no comment at this point as to their respective merits or demerits.

1. Article 221(1) of the Constitution requiring the Cabinet Secretary responsible for Finance to submit to the National Assembly estimates of the revenue and expenditure of the national Government for the next financial year, at least, two months before the end of each financial year; and Article 221(4) and 221(5) requiring public participation in the budget-making process have not been observed.

2. That Kenya has an international obligation under the East African Treaty to read the Budget at the same time as the other partner States.

3. Pursuant to Section 6 of the Sixth Schedule to the Constitution, the provisions of the former Constitution concerning the Executive continue to operate until the first General Elections held under the new Constitution and that those provisions recognize the Deputy Prime Minister and Minister for Finance and a window

can, therefore, be found to permit the Minister to read the Budget even if Article 221 has not been complied with in full.

4. Article 221 is operative and the budget process as stipulated under the new dispensation requires that the estimates referred to in Article 221 should be submitted to the House and subsequently referred to the relevant Departmental Committees.

5. That a failure to read the Budget could lead to a paralysis and in the absence of resources to run its services.

6. That the Budget consists of the proposals that the Government wishes to put forward in terms of policies to be pursued in the following year and its reading is not inconsistent or incompatible with the presentation of the estimates of revenue under Article 221of the Constitution and can be done with or without the existence of Article 221.

7. That the law contemplated in Article 221(2)(b) to govern the form and procedure of Estimates of Revenue and Expenditure has not been passed and that that Article is, therefore, inapplicable. From these arguments, I have determined the following as the key issues requiring my ruling or directions:-

   (a) Whether or not Chapter 12 of the Constitution of Kenya, 2010 is in force and operation and whether in particular Article 221 of the Constitution is applicable to the current budget process.

   (b) Whether it is lawful in the present state of the law for the Deputy Prime Minister and Minister for Finance to read the Budget in the House and, if so, whether it is imperative that the Budget is read on the same date as the other partner States of the East African Community (EAC).

   (c) What the correct budgeting process at present should be.

Hon. Members, I wish to acknowledge that while preparing my ruling on these issues, I received, on 6th June, 2011 correspondence from the Commission on the Implementation of the Constitution (CIC) under the hand of its chair person, Mr. Charles Nyachae, attaching an advisory opinion on the matters at hand and requesting my consideration of it. I now propose to make my findings and comments on each of these issues.

Hon. Members, on issue No.1 on whether or not Chapter 12 of the Constitution of Kenya, 2010 is in force and in operation and whether in particular Article 221 of the

Constitution is applicable to the current budget process, these two issues can be collapsed into one and disposed of together. The general proposition, I think, is that unless a provision of the Constitution has been expressly or by absolutely necessarily implications suspended, it is in force and applicable. Sections 2 and 3 of the Sixth Schedule to the Constitution do not suspend the operation of Chapter 12 except in so far as it relates to devolved Government. Hon. Members, Chapter 12 of our Constitution relates to public finance. Sections 2 and 3 of the Sixth Schedule to the Constitution do not suspend the operation of Chapter 12 except in so far as it relates to devolved Government. Accordingly, I take the position that the Chapter is in force inclusive of Article 221 and, therefore, to the extent that the Estimates of Revenue and Expenditure for the next financial year were not submitted to the National Assembly, at least, two months prior to the end of this financial year, this provision of the Constitution has been breached. It follows that any requirement of Article 212 which under the Constitution ought to have been met, such as that on public participation at Article 221(5) and requirement for discussion and review of the Estimates by a Committee of the Assembly prior to their consideration by the Assembly at Article 221(4), must be complied with. The argument that it is impossible to comply with Article 221 or other provisions of Chapter 12 on the grounds that there is not at present a Cabinet Secretary for Finance is not correct. Pursuant to Section 31(2) of the Sixth Schedule to the Constitution, provision is made for the position of Cabinet Minister to be regarded as the position of Cabinet Secretary in terms of the application of Article 221 of the Constitution. On whether it is lawful in the present state of the law for the Minister for Finance to read the Budget in the House and if so, whether it is imperative that the Budget is read on the same date as the other partner states of the East African Community, the spirit, letter and intent of the new Constitution as set out at Chapter 12 on Public Finance completes the transition of our Parliament from a budget approving legislature to a budget making one. It brings openness and accountability to the budget process, strengthens the separation of powers and ensures fiscal parity between the three arms of Government.

The Constitution as promulgated on 27th August 2010 deviates from Section 100 of the former Constitution which required the Minister for Finance to cause to be prepared and laid before the National Assembly in each financial year Estimates of the revenue and expenditure of the Government of Kenya for the next following financial year.

Now under Article 221 of the Constitution, the Cabinet Secretary responsible for Finance now read; The Deputy Prime Minister and Minister for Finance, is required to submit to the National Assembly Estimates of revenue and expenditure of the national Government. The Estimates are to be considered together with those of the Judicial Service Commission as well as those presented by the Parliamentary Service Commission (PSC). The provision further stipulates that the Estimates shall stand committed to the relevant Committees, which Committee, in finalizing its report is

required to seek the views of the public. The requirement under Article 221 of the Constitution, that the Estimates of Revenue and Expenditure be submitted at least two months before the end of the financial year, aims to ensure that there is adequate time for the legislature to seek the views of the public and their participation in the budget making process. The delay in submission of the Estimates has an adverse effect on and, indeed, is a contravention of this important constitutional objective. In a period of transition, it needs to be recognized that it is possible to see that delay can be occasioned by the dynamics of socializing the new constitutional order.

The question naturally arises: What should be done when a delay occurs in a matter where constitutional timelines are expressly stipulated and further where as in the circumstances of Article 221(1); no person or authority has been mandated to extend the period within which the Estimates may be submitted to the House? A delay in such a situation is highly regrettable and must be strenuously avoided. But if, despite every effort, it does occur, I think that the obligation at Article 3 on every person to respect, uphold and defend the Constitution would demand that the person responsible for the delay or other failure seizes every available means to repair and mitigate that delay or failure. It is gratifying that in the present matter, the delay in submitting the Estimates of Revenue and Expenditure has at least been mitigated by the fact that as we speak, these Estimates have already been submitted to the House.

Hon. Members, the question of whether or not to have a Budget Speech in the form and style that all Kenyans have been accustomed to since Independence has been raised. On the one hand, the argument has been made that the spirit and provisions of the new Constitution, including the reforms in the budget making and approval process, leave no room for a Budget Speech and the attendant fanfare and ceremony. By this account, a Budget Day, if any, is the day when the Minister submits his tax proposals to the House and subsequently publishes a Finance Bill for introduction in the House and the debate on this Financial Statement is under the provision of Standing Orders No.147 and 148. Support is found for this proposition in the precedent set on 22nd March 2011 when the House reconvened for the continuation of the Fourth Session in a Special Sitting, foregoing some of the traditional events associated with the State Opening of Parliament on the occasion of a new session.

Another point of view and, indeed, some hon. Members have argued so, is that the reading of the Budget and any accompanying ceremony are not inconsistent or incompatible with the Constitution. The answer may lie somewhere in between. It commences with an appreciation that the Budget Speech is, as it were, an outline of the state of the economy and the financial environment that the country is operating in. The Budget indicates the total expenditure and key areas earmarked by the Government for the raising of funds. This aspect roughly corresponds with the budget policy statement submitted to the House in the month of March this year.

The second part of the Budget Speech normally concentrates on the measures that the Minister intends to employ to address taxation and the effect thereof on various forms of investment or business in the country. It further covers those measures which the Government seeks to employ to raise all the required finances, including action to bridge any deficits. It may be argued that it is this part of what is traditionally the Budget Speech which is presently outstanding and which is important to propound as it has an impact on our partnership in the East African Community. This has no doubt instructed the argument that it is a constitutional imperative that our Budget be not only read, but also that it be read on the same day as those of the other partner States. This last proposition may be desirable, perhaps even prudent, but it certainly does not rise to a constitutional dictate.

Article 2(6) of the Constitution does not subordinate the Constitution of Kenya and our laws to our treaty obligations. It requires that our treaty obligations form part of our law under our Constitution. The effect of this is to make it the obligation of the State to ensure that we not only meet our treaty obligations, including those under the treaty for the East African Community but also that we do so without violation of our own Constitution. Indeed, Article 2(6) is in my view, so worded as to try to avoid the possibility of such conflict. In any event, I think it is indisputable that a need for the announcement of the Government's fiscal policy on the same day as the other partner States does not lead to any corresponding need to adopt or maintain the same style or form of announcement as is in the case in those States or has been done in the past. I should hasten to add, however, that as this House is in charge of its own affairs so long as the Constitution and the laws are not broken in letter or spirit and so long as the Standing Orders of the House are observed, it is not the place of the Chair to prevent the Minister for Finance or any other hon. Member from making a Statement in this House. I must emphasize though that the important point is that any statement or speech and any ceremony or fanfare attending thereto, can only be such as is countenanced by the Constitution as it stands, the laws and the Standing Orders. On what the correct budgeting process at present should be, I will say the following: Hon. Members, given the position that I have taken, that Article 221 is in force and operational, it follows that it is my considered opinion that the budgeting process is broadly speaking as set out in that Article.

It is worth noting that certain sections of the old Constitution relating to the Legislature are saved under Section 3 of the Sixth Schedule of the Constitution and it further follows therefore, that Standing Orders providing for financial procedures in the House will continue to apply with such alterations, adaptations and exceptions necessary to bring them in conformity with these provisions. As hon. Members are aware, the matter of the budget process has generated extensive national debate and the Chair, therefore, takes the liberty to set out the following roadmap in the hope that it will help to guide

the budgeting process going forward. The budget process, from the point of view of this House, commences with the presentation of a Budget Policy Statement pursuant to Standing Order No.143, which the House dutifully considered and adopted on 3rd May 2011. This is followed by submission of the Estimates to the National Assembly as has been belatedly done, which Estimates, once laid in the House, should stand committed to the relevant Committees of the House for review. This process should include a macro review of the Estimates by the Budget Committee.

As a third step, subject to abiding by the Constitution and the laws, I think that during the transition period, while the Deputy Prime Minister and Minister for Finance is a Member of this House, he may, if he is so minded, present his Financial Statement to the House and upon conclusion, lay the necessary documents in the House for review by the relevant Committee, together with the Estimates. Clauses No.4 and 5 of Article 221 of the Constitution should thereafter come into play. Before the National Assembly can consider the Estimates of revenue and expenditure, these have to be discussed and reviewed by the relevant Committee. Further, as provided by the Constitution under Article 221(5), in renewing the Estimates, the Committee shall seek representations from the public. Considering the late submissions of the Estimates this year, the Budget Committee will need to move with dispatch to nevertheless, hear the public in a structured manner on issues they think the Budget has not adequately taken care of. The other Departmental Committees will, in the same vein, need to urgently convene and allow the public access to their review meetings. They will consider, discuss and review the Estimates committed to them and report to the House in accordance with Standing Order No.152 (2).

Although it is not expressly provided for, the committal of the Estimates to the Budget Committee means that as a matter of course, if the spirit of the Constitution is to be observed, the next step should be that the Budget Committee will require to lay its report on the Estimates in the House for debate and adoption before the House can move to the Committee of the Whole House. The Report could be laid on a Motion that "this House do adopt the Report of the Budget Committee on the Estimates of Revenue and Expenditure, laid in the House by the Judicial Service Commission, the Parliamentary Service Commission and the Executive on--- (date)."

The Committee of Supply should then commence and proceed as provided for in Standing Orders No.153 to 155. It is noted that as Ministers are at present still Members of the House, they will move their votes during this transitional period. But in future, starting from the next Parliament - that is the Eleventh Parliament - depending on amendments made to the law and the Standing Orders, it may have to be the Chairs of respective Departmental Committees or Members designated by the leaders of the House to do this. Once the Estimates have been approved, an Appropriation Bill

should be introduced to the House by the Minister for Finance or in future, possibly, by the Chairperson of the Budget Committee.

Hon. Members, the roadmap I have presented is enough, I hope, to discount the claim that the law contemplated in Article 221(2), paragraph (b), to govern the form and procedure of the Estimates of Revenue and Expenditure has not been passed and that, on that basis, the Constitutional provisions are, therefore, inapplicable. It has been argued by the Commission for the Implementation of the Constitution - and I agree and want to persuade all of us to agree – that Article 221, being a constitutional provision, must take precedence over legislation and that, in any case, the purpose of passage of legislation is to give further effect to the provisions of the Constitution and not to contradict or take away that which the Constitution has expressly mandated. So, please, note that whatever law you pass to operationalize the Constitution only gives effect to the Constitution. It does not take away from the Constitution.

Hon. Members, invoking Section 7 of the Sixth Schedule to the Constitution, it is clear that it is possible and necessary to use the existing laws, including the Fiscal Management Act of 2009 and the existing Government Financial Regulations and Procedures, to navigate the Budget process. I think I should also emphasize that the Budget process has also got inbuilt mechanisms for dealing with unforeseen events in order to avoid the possibility of what, sometimes, is described as a financial shutdown. Article 222 of the Constitution provides that the National Assembly may authorize the withdrawal of money from the Consolidated Fund, in the event that the Appropriations Bill may not be assented to or is unlikely to be assented to by the beginning of a new financial year. This is the Vote on Account that is limited to no more than one half of the amount included in the Estimates of Expenditure for the particular year as tabled in the National Assembly.

Hon. Members may wish to note now that the doctrine of separation of powers has played out in recent days, as the Executive, Legislature and Judiciary have all been seized of the matter of the Budget process concurrently, each feeling at liberty to deal with it in its own right and according to its constitutional limitations. It is also useful to observe that the decision of the Cabinet, the Minister and Treasury about how to proceed in this matter was based on their interpretation of the Constitution and its application to the matter. They did not go to court to seek the interpretation of the court as to how they should proceed. The court, for its part, at the insistence of a citizen, has proceeded to deal with the matter as it considers appropriate. Parliament now needs to interpret the Constitution and determine how it wishes to proceed. This is as it should be. There is neither contradiction nor conflict in these concurrent processes. However, if there is discordance between these interpretations or if a person is aggrieved by any of these interpretations, that person still has recourse to the courts

for a judicial interpretation and determination. I will, once again, pause for those at the door to come in.

In the meantime, I wish to assure Members of the Cabinet that the Chair will always give them the opportunity to make Statements in the House, touching on the policies of their Ministries. The Chair will similarly avail opportunity for the House to interrogate those policies. Indeed, in respect of the issue at hand, the Chair will have expected that the Minister for Finance will indicate, on the Floor of the House, the difficulties, if any, that the Treasury was facing in meeting the timelines for submission of the Estimates of the National Government and the actions that were being taken to mitigate the situation. The following is directed to the Deputy Prime Minister and Minister for Finance. It is unprogressive, I must say, for the Deputy Prime Minister and Minister for Finance to seek to speak to among others, his colleagues, let alone Kenyans, on a matter pending before Parliament, away from the House. I will urge all Ministers to use the opportunity afforded by this House to inform Members and the public at large, of the management, activities and operations of their Ministries, rather than doing so through press conferences or other unhelpful fora.

Hon. Members, I am of the view that in the matter of the application of the transitional provisions in respect of the Public Finance Chapter, it is a question of the choice of constitutional philosophy. For my part, I am satisfied that in the present matter, perhaps more than ever, there is need for recourse to Article 259(1) of the Constitution – and I am sure the Minister for Justice, National Cohesion and Constitutional Affairs, the Attorney-General and the rest of us will agree – which requires the Constitution to be interpreted in a manner that:-

> *"(a) promotes its purposes, values and principles;*
> *(b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;*
> *(c) permits the development of the law; and*
> *(d) contributes to good governance."*

Hon. Members, if upon this interpretation it is conceded, as I think it must be, that the regime of the new Constitution, in respect of the Public Finance Chapter of the Constitution is applicable, it must follow that every effort must be made to abide by the provisions of that Chapter. In a matter as important as the Budget process, the good will of everyone is required and expected. In this respect, the Chair notes with concern that this entire controversy was avoidable in the first place. It has been claimed with evidence provided that the Treasury had, in fact, correctly understood the constitutional obligation imposed on it and had issued Treasury Budget Circular No.2 of 2011 dated 17th March 2011, to all Accounting Officers. The contents whereof were categorical that the Circular was "intended to guide Ministries, departments and

other Government Agencies (MDAs) on planning for the Financial Year 2011/2012 Budget which would be presented to Parliament in accordance with Article 221 of the new Constitution". That is a circular issued by the Treasury on 17th March, 2011, emphasizing that the Treasury was aware that Article 221, in fact, applied. It is unclear at what point there was departure from this thinking and it must be hoped that this will not recur. It also emerges that as the constitutional deadline for submission of Estimates in April approached, the Treasury sought, and apparently obtained from the relevant Parliamentary Committee, a one month extension of the period for the submission of the Estimates. It should be quite clear that no person or organ has the authority to enlarge constitutional deadlines and any such purported extension is a nullity in law for all purposes. It must similarly be hoped that this will not recur. Everything notwithstanding and arising from all the foregoing, hon. Members, I wish to now give the following directions:-

1. That the Minister for Finance shall be given an opportunity on Wednesday, 8th June, 2011, at 3.30 p.m. to give a Ministerial Statement outlining an overview of his measures for tax proposals and other measures to finance the Budget. The Minister shall thereafter lay the necessary documents on the Table of the House on a Motion that the measures be referred to the Budget Committee. The debate on this Motion shall proceed in terms of the Standing Order No.148 (2).

2. The Estimates submitted by the National Government together with the Estimates submitted by the Parliamentary Service Commission and the Judiciary shall be referred to the Budget Committee and the Departmental Committees in accordance with Standing Order No.152 while the Ministerial Statement and any document laid by the Minister for Finance shall be referred to the Budget Committee. All the Departmental Committees should review the Estimates as has been the case before and submit a summary of key issues to the Budget Committee as well as detailed reports on the Estimates to the House within 21 days. In conformity with the provisions of Article 221(5) of the Constitution, all the concerned Committees will be required to seek and receive representation from the public.

3. Upon the tabling of the reports of the Departmental Committees on the Estimates, the Committee of Supply will commence as per the provisions of Standing Orders No.153 to 155 and based on the Supply resolutions, the Minister for Finance will be required to introduce an Appropriations Bill in the House to give legal effect to those resolutions.

4. In view of the fact that the Appropriations Act for the incoming financial year will not have been enacted by the beginning of the next financial year, it is expected that the Minister for Finance shall move a Motion of Vote on Account

pursuant to Article 222 of the Constitution and Standing Order No. 155(7) on or before 26th June, 2011

5. The Finance Bill that will have been published following the Financial Statement shall be referred to the Departmental Committee on Finance, Planning and Trade for consideration and necessary action.

Hon. Members, these directions will continue to be in place during the life of this Parliament along with the relevant Standing Orders and in conformity with other financial statutes governing the Budget process as provided for in the Constitution.

I thank you.

10. FINANCE MINISTER TO STICK TO POLICY STATEMENT ON REFERRAL OF FINANCIAL STATEMENT

9th June 2011

Mr. Deputy Speaker:
Hon. Members, you realize this is a very weighty matter. It is setting of a precedent in this country. I do agree with the number of hon. Members, who did indicate, that actually, the Constitution takes precedence over any other written rule or law. As far as the commitment of the Financial Statement is concerned, on the Annual Estimates, Standing Order No. 152 (1) is very clear; it stands committed to the Budget Committee, the relevant Committee for that matter. As far as the debate is concerned, the hon. Khalwale indicated that if it is not an Allotted Day, then why do have three days? Standing Order No.148 (2) says:

> *"The debate on the Financial Statement on the Annual Estimates shall be limited to three days exclusive of the Mover's Speech and reply."*

It is limited to three days; you can do it in a day, you can do it in a half day, and you can do it in any number of days so long as is not more than three days. As far as the Constitutional provision is concerned, yes, Article 221(3) says:-

> *"The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively"*

Sub-article (4) says:-

> *"Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly."*

Hon. Members, my ruling on this is guided by two things; one, a precedent setting in which the Speaker did rule on the admissibility of this Motion. Two, Article 221(4) talks about the National considers the estimates as opposed to the financial statement. The financial statement, in the opinion of the Chair, is the policy that has been engaged in the construction of the Estimates. However, I stand to warn the hon. Minister that, indeed, he has to confine himself to the Policy Statement. In the event he proceeds and moves into the Estimates themselves, then clearly, you do appreciate how the Chair will rule on the same.

11. HIGH COURT JUDGMENT ERODES THE SUPREMACY OF PARLIAMENT

4th August 2011

Hon. Members, on 21st July, 2011 the hon. Member for Kisumu Town West, Mr. Olago, rose on a point of order seeking direction from the Speaker on the essence of the judgment delivered by Her Ladyship Justice Kalpana Rawal on 14th July, 2011 in Nairobi High Court, Civil Case No.1250 of 2004 George Odinga Oraro Versus Gor Sungu.

In his point of order, Mr. Olago raised the following issues:-

(i) That the judgment erodes the supremacy of Parliament and whittles down the principle of Parliamentary privilege under the National Assembly Powers and Privileges Act, Cap.6 of the Laws of Kenya and Article 117 of the Constitution.

(ii) That the Speaker should protect Parliament from the Judiciary.

(iii) That Members of Parliament be allowed to ventilate on this issue.

(iv) That the matter be referred to the Parliamentary Service Commission (PSC) for appropriate action and the Commission reports back to the House.

Hon. Members, you will recall what followed were a number of interventions by five more hon. Members who rose to speak on the point of order by the hon. Member for Kisumu Town West providing various additional perspectives on the matter. I have carefully considered the point of order raised by the hon. Member for Kisumu Town West and the contributions made by other hon. Members on the Floor and I have also looked generally into the principle of Parliamentary powers and privileges; a privilege in the legal sense is an exemption from some duty, burden, Erskine May an authority in Parliamentary practice states:-

> *"Parliamentary privilege is the sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by which members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land is to a certain extent an exemption from the general law."*

Hon. Members, the individual privileges in the context of Parliament include freedom of speech, freedom from arrest in civil process and the privileges relating to persons

summoned as witnesses. Underlying the doctrine of parliamentary privilege is the justification that these privileges are necessary for the conduct of Legislatures' business and that, for that to be effective Parliament must enjoy a certain autonomy from control by the Executive and the Judiciary. The basic concept underlying parliamentary privilege is the need to ensure so far as possible that a Member of the Legislature and witnesses before Committees of the House can speak freely without fear, that what they will say will later be held against them in court. This freedom of speech is conferred for the benefit of the parliamentary system with the purpose of safeguarding the integrity and effectiveness of this key democratic body. Hon. Members, be that as it may, I wish to inform you that my office is in contact with the former Member for Kisumu Town East, Mr. Sungu, who has informed me that he has filed a notice of appeal against the ruling by the learned judge and that he intends to proceed to the Court of Appeal and challenge the entire decision by Justice Kalpana Rawal. The former hon. Member has also written to my office reiterating generally the matters raised by Mr. Olago and requesting for assistance by Parliament. Considering that the former Member for Kisumu Town East Constituency has already preferred an appeal against the judgment by the learned judge, I do not find that the interest of justice would be served by a pronouncement by the Speaker on this matter at this time, conscious as I am, that the matter is sub judice. I, therefore, stay my ruling on the matter to allow the former hon. Member to pursue the legal processes to their logical conclusions. I do, however, reserve the right to pronounce myself as sought by this House at the appropriate time. May I add that since completion of this communication, this matter has been raised before the Parliamentary Service Commission and that it is considering various options at its disposal among them as to whether or not Parliament can come to the aid of the former hon. Member in whatever manner.

12. ERRORS IN THE PUBLISHED ELECTIONS ACT, 2011

3th October 2011

Mr. Deputy Speaker:
Hon. Members, on Tuesday 11th October 2011, hon. Mungatana rose on a point of order seeking urgent corrective measures on what he described as "a grave error" reflected at Section 34(9) of the Elections Act of 2011. He further sought directions of the Chair as to the consequences that ought to be visited on the officer, or officers, offending the integrity of the work in Parliament. Hon. Mungatana went on to allege that it had come to his attention that the Elections Act, as published, had been added in Section 34(9) the words, "not", "Presidential" and "Deputy Presidential" which words were not in the Committee Stage amendments that he had moved nor, indeed, anywhere else and that the effect of this was to alter completely the intent of the amendments that Parliament passed.

To support his claims, hon. Mungatana tabled the following documents:-

(a) A copy of the relevant page of the Elections Bill, 2011 showing the text of Clause 35 of the Bill.

(b) A copy of his Notice of Motion as it appeared on the Order Paper of Friday 26th of August 2011, the day that the House proceeded into the Committee Stage and passed the Elections Bill.

(c) A copy of the relevant page of the HANSARD of 26th August 2011, showing the amendments as passed by Parliament.

(d) A copy of the Elections Act as published showing Section 34(9) with the words, 'not', 'Presidential' and 'Deputy Presidential' allegedly added to the law.

(e) Hon. Mungatana requested that the Speaker rules that the Elections Act, 2011, be immediately returned to the Government Printer and corrigenda be done. Secondly, that an investigation be conducted both in Parliament and the Government Printer with a view to identifying and taking disciplinary action against the officers who may be found to have inserted into the Act words not passed by the House.

The Member for Gichugu, hon. Martha Karua, supported the point of order by the Member for Garsen, hon. Mungatana, but also added a further claim that having gone through the Elections Act as published, she was struck that the penalties for offences

related to elections contained in the Act were not the same penalties passed by the House. She claimed, in particular, that the House had passed a provision that, after serving a three-year jail term for an election offence, a person would not be eligible to serve in the Public Service for ten years. She called for thorough scrutiny of the Elections Act to reveal what she termed as "many other errors" which to her appeared to be a deliberate scheme to alter the contents of the Act. She also called for scrutiny of the Bills passed during the same season. The Member for Kisumu Town, hon. Olago Aluoch weighed in claiming that the discrepancy in respect of Section 34(9) was not an innocent error, but was rather a deliberate and well-orchestrated attempt by public officers, either in Parliament or at the Government Printer, to falsify what the House had deliberated and agreed upon. He supported the call for an investigation and taking of appropriate action. Hon. Members, the Chair agreed that the matters raised by the three Members were weighty and serious and undertook to go through the documentation tabled and the HANSARD and then give a Communication today.

Hon. Members, I wish to state, at the outset, that owing to our recent history in the country, it is quite obvious that any matter that relates to elections needs to be approached with great sobriety and careful attention. Indeed, all Members will be aware that this matter has been given extensive coverage in the print and electronic media with each media house giving a different perspective to it. Some media houses even went so far as to lay the blame at the feet of the Government Printer and carried the photograph of the individual holding that office. I, therefore, feel that regardless of the audit undertaken and findings which I am about to pronounce, it is important that all Members of this House, the media, and the general public, approach claims made relating to elections with caution. Hon. Members, as I had promised, I have carefully examined the claims made by hon. Mungatana and studied the documents tabled by him. Similarly, I have carefully examined the claims made by hon. Karua. I have also examined the documents entailed in the processing of the Elections Bill from the proceedings on the Floor up to the publication of the Elections Act. The process can be summarized as follows: After a Bill is passed by this House, the Order Paper, the Bill, the HANSARD Report on the proceedings of the day, and the amendments passed as contained in the Votes and Proceedings for the day, are compiled by the Office of the Clerk and send to the Office of the Attorney-General for preparation of the Draft Act to be assented to by the President.

Hon. Members, the Attorney General uses the documents sent to that Office to prepare the Draft Act. When complete, he sends it to the Clerk of the National Assembly for verification and certification. Once certified by the Clerk, the Draft Act is sent to the Attorney General who then presents it to the President for Assent. Once the Draft Act is assented to, the Attorney General forwards it to the Government Printer for publication as an Act of Parliament. I hope you have heard and understood the procedure that we follow in dealing with our Bills, which finally become Acts of Parliament. An audit of

this process and the pertinent documentation has revealed the following:- On the claim by hon. Mungatana that the Elections Bill had provided at Clause 35(9) as follows:- "The party list shall not contain a name of any candidate nominated for an election under this Act." Hon. Mungatana gave notice of an amendment to this clause which appeared on the Order Paper of the day seeking to delete the words, "shall not" and substitute therefor the word, "may". However, when the opportunity to move the amendment on the Floor came, the records of this House show that hon. Mungatana moved his amendment in a further amended form.

I hope you realize that the Chair has no powers to stop somebody from going out of this House! The video and the audio-recording of the relevant part of the proceedings which have been made available to the Chair, and which are available to every hon. Member and the public goes as follows, and I am quoting this verbatim:-

"The Temporary Deputy Chairlady (Dr. Laboso): Hon. Mungatana!

Mr. Mungatana: Madam Temporary Deputy Chairlady, I move to amend Clause 34, Subclause 9---

The Temporary Deputy Chairlady (Dr. Laboso): 35!

Mr. Mungatana: Clause 35, sorry, I stand corrected, Subclause 9 by saying that - and I have given notice that it will be an amended version – "the party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act." Madam Temporary Deputy Chairlady, I was explaining this and, now if the point I wanted to make---

Hon. Members: It is okay! Sawa!

Mr. Mungatana: If it is okay then I do not need to explain!
The Temporary Deputy Chairlady (Dr. Laboso): Mr. Minister, hon. Members, I therefore propose the Question which is that Clause 39 be amended as proposed by Mr. Mungatana.

(Question of the amendment proposed)

(Question, that the words to be left out be left out, put and agreed to)

(Question, that the words to be inserted in place thereof be inserted, put and agreed to)

(Clause 35 as amended agreed to)"

This is our own procedure of disposing of Bills. Clause 35(9) of the Bill as passed by the House then became Section 34(9) of the Elections Act and should have read as follows:-

> *"The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act."*

Instead, the Act as now published shows that the word "not", which this House deleted, remained in the text of this subsection. I hope you understand, hon. Members. From these findings, it is clear that other than the failure to delete the word "not" none of the other claims of a very serious nature made by Mr. Mungatana are true. It is not true that the words "Presidential and Deputy Presidential" were inserted elsewhere into a law passed by Parliament. These words were inserted by the House itself under a Motion by the very same Mr. Mungatana. It is also not true that the word "not" was inserted into the Act by outside forces. This word was in the Elections Bill as it was presented before the House. While the House passed an amendment deleting it, the word was not deleted in the course of the preparation of the Draft Act. This is a different proposition from the allegation that it was a word not found anywhere in the Bill. The word was initially in the Bill, but it was deleted by the House, then someone suspiciously introduced it and inserted it into the Act. That point is key to the understanding of this matter and I repeat this: This is a different proposition from the allegation that it was a word not found anywhere in the Bill, which someone then suspiciously introduced and inserted into the Act. This point is key to understanding this matter. By relying on the Order Paper of the day which contained his initial amendments, as he had proposed to move, rather than as he actually moved them, Mr. Mungatana erroneously came to the conclusion that the words which he himself moved and which the House moved were inserted into the law by persons outside this House. Matters were not helped by his failure to verify the Hansard copy he tabled with the office of the Clerk and to consult the Votes and Proceedings of the day, where the decisions of the House are recorded. On the claims by Ms. Karua, the audit has found no merit in them. She had claimed that penalties passed by this House were altered in the published Act. It is difficult to establish the basis of that claim because no reference was made by the hon. Member either to the Clause of the Bill which this House amended, the amendment which the House passed and its Mover or to the purportedly altered section as now it appears in the published Act. Be that as it may, the audit of documents suggests that Ms. Karua may have been referring to Section 160 of the Elections Act, titled "General Penalties" which was originally Clause 108 in the Bill. That Section provides, in Subsection 3, that a person who is convicted of an offence under this Act shall not be eligible for election or nomination in an election under this Act for a period of five years, following the date of the conviction. The HANSARD shows that Ms. Karua spoke in support of an earlier amendment by Mr.

Mbadi which sought to make the period of ineligibility to ten years. That amendment was, however, further amended and passed by this House on the Motion of the Minister for Lands, Mr. Orengo, reducing the period of ineligibility to five years. There was no amendment passed by this House to bar a person from Public Service for ten years, as Ms. Karua had alleged. It is, therefore, also not true that the penalty passed by this House was altered by persons outside this House.

Hon. Members, the Elections Act was one of the many statutes passed on the last day of the Constitutional deadline for enactment of certain legislations. There was extensive debate on it and numerous amendments were made to it, including amendments on the Floor in a form other than that for which notice had been given on the Order Paper. All the amendment to all the Acts needed to be harmonized and incorporated in the Draft Acts so as to have them presented to the President for assent before midnight on 27th August 2011. The Chair is aware that work on those Bills went on well into the small hours of the morning for several days during that week in August. In those circumstances, one can see how a typographical error resulting in the nondeletion of the word "not" could occur at the Office of the Attorney General in the preparation of the Draft Elections Act. The error was similarly not detected by the officers of Parliament during the verification and certification of the Draft Act. The Chair should not appear to and will, indeed, not tolerate or downplay such errors. The public officers of the Office of the Attorney General and Parliament who process Draft Acts after passage must be reminded to always be on the alert to ensure that no such errors occur. But the Chair is always alive to the fact that those officers are only human and an error can occur. Perhaps, this House should also pose and reflect on whether such errors could have been avoided in this House, had all the other parties concerned not waited until the very last minute to transact a myriad of key legislations. That said, the Chair agrees with Ms. Karua that it is important that all the documentation relating to the Bills passed during that season be scrutinized again to make sure that there are no other errors.

Hon. Members, the findings of this audit suggest that there may be more appropriate means of dealing with matters relating to this House and its records, than to sensationalize and, sometimes, make very serious claims on the Floor of the House. The matters in respect of which those claims were made could easily have been administratively verified in the first instance by recourse to the records and journals of this House. The proceedings of this House are available, as Members are aware, in both video and audio form in the custody of the Clerk. Good practice would demand that where there is an issue in our own records, before we resort to the Floor of the House, Mr. Speaker would be approached to order the necessary verification by the Office of the Clerk. This is particularly critical when the claims relate to a matter as sensitive as a law relating to elections in our country. In response to the concerns raised by the three hon. Members, I therefore, wish to pronounce and direct as

follows:- The allegations made by Mr. Mungatana relating to the insertion of the word "not", "Presidential" and "Deputy Presidential" to the Elections Act, have been found to be misleading. The allegations made by Ms. Karua relating to the alterations to penalties passed by the House have also been found to be misleading. On the basis of Mr. Mungatana's claims, a typographical error has been noted in Section 34(9) of the Elections Act, arising from failure during the process of preparation of the Draft Act, to delete the word "not" which was deleted by the House. Considering all the circumstances, it has not been shown that the typographical error was a result of a deliberate action by any person to subvert the legislative process. Indeed, the attention of the Chair has been drawn to Legal Notice No.142 contained in the special issue of the Kenya Gazette Supplement No.132 dated 12th October, 2011 by which the Attorney-General has moved with expedition to invoke the powers conferred upon him by Section 13 of the Revision of Laws Act and has issued a rectification order deleting the word "not" in Section 34(9) of the Elections Act. Considering the circumstances in which the Bills required to be enacted by Parliament before the first anniversary of the promulgation of the Constitution were passed, the Clerk of the National Assembly is directed to liaise with the Office of the Attorney-General and other appropriate offices and scrutinize all the relevant documentation and published Acts to ensure that no other errors are contained in the published Acts. That scrutiny should be concluded and the results reported to the Speaker within 14 days from today.

Hon. Members, we are all conscious of the fact that there are civil servants who are working in our country, and who do not have the opportunity available to Members of Parliament to defend themselves on the Floor of the House, and that includes the Government Printer. The scrutiny has found absolutely no foul play or otherwise on the part of the Government Printer. It is important as Members of Parliament to protect the civil servants who cannot essentially protect themselves on the Floor of the House. In future we will deal with this differently.

Finally, I wish to thank Mr. Mungatana for his vigilance which has resulted in the detection of this error. In the same breath, I would also wish to urge all hon. Members that if any such matter should come to their attention, they should consider, in the first instance, approaching the Office of the Speaker, so that the matter is appropriately addressed. We have a responsibility not to heighten any tempers or any apprehension in the minds and hearts of the Kenyan people. That is because we know where we have come from in our history as a result of elections that were not done right.

Thank you, hon. Members.

13. ADMISSIBILITY OF DOCUMENTS TABLED OVER ALLEGED LOSS OF KKV FUNDS

1st November 2011

Hon. Members, you will recall that on Wednesday, 26th October 2011, the Deputy Prime Minister and Minister for Local Government, while issuing a Statement during Prime Minister's Time on the implementation of the Kazi kwa Vijana (KKV) Programme, tabled a number of documents on the subject in question. You will also recall that some of the documents tabled were admitted. The Chair undertook to examine the other documents to establish whether or not they are admissible pursuant to the practice and procedure that this House has established. Hon. Members, there are three documents in question; two are titled, "Statement from the World Bank on the Kenya Youth Empowerment Project". As I observed at the time, although the two documents are different in structure, their content is essentially the same. Each of these documents has contact details of persons who, on the face of it, are connected to or working for the World Bank in Nairobi. In addition, the Statement appears on the World Bank website. I, therefore, find that the statements, although different in format, are admissible. Hon. Members, the Deputy Prime Minister and Minister for Local Government further tabled a third document titled, "Kenya Portfolio Financial Management Supervision – June, 2011: Interim and Unvalidated Report (FM) indepth Review, 13th September 2011." The document has the following words imposed on it, "Strictly confidential - For internal World Bank view only." A careful study of the document has revealed that it is not signed and does not have a forwarding letter or details of the author. In addition, efforts to access it on the World Bank website have been futile as it is apparently not posted.

As hon. Members are aware, the Chair has guided the House on previous occasion on the admissibility and/or authenticity of documents tabled in the House. For instance, on 18th January 2011, when faced with a similar question, the Chair made the following Communication: "The final document is not dated and there is no indication who the author is or to whom it is addressed. There is no signature or other identification of source or ownership. I have further perused the document with a view to ascertaining its source and admissibility, but find that the document, whatever may be its value or use outside this House, does not speak for itself in any of the crucial aspects pertaining to admissibility and our rules and is, therefore, inadmissible." Arising from the foregoing, therefore, I find that the document is not admissible. I make the same findings with respect to the document tabled by the Member for Ikolomani, hon. Dr. Khalwale which, although structurally different from that tabled by the Deputy Prime Minister and Minister for Local Government, appears to have the same conclusion on the amount of money that was allegedly misallocated. In a nutshell,

therefore, the net effect is that I admit the first two documents. I do not admit the last two documents.

I thank you

14. THE CONSTITUTION OF KENYA (AMENDMENT) BILL ADMISSIBLE FOR FIRST READING

22nd November 2011

Hon. Members, I plead with you that you bear with me because the communication is a bit long. This is with respect to the Constitution of Kenya (Amendment) Bill, Bill No.57 of 2011, which was programmed for First Reading. I, therefore, would give directions now that will affect its destiny hereafter. Hon. Members, as you will recall, Order No.8 on the Order Paper of the afternoon of Wednesday 2nd November 2011, provided for the First Reading of the Constitution of Kenya (Amendment) Bill, 2011, which was published on 19th October 2011. When the Order for the First Reading of the Bill was called, hon. Mungatana, the Member for Garsen rose on a point of order objecting to the First Reading of the Bill. Explaining the reason for his objection, hon. Mungatana stated that the Bill as published covered a number of issues all of which were of fundamental constitutional significance. In hon. Mungatana's view, these matters ought not to have been presented under what he referred to as an "omnibus" Bill but should rather have been separated so as to allow the House to focus on and debate each issue separately. In support of this position, hon. Mungatana made reference to the history of constitutional amendments in our jurisdiction and stated that whenever constitutional amendments were proposed through the years, they had focused on one specific issue so as to allow the House to mull over the issue and to conclusively debate it before deciding whether or not to accept the amendment. In concluding his remarks, hon. Mungatana proposed that the Minister withdraws the Bill and re-drafts it so as to bring each issue separately for debate before the House.

Hon. Members, this matter raised considerable interest and was further deliberated upon in the House on the 2nd, 9th, 15th and 16th of November 2011, with a number of hon. Members contributing to the point of order raised by hon. Mungatana. These Members were hon. Imanyara, hon. Rachel Shebesh; the Chairperson of the Constitutional Implementation Oversight Committee (CIOC), hon. Abdikadir; the Minister of State for Immigration and Registration of Persons, hon. Otieno Kajwang'; the Member for Gichugu, hon. Karua; the Member for Gem, hon. Jakoyo Midiwo; the Member for Ikolomani, Dr. Khalwale; I think, the hon. Njuguna; the Member for Gwassi, hon. John Mbadi and the hon. Minister, Mr. Mutula Kilonzo who responded to the points of order raised. Hon. Members, I have carefully considered the contributions by all the Members who spoke to this issue. These contributions raise the following issues that require my ruling-

(i) Whether or not the processes for development and introduction of the Bill complied with Article 256 of the Constitution which provides for amendment by parliamentary initiative;

(ii) whether or not there was sufficient consultation with the public and with stakeholders, including the Constitutional Implementation Oversight Committee (CIOC), prior to and following the publication of the Bill;
(iii) whether or not the matter is sub judice;
(iv) whether or not the Constitution permits the introduction of an amendment Bill that covers a number of subjects;
(v) in the light of the foregoing issues, whether or not the Constitution of Kenya (Amendment) Bill, 2011 is admissible for First Reading.

Hon. Members, I shall commence with the first issue which is whether or not the processes for development and introduction of the Bill introduced by the Minister complied with Article 256 of the Constitution which provides for amendment by parliamentary initiative. In some of the contributions made on this issue, the view was advanced that the Bill, having originated from the Cabinet, did not meet the threshold of a Bill introduced by "parliamentary initiative" as the Constitution made no provision for the introduction of a Bill to amend the Constitution by Cabinet or by a sub-committee of Cabinet. It was argued that Article 256 provided only for the introduction of a Bill to amend the Constitution by members of Parliament and not by the Cabinet. Hon. Members, Chapter 16 of the Constitution titled "Amendment to the Constitution" provides for amendment either by parliamentary initiative or by popular initiative. The matter presently before us relates specifically to amendment by parliamentary initiative in respect of which Article 256(1) provides as follows:-

> *"A Bill to amend this Constitution-*
> *(a) may be introduced in either House of Parliament;*
> *(b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;*
> *(c) shall not be called for Second Reading in either House within ninety days after the First Reading of the Bill in that House; and*
> *(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its Second and Third Readings, by not less than two-thirds of all the Members of that House".*

It is clear, Hon. Members, that a Bill by "parliamentary initiative" is one to be introduced by a Member of Parliament. In this transitional period, Article 256 should be read together with Sections 2 and 3 of the Sixth Schedule to the Constitution by which some provisions of the New Constitution are suspended while some of those of the former Constitution are extended. These provisions indicate that during the period of transition from the former to the new Constitution, some Members of the Executive will continue to sit as Members of Parliament. The import of the architecture of our Constitution and the transitional provisions thereunder is that our Parliament continues, until the next general elections, to have in its ranks, Members who are also Members of

the Executive. These Members enjoy the same rights and constitutional status as any other Member of Parliament. From this perspective, there is, therefore, little doubt that Members of the Executive who are also Members of Parliament are entitled to introduce a Bill under Article 256 as the Minister has done. A constitutional amendment by parliamentary initiative at present refers to the capacity, and indeed, entitlement, of any Member of Parliament to publish and introduce in the National Assembly, a Bill to amend the Constitution.

Hon. Members, related to the matter above, is the issue of whether or not there was sufficient consultation with the public and with other stakeholders, including the CIOC, prior to and following the publication of the Bill. Hon. Members, one of the cornerstones of the New Constitution is public participation and stakeholder consultation. Public participation has been secured through a number of provisions in the Constitution. Chapter 16, in a departure from the former Constitution, makes elaborate provisions for the inclusion and involvement of the public by providing for publication of proposals for amendment of the Constitution and for participation of the public in the processes leading to amendment of the Constitution, including in some cases, reference to the people through a referendum. Article 256, in particular, provides at sub-section (1)(c) that a Bill to amend the Constitution by parliamentary initiative "shall not be called for Second Reading in either House within 90 days after the First Reading of the Bill in that House". Article 256(2) requires Parliament to publicize any Bill to amend the Constitution and to facilitate public discussion about the Bill. I want to repeat that so that Members follow. Article 256(2) requires Parliament to publicize any Bill to amend the Constitution and to facilitate public discussion about the Bill. The duty imposed on Parliament is one which arises after the publication of a Bill rather than before that. Further, Article 256(1(c) provides that a Bill to amend the Constitution shall not be called for Second Reading in either House within ninety days or after the First Reading of the Bill in that House. The period of three months provided for under Article 256(1)(c) has been set aside by the Constitution to facilitate publicizing of the Bill and public discussion that should inform the Second Reading and subsequent stages in the House.

Hon. Members, the third issue before us is whether or not this matter is sub judice. Reference was made to Supreme Court Constitutional Application No. 2 of 2011 in which the Supreme Court by a ruling dated 15th November 2011 directed that the case be heard and determined by the High Court. The High Court is currently seized of the matter in High Court Constitutional Petition No. 185 of 2011. It was argued that an attempt to introduce the Bill while the Petition was alive and current before the Judiciary will undermine Article 160 of the Constitution, and in particular sub-Article (1) thereof which insulates the Judiciary from any form of control or direction from any person or authority. It was further argued that introducing the Bill at this stage will be a violation of standing order 80 which disallows reference to a matter that is sub judice.

For his part, the Minister argued that Parliament's power to amend the Constitution under Article 256 did not interfere with or contradict the mandate of the Supreme Court provided for under Articles 163 and 165. He further argued that the matter before the Supreme Court was not whether or not, it was unlawful to amend the Constitution. The Minister, therefore, took the view that ultimately, Parliament, as the law making body, will require to enact legislation that will enable the Executive and other organs to organize transparent, free and fair elections.

Hon. Members, the question of whether or not a matter is sub judice is not new to this House and the rules are by now fairly well settled. The rule of sub judice operates to bar members from making reference to any matter relating to active criminal or civil proceedings, the discussion of which is likely to prejudice its fair determination. It is not an absolute rule as the Speaker is empowered to waive the rule and allow reference to any matter in the House or in a Committee of the House.

On this matter, the hon. Minister is right. The Courts and this House are not seized of the same matter. The matter before the courts is distinctly different from what is before the House in the form of the constitutional amendment Bill. The High Court is being asked to interpret the provisions of the Constitution and determine the date of the next General Elections from the wording of the Constitution. Again, I want to repeat that because it is important. The High Court is being asked to interpret the provisions of the Constitution and determine the date of the next General Elections from the wording of the Constitution The question to the High Court is: "What is the election date as provided for in the Constitution?" The Court is not being asked, and cannot be asked to determine what the election date should be. But rather, the court is only being asked to interpret the provisions of the Constitution as to what the election date is. The Constitution of Kenya (Amendment) Bill, on the other hand, is proposing a date for the election. It is speaking to the question; what the election date should be. The House can deliberate on and pass an amendment of the Constitution setting out a date for the election, regardless of the decision of the Court. Similarly, the Court can rule on the election date as currently provided for in the Constitution regardless of the proposals in the Bill. Hon. Members, there is the question of whether or not the Constitution permits the introduction of what a number of members described in their contributions, as an "omnibus" Bill to amend the Constitution. Several members made reference to the history of amendments to the former Constitution and stated that such amendments had, in all instances, addressed single issues. On this matter, the Minister argued that in a number of instances, single Constitutional (Amendment) Bills had dealt with a multiplicity of matters.

Hon. Members, I have carefully studied the amendments made to the former Constitution right from 1963. I have found that there are precedents for either proposition. As an example, Act No. 26 of 1964 was a single-issue Constitutional

(Amendment) Bill on the subject of holding referendums to ascertain the wishes of the public with regard to the amendments to the Constitution. Act No. 6 of 1985, also a single-issue amendment, clarified the citizenship status of certain persons born in Kenya after 1963. Other single-issue amendments through the years have included: Act No.1 of 1974, No.13 of 1977, No.1 of 1979 and No.5 of 1979. This list is by no means exhaustive. There have also been numerous amendments to the Constitution that have covered a diverse range of subjects. One of the most memorable, if infamous amendments, the 1982 amendment to the Constitution (Act No. 8 of 1982) that introduced a new Section 2A and made Kenya a de jure one-party state, also introduced an unrelated and new Section 22 creating an omnipotent office of Chief Secretary. Note that these two amendments were carried in the same Bill. I know the Member for Central Imenti will say that was then, bad practice. Similarly, Act No.7 of 1984 contained provisions relating to the exercise of judicial power as well as unrelated provisions increasing the membership of the Public Service Commission from five to fifteen. Again see how those two issues maybe unrelated and reasonably far apart. Further, the amendment widened the definition of local authority. Other examples of omnibus constitutional amendments include Act Nos. 19 of 1964, 14 of 1965, 16 of 1966, 18 of 1966, 45 of 1968, 14 of 1986, 10 of 1991 and 3 of 1999. Again, this list is by no means exhaustive. Comparative experience indicates that although in some instances, Bills to amend the Constitution have addressed single issues, it is not uncommon for a bill to amend the Constitution to address multiple issues, subjects or themes. Some examples illustrate this.

Hon. Members, the Constitution (Amendment) Act, 2005, of Uganda covered a number of subjects. Among other things, it distinguished Kampala as the capital city of Uganda and provided for Swahili as an official language of Uganda. Again, see the proximity between those.

It further made provision for a leader of the opposition in Parliament and removed the limits of the tenure of the office of the President. Those are four amendments which are not so close to each other, as you will all note. The Act also provided for the independence of the Auditor-General, and for the creation and functions of special courts to handle offences relating to corruption, for the control of minerals, petroleum and for the holding of referenda. In the case of South Africa, which a lot of Kenyans want to compare themselves with, the Constitution (Amendment) Act, No.65 of 1998, extended the term of municipal councils, provided for the designation of alternates in respect of certain members of the Judicial Service Commission (JSC), amended the name of the human rights commission, adjusted the powers of the Public Service Commission (PSC) and extended and modified the application of transitional arrangements in respect of local government. An earlier Act, No.35 of 1997, amended the Constitution of South Africa so as to make further provision in relation to the oaths sworn or affirmation made by an acting President and to extend the cut-off date in

respect of the granting of amnesty – two subjects that are quite diverse in their nature. In India – our model democracy – the 42nd amendment to the Constitution of India is notable as it brought about the most widespread changes to the Constitution – so widespread that it is referred to by some as "The mini Constitution". The amendment was passed by the Indian Parliament on 2nd November 1976 but was later repealed in 1977.

Honourable Members, in light of all the foregoing, I rule as follows-

1. On whether or not the processes for the development and introduction of the Bill complied with Article 256 of the Constitution, which provides for amendment by parliamentary initiative, a reading of Article 256 together with sections 2 and 3 of the Sixth Schedule to the Constitution indicates that in this period of transition from the former to the new Constitution, a Cabinet Minister may initiate and publish a Bill seeking to amend the Constitution by parliamentary initiative under Article 256 or any other Bill for that matter. I, therefore, find no bar to the Minister for Justice, National Cohesion and Constitutional Affairs initiating and publishing a Bill to amend the Constitution, and I rule accordingly.

2. On whether or not there was sufficient consultation with the public and with stakeholders, including the Constitutional Implementation Oversight Committee (CIOC), prior to and following the publication of the Bill, hon Members, it would be hoped that whenever there is a proposal to amend the Constitution, there would be efforts to build consensus prior to and following the publication of the Bill, and to educate the public on such proposals so as to ensure that the people of Kenya, who are the owners and custodians of the Constitution, are empowered to make an informed choice on any such proposal. In this particular instance, a number of Members, including the chairperson of the CIOC, have voiced concern on the level of public participation prior to and after the publication of the Bill to amend the Constitution. Members argued that consensus was not adequately built prior to the publication of the Bill and that the public was not informed and educated on the contents of the Bill. These are concerns that I would hope the Minister would take time to critically reflect on. I do not, however, find the Minister to be in breach of any constitutional prerequisites to the publication of this Bill.

3. On whether or not the matter is sub judice, although the Court is yet to determine the issues in High Court Petition No. 185 of 2011, there can be no doubt that the exercise of the legislative mandate will not interfere with the decision of the Court as the two are addressing different aspects of the question of the election date. The legislative mandate includes the power to amend the Constitution through the procedure prescribed in Chapter 16. Consequently, I find that this matter is not sub judice.

4. On whether or not the Constitution permits the introduction of an amendment Bill that covers a number of subjects, I find that Article 256 of the Constitution and Chapter 16, as, indeed, the Constitution as a whole, do not bar the introduction of a Bill to amend the Constitution that addresses diverse matters – the so-called "omnibus" Bill. While it may, therefore, be undesirable to some, and quite in order for others, there is no bar in the Constitution to the introduction of a Bill that addresses itself to either a number of articles, chapters, subjects or themes in the same Bill. In any event, hon Members, drawing the distinction between a single issue amendment Bill as opposed to an omnibus Bill is, itself, a process that is fraught with challenges. Although the issue was not raised, I consider it opportune to mention another important aspect of the constitutional amendment process provided for in the Constitution, in departure from that in the former Constitution. The hon. Mutula Kilonzo, the Minister for Justice, National Cohesion and Constitutional Affairs, made a most important point in the course of his response to the points of order raised. The point, which bears repeating, was that the language, philosophy and precedents on the amendment of the former Constitution and, indeed, the entire architecture of the former Constitution cannot be used for interpreting the amendment process in the Constitution of Kenya, 2010. The Standing Orders, too, insofar as they are oriented to the former constitutional dispensation would similarly not provide the requisite guidance on this score. Hon. Members, it must always be remembered that in many respects, the new Constitution is and was intended to be a departure from the former Constitution. Hon. Members may want to reflect on the import of this vis-à-vis the 90-day window provided for in the Constitution before the Second Reading of a Constitutional (Amendment) Bill. A large proportion of the points of order prosecuted by the hon. Members go to the merits and demerits of the substance of the Bill, and appear appropriate as arguments to be made at the Second Reading of the Bill. Hon. Members, the final matter requiring my determination is, therefore, whether the Constitution of Kenya (Amendment) Bill, 2011 (Bill No.56 of 2011) published in the Kenya Gazette Supplement as Supplement No.141, dated 19th October 2011, is admissible for the First Reading. For all the reasons I have given, I find and rule that the said Constitution of Kenya (Amendment) Bill, 2011 is, indeed, admissible for First Reading, and I direct that the Bill be listed in the Order Paper for First Reading, tomorrow, Wednesday, 23rd November, 2011 at 2.30 p.m.

I thank you.

15. ADMISSIBILITY OF THE CONSTITUTION OF KENYA (AMENDMENT) BILL

23rd November 2011

Hon. Members, I wish to make the following Communication on further directions with respect to the admissibility of the Constitution of Kenya (Amendment) Bill No.51 of 2011 for First Reading. Hon. Members, after I delivered the ruling on the matter of the admissibility of the Constitution of Kenya (Amendment) Bill, Bill No.51 of 2011, a number of hon. Members sought further directions on the communication. As I indicated, it is not the practice here and, indeed, in other jurisdictions that the Speaker's ruling is followed by comments or requests for further directions. However, the Speaker, out of respect for the Members of this House and in recognition of the importance of the matter at hand considered it necessary to make an exception and to depart from normal standard practice in order to accommodate the demands of the situation. Matters as canvassed variously called for further directions relating to the applicability of comparative practice, including reference to authorities such as Erskine May on Parliamentary Practice, the application and significance of Article 256(1)(b); the application of Articles 20 and 35(3) of the Constitution in relation to public participation and the desirability of a multiple subject constitutional amendment Bill. Hon. Members, I have agonizingly reflected on each of these requests and I am able to observe as follows:-

(a) Comparative experience from other jurisdictions is valuable and persuasive, but not binding. The relevance of precedence from some countries to Kenya is most useful where quite obviously, and this was alluded to by some hon. Members, the circumstances surrounding the decision or practice were similar to those that we are having to deal with in Kenya in the instant case. But again, any such practice can only be persuasive. Erskine May cited by the hon. Member for Ikolomani is certainly a most handy source of authority on Parliamentary practice. But it is helpful to bear in mind that it largely relates to the English legislature which is in a jurisdiction without a written Constitution. Member for Ikolomani, you may want to acquaint yourself with that.

(b) It requires a constitutional amendment to limit itself to its own subject matter and to only make those amendments to Acts of Parliament. I want to underline this because this is in the article. Only those amendments to Acts of Parliament that are consequential on the constitutional amendment. It is not to be understood as limiting the amendments that can be proposed to the Constitution itself in a Constitution Amendment Bill. The distinction there obviously is important. It is a matter of interpretation but you need to read that article very carefully to get the import of it.

(c) It may even be argued that this is encouraged.

The constitutional obligation under Article 256(2) of the Constitution, however, arises only after a Bill is published. Before the publication of a Bill in the Kenya Gazette there is no Bill which the Constitution can require to be publicized. Ultimately, the legal issues on which I had to rule were the following five issues as I isolated from the submissions of hon. Members; namely:-

(i) whether or not a Minister can introduce a Bill to amend the Constitution under the ambit of "Parliamentary Initiative";
(ii) whether or not there is a requirement for public participation before the publication of a Constitution (Amendment) Bill and whether this in fact, occurred in the present matter;
(iii) whether or not the disposal of this Bill by the House would be sub judice;
(iv) whether or not a constitutional amendment can cover more than one subject matter; and,
(v) whether or not the Constitution (Amendment) Bill has been properly brought before the House and if thus, the Bill is admissible. I am satisfied doing the best I could, taking into account all pertinent matters and weighing one thing against another as Justice Kneller would say, I arrived at the correct constitutional and lawful finding on each of the aforesaid matters in my ruling of yesterday which I reiterate.

I have respectfully and with all the humility I can command, formed the view that a number of the submissions in the original points of order as well as the requests for further directions are invitations to the Speaker to make a finding on the merits or demerits of the substance of the Constitution (Amendment) Bill including such matters as whether or not the early timing of a proposal for the first constitutional amendment may not set the stage for the mutilation of a hard-won new Constitution, the soundness or goodness of the Bill and the desirability of the joinder or otherwise of the issues contained in the Bill. I did, in my ruling, determine to stay within the strict parameters of what is in my province to decide, namely; whether or not the Bill, as a matter of law and procedure, is admissible for First Reading. I did all these other matters as I have inter alia particularized above, and respectfully so to the House to decide one way or another. The House will, in its own wisdom in the fullness of time have the last word as to the fate of the Constitution of Kenya (Amendment) Bill (Bill No.51 of 2011).

I thank you.

16. PROPOSED AMENDMENTS BEYOND THE SCOPE OF THE FINANCE BILL

13th December 2011

Hon. Members will recall that on Thursday, 1st December 2011 Order No.8 on the Order Paper of that day was the Committee of the whole House on the Finance Bill (Bill No.12 of 2011). When the Order was called, the Deputy Prime Minister and Minister for Finance requested that the matter be deferred as numerous amendments had been proposed to the Bill, some of which were new clauses. He further stated that some of the amendments had far reaching consequences not just to matters pertaining to finance, but also to issues touching on the mandates of other Ministries. The Deputy Prime Minister and Minister for Finance, therefore, requested time to enable him to go through the amendments in detail and engage Members who had filed them.

Hon. Members, I have considered the request by the Deputy Prime Minister and Minister for Finance for deferment of the Committee of the whole House on the Finance Bill, 2011. The request raises a fundamental issue on the scope and ambit of the Finance Bill; what matters ought to be covered in a Finance Bill, and which Committee Stage amendments should be allowed to a Finance Bill. The Finance Bill 2011 was published on 8th June 2011. The Long Title to the Bill reads as follows:- "A Bill for an Act of Parliament to amend the law relating to various taxes and duties and for matters incidental thereto." This Long Title clearly indicates that the purpose and scope of the Finance Bill, 2011 extends to matters of taxation and duties. It should, therefore, follow that any amendments proposed to the Bill at the Committee Stage should fall within this general scope of the Bill.

Hon. Members, the practice that is emerging where amendments covering diverse subject matters are introduced as amendments to a Finance Bill is one that requires to be reconsidered. Some of the amendments that have been proposed to Finance Bills in recent times, and in the present case, cover matters that rightfully fall within the mandates of Ministries other than the Ministry responsible for finance, and consequently the mandates of various Departmental Committees. Introducing such amendments to a Finance Bill denies the relevant Ministries and Committees of the House, stakeholders, and the general public, the opportunity to reflect and deliberate on the proposed amendments.

The admissibility of amendments or their relevance to a Bill is a matter that is alive in other jurisdictions and where thresholds for their relevance have been developed.

Hon. Members, the Australian Senate Practice Twelfth Edition, as our source of authority, states as follows:- "An amendment must be relevant to the subject matter of

the Bill. In determining relevance, the question is: What is the subject matter of the Bill and does this amendment deal with that subject matter? The Long Title of a Bill can be taken as an indication of its subject matter, but does not conclusively determine the question. Thus, if a Bill has the Long Title such as "A Bill for the Act to amend the Social Security Act 1991", any amendment relating to social security or any matter dealt with by the Social Security Act is probably a relevant amendment. If, however, a Bill has the Long Title such as "A Bill for an Act to amend the Social Security Act 1991 in relation to age pensions", this is an indication that the subject matter of the Bill is age pensions and amendments to deal with other matters covered by the Social Security Act would probably not be relevant to the Bill." If you find that book, you will find that at page 249.

Erskine May, an authority on parliamentary practice has stated in Parliamentary Practice, 23rd Edition thus:

> *"Provisions not essentially connected with national finance or not incidental to the taxing or administrative provisions of a Finance Bill are outside the scope of a Finance Bill. From time to time, however, resolutions are passed in the Committee of Ways and Means similarly beginning with the words "notwithstanding anything to the contrary in the practice of the House to authorize the inclusion in the Bill provisions which, while not falling within the strict definition of matters appropriate to a Finance Bill, are nevertheless sufficiently closely related to those matters to justify inclusion. By practice, certain resolutions are not permitted in respect of matters which are so far removed from central finance as to make their inclusion in the Finance Bill indefensible."*

Hon. Members, in the recent past, we have had cases where Members in a bid to fast track the legislative process, proposed amendments to the Finance Bill, the subject matter of which is the same as a Bill or Bills already published under different stages before the House. This practice is in breach of Standing Order No.77 (1) on anticipating debate which provides thus: "It shall be out of order to anticipate the debate of a Bill which has been published as such in the Gazette by discussion upon a substantive Motion or an amendment, or by raising the subject matter of the Bill upon a Motion for the Adjournment of the House." Further, by such practice, this House is denied the opportunity, through its Committees and in plenary, to consider the specific subject matter covered in a Bill. In the present case, the Order Paper of Thursday, 1st December 2011 carried a proposal to amend the Banking Act, Cap. 488 of the Laws of Kenya by inserting new sections 16(b) and 16(c). These same amendments also appear in the Banking (Amendment) Bill, 2011, a Private Member's Bill which, coincidentally, was listed in the Order Paper on the same day. Applying Standing Order No. 77, there

can be no doubt that this amounts to anticipation of debate and should not be encouraged.

Hon. Members, in the light of the above, the Chair rules and directs that henceforth commencing with the Finance Bill, 2011, proposed amendments to a Finance Bill shall be approved only where they fall within the scope and ambit of a Finance Bill, that is matters relating to taxes and duties, and where the House is not already seized of the proposed amendments through a previously published Bill. It is my considered view that the proposed amendments in respect of the Price Control Essential Goods Act, The Public Procurement and Disposal Act, 2005; The Energy Act, 2006; The Kenya Information and Communications Act, 1998; and The Privatization Act, 2005 are beyond the scope of the Finance Bill as published and are inadmissible. Accordingly, applying this criterion, only the proposed amendments that fall within the scope of the Finance Bill, 2011 will appear in the Order Paper when the Bill is next listed for Committee Stage. Any amendments that do not fall within the scope of a Finance Bill may be introduced through a Statute Law (Miscellaneous Amendments) Bill published by the Attorney-General or as a Private Member's Bill.

I thank you.

17. DEFEAT OF MOTION BY DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS REJECTING THE PROPOSED NOMINEES TO THE POSITIONS OF CHAIRPERSON AND MEMBERS OF THE ETHICS AND ANTI-CORRUPTION COMMISSION

21st December 2011

Hon. Members as you will recall, at the sitting of the House held this morning, Wednesday, 21st December 2011, the hon. Member for Gem, Mr. Jakoyo Midiwo, rose on a point of order on the matter of the defeat by the House at the afternoon sitting of yesterday, Tuesday, 20th December 2011, of the Motion by the Departmental Committee on Justice and Legal Affairs. The Motion by the Departmental Committee on Justice and Legal Affairs was to the effect that "This House adopts the Report of the Departmental Committee on Justice and Legal Affairs on the rejection of the proposed nominees to the positions of chairperson and members of the Ethics and Anti-Corruption Commission laid on the Table of the House on Wednesday 14th December 2011." In his point of order, hon. Midiwo stated that by law, the nominees are required to be approved by the House. In the instant matter, hon. Midiwo took the view that the rejection of the Motion did not amount to an approval of the nominees by the National Assembly and did not satisfy the constitutional and statutory requirements for approval by the National Assembly. In his view, by the rejection of the Motion by the Departmental Committee, the nominees stood nominated by the Executive, but had yet to be approved by the House. Hon. Midiwo suggested that the names of the nominees will, therefore, require to be returned to the nominating authorities for resubmission to Parliament for vetting by the Committee and subsequent tabling in the House.

Hon. Members, a number of hon. Members rose to contribute to the issues raised by the hon. Member for Gem, namely Messrs. Olago Aluoch, Mohamed Abdikadir, Ndiritu Muriithi, Adan Duale, Martin Ogindo, Dr. Boni Khalwale, Mr. Charles Kilonzo and the Deputy Speaker and hon. member for Lagdera, Farah Maalim. Hon. Members will recall that I undertook to make a ruling on this matter later today. Hon. Members, from the contributions of the aforesaid hon. Members I have arrived at the following as the key questions that require my determination. 1. What is the effect of the rejection of the adoption of a report of a Committee? 2. What does approval by the National Assembly of a nominee of the Executive mean and/or entail? One other matter which I will speak to is on the rules relating to an original and a casting vote, as well as the manner in which these votes should be cast. I wish to commence by drawing the attention of this House to the importance of the matter at hand. The appointments in issue relate to a key constitutionally sanctioned organ for the eradication of corruption in our country. It is, therefore, critical, hon. Members, that this House be not the source of delay in the operationalisation of the Ethics and Anti-Corruption Commission

(EACC). By way of acknowledgement only, I wish to inform the House that I have received communication from the Chairperson of the Commission for Implementation of the Constitution (CIOC) on the subject of the recruitment and appointment of the Chairperson and Members of the EACC. The Commission states its position and expresses its concerns on the necessity and urgency of the recruitment and appointment of the Commission without delay and in accordance with the Constitution and the law. The Commission reminds the House a position that I entirely endorse and have previously pronounced to take heed of Article 259 (1) of the Constitution, which obligates all state organs and persons to interpret the Constitution and legislation in a manner that promotes the purposes, values, principles enshrined in the Constitution, advances the rule of law, permits the development of the law and contributes to good governance. Additionally, hon. Members, a key aspect of the new constitutional dispensation in departure of the old constitutional order is the number of appointments which require the approval of Parliament before they can be made. It is, therefore, imperative that we make absolutely clear what the process of parliamentary approval means and entail, so as to avoid future disputation.

In arriving at the conclusion which I am about to share with the House, I have looked at previous precedence in this House as well as from other jurisdictions. I am satisfied, however, that the answers to the matters raised by hon. Members are to be found in the Constitution, the Standing Orders, the Ethics and Anti-Corruption Commission Act and the Public Appointments (Parliamentary Approval) Act. On the question of the rejection of a Motion for adoption of a report of a Committee, I wish to re-affirm the important role that Committees as agents of the House play. Committees, as I have previously stated, provide the best forum for reflection and circumspection on matters which cannot effectively be achieved in the plenary of the House. The House, therefore, respects and appreciates the work of Committees for which reason I reiterate recommendation I previously bestowed on the Justice and Legal Affairs Committee for discharging the work delegated to it. Ultimately, however, the decision on any matter is for the House itself. In the House making its decision, it should, however, be noted that a Committee report such as that presented by the Justice and Legal Affairs Committee may contain more than just the recommendations for the approval or rejection of nominees. It may contain other findings and observations by the Committee.

Therefore, hon. Members, when a report of a Committee is rejected, the question must arise whether it is possible to say what aspect of the report the House did not agree with and what aspect the House is comfortable with. The argument can rightfully be made that the rejection of a Committee report is a rejection in toto and that nothing is left of it. The argument can further rightfully be made that no aspects can be salvaged from a rejected report. This is why it is open to the House to adopt the report or to adopt the report with such amendments as may have been moved to it. The

amendment of a Motion for adoption of a Committee report is, however, subject to the rules of this House about permissible amendments to Motions. As I indicated when I disallowed the amendment proposed by hon. C. Kilonzo, the Member for Yatta, who sought to introduce an amendment to the Motion by the Departmental Committee, the effect of which will have been to directly negative the Motion. The Standing Order No. 55(2), prohibits the introduction of an amendment if it represents a direct negative of the question proposed. I will want all the Members to visit that Standing Order. I indicated further that the recourse of the House or of a number who is of a view directly opposite to the text of the Motion is to defeat the Motion. The question, however, arises as it has in the present case, what the effect of such a rejection of a report proposing the rejection of nominees becomes, and I will return to this shortly. The second question which is intimately linked to the first one is what approval by the National Assembly of a nominee of the Executive means and or entails. Chapter 15 and in particular Article 250(2) provides for the procedure for appointment of the Chairperson and members of a Commission in the following terms:-

The chairperson and each member of a Commission and the holder of an independent office shall be –
(a) identified and recommended for appointment in a manner prescribed by national legislation,
(b) approved by the National Assembly,
(c) appointed by the President.

Section 6(7) of the Ethics and Anti-Corruption Commission Act provides that the National Assembly shall within 21 days of the day it next sits after receipt of the names of applicants by the President, vet and consider all the applicants and may approve or reject any or all of them. Thereafter, Section 6(8) of the same Act provides that where the National Assembly approves the applicants, the Speaker of the National Assembly shall forward the names of the approved applicants to the President for appointment. If on the other hand, the National Assembly rejects any or all applicants, the Speaker shall within three days communicate the decision of the National Assembly to the President and request the President to subject fresh nominations. Hon. Members, from the position of the Constitution, as read together with the Ethics and Anti-Corruption Act, it is my considered opinion that if the Constitution is to be interpreted in the manner demanded by Article 259 as well as Article 10 of the Constitution, it must be absolutely certain either that the National Assembly has unequivocally approved or rejected the nomination of any person. The Speaker, in preparing a certificate, advising the President on the set of the approval process in respect of any nominee should not be put in the position where he has to deduce what the implication of any decision of the House is. Taking into account Section 6, (subsections 7 and 8) of the Ethics and Anti-Corruption Commission Act, it is imperative that the Speaker is absolutely certain, and without a shred of doubt, as to the decision of the House. The jurisprudence on

the process of approvals of office holders by the National Assembly prior to their appointment by the Executive is still evolving. However, it will be much assisted by interpretations that promote the spirit and intendment of the Constitution.

Hon. Members, having considered all the relevant circumstances, I come to the considered position that the two most critical questions to the present matter can fairly be determined together, which I proceed to do as follows:- I ruled, firstly, that in the context of approvals of nominees for appointment to any office, the rejection of the Report of a Committee of the House, whatever its proposals, leaves nothing before the House, in respect of which without further action, progress can be made either to appoint or not appoint the nominees. It is, however, imperative to observe, as I indicated to the hon. Charles Kilonzo, the able Member for Yatta, in disallowing his directly negative amendment proposals that "the nominees stand." Hon. Members, if you go back to the HANSARD, you will find that those are the exact words that I used – that "the nominees stand". This means that the nominees still remain before the House. This brings me to the second aspect, where I rule that "approval" as contemplated by the Constitution and statutes is an affirmative and unequivocal approval by the House, and cannot be derived or deduced from the rejection of a Committee Report. In circumstances such as are in issue, by the rejection of the Committee's Report, the House is put in the position in which it was before the Committee's Report; namely that there are nominees before the House, who have neither been approved by the House nor rejected by it and it becomes incumbent on the owner of the business in question, in this case the Government, through the Leader of Government Business or otherwise as the Government may determine, to move a Motion for the approval by the House of the nominees. Such a Motion is a different Motion from the defeated Motion in so far as it does not seek the adoption of a Committee Report already defeated. It is a Motion independent of the defeated Motion.

Hon. Members, the final matter relates to the questions as to voting in this House. Section 54 of the former Constitution which is saved by virtue of Section 3(2) of the Sixth Schedule to the Constitution provides as follows:

"1. Except as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of votes of the Members present and voting.

2. On a question proposed for decision in the National Assembly, the person presiding in the Assembly shall:

a) if he is the Speaker, have a casting vote, but not an original vote;
b) if he is not the Speaker, have both an original vote and a casting vote."

Standing Orders Nos. 64 and 65, which were cited this morning, amplify this constitutional provision by providing at Standing Order No. 64 that: "Every Member other than the substantive Speaker or the Attorney General shall be entitled to vote in a division even though the Member is in the Chair." Further at Standing Order No. 65, it states that: "Whenever there is an equality of votes on any question not requiring a special majority, the Speaker including any other Member in the Chair shall have a casting vote." The Constitution and the Standing Orders are, therefore, clear on this matter. As the situation could recur, it is useful to mention that the procedure is that if an elected Member who is in the Chair desires to vote during a division, he is entitled to do so while the division is in progress by having another Member temporarily relieve him or her in the Chair. After the division is complete and the Chair has announced the results of the division, and the results are a tie, it is the prerogative of the Chair to determine if he or she wishes to exercise the casting vote and if so, whether it will be an Aye or a Nay and therefore whether the Motion is carried or lost. To complete the picture, in the event that there is a tie and the Chair chooses not to exercise the casting vote, the Motion is lost. Hon. Members, I, therefore, conclude by ruling as I have that the Motion for the adoption of the Report of the Departmental Committee on Justice and Legal Affairs having been rejected and the requirements relating to approval or rejection of nominees not having been met, it is important that the Government moves expeditiously to move a Motion for the approval of the nominees for Chairperson and members of the Ethics and Anti-Corruption Commission so as to enable the House to make its decision such as the Executive may be appropriately advised expressly by the Speaker in compliance with Section 6 of the Ethics and Anti-Corruption Commission Act, 2011.

I thank you, hon. Members.

FIFTH SESSION (2012)

Speakers' Considered Rulings and Guidelines (2012)

Contents

1. EXTENSION OF PRESCRIBED PERIOD OF ENACTMENT OF LAND REGISTRATION BILL/NATIONAL LAND COMMISSION BILL

Tuesday, 21st February 2012

Hon. Members, my Communication is with respect to a request that I did receive from the Joint Committees, Constitution Implementation Oversight Committee and the Justice and Legal Affairs Committee. This Communication, therefore, is in respect of Order Nos. 11 and 12 as appear on today's Order Paper relating to the Land Registration Bill, 2012, and The National Land Commission Bill, 2010.

Hon. Members, following the publication of these Bills, my Office received a letter from the Chairperson of the Constitution Implementation Oversight Committee, hon. Abdikadir, which indicated that at a joint meeting of the Constitutional Implementation Oversight Committee and the Departmental Committee on Justice and Legal Affairs held on 15th February 2012, Members of the two Committees resolved for a number of stated reasons to request the Speaker to find that pursuant to Article 261(3) Paragraph (b) of the Constitution, there are exceptional circumstances necessitating extension of the period prescribed for the enactment of these Bills together with those relating to devolved governments, which are all due for enactment on or before 27th February 2012.

The request by the Chairperson of the Constitution Implementation Oversight Committee, on behalf of the two Committees, was made pursuant to Article 261 of the Constitution, which mandates the National Assembly, by resolution supported by the votes of at least two-thirds of all the Members of the National Assembly, to extend the period prescribed for enactment of any legislation required to be enacted for the implementation of the Constitution in respect of any particular matter by a period not exceeding one year. Article 261(3) provides that the power of the National Assembly to extend time may be exercised only once in respect of any particular matter and may be exercised only in exceptional circumstances to be certified as such by the Speaker of the National Assembly.

Hon. Members, the subjects of land and devolution are highly emotive and were at the heart of the clamour for a new Constitution. These matters have continued to attract significant interest from Kenyans, even after the promulgation of the new Constitution. Many Kenyans hold the view that the resolution of the myriad issues surrounding the land question and the implementation of the devolved system of government will resolve a number of social, economic and political problems that bedevil Kenya.

It is noteworthy that the land and governance issues constituted the core of Agenda Four items under the Kenya National Dialogue and Reconciliation Framework as agreed on 23rd May 2008.

Hon. Members, concerning the processes of preparation of the legislation to operationalise the relevant provisions of the Constitution on the subjects of land and devolution, it may be noted that these processes have taken a considerable period of time owing to the complexity of the issues at hand and the divergent opinions thereon. The Draft Bills were received in Parliament with only a few days remaining to the expiry of the timeline set out in the Fifth Schedule to the Constitution. In keeping with the letter and spirit of the Constitution, Parliament requires time within which to engage the public on Bills, to study the Bills in Committee and to debate and pass the Bills in plenary. The time that is now remaining – barely six calendar days – will not be sufficient for Parliament to effectively discharge its mandate, particularly on such critical Bills.

Hon. Members, it is important to observe that Parliament has, following publication of the Bills, taken all steps necessary to diligently commence work on and process the Bills. In the light of all these factors, I find that there are, indeed, exceptional circumstances as contemplated in Article 261(3) Paragraph (b) of the Constitution, making a case for extension of time in respect of The Land Registration Bill, 2012 and The National Land Commission Bill, 2012. With respect to the Bills relating to devolved governments, I am satisfied with the progress so far made by the House and I am confident that this House is capable of meeting the constitutional deadline in respect thereof.

Hon. Members, I will therefore, be allowing a Notice of Motion seeking the extension of time to be give in respect of The Land Registration Bill, 2012 and The National Land Commission Bill, 2012 and thereafter for the Motion thereon to be moved during the Morning Sitting on Thursday, 23rd February, 2012.

Hon. Members, we thought that for the Motion to be approved, the Constitution requires that it must have the support of not less than two-thirds of all the Members of the National Assembly. It is further noted that under Standing Order No. 60(2):-

> *"The Speaker shall direct a division to be taken in every instance where the Constitution lays down that a fixed majority is necessary to decide any question"*.

In addition, Standing Order No. 68(1) requires that:-

"In every instance where the Constitution lays down that a fixed majority is necessary to decide any question, the House shall not proceed to a division on that question unless and until a number of Members equivalent to such fixed majority is present at the time for directing the division."

Hon. Members, in the light of these provisions of the Constitution and the Standing Orders, it is clear that a Division on this Motion will require the presence in the House, at the sitting of Thursday, 23rd February, 2012, at least, two-thirds of the membership of this House, which is 148 Members at the time of directing the Division.

Considering the importance of the matters at hand, I urge the Government, the party whips and all hon. Members to make a special effort to be present to transact this critical business.

In a nutshell this Communication directs that we proceed and conclude transaction of the Bills relating to Devolved Governments. All Bills that have been moved by the Minister for Local Government who is also the Deputy Prime Minister will have to be concluded through Committee Stage not later than Thursday this week. For the land Bills, you have that process to undergo and it entails quite some serious effort. It will, therefore, take the commitment of all the hon. Members to see to successful fruition of that Motion.

2. COMMITTEE ON JUSTICE AND LEGAL AFFAIRS CAN MAKE RECOMMENDATIONS ON IEBC REPORT

Thursday, 23rd February 2012

Mr. Deputy Speaker:
Hon. Members, the Chair did undertake to give both direction and Communication on the matter that was raised by Mr. Jakoyo Midiwo yesterday morning. The direction has been given and the Report has been laid. But to address the concerns raised by hon. Members who raised very pertinent and important issues on this matter, the Chair is going to give a communication on the same.

Hon. Members, during the morning sitting held yesterday Wednesday, 22nd February 2012, Mr. Jakoyo Midiwo rose on a point of order seeking the direction of the Chair on what he described as the boundaries report which is about to make its way to this House. He claimed that as a Whip he had received many calls from hon. Members seeking the way forward and expressing concerns whether the Departmental Committee on Justice and Legal Affairs had any power in law to change the recommendations of the Independent Electoral and Boundaries Commission (IEBC).

He argued that under the Constitution, the delimitation of constituencies and wards is a function of the IEBC and that a Member of Parliament is ineligible to sit on the Commission. Hon. Midiwo was concerned about the proper constitutional role of Members of Parliament, the Committee and, indeed, this House, in matters relating to the delimitation of constituencies and wards in general and the IEBC Report in particular and whether specifically, changes could be made to the Report of the IEBC or whether the role of the Committee is limited to merely looking at the Report and then tabling it before the House.

Several Members similarly rose on points of order on the matter; Mr. Isaac Ruto, Dr. Bonny Khalwale, Eng. M.M. Mahamud, Mr. Mbadi, Mrs. Odhiambo-Mabona, Mr. Kabogo, Mr. Abdikadir, Mr. Muriithi, Mr. Bahari, Mr. James Orengo, Ms. Karua, Mr. Olago, Mr. Githae, Mr. Ababu Namwamba and Mr. Baiya.

The Chair has carefully considered all the contributions made and has come to the view that they raised the following issues:-

(i) Whether it is in order for issues relating to a report of the Departmental Committee on Justice and Legal Affairs to be debated in the House and objections raised even though the report has not itself been tabled in the House.

(ii) Whether the provisions relating to the first review of the delimitation of boundaries of constituencies and wards set out in the Fifth Schedule to the Independent Electoral and Boundaries Commission (IEBC) Act (No.9 of 2011) in providing for a role for the Departmental Committee on Justice and Legal Affairs and thereafter this House, in matters relating to delimitation of boundaries of constituencies and wards are in conflict with the Constitution to the extent that they undermine the constitutional independence of the IEBC.

(iii) Whether arising from items (i) and (ii) the report of the Departmental Committee on Justice and Legal Affairs may be tabled for debate and resolution by the House.

On this last issue, it may be noted that the report was permitted by the Speaker to be tabled yesterday and was indeed tabled. To appreciate these issues, it is important on the outset to understand the constitutional and statutory provisions in the process of the first review of the delimitation of boundaries of constituencies and wards. Article 88 of the Constitution establishes the IEBC and invests in it the responsibilities of amongst other things the delimitation of constituencies and wards.

Clause 5 of Article 88 provides that the Commission shall exercise its powers and perform its functions in accordance with the Constitution and national legislation. It has also been noted that the IEBC is one of those commissions to which pursuant to Article 248(1) Chapter 15 applies.

Article 249(1) of the Constitution is clear that such commissions including the IEBC are established to:-

a) Protect the sovereignty of the people.
b) Secure the observance by all the State organs of democratic values and principles.
c) Promote constitutionalism.

Additionally, Clause 2 of that Article provides that commissions are only subject to this Constitution and the law, and are independent and not subject to direction or control by any person or authority.

The Fifth Schedule to the IEBC Act is underpinned by Section 36 of the Act and sets out the procedure for first review. Under Paragraph 3(2), the IEBC, having prepared and published a preliminary report, was required to make it available to the public for a period of 21 days and invite representations from the public on the proposals contained in the report. Upon the expiry of that period, the Commission was required, within 14 days, to review the proposed delimitation of boundaries considering the

views received from the public and submit the revised preliminary report of proposed boundaries to the relevant parliamentary Committee, in this case the Departmental Committee on Justice and Legal Affairs.

Sub-paragraphs 4, 5, 6 and 7 detail the procedure and the fate of the revised preliminary report before the National Assembly. Sub-Paragraph 4 requires the Departmental Committee on Justice and Legal Affairs, within 14 days of receipt of the revised preliminary report, to table it together with its recommendations. Upon such tabling, Sub-Paragraph 5 requires this House to consider the revised report and forward its resolutions to the Commission within seven days.

Thereafter, under Sub-Paragraph 6, the Commission is required to prepare and submit its final report for publication in the *Kenya Gazette*, taking into account the resolutions of the National Assembly. These words are critical, hon. Members, and I will return to them in the course of this ruling.

Sub-Paragraph 7 is also important because it makes it clear that if this House fails to consider and adopt the Report of the Departmental Committee on Justice and Legal Affairs within seven days from the date on which it is tabled, the IEBC may proceed to publish its report in the Gazette without the input of this House.
Having thus put matters into constitutional and statutory perspective, it is now opportune to make a determination on the issues raised.

On whether it is in order for issues relating to a Report of the Departmental Committee on Justice and Legal Affairs to be debated in the House and objections raised even though the report itself has not been tabled in the House, I already pronounced myself this morning. The Chair did already pronounce himself this morning in response to the points of order raised by hon. Isaac Ruto. Although Standing Order No. 77(2) provides that it is out of order to anticipate debate of a Motion of which notice has been given by discussion upon a substantive Motion or amendment or by raising the same subject matter on a Motion of the adjournment of the House, it is clear that no notice of Motion for the Report had been given when the hon. Jakoyo Midiwo raised his point of order. The Standing Order is, therefore, inapplicable to the present matter.

More importantly, hon. Members, a careful reading of Standing Order No. 47(3) empowering the Speaker to rule certain proposed Motions to be out of order for unconstitutionality as well as Article 3(1) of the Constitution enjoining all persons, including the Chair of this House to respect, uphold and defend the Constitution, all lead to the conclusion that the Chair cannot wait for an unconstitutional Motion to be moved before overruling it. It follows, and the Chair has previously ruled that on a question of an alleged violation of the Constitution or a threatened violation of the Constitution, it is incumbent to any hon. Member to raise it at any time for the Chair to

rule thereon. The question of constitutionality raised by hon. Jakoyo Midiwo and the critical nature of the matter of constituency and ward boundaries to the entire electoral process is, indeed, the reason that the Chair has found it necessary to make this considered ruling.

The second issue, and which is really the key issue at hand in this matter, relates to whether the provisions relating to the first review of the delimitation of boundaries of constituencies and wards set out in the Fifth Schedule to the IEBC Act No.9 of 2011 is providing for a role for the Departmental Committee on Justice and Legal Affairs and thereafter this House in matters relating to the delimitation of boundaries of constituencies and wards; they are in conflict with the Constitution to the extent that they undermine the constitutional independence of the IEBC.

The arguments making the case for unconstitutionality, as I understand them, are weighty. They raise the whole question of whether considering the entire history about constitutional development in the area of electoral boundary demarcation culminating in the constitutional provisions that were cited this morning establishing an IEBC and considering the direct interest that hon. Members serving in this House have in the matter in which constituencies and wards are delimited, it is in keeping with the letter and spirit of the Constitution to allow a House Committee and thereafter this House to make resolutions on the Report of the IEBC. Indeed, it is a legitimate concern.

On the flip side, and which is the argument made by Messrs Khalwale, Orengo, Abdikadir, Muriithi; Ms. Karua, Messrs. Namwamba, Githae, Olago and Baiya, one wants to consider carefully the legitimate role of Parliament and the meaning of the independence of constitutional commissions. I have to agree with these hon. Members that Parliament cannot be limited in its oversight and the deliberative role on any matter. These roles are invested on Parliament by Article 1 of the Constitution which recognizes that all sovereign power belongs to the people of Kenya and that this sovereign power may be exercised either directly or through democratically elected representatives.

These roles are invested on Parliament, as I had said earlier, by Article 1 of the Constitution which recognizes that all sovereign power belongs to the people of Kenya and that this sovereign power may be exercised either directly or through democratically elected representatives. Whereas this mandate of Parliament cannot be construed as entitling Parliament to direct and control independent commissions and offices, the Constitution cannot similarly be read or construed as barricading independent commissions and offices in an isolated space immunized from entertaining the views and opinions of the citizens of this country, whether those citizens are in this House or elsewhere.

Hon. Members, it is, therefore, important that this House and Kenyans at large understand the status of the revised preliminary report of the IEBC and the work thereon by the Departmental Committee on Justice and Legal Affairs and this House. As correctly put by hon. Orengo and endorsed by a number of hon. Members, there are in fact two documents that will come before this House. The first is the revised preliminary report of the IEBC, which has been published and which cannot be altered neither by the Departmental Committee on Justice and Legal Affairs nor by this House. The second document consists of the recommendations on the revised preliminary report made by the Departmental Committee on Justice and Legal Affairs and tabled in this House; and the Chair repeats the recommendations. These are no more than recommendations by our Committee to the House. The House can alter, amend, adopt or reject them. The House, as envisaged at Paragraph 6 of the Fifth Schedule to the IEBC Act, can also fail within the time provided to do anything at all with these recommendations.

Hon. Members, if the House makes resolutions on the recommendations of the Committee, the law requires that these are forwarded to the IEBC, which should take these recommendations into account. As I had mentioned earlier on, it is these words "taking into account" that we must interrogate. No doubt, the courts will pronounce themselves on the meaning of these words if the matter should arise before them. For the purposes of my ruling on the point of order raised by hon. Midiwo, however, I am satisfied, and I so rule that it is notunconstitutional for the Committee to make recommendations for the House to make resolutions which can be taken into account of by the IEBC. The resolutions of the House, though they may be useful, arising as they do from the representatives of the people, are not binding on the Commission and, therefore, are not in conflict with the functional independence of IEBC. The Commission can accept them all, some of them or reject them in their entirety and proceed to publish its final report as it determines.

In that event, paragraphs 4 and 5 of the Fifth Schedule provide recourse to the High Court for a person whether in this House or outside of it who is dissatisfied with the decision of the Commission.

Hon. Members, finally, considering that the Report of the Departmental Committee on Justice and Legal Affairs was tabled and Notice of Motion thereon given in accordance with the rules and the procedures of the House, the Chair now urges all hon. Members to take heed of these matters as the Report is debated by the House.

Thank you.

3. SUB JUDICE: DETERMINATION OF *SUB JUDICE* RULE ON QUESTION NO. 676 ON TRESPASS INTO PRIVATE PROPERTY BY ADMINISTRATION POLICE

7th March 2012

Honourable Members, on Tuesday 17th May 2011, hon. Martha Karua asked the Minister of State for Provincial Administration and Internal Security the following Question:

Question No. 676

a) whether he is aware that a contingent of Administration Police officers trespassed onto private property that is the subject of a court dispute, namely Narok/Ngurumani/Kamorora/1, in April 2010 and have remained there since despite protests by the registered owners; and,
b) whether he could order the immediate withdrawal of the police from the property.

This Question was answered by the Assistant Minister of State for Provincial Administration and Internal Security. Certain elements of the Question, however, remained outstanding and were deferred to be addressed at a later date.

Hon. Members, on Tuesday, 17th May 2011, when the Question was revisited in respect of the outstanding issues, hon. K. Kilonzo rose on a point of order and stated that he had previously asked a Question touching on the same matters as the Question asked by the hon. Member for Gichugu. The hon. Member further stated that there existed three pending court cases relating to and whose subject was the same as the particular matters raised by the Member for Gichugu in Question No. 676. The Member for Mutito further stated that restraining court orders had been issued in the matter and that the matter was, therefore, *sub judice*. The hon. Member tabled seven documents in support of his claim for *sub judice*.

Hon. Imanyara then rose on a point of order seeking clarification as to whether it was possible for hon. K. Kilonzo to revisit a Question that had been fully answered and in respect of which the only outstanding matter was the tabling of certain documents. In response to the matters raised by hon. K. Kilonzo, hon. Karua stated that in her view, once a Question had been substantively answered, a point of order relating to *sub-judice* was overtaken by events and ought not to be raised. She further stated that Question No. 676 as asked acknowledged the fact that there were ongoing court cases but did not relate to the particular court cases. On these grounds, she urged that the Chair allow the answering of Question No.676 to conclusion.

The Assistant Minister in the Ministry of State for Provincial Administration and State Security, on his part, stated that there, indeed, existed about seven court cases on the matter, all of which had a bearing on the issue of trespass. He further stated that he had previously answered the Question and that he was ready to report on the issues that were outstanding on the Question. Hon. Olago, who also stood on a point of order, sought directions from the Chair as to whether it was in order for a Member of the Back Bench to attempt to frustrate the answering of a Question that had been asked by a Member by raising a point of order which directly went against the Question asked.

Hon. Members, having reflected on the contributions of Members on this matter, I isolated the following as the issues that require the directions of the Chair:

1. Whether or not a Member of the Back Bench can claim that a Question raised by a fellow Member of the Back Bench is *sub judice*;
2. At what point should a claim of *sub judice* be made; and
3. Whether in the light of the documents laid on the Table by hon. K. Kilonzo, the subject matter of Question No. 676 is *sub judice*.

Hon. Members, in respect of the first of these issues which is whether or not a member of the Back Bench can claim that a Question raised by a fellow Member of the Back Bench is *sub judice* need not detain us, it is clear that the Standing Orders, as adopted by this House, bind and apply in equal measure to all Members of the House. Members are obligated and encouraged to abide by the provisions of the Standing Orders and in so doing, may, where necessary, bring to the attention of the Chair any contravention of the provisions of the Standing Orders. It, therefore, remains open to any Member who takes the view that a matter before the House offends the rule of *sub judice* to rise and draw the attention of the Chair to the same. It is thus in order for hon. K. Kilonzo to claim *sub judice* in the matter of Question No.676 and his concern calls for due consideration and response.

Hon. Members, the second matter requiring my determination is that of the point at which a claim of *sub judice* should be made. Concern was raised by several Members that in the present case, the claim of *sub judice* was made when the substantive Question had previously been answered and when all that remained were clarifications on certain outstanding matters.

Hon. Members, while Standing Order 80(2) prevent deliberation by the House of matters that are *sub judice,* "where the discussion of such matter is likely to prejudice its fair determination", the Standing Orders do not specify the point at which a Member should rise to claim *sub judice*. Although it would be expected that the claim of *sub judice* would be made ahead of any discussion on the matter in issue, there is no bar in the Standing Orders to such a claim being made at any point during the discussion of a

matter if the Member takes the view that the ongoing discussion offends the rule of *sub judice*.

Hon. Members, I therefore, find that although the claim made by hon. K. Kilonzo came in the dying stages of the Question when the bulk of the Question had been disposed of, the claim was still within the confines of Standing Order 80 and the concerns of the hon. Member, therefore, require to be addressed before the House proceeds with deliberation on Question No. 676.

Hon. Members, the third and final issue is this: whether in the light of the documents laid on the Table of the House by the hon. Member, the matters the subject of Question No. 676 are *sub judice*. Standing Order 80 which has often been the subject of communications by me, gives guidance on the subject of *sub judice*.

Standing Order 80(1) stipulates that "no Member shall refer to any particular matter which is *sub judice* or which, by the operation of any written law is secret". As to which matters are to be considered *sub judice,* standing order 80(2) provides that "a matter shall be considered *sub judice* when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination".

Hon. Members, Standing Order 80(4) requires a Member who alleges that a matter is *sub judice* to provide the necessary evidence. On Tuesday, 17th May 2011, the Member for Mutito tabled in this House the following documents-

1. Paper Number 1: An order dated 30th August 2010 issued by the High Court sitting in Nairobi, the parties being Jan Bonde Nielsen *versus* Herman Philupus Steyn, Hedda Steyn and Ngurumani Limited in which, amongst other orders, an *ex-parte* interlocutory injunction was issued restraining the defendants their agents, employees and/or nominees from interfering with the plaintiff's homestead commonly known as Ol Donyo Laro and an *inter-parte* hearing date set for 13th September 2010;
2. Paper Number 2: A Notice of Motion dated 21st September 2010 filed on behalf of Ngurumani Limited against the Commissioner of Police, the Commandant Administration Police and others, seeking, *inter alia,* orders of *mandamus* and prohibition against the respondents;
3. Paper Number 3: A Notice to the Registrar dated 15th September 2010 by Ngurumani Limited that informed the Registrar that Ngurumani Limited intended to file an application for Judicial Review Proceedings for orders of *mandamus* and prohibition against the Commissioner of Police, the Commandant Administration Police and others.

4. Paper Number 4: Summons to Enter Appearance dated 7th April 2009 issued to Ol Donyo Laro Estate Limited in the matter of Ngurumani Limited *versus* Ol Donyo Laro Estate Limited;
5. Paper Number 5: An Application dated 14th May 2009 brought under certificate of urgency by Ngurumani Limited against Kenya Civil Aviation Authority and another seeking leave to bring a judicial review application for orders of *certiorari* and prohibition against the defendants;
6. Paper Number 6: An Amended defence and counter-claim filed on 20th May 2010 by Ngurumani Limited in the matter between Ol Donyo Laro Limited and Ngurumani Limited; and
7. Paper Number 7: An Application dated 16th September 2010 brought under certificate of urgency by Ngurumani Limited for leave to apply for judicial review orders of *mandamus* and prohibition against the Commissioner of Police, the Commandant Administration Police and others.

Thereafter, at my request, the hon. Member for Mutito submitted to my office a compendium of further documentation, including some of the documents that the hon. Member had earlier tabled in the House on 17th May 2011. The bundle of documents includes a charge sheet, not previously tabled by the Member, the complainant being Peter Jan Bonde and the accused being Philip Styne. The subject of the charge is assault causing actual and bodily harm contrary to Section 251 of the Penal Code. According to the charge sheet, the accused was to appear before the Chief Magistrate's Court in Kibera on 31st August 2010.

Hon. Members, I have carefully studied the seven documents tabled by hon. K. Kilonzo and the compendium of documents subsequently presented to me by him. These documents bear witness to the hon. Member's claim that several court matters relating to the property known as Narok/Ngurumani/Komorora/1 have indeed been filed. In fact, the documents indicate there have been matters in Nairobi and Nakuru.

Further, the first document tabled by the Member indicates that at an *ex-parte* hearing held on 30th August, 2010 in the High Court sitting in Nairobi, an interlocutory injunction was issued and an *inter partes* hearing set for 13th September, 2010. Although the documents submitted by the hon. Member indicates that there have existed civil proceedings in respect of the property known as Narok/Ngurumani/Koromora/1, Standing Order No. 80(2) as read together with Standing Order No. 80(4), place the onus on the Member claiming *sub judice* to provide evidence to show that the proceedings are active. Under Standing Order No. 80(3)(a) and (b), criminal proceedings shall be deemed to be active when a charge has been made or summons to appear have been issued and shall be deemed to have ceased to be active when they are concluded by verdict and sentence or discontinuance. Under Standing Order No. 80(3)(c), civil proceedings would be

considered active when arrangements have been made for hearing, such as setting down a case for trial until the proceedings are ended by judgement or discontinuance.

Honourable Members, in the present matter, with respect to all the civil matters cited, I do not find that the Member has met the requirements of Standing Order No. 80(2), (3)(c) and (4). There is no indication from the documents tabled by the hon. Member on the present status of the court matters to which the documents refer. The following pertinent questions remain to me unanswered:-

(i) Did the applications referred to ever proceed to full hearing?
(ii) Are the applications presently or at all listed for hearing?
(iii) Were the interlocutory orders issued by the High Court on 30th August, 2010 extended?
(iv) Has judgment been issued in any of the matters? Have the applications been withdrawn?

Concerning the criminal matter, there is similarly no indication of the present position on the case from the documents on record. Did the case proceed to Court? Has the matter been concluded? Were the charges withdrawn? What sentence was meted out, if any? I, therefore, find that in respect of the criminal case, the Member has not met the requirements of Standing Order 80(2), (3) (a) and (b) and (4).

Honourable Members, in the circumstances, bearing in mind the considerable length of time that has elapsed without the Speaker being furnished with the requisite evidence in terms of our rules, the claim by Mr. K. Kilonzo that the matters, the subject of Question No. 676, are *sub judice* does not meet the threshold of the Standing Orders. I, therefore, rule that Question No. 676 be fully answered. To this end, I direct that the Question be listed in the Order Paper for disposal at the earliest opportunity that Order No. 6 permits.

I thank you.

4. MEMORANDUM FROM HIS EXCELLENCY THE PRESIDENT ON COUNTY GOVERNMENTS BILL, 2012

Wednesday, 7th March 2012

At the afternoon sitting of Wednesday, 29th February 2012, I directed that the Memorandum by His Excellency the President on the County Governments Bill, 2012 (Bill No. 1 of 2012) be committed to the Departmental Committee on Local Authorities for consideration. Thereafter, Mr. Mbadi rose on a point of order and sought directions from the Chair on whether or not the Memorandum violated Article 261 of the Constitution, as read together with the Fifth Schedule to the Constitution, which sets out specific timelines within which legislation to implement the Constitution should be enacted.

Following several contributions on the issue by a number of Members, I undertook to give guidance on the matter. Honourable Members will recall that this House passed the County Governments Bill, 2012 on Thursday 23rd February 2012. His Excellency the President, however, pursuant to section 46(3) and (4) of the former Constitution, which are saved by section 3(2) of the Sixth Schedule to the Constitution, declined to give assent to the Bill and submitted a Memorandum in respect thereof indicating specific provisions which should be reconsidered by the National Assembly including recommendations for deletion and amendments. As Honourable Members are aware, the County Governments Bill, 2012 is one of the proposed statutes which in terms of Article 261 of the Constitution and the Fifth Schedule of the same, was required to be enacted within a period of eighteen months from 27th August, 2010, the date of the promulgation of the Constitution. The final date for the enactment of this Act was 27th February 2012.

The question that then arises, and on which the directions of the Chair have been sought, is whether or not the submission of a Memorandum by His Excellency the President on the County Governments Bill, 2012, which Memorandum is dated 27th February, 2012, accords with the constitutional requirements of Article 261 and the Fifth Schedule to the Constitution.

Honourable Members, Article 261(1) of the Constitution requires Parliament to enact any legislation required by the Constitution to govern a particular matter within the period specified in the Fifth Schedule, commencing from the effective date. The applicable provisions on the procedure for the enactment of legislation during this period of transition is to be found at Sections 30 and 46 of the former Constitution. Section 30 provides that the legislative power of the Republic vests in the Parliament of Kenya which consists of the President and the National Assembly. While Sub-sections (1) and (2) of Section 46 provide for that legislative power to be exercised through Bills

passed by the National Assembly and assented to by the President. Legislation is, therefore, enacted, not when it is passed by this House, but when the President assents to it. It is thus clear that the requirement at Article 261(1) of the Constitution that legislation on County Governments be enacted on or before 27th February, 2012 sets out a deadline within which the processes both by this House and by the President must have been completed. In the event, the requirements of Article 261(1) of the Constitution were not met with respect to the County Governments Bill, 2012, as it ought to have been enacted into law on or before 27th February, 2012, now past.

Honourable Members, notwithstanding the foregoing, it is clear that pursuant to Sub-sections (3) and (4) of Section 46 of the former Constitution says that the President's right to refuse to assent to a Bill passed by the House and to return it to the House with a Memorandum is not taken away by the expiry of the period for enactment provided for under Article 261 of the Constitution. The question that then arises is as follows: Does this failure to meet the deadline fall under the ambit of Article 261 (5) especially taking cognizance of the fact that the Bill in question had been passed by the House? I am awake to the terms of Article 259 (9) as follows:-

> *"If any person or state organ has authority under this Constitution to extend a period of time prescribed by this Constitution, the authority may be exercised either before or after the end of the period, unless a contrary intention is expressly specified in the provision conferring the authority."*

I appeal to the Attorney General to exercise his mind on this provision more so noting his submission in his contribution in the House when the issue was raised to the effect that he is already seized of the matter.
Hon. Members, I wish to further draw your attention to the provisions of Article 259(1), which states-

> *"This Constitution shall be interpreted in a manner that-*
> *(a) promotes its purposes, values and principles"*

Considering all the foregoing issues which are all formidable and the options available to the House in their entirety and the end result of the process envisaged in Article 261(5) and (6) of the Constitution, it is my considered view that the House should proceed to dispose of the Memorandum from His Excellency the President in the manner outlined in my communication of Wednesday, 29th of February, 2012, as it furthers the purpose of the timelines specified in the Fifth Schedule.

Hon. Members, the directions of the Speaker were also sought on two other matters. The first is the point of order raised by the hon. Member for Kimilili, Dr. Eseli, in which he observed that although the Constitution sets out, at Article 261 of the Constitution,

penalties for Parliament where Parliament fails to enact legislation required for the implementation of the Constitution within the timelines specified, in several instances, it was the Executive and not Parliament that had occasioned the delay in the processing and publication of the required legislation.

For the information of hon. Members and pursuant to section 30 of the former Constitution as saved by section 3(2) of the Sixth Schedule, Parliament consists of the President and the National Assembly. Additionally, all Ministers, the Attorney-General and Assistant Ministers who constitute the core of the Executive are Members of Parliament and, consequently, exposed to the same perils with respect to implementation of the Constitution as the rest of us.

The Constitution and the Standing Orders are clear on the processes attendant to the enactment of legislation by this House once such legislation is published. I, therefore, urge the Executive to ensure that the timeframes envisioned for the processing of legislation by this House, including the publication period and the time required for consideration in the relevant Committees, are factored into the dates of publication of the legislation. This will ensure that legislation to implement the Constitution is enacted in a timely manner and with the requisite input of the House.

Hon. Members, the final matter, which was raised by hon. Charles Kilonzo and to which a number of Members spoke, related to the attendance in the House by Ministers of Government during the Committee Stage on the County Governments Bill, 2012. Hon. C. Kilonzo lamented that there were very few members of the Front Bench present during that critical debate. Although the Executive must determine for itself how the Front Bench shall be organized for the transaction of any business in this House, I note that on that date, in responding to this matter, the Deputy Prime Minister and Minister for Local Government; the Hon. Musalia Mudavadi, committed himself to communicate the sentiments of this House on the issue to the Cabinet. I will reiterate my stand on the matter as pronounced then and look forward to positive change by all concerned. We will, therefore, trust that the matter will be appropriately addressed.

5. CORRIGENDA TO THE PRESIDENTIAL MEMORANDUM ON THE COUNTY GOVERNMENTS BILL, 2012

Thursday, 15th March 2012

Hon. Members, further to my Communication on the Presidential Memorandum on the County Governments Bill, 2012, issued on 29th February, 2012, I wish to inform the House that His Excellency the President has, in a letter dated 13th March, 2012, clarified that a reference in the Memorandum to the proposed deletion of Clause 30(1)(i) was erroneous and that the correct reference is to "Clause 30(2)(i)".

It is noted that, notwithstanding the correction of this formal error, the text proposed by His Excellency the President to be deleted remains as it is and reads as follows:-

> *"(l) Subject to the operational command structures set out in the National Police Service Act or any other national security legislation, chair the county equivalent of the National Security Council as provided for in Article 239(5) of the Constitution."*

I thank you.

6. STATUS OF THE TAX ACCOUNT AT THE TREASURY

Thursday, 15th March 2012

Hon. Members, on Thursday 21st April 2011, Hon. Mbadi rose on a point of order and requested for a Ministerial Statement from the Deputy Prime Minister and Minister for Finance on the status of the Tax Account at the Treasury. In particular, hon. Mbadi sought to know:-

1. The number of revenue statements that were certified by the Controller and Auditor-General for the financial years, 2007/2008 and 2008/2009.
2. The actual receipts of revenue for the year 2007/2008 and 2008/2009 in respect of certain revenue heads.
3. Whether the receipts of revenue for the years 2007/2008 and 2008/2009 as declared to Parliament in the estimates of revenue reflected the actual receipts into the Exchequer Account for the respective revenue heads and for the same period.

Hon. Members, on Wednesday 18th May 2011, in the Afternoon Sitting, the Assistant Minister in the Office of the Deputy Prime Minister and Ministry of Finance issued a Ministerial Statement in response to the request by hon. Mbadi. In his statement, the Assistant Minister stated that the accounts for the Financial Year 2007/2008 had been queried by the Controller and Auditor-General and that the Controller and Auditor-General had submitted a report on the accounts to the House. The Public Accounts Committee had investigated the matters arising and had, subsequently, submitted its report to the House. The Assistant Minister further stated that the accounts for the Financial Year 2008/2009 had also been audited by the Controller and Auditor-General, and that the report of the Controller and Auditor-General was before the Public Accounts Committee. Arising from this, the Assistant Minister argued that issuing a statement in response to the hon. Member's request would be in violation of the Standing Orders and in breach of parliamentary practice.

In response to the aforesaid position taken by the Assistant Minister, the Member for Gwassi averred that the Report of the Public Accounts Committee relating to the Financial Year 2007/2008 had been adopted by the House, and that the report did not cover the matters that he had raised in his request for a Ministerial Statement. On this, the Assistant Minister took the view that the concerns by the Member in his request for a Ministerial Statement had been adequately addressed in the Report of the Public Accounts Committee. I undertook to give directions on this matter as I now do.

Hon. Members, having reflected on this matter, I have isolated two issues that require the directions of the Chair.

1. Can a member request for a Ministerial Statement or otherwise seek to re-open debate on a matter that has previously been addressed conclusively by the House?
2. Can a member seek a Ministerial Statement on or seek to deliberate on a matter in Plenary when the same has been referred to, or is before a Committee of the House?

On the first issue as to whether or not a member can request for a Ministerial Statement or seek to re-open debate on a matter that has previously been addressed conclusively by the House, the general rule of debate in the House is that, a member is, subject to the Standing Orders, free to interrogate the Executive on any matter of concern to the Member. This is the essence of parliamentary oversight over the functions of the Executive. The Standing Orders, however, do not encourage the repetition of issues that have already been deliberated on and resolved one way or the other by the House.

Standing order 14(4) provides that "a Question shall not repeat in substance any Question already answered, either as a Question or in the course of a debate during the same Session". Concerning Motions, Standing Order No.49 provides that "no Motion may be moved which is the same in substance as any question which has been resolved (either in the affirmative or in the negative) during the preceding six months in the same Session, provided that a Motion to rescind the decision of such a question may be moved with the permission of the Speaker".

Hon. Members, the Standing Orders having specifically made provisions that address the issue of repetition in not less than two instances, it is clear that repetition is, at all costs, to be avoided, in the proceedings of the House. This would naturally extend to re-opening, for debate, matters that have conclusively been addressed by the House in the previous six months.

Hon. Members, I now proceed to the second question on whether or not a member can seek a Ministerial Statement on or otherwise seek to address a matter on the Floor of the House when the matter has been referred to or is the subject of deliberations of a committee of the House. Committees are agents of the House and the House relies on them to thoroughly scrutinize and study specific matters that cannot be adequately interrogated or inquired into by the House in Plenary.

Hon. Members, Standing Order No.78 gives guidance on how matters that have been committed to or are before committees are to be dealt with by the House. It states that, "no member shall refer to substance of the proceedings of a Select Committee before the Committee has made its report to the House".

Hon. Members, it is clear from these provisions that the Standing Orders do not contemplate a scenario where the House delegates a matter to a Committee with one hand and, with the other, continues to deliberate the same matter. Such a scenario would most certainly lead to disorder in the manner in which we conduct our business.

Bearing the foregoing in mind, I now turn to the specific matter at hand. The issues raised by hon. Mbadi in his request for a Ministerial Statement traverse two financial years - 2007/2008 and 2008/2009. In the case of the Financial Year 2007/2008, the Minister informed the House that the Public Accounts Committee had investigated the matters raised for that financial year and tabled its Report in the House. Indeed, hon. Members, the HANSARD record indicates that the 2007/2008 Public Accounts Committee Report was tabled in this House on 7th December 2010 and was, subsequently, adopted by the House on 14th December 2010. The Treasury's Memorandum responding to the Committee's recommendations was submitted on 24th May 2011 and will be tabled in the House along with the Public Accounts Committee Report on the 2008/2009 accounts.

Hon. Members, in respect of the accounts for the Financial Year 2008/2009, the Minister informed the House that the Report of the Controller and Auditor-General on those accounts had been submitted to the House and that the Public Accounts Committee was presently seized of the matter, and is at an advanced stage of completing the Report. Hon. Dr. Kones, the Vice-chairperson of the Public Accounts Committee confirmed on the Floor of the House that the accounts for 2008/2009 were, indeed, before the Committee and that the matters visited by hon. Mbadi had been raised as an audit query by the Controller and Auditor General.

Given that the matters raised by the Member for Gwassi were before the Public Accounts Committee at the time he sought to speak to them in Plenary, I find that it would be premature for the House to interrogate the same matters before it formally receives a report of the Public Accounts Committee.

Any debate prior to the receipt of a report of the Committee would be tantamount to anticipating the findings of the committee.

Honourable Members, I therefore uphold the objection of the Assistant Minister in respect of the Financial Year 2008/2009 accounts on the grounds that the Public Accounts Committee (PAC) was seized of the matters raised by the hon. Member for Gwassi. I would advise Mr. Mbadi and, indeed, any other hon. Member who is interested in the matter, to attend and participate in the meetings of the PAC during the Committee's deliberations on the matters at hand in terms of Standing Order No. 178. Should such hon. Members still have outstanding issues after the PAC has concluded its consideration of the accounts for the Financial Year 2008/2009 and tabled its Report

in the House, hon. Members would be free to raise those issues in the House at that point.

Regarding the accounts of the Financial Year 2007/2008 in respect of which the House adopted recommendations on 14th December, 2010, I find that the Assistant Minister is obligated to respond to the issues sought by Mr. Mbadi, as no provisions of the Standing Orders would be breached. I, therefore, direct the Minister for Finance to issue a Ministerial Statement in relation to the receipts of revenue for the Financial Year 2007/2008.

I thank you.

7. CONSTITUTIONAL TIMELINES FOR THE ENACTMENT OF PUBLIC FINANCE MANAGEMENT BILL AND THE COUNTY GOVERNMENTS BILL

19th April 2012

Mr. Deputy Speaker:
Hon. Members, the Chair has a Communication to give. You will recall that on Tuesday, 17th April, 2012, when the Public Financial Management Bill, 2012, came up for Second Reading, Mr. Mbadi, rose on a point of order seeking the direction of the Chair as to whether the debate on the Public Financial Management Bill, 2012 was constitutional. In the debate that ensued, various arguments were advanced by the Deputy Leader of Government Business, Mr. Kimunya, the Minister for Finance, Mr. Githae, Mr. Ethuro and Mr. Ogindo. In a summary, the following issues were raised for determination by the Chair:

(a) whether the Second Reading of the Public Financial Management Bill, 2012 was contrary to the Constitution and more specifically whether the debate on Clause 109 of the Public Financial Management Bill, 2012 relating to the establishment of county revenue funds for county governments was unconstitutional in so far as the timeline of 18 months specified in the Fifth Schedule to the Constitution for the enactment of legislation to implement Article 207 of the Constitution had lapsed,

(b) whether the County Governments Bill, 2012 as passed by the National Assembly on 23rd February, 2012, contains provisions establishing the county revenue funds for county governments, and whether the passage of County Governments Bill, 2012 satisfied the requirement of the said Article 207 and the Fifth Schedule to the Constitution,

(c) whether the Government must seek leave of the House to extend the time for the implementation of Article 207 of the Constitution so as to enable Parliament to debate and enact the Public Financial Management Bill, 2012, and;

(d) whether the Government must seek leave of the House to extend the time so as to enable Parliament to enact the County Governments Bill, 2012.

Hon. Members, you will further recall that the Chair did then make preliminary observations on the issues raised, observing that the facts of the matter were, on the face of it, very clear but the Chair was inclined to adjourn debate so as to study the matter in detail and give a comprehensive ruling or direction this afternoon.

On the first issue as to whether the Second Reading of the Public Financial Management Bill, 2012, is contrary to the Constitution, Article 207(1) and (4); Article 207 (1) says:

> *"There shall be established a Revenue Fund for each county government into which shall be paid all money raised or received by or on behalf of the county government except money reasonably excluded by an Act of Parliament."*
>
> *"(4) An Act of Parliament may –*
>
> a. *make further provision for the withdrawal of funds from a county Revenue Fund, and*
> b. *provide for the establishment of other funds by counties and the management of those funds."*

The Fifth Schedule of the Constitution then gives a timeline of 18 months for the enactment of legislation with regard to the establishment of revenue funds for county governments under Article 207 of the Constitution. The period of 18 months from the date of Promulgation of the Constitution of Kenya, 2010 expired on 24th February 2012. As the Chair had earlier observed, Clause 109(2) of the Public Financial Management Bill, 2012 contains provisions specifying the monies raised by a county government that are exempted from payment into the county revenue fund of that particular county. This is an express implementation of the requirement of Article 207(1) of the Constitution, which was required to be implemented by 24th February 2012. The Chair has upon further and closer scrutiny of the Public Financial Management Bill, 2012 realized that is not the only debate on Clause 109 of the Bill that raises the issues of constitutionality, but Clause 110 of the Bill that empowers the county executive committee to establish the county governments emergency funds and Clauses 111, 112, 113, 114 and 115 provide for the management of the emergency funds by the county governments executive committees which are in effect implementing the provisions of Article 207(4) of the Constitution. The same can be said of Clause 116 of the Bill that empowers the county executive committee, with the approval of the county assembly, to establish other county public funds.

The Fifth Schedule to the Constitution requires that the legislation to implement Article 207(4) should have been enacted by 24th February 2012.

Hon. Members, on the second issue as to whether the County Governments Bill, 2012 as passed by the National Assembly on 23rd February, 2012 contains provisions establishing the Revenue Fund for county governments, and whether the passage of the County Governments Bill, 2012 satisfied the requirements of the said Article 207 and the Fifth Schedule to the Constitution, I have perused the County Governments Bill, 2012 in the form in which it was passed by the House and have ascertained that this Bill contains no substantive provision relating to the finances of county governments as

contended by the Deputy Leader of Government Business, Mr. Kimunya and the Minister for Finance, Mr. Githae. Indeed, the Bill makes no attempt to substantively implement Article 207 of the Constitution, but merely makes a cross reference to the proposed Public Financial Management Act. This can be found at Clause 122 of the County Governments Bill, 2012 where the Bill provides as follows.
Clause 122 (1) says:

> *"The funds and financial management of county governments shall be as provided under the law relating to public finance."*

Clause 122 (2) says:

> *"The procedure of budgeting, borrowing powers and grants management shall be as provided in the law relating to public finance."*

On the third issue as to whether the Government must seek leave of the House to extend the time for implementation of Article 207 of the Constitution so as to enable Parliament to debate and enact the Public Financial Management Bill of 2012, Article 261(1) of the Constitution provides that:-

> *"Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule commencing on the effective date.*
> *We all know the effective date.*
>
> *(2) Despite Clause (1), the National Assembly may, by resolution supported by the votes of at least, two-thirds of all the Members of the National Assembly, extend the period prescribed in respect of any particular under clause (1) by a period not exceeding one year.*
>
> *(3) The power of the National Assembly contemplated under (2) may be exercised-*
>
> *(a) only once in respect of any particular matter; and*
> *(b) only in exceptional circumstances to be certified by the Speaker of the National Assembly."*

Hon. Members, you will recall that the House has in the recent past invoked the provisions of (2) in extending the time of the enactment of various legislations required to implement the constitutional provisions related to land. The reason for this is because in instances where the Constitution sets out clear procedural guidelines, including a mechanism for rectification or redress in case of a breach of those timelines, the House is bound by the provisions of the Constitution. To do otherwise

will be to open a pandora's box for the House to breach the express provisions of the Constitution.

Indeed, the Constitution contemplates great consequences for Parliament if there is failure to adhere to the timelines set in Fifth Schedule. Article 261(5) of the Constitution provides as follows:-

> *"If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.*
>
> *(6) The High Court in determining a petition may under Clause (5) may-*
> *(a) make a declaratory order on the matter; and,*
> *(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted within the period specified in the order and to report progress to the Chief Justice.*
>
> *(7) If Parliament fails to enact legislation in accordance with an order under Clause (6)(b), the Chief Justice shall advice the President to dissolve Parliament and the President shall dissolve Parliament."*

As I have already observed, Clauses 109, 110, 111, 112, 113, 114, 115 and 116 of the Public Financial Management Bill of 2012 contains provisions expressly implementing the requirements of Article 207 of the Constitution of which legislation was required to have been enacted by 24th February 2012.

In other words, the timelines for legislative action by the House have already passed. It has already lapsed and the House is bound to invoke provisions of Article 261 of the Constitution if it wishes to be further seized of the matter.

Hon. Members, the fourth issue as to why the Government must seek extension of the period by the House so as to enable Parliament to fully enact the County Governments Bill, 2012, was raised by hon. Martin Ogindo. Under Section 46 of the former Constitution which is saved by Section 3 of the Sixth Schedule to the Constitution of Kenya, 2010, the legislative power of Parliament shall be exercisable by Bills passed by the National Assembly and assented to by the President.

Hon. Members, Article 261 of the Constitution of Kenya, 2010, requires Parliament to enact any legislation required by the Constitution within the various specified periods. Under Section 30 of the former Constitution, Parliament consists of the President and the National Assembly. It, therefore, follows that the Bill is only enacted by Parliament when it receives the assent of the President in the manner contemplated under Section 46 of the former Constitution.

Hon. Members, owing to the special circumstances of raised points of order and considering that the issues raised have far reaching constitutional implications for this House, I am convinced that debate on The Public Financial Management Bill, 2011 and The County Governments Bill, 2012, in their present form is contrary to the express provisions of Article 261 of the Constitution. The Chair, therefore, orders that the Leader of Government Business initiate immediate action to ensure that the House is in compliance with the provisions of Article 261 of the Constitution before proceeding with debate on these two Bills.

Consequently, consideration of Order No. 10(i) on today's Order Paper with regard to the consideration of the County Governments Bill, 2012, is deferred until the necessary extension of period is granted by the House.

Thank you, Hon. Members.

8. BREACH OF PRIVILEGE: EXTORTION AND CORRUPTION ALLEGATIONS AGAINST HON. MEMBERS

Thursday, 26th April 2012

Hon. Members it is with grave concern that I have to make the following Communication relating to serious allegations made against Members of this House from the Floor and elsewhere with regard to alleged bribery, extortion and other forms of corruption and criminal conduct.

Hon. Members will recall that on Thursday 19th April, 2012, allegations were made on the Floor of the House that money had been demanded by, or on behalf of a Member of this House from a private sector corporation in relation to a Question that was then pending before the House. These allegations have been followed swiftly by other similar allegations made in the Press and elsewhere in the public domain. Without commenting on the veracity or otherwise of these yet to be proven claims, I wish to state categorically that in my capacity as the Speaker of the National Assembly, I do not and shall not condone the use of this House or the membership in it for purposes of, or as avenues for corruption or other criminal conduct. No privileges of Parliament shield any person from criminal prosecution for corruption or extortion.

As you are all aware, the respect accorded to this House and to its Members is predicated on our conducting ourselves with the highest standards of integrity, honor and decorum. If these are absent, we lose the moral ground to continue to be Members of this House and to represent the people. That said, may I also draw the attention of all hon. Members to the provisions of Standing Order No. 79(4) which provides as follows:-

> *"No Member shall impute improper motive to any other Member except upon a specific substantive Motion of which at least three days' notice has been given, calling in question the conduct of that Member."*

This rule of debate is important if we are to conduct our proceedings in an orderly manner. The freedom of speech and debate in the House comes with a heavy responsibility both with respect to members of the public and among ourselves. If a Member becomes aware of wrongdoing by another Member, it is incumbent upon him to give notice of a substantive Motion under this Standing Order so that the alleged conduct of the Member is discussed and a resolution by the House is made. The House should not degenerate into an arena for name calling and accusations and counter-accusations.

Hon. Members, for the foregoing reasons, it is necessary to revisit and clarify the directions issued from the Chair last Thursday. In particular, I wish to draw the attention of Members to the roles and functions of the Committee of Privileges established under Section 10 of the National Assembly (Powers and Privileges) Act. Section 10(4) of that Act provides that the Committee which is chaired by the Speaker *"shall either on its own motion or as a result of a complaint made by any person inquire into any alleged breach by any Member of the Assembly of the code of conduct issued under Section 9, or into any conduct of any Member of the Assembly within the precincts of the Assembly other than the Chamber* ***- emphasis: other than the Chamber -*** *which is alleged to have been intended or likely to reflect adversely on the dignity or integrity of the Assembly or the Member thereof or to be contrary to the best interest of the Assembly or the Members thereof."* The Committee of Privileges, after such inquiry, reports its findings to the Assembly together with such recommendations as it deems appropriate and the House then considers the report and the recommendations thereon and may take such disciplinary action against the Member concerned as may be recommended by the House. The jurisdiction of the Committee of Privileges is, therefore, limited and does not extend to matters which arise on the Floor. The Committee cannot be used as a substitute for what essentially can only be disposed of by the House through a substantive Motion. Similarly, in matters that arise on the Floor of the House, determinations properly belong to the Speaker or the presiding officer. The Committee of Privileges will not be seized of such a matter. It should be clear from what I have stated that what transpired on the Floor last Thursday both in the manner in which accusations were made and rebutted was not in keeping with our rules. The Committee of Privileges may become seized of the matter, but this will need to happen in accordance with Section 10 of the National Assembly (Powers and Privileges) Act. Any evidence that is in the possession of any person, whether a Member of this House or otherwise will need to be presented to the Committee. I call upon any person or persons, any witnesses who may have information or evidence of alleged improper conduct by any Member of this House which will be useful to the Committee of Privileges to not just write or speak about it, but to present the evidence or information without delay to my office for appropriate action. Where the alleged conduct borders on extortion or corruption, all persons are encouraged to additionally report to the relevant law enforcement agencies.

For my part, I beg that where conduct falls properly within the ambit of the various mechanisms of the House, this will be invoked to deal with it. I wish to pledge further the readiness and availability of the institution of Parliament to co-operate where appropriate with law enforcement agencies, so as to ensure that criminal conduct alleged to have been committed by any person in Parliament or within the context of the work of Parliament is investigated and, if necessary, to be prosecuted in accordance with the law. Parliament and its entire Membership is committed to be law abiding.

I thank you.

9. CONSIDERED RULING ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL

Wednesday, 30th May 2012

Hon. Members, I have one Communication with respect to The Statute Law (Miscellaneous Amendments) Bill of 2012 which today is appearing on the Order Paper. Yesterday, Tuesday, 29th May 2012, after the Attorney-General had made certain undertakings relating to how he proposed to proceed with prosecution of The Statute Law (Miscellaneous Amendments) Bill, I made a ruling to the effect that the Speaker will hold the Attorney-General to his word in respect of those clauses which, in his opinion, raised important questions of constitutionality and that, for all purposes, those clause specifically recited by the Attorney-General would stand withdrawn and the Attorney-General will not be permitted to move them in the Committee Stage on the Bill. Several hon. Members subsequently stood on points of order contesting a number of other clauses in The Statute Law (Miscellaneous Amendments) Bill, 2012 and urging the Speaker to rule that the clauses are unconstitutional or otherwise inappropriate and should be similarly withdrawn. These hon. Members were Dr. Khalwale, Mr. Mbadi and Eng. Rege. I then promised to give a ruling today covering the concerns of these hon. Members as well as those aspects spoken to by other hon. Members last Thursday and in respect of which a ruling from the Speaker had been sought. Hon. Members, arising from the points of order raised by Mr. Mbadi last Thursday and endorsed with further observations by Mrs. Odhiambo-Mabona and the other points of order raised yesterday, the outstanding propositions on which I will rule are as follows:-

(i) That the scope of the amendments proposed to the various statutes under the Bill including, as an example, those to the Energy and Communications Act is such that there are substantive issues being canvassed in the Bill and they required, according to the Constitution public participation and separate publication in Bills, and further that introducing such substantive amendments in the form of a Statute Law (Miscellaneous Amendments) Bill would deny the people of Kenya their right to participate in the legislative process.

(ii) That some amendments proposed in The Statute Law (Miscellaneous Amendments) Bill, 2012, and specifically the amendments relating to the Elections Act and the Industrial Court Act are unconstitutional and should be withdrawn.

(iii) That when a claim of unconstitutionality is made, the House should not proceed with the debate or other proceedings on the business in hand until a determination by the Speaker has been made.

Hon. Members will recall that last Thursday, after listening to the representations of hon. Mbadi, Mrs. Odhiambo-Mabona and several other Members and after hearing the AttorneyGeneral, I stated that although the issues canvassed were weighty and meriting of respective consideration, I was not convinced that I could find as at that point that I was persuaded to find that the Statute Law (Miscellaneous Amendments) Bill, Bill No.14 of 2012 is unconstitutional.

I stated that I did not have adequate material before me from the arguments articulated to make that finding. I, however, indicated that I wish to accord myself an opportunity to reflect on the matter and give such further directions as will be necessary. It was on this basis that I allowed debate to continue making it clear that I will give directions before the Mover of the Bill was called to reply and before putting the question on the Bill. I have now had the benefit of considerable reflection on the issues raised and the responses urged and I have come to the view that these issues can best be dealt with in two categories, namely; those that go to the question of appropriateness of the content of the Bill as a whole, the matter of its introduction and the procedure for its disposal and those which challenge the constitutionality of specific provisions of the Bill. In respect of the first category, I think it is pertinent to interrogate the scope and intent of a Statute Law (Miscellaneous Amendments) Bill.

Generally in this country and elsewhere in the Common Wealth, the traditional - and I may add orthodox - role of this kind of Bill is to make minor amendments to the statutes. This, indeed, is the long title of the Statute Law (Miscellaneous Amendments) Bill, 2012. The rationale for this kind of Bill is to save the time of Parliament by making, in one Bill, all the minor amendments and corrections to statutes whose non-contentious and mundane nature will not merit the numerous amendment Bills that will otherwise be entailed. To borrow a classical example from Canada, the long title of the Miscellaneous Statute Law (Amendment) Act, 2001, provides that it is "an act to correct certain anomalies in consistencies and errors and to deal with other matters of uncontroversial and uncomplicated nature in the statutes of Canada and to repeal certain provisions that have expired, lapsed or otherwise ceased to have effect". A Statute Law (Miscellaneous Amendments) Bill is not, and was never meant to be, an omnibus for substantive statutory amendments. It is, therefore, quite in order that questions have been raised whether the present Bill is compliant in this respect. This is a rule of practice of such notoriety that it comes close to assuming a legal status. I ask the hon. Attorney-General that he considers these concerns very carefully now and in the future. Amendments which are substantive in nature and which raise policy questions do not generally belong to this kind of Bill and should be brought as separate stand alone Bills. However, while some amendments may be unsuitable for inclusion in such a Bill and while the Attorney-General may be encouraged to bring such amendments in separate and stand alone Bills, I am unable to find nor am I prepared to

go so far as to say that their consolidation and inclusion in a single Bill is unconstitutional. This therefore, deals with the concerns of Eng. Rege and any other Member with similar concerns. It is, however, further important to observe that a Statute Law (Miscellaneous Amendments) Bill is a Bill like any other and the constitutional right of public participation in the legislative process is not taken away by the form in which statutory amendments are proposed. The publication period of such a Bill is the same and it is referred to a departmental Committee in the same manner as any other Bill. The public is free and is encouraged to engage the Committee and the House as a whole in the same manner as with other Bills. For the convenience of the House, this Bill has traditionally been referred to the Departmental Committee on Justice and Legal Affairs. Its miscellaneous nature notwithstanding, there is, of course, no bar to any Member of this House attending the meetings of this Committee in its consideration of any aspect of the Bill. This brings me to the second category of concerns raised by the hon. Mbadi and spoken to by other Members. This category relates to claims that specific proposed amendments are unconstitutional. Apart from the proposed amendments, which the Attorney-General has already withdrawn and to which I will make no further comment, hon. Mbadi draws specific attention to the amendments proposed to the Elections Act while Dr. Khalwale raised issue with the amendments proposed to the Industrial Court Act. In respect of the amendments to the Elections Act, after careful consideration, I do not find that I can agree with hon. Mbadi that these are unconstitutional. In fact, it is clear to me that the amendments seek to clarify the correct constitutional position in relation to by-elections which are held before the first general elections under the Constitution of Kenya, 2010. Some doubt has arisen and a lacuna appears to have been created after the passage of the Elections Act, 2011, which appear to bring such elections under the ambit of the new Constitution while the Constitution itself is clear at Sections 2, 3 and 7 of the Sixth Schedule that the applicable law should be the former Constitution and the law applicable before the passage of the Constitution of Kenya, 2010. The amendments are proposed to a Statute and not the Constitution. It is important to note that, that the amendments which are in the Statute Law (Miscellaneous Amendments) Bill are to a statute; the Elections Act and not to the Constitution. If they were to the constitution, then you will require a constitutional amendment. But because they are to a statute, you can amend through another statute. Hon. Mungatana will be useful to some of you who are around him. The amendments are proposed to the Statute and not to the Constitution. Although this should ideally be explained by the Mover of the Bill at Second Reading and in the Committee Stage, the Chair notes that the amendments seek to remove the anomalies and clarify the correct constitutional position and they are, therefore, not unconstitutional. On the basis of his point of order and on the face of the record, I similarly have not found that I can agree with Dr. Khalwale that the amendments proposed to the Industrial Court Act, 2011, are unconstitutional. The reasoning will largely be the same. Dr. Khalwale correctly observed that the Industrial Court Act is the court established by Parliament pursuant to

Article 162 of the Constitution. Parliament can amend this statute from time to time as becomes appropriate, that is, that Parliament can amend the Industrial Court Act because it is a statute from time to time. You do not require a constitutional amendment to do that. While I agree that the provisions of Article 2(6) of the Constitution provide that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution, this must not be construed to mean that such a treaty or convention overrides the Constitution itself.

Hon. Members, the final question I have to address relates to the appropriate time for the Speaker to rule on questions of constitutionality, and is a crucial one. This issue was canvassed by the hon. Odhiambo-Mabona who drew the attention of the Speaker to precedence in rulings previously made, that matters of constitutionality could not be the subject of a vote. Mrs. Odhiambo-Mabona also sought the direction of the Speaker on whether a claim of unconstitutionality needed to be first disposed of, or whether the House could proceed with the contested business and return to the question later. The issue is best answered by appreciating the nature of the defect that is alleged when a claim of unconstitutionality is made. It is the most serious claim that a Member of this House can make. It is a caution to all Members that they could be proceeding on a nullity as contemplated by Article 2(4) of the Constitution. It draws attention to Article 3 of the Constitution, the obligation of every person to respect, uphold and defend the Constitution, Article 10 on the values and principles of governance, Article 259 on construing the Constitution, among many other provisions of the Constitution. It is, therefore, a claim that merits the most urgent and careful attention and action. Standing Order No. 47 of our Standing Orders emphasizes this point by providing that the Speaker, if he is of the opinion that any proposed Motion is contrary to the Constitution, without expressly proposing appropriate amendment of the Constitution, may direct either that the Motion is inadmissible or that notice of it cannot be given without such alteration as the Speaker may approve. That said, I must agree with the remarks of the hon. Attorney General made last Thursday that a conclusion that a provision of a Bill is unconstitutional should not be casually or hastily arrived at, without considering all the points of view. It cannot be the case that every claim of unconstitutionality suspends the proceedings of this House until a ruling is made by the Speaker. It may well be the case that the claim, on closer scrutiny, is made on account of an erroneous interpretation of the Constitution, or is, otherwise, unfounded. It is for this reason that the Speaker may allow other points of view to be advanced, or may allow proceedings to continue as he reflects on the claim of unconstitutionality. This was, indeed, the case in the present matter. I wish to urge Members, however, that points of order on the basis of unconstitutionality be carefully considered before they are raised. It is possible that the proceedings of the House could become adversely affected if, instead of points of argument being advanced in debate on the Floor of the House, and contrary views expressed in the same manner or by voting for or against specific provisions, matters are, instead, raised as challenges on constitutionality.

Hon. Members, following all the foregoing, I direct that debate on the Second Reading of the Statute Law (Miscellaneous) Amendments Bill, 2012 shall resume at the point at which it was interrupted, and the Bill shall be proceeded upon by the House in accordance with the law and the Standing Orders. Members will note that the withdrawn provisions may not be referred to in debate at the Second Reading or at any subsequent stage.

I thank you.

10. DELAYED TABLING OF ESTIMATES OF REVENUE AND EXPENDITURE FOR 2012/2013 FINANCIAL YEAR

Wednesday, 13th June 2012

Hon. Members, you will recall that I promised to give directions in relation to a point of order raised by the hon. Member for Gwassi, alleging a failure by the Minister for Finance to table Estimates of Revenue and expenditure for the Financial Year 2012/2013 in compliance with Article 221 of the Constitution. The issues which arise from Mr. Mbadi's point of order and supplemented by a number of other hon. Members, including Mr. Imanyara, Dr. Khalwale and Mr. Mungatana are, as briefly as follows:-

(i) That the document tabled by the Minister for Finance on 26th April, 2012 was titled "Draft Financial Statement and Budget Framework" and was not the Estimates of Revenue and Expenditure of the National Government as contemplated in Article 221 of the Constitution.

(ii) That being titled "Draft" as the document was, the Minister in effect did not present a formal document that can be said to meet the requirements of the Constitution and that such a document ought not to have been accepted by the House.

(iii) The document tabled by the Minister for Finance was not compliant with the Constitution generally on account of its failure to give a detailed and itemized breakdown of the various Vote Heads or other such particulars as would enable this House to be properly informed of the Estimates of Revenue and Expenditure for the National Government.

(iv) That the Constitutional provisions at Article 221 of the Constitution should not be subordinated to legal and other processes outside the Constitution and the laws of Kenya.

Hon. Members will recall that I accorded an opportunity to the Minister for Finance to respond to the issues raised and that he did so on Thursday, 7th June 2012. In his response, he argued that he did submit on 26th April 2012 the Estimates of Expenditure for 2012/2013 together with the Draft Financial Statement and Budget Framework for the same year. He urged me to find that the Draft Financial Statement not only contained the Estimates of Revenue for the Financial Year 2012/2013, but also other resources to finance the estimates of revenue and that he had, therefore, fully complied with Article 221 of the Constitution. The Minister explained that the documents were marked as "draft" because the detailed Estimates of Revenue in the form in which hon.

Members are used which are printed Estimates of Revenue will only be available taking into account import duties and other taxation measures that are agreed upon jointly under the East African Pre-Budget consultations and also the consultations under the Sectoral Council on Finance and Economic Affairs Framework. He informed the House that it is only after consultations with the other East African Community partner States on proposed taxation measures that firm Estimates of Revenue can be availed. He, therefore, undertook to deliver the Estimates of Revenue books on Thursday 14th June 2012 when reading to the House the Budget Statement for the Financial Year 2012/2013.

This explanation did not appear to satisfy some Members of this House who wondered whether he was subjecting the mandatory provisions of Article 221 of the Constitution to consultations with other East African Community member States. This, he denied, arguing that the use of the word "draft" was administrative so as to distinguish the estimates tabled from estimates as they would stand after the consultations with the East African Community partner States. He, therefore, urged the House to ignore the word "draft" and to consider the draft estimates tabled in the House as the estimates required to be tabled under Article 221 of the Constitution.

Hon. Members, the issues which arise from this matter are important because they are precedent setting and have the potential to define the meaning to be attached to the requirements of Article 221 of the Constitution and the manner in which these key aspects of the Budget cycle will be implemented. Before I give directions on this matter, it is appropriate that we consider carefully the wording of Article 221 of the Constitution. The Article requires that the Annual Estimates of Revenue and Expenditure of the national Government are tabled in the National Assembly, which Assembly then considers them together with those of the Parliamentary Service Commission and the judiciary.

The National Assembly is required to seek the representations of the public and to take account of their recommendations when considering the estimates. Upon approval, the estimates are to be included in an Appropriation Bill which is introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed for the expenditure and for the appropriation of that money for purposes mentioned in the Bill. I think that this entire process needs to be contextualized in order to properly deal with the issues.

On the question on whether the document tabled by the Minister on 26th April, 2012 was the Estimates of Revenue and Expenditure contemplated by Article 221 of the Constitution despite its being titled "draft", I think it is crucial to emphasize the importance of fidelity to the letter and spirit of the Constitution. Article 259 of the Constitution, I must reiterate, enjoins us to interpret the Constitution in a manner "that

promotes its purposes, values and principles, advances the rule of law, permits the development of the law and contributes to good governance."

The clear intention of the mandate vested on the Cabinet Secretary for Finance to submit estimates of revenue and expenditure as evidenced by the processes thereafter is that documents are presented that can properly inform and benefit those processes. Words mean something. Every word has a meaning and I have to agree that when a document required by the Constitution to be tabled in this House is titled as "draft" a legitimate anxiety is created as to whether or not this is the document required to be tabled by the Constitution, or if a subsequent one shall be availed that will answer to the constitutional requirement. It is a legitimate question whether such a document is the formal document required under the Constitution. It must follow then that whatever may be the antecedent administrative processes in the Ministry of Finance and whatever may be the according system, the House expects and shall in terms of the Constitution, receive estimates of the revenue and expenditure of the national Government for the next financial year. For the avoidance of any doubt, a document intended to meet the requirements of Article 221 should be clearly so titled and labelled. It will not do for the Minister to ask the House to ignore certain words or make presumption.

Hon. Members, following on the observations I have already made about the need to give meaning to the letter and spirit of the Constitution, it is clear that the estimates required to be tabled to the House under Article 221 should provide such adequate detail as to inform the House and the public of the financial plans of the national Government and enable them to interact with, interrogate and make informed proposals for change. These requirements can hardly be said to be met when global figures are presented without the benefit of detailed breakdown and itemization. This is what I have previously called, and I quote "minimalist approach to constitutional interpretation that should be discouraged."

It should be noted, however, as hon. Boni Khalwale observed, that Article 222(2)(b) of the Constitution provides that the Estimates of Revenue and Expenditure to be tabled in the House, shall be in the form and according to the procedure prescribed by an Act of Parliament. Hon. Khalwale aptly noted that no obligation has been enacted by the House, setting out the form in which the Estimates must be presented and the procedure for doing so and invited the House to avail itself of this opportunity to enact legislation, clearly setting out the form and level of detail in which the Annual Estimates of Revenue and Expenditure shall be presented. The conclusion must be drawn that until such time, while the Minister needs to be guided by good precedence from the past and by the requirements of Article 259 of the Constitution, it cannot be said that the Annual Estimates presented shall be disallowed for the reason only that the figures presented are not adequately itemized.

Hon. Members, the point that was made by hon. Mbadi and emphasized by hon. Imanyara, whose effect is that the mandatory constitutional provisions cannot be subordinated to or postponed on account of our countries' international or regional obligations, is an important one. As I observed in the directions that I gave on 7th June 2011, the need to harmonize our Budget circle with those of our partners in the East African Community (EAC) is desirable and even prudent, but it cannot stand in the way of existing constitutional dictates. I said then and emphasize now that in my estimation, Article 2(6) of the Constitution does not subordinate the provisions in the Constitution of Kenya and our laws to our Treaty obligations. What that Article requires is that our Treaty obligations form part of our law under our Constitution. The effect of this is to make it the obligation of the State to ensure that we not only meet our Treaty obligations, including those under the Treaty for the establishment of the EAC, but that also we do so without violation of our own Constitution. What this means in the present context is that the Treasury must make any requisite consultations with our partner States without prejudice to its obligation to submit Estimates of Revenue and Expenditure, under Article 221 of the Constitution. Such consultations will not be permitted to be the reason for delay in presentation or for presentation of the Estimates in an unacceptable manner.

Hon. Members will note that there has been significant improvement in the budgeting process this year, in departure from the same time last year, when the Treasury failed altogether to submit the Estimates of Revenue and Expenditure to the House, at least, two months before the end of the Financial Year. This time around, subject to the observations and directions as I have given herein, the Estimates can be said to have been submitted in time. However, as has become apparent from my analysis of the issues that had been raised, there is still plenty of room for improvement in relation to the form in which the Estimates should be presented, in order to give full expression to the letter and spirit of Article 221 of the Constitution, and generally, the provisions of the Constitution as a whole. The Minister will do well to carefully consider all the issues raised on this matter on this occasion, so as to ensure that next year and subsequently, he tables Estimates of Revenue and Expenditure, fully compliant with the requirements of the Constitution.

Thank you.

11. CONSTITUTIONALITY OF TABLING OF MOTION ON VOTE ON ACCOUNT

Thursday, 21st June 2012

Hon. Members, during the afternoon sitting of the House yesterday, Wednesday, 20th June, 2012, the Member for Gwassi, Hon. John Mbadi, rose on a point of order and sought the ruling of the Chair on a matter of the tabling of a Motion on Vote on Account. He laid on the Table two letters from the Treasury dated 19th June 2012 and 20th June 2012, respectively. One of the letters was addressed to the Chairperson of the Parliamentary Budget Committee and related to the Report of the Committee on the Estimates of Revenue and Expenditure for the Financial Year, 2012/2013. In this letter, the Treasury sought to inform the Committee that although the Treasury agreed in principle on the recommendations made by the Committee on the Estimates as approved by the House, the Treasury was concerned that some of the proposed expenditure cuts would have adverse effects on the ability of the Government to deliver some critical services.

Regarding this particular letter, hon. Mbadi contended that it amounted to a calculated attempt by the Treasury to demonstrate that the Estimates approved by the House were incapable of implementation, a situation he termed as being unacceptable. Hon. Members, by the letter dated 20th June, 2012, the Treasury forwarded to the Clerk of the National Assembly a Motion on Vote on Account for the financial year 2012/2013 duly signed by the Minister for Finance and the Vote on Account Schedules in respect of Recurrent and Development Expenditure for the financial year 2012/2013.

Hon. Mbadi contended that in order to ensure compliance with Article 222 of the Constitution, a Motion on Vote on Account for the financial year 2012/2013 could not be introduced for debate in the House unless it was preceded by the introduction of an Appropriation Bill. In support of his position, hon. Mbadi tabled before the House a judgment by Justice David Majanja in a High Court Petition No.108 of 2011: Jayne Mati and Another v. Attorney General and Another.

Hon. Mbadi summed up his contribution by stating that the two letters from Treasury constituted Acts of impunity and violation of the Constitution that should not be condoned. Hon. Members, the Chair undertook to give directions on this matter today, Thursday, 21st June, 2012, noting nevertheless that the House transacts its business based on traditions, precedence, the Standing Orders, the Constitution and other written laws. Hon. Members, from the point of order and arguments made by hon. Mbadi I have determined the following as issues requiring my direction:

1. Whether pursuant to Article 222 of the Constitution, the Motion on Vote on Account is admissible in the House in the absence of a published Appropriation Bill.

2. The implications of the ruling by the High Court of Kenya in the matter of Jayne Mati and Another v. Attorney-General and Another, 2011 delivered by hon. Justice Majanja on 23rd December 2011.

3. Whether the Vote on Account should be based on the original Estimates laid by the Minister for Finance on 26th April 2012 or whether it should instead be based on amended and reviewed Estimates in line with the Budget Committee Report adopted by the House on 7th June 2012.

I think that the first two issues can be fairly considered and disposed of together by revisiting the ruling made by the Chair on 7th June, last year as well as the decision of the court in the Jayne Mati Case. Faced with somewhat similar circumstances last year, the Chair ruled that Articles 221 and 222 were in force and that it was incumbent on this House and the Executive to abide by them in the Budget-making process. The Chair explained the elaborate process contemplated by the Constitution culminating into the introduction of an Appropriation Bill in the House by the Minister for Finance, or in future by the Chairperson of the Budget Committee once the Estimates have been approved.

The Speaker ruled that the budget process has in-built mechanisms for dealing with unforeseen events in order to avoid the possibility of what is sometimes described as a financial shut down of the Government. It was explained that the purpose of Article 222 of the Constitution is to enable the National Assembly to authorize the withdrawal by the Government of money from the Consolidated Fund in the event that the Appropriation Bill may not be assented to or is unlikely to be assented to at the beginning of a new financial year.

It will be recalled that the Chair emphasized the doctrine of separation of powers and the prerogative of each arm of the Government to proceed in the budget process based on its interpretation of the Constitution and that for Parliament's part, he would have recourse to Article 259(1) of the Constitution requiring the Constitution to be interpreted in a manner that promotes its purposes, values, principles, advances the rule of law, permits the development of law and contributes to good governance. Applying these provisions, the Speaker, underlining his hope that the shortcomings occasioned by the Executive in the budget process last year would not recur, allowed the budget process to proceed but also set out guidelines for this year's and subsequent budget processes.

Hon. Mbadi contended that in order to ensure compliance with Article 222 of the Constitution, a Motion on Vote on Account for the financial year 2012/2013 could not be introduced for debate in the House unless it was preceded by the introduction of an Appropriation Bill. In support of his position, he tabled before the House a judgment by Justice David Majanja in the High Court Petition No.108 of 2011, Jayne Mati and Another v. Attorney General and Another. Hon. Mbadi summed up his contribution by stating that the two letters from Treasury constituted acts of impunity and violation of the Constitution that should not be condoned.

Hon. Members, as pointed out by hon. Mbadi, the matter of last year's budget process and in particular the Vote on Account found its way to the High Court in the Jayne Mati Case where the court was urged to find that the National Assembly contravened Articles 114, 206, 221, and 222 of the Constitution of the Republic of Kenya by permitting debate, approving and passing the Motion on Vote on Account authorizing the withdrawal of money from the Consolidated Fund without the passing of an Appropriation Bill.

In the judgment of the High Court, which was tabled by hon. Mbadi, the court ruled, among other things in paragraph 25 of the ruling, that Article 222 contemplates the existence of an Appropriation Bill hence the reference to the words in Article 221 which say: "If the Appropriation Act for the financial year has not been assented to or is not likely to be assented to". These words import the existence of a Bill that is within the legislative process or a Bill which has been passed, but is awaiting Presidential assent." Paragraph 27 of the same ruling – Judgement: I, therefore hold that for there to be compliance with Article 222, there must be an Appropriation Act or Bill in place and it was in breach of the Constitution to proceed to withdraw money from the Consolidated Fund without the existence of an Appropriation Act or Bill. This finding does not end the matter.

Despite this finding of the court, Justice Majanja declined to issue the declaration sought in the petition on the grounds that he was satisfied that the Speaker's ruling to allow the Vote on Account to proceed last year – the procedures adapted and directions given by the Speaker - were made in good faith and they were not calculated to undermine the constitutional bedrock of the Budget process and the Constitution itself. It was unclear as to whether the Minister for Finance was aware of this judgement in bringing the Motion for Vote on Account and, if so, how, regardless of the ruling of the Chair, he proposes to deal with it in light of the doctrine of separation of powers, as I have enunciated. I think that it would have been useful to hear the thoughts of the hon. Attorney General, the Principal adviser to the Government on this matter.

Hon. Members, on the issue of the estimates on which the Vote on Account should be based, given that Article 221 of the Constitution is in force and requires interpretation in the spirit of Article 259 of the Constitution, it follows that the Appropriation Bill referred to in Clause 7 of Article 221 of the Constitution and which subsequently gives rise to the Appropriation Act referred to in Article 221 of the Constitution is based on the estimates of expenditure that have been reviewed and approved by the House in line with Article 2216 of the Constitution.

In this regard, an Appropriation Bill which draws its legal mandate from Article 222 of the Constitution cannot be based entirely on drafts of estimates of expenditure unilaterally presented to this House by any single arm of Government. It will follow that an Appropriation Bill needs to be based on estimates that result from a comprehensive review – an amalgamation by this House, which in this case, would be the estimates that result from the approval of this House of the report of the Budget Committee on the 2012/2013 estimates of the revenue and expenditure.

Hon. Members, arising from the foregoing and considering all pertinent circumstances, I will now rule on the way forward on this matter. In so doing, I am guided by the precedence of this House, our Constitution and of other kindred jurisdictions on the matter of Vote on Account. I also know that the current Article 222 of the Constitution is not entirely new. Section 101 of the former Constitution had similar provisions and was the basis for the Vote on Account. It was not understood in law or practice to be a requirement that the publication of an Appropriation Bill had to precede the Motion for Vote on Account. But that is not all. The argument that Article 222(1) has an implication that there has to be in existence a published Appropriations Bill can be countered by the equally persuasive argument that there is no such implication and the Vote on Account is introduced as set out in Article 222.

This is the Article - If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year so as to enable the National Assembly to authorize the withdrawal of money from the Consolidated Fund for the purpose of meeting expenditure necessary to carry out on the services of the National government during that year until such time as the Appropriation Act is assented to---. The Article is clear; the amount to be withdrawn should not exceed in total one-half of the amount included in the estimates of expenditure for that year that have been tabled in the National Assembly. The Vote on Account, therefore arises if the Appropriation Act for the financial year has not been assented to or is not likely to be assented to by the beginning of the year.

The provision in the Constitution proceeds and says – I read:-

(1) If the Appropriation Act for a financial year has not been assented to, or is not likely to be assented to, by the beginning of that financial year so as to enable the National Assembly to authorize the withdrawal of money from the Consolidated Fund.

(2) Money withdrawn under clause (1) shall-

(a) be for the purpose of meeting expenditure necessary to carry out the services of the national government during that year until such time as the Appropriation Act is assented to;

(b) not exceed in total one-half of the amount included in the estimates of expenditure for that year that have been tabled in the National Assembly".

Hon. Members, whatever the reason, this argument is enhanced by the comparative practice in most jurisdictions where every effort is made to avoid a scenario that results in the shutdown of Government and, therefore, denial of the citizens of their constitutional right to services.

Hon. Members, for all these reasons, I feel that I am guided once again by the constitution and, as I indicated, the precedent set out in the ruling of the Speaker on June 7th 2011. I, therefore, find that from the standpoint of Parliament, the position that it is a requirement for a published Appropriation Bill as a condition precedent to the mentioned Vote on Account cannot be presumed on that basis. And considering the totality of the current prevailing circumstances, the Minister for Finance shall be permitted to give notice and to prosecute a Motion for Vote on Account.

Thank you Hon. Members.

12. AMENDMENTS REPRESENTING A DIRECT NEGATIVE OF THE QUESTION PROPOSED IN A PRESIDENTIAL MEMORANDUM ON A BILL

Thursday, 28th June 2012

Hon. Members, as you will recall yesterday, Wednesday, 27th June 2012, I gave communication on the matter of the refusal by His Excellency the President to assent to the Statute Law (Miscellaneous Amendments) Bill, 2012 and his submission of a memorandum thereon. This communication followed the earlier communication I made on Tuesday, 26th June, 2012, in which I detailed the procedure for the disposal by this House of a Presidential Memorandum.

Hon. Members, subsequent to these communications, I did receive yesterday a proposal supported by several hon. Members seeking to put forward for the consideration of the House a proposed amendment to the President's amendment as set out in the memorandum in respect of Section 51 of the Political Parties Act. I have carefully considered the proposed amendment in question in the context of Section 46(5) of the former Constitution which sets out the options for the House in considering a Presidential Memorandum and Standing Order No. 55 which disallows the amendments which in the opinion of the Speaker represent a direct negative of the question proposed. I have come to the conclusion that the proposed amendment is inadmissible. Therefore, I accordingly direct that the Committee of the whole House considers the proposed amendments as set out in the Order Paper and that the House will proceed to deal with the Presidential Memorandum in terms of Standing Order No.125(6) and Section 46(5) of the former Constitution.

Thank you.

13. CONSTITUTIONALITY OF THE PROCESS OF VETTING NOMINEES TO THE NATIONAL POLICE SERVICE COMMISSION

Thursday, 28th June 2012

You will recall on Thursday 8th March 2012, in a communication from the Chair I informed hon. Members that by a letter dated 7th March 2012, from the Permanent Secretary to the Cabinet and Acting Head of Public Service, the National Assembly had been advised by His Excellency the President in consultation with the Prime Minister that they had nominated the following persons for appointment to the National Police Service Commission. They are:-

- Amina Ali Masoud - Chairperson
- Esther Chui-Colombini - Member
- Ronald Musengi - Member
- James Atema - Member
- Dr. Maj. Muia Shadrack Mutia - Member
- Mary Auma Owuor - Member

These names, the accompanying curriculum vitae of the nominees and the report of the selection panel were forwarded to the Departmental Committee on Administration and National Security for consideration by the Committee prior to approval by the House. On 15th May 2012, the Chairperson of the Departmental Committee on Administration and National Security, Mr. Kapondi, laid the report of the Committee on the vetting of the nominees to the National Police Service Commission on the Table of the House and gave notice of Motion for the adoption of the report.

On Tuesday, 22nd May 2012, in the course of debate on the report of the Committee, the hon. Ababu Namwamba rose on a point of order under Standing Order No. 47(3)(b) and raised a number of questions. The hon. Member sought to know whether the Departmental Committee on Administration and National Security had acted outside its mandate by going beyond the list of names submitted to it through the Office of the Clerk of the National Assembly by the letter dated 7th March 2012.

In this regard, he observed that the Committee in its report had stated that it had invited all persons who had been short-listed for the position of chairperson to appear before it despite the fact that these persons had been interviewed by the selection panel. He further observed that the names of some of the persons who had appeared before the Committee were not among the names that had been forwarded by His Excellency the President to the National Assembly for approval prior to appointment.

Mr. Namwamba further sought to know whether the Committee had exceeded its mandate by conducting actual interviews as opposed to vetting the nominees as was required by law. The Member took the view that the Committee may have engaged in a re-interviewing process, or in an audit of the work of the selection panel and that the Committee may have served as an appellate tribunal for the candidates who had previously been interviewed, and who had not been nominated for appointment to the Commission.

Mr. Namwamba, therefore, urged the Chair to find that the report of the Committee could not be considered by the House in the form in which it had been tabled owing to the procedural anomalies that he had observed. He argued that to proceed with the consideration of the report would be an illegality and would be unconstitutional.

A number of Members rose to contribute to the matter, among them Mrs. Odhiambo Mabona, Mr. Kapondi, Dr. Khalwale, Mr. Mbadi, Mrs. Shebesh and the Attorney-General, Prof. Githu Muigai. The issues they raised included the following:-

(a) That there was no consultation between His Excellency the President and the Rt. Hon. Prime Minister in forwarding the names of the nominees to the National Assembly, and, therefore, the report of the Committee was not properly before the House.

(b) That the report is unconstitutional in recommending to the President the appointment of persons other than those nominated by the President.

(c) That there is no unconstitutionality or illegality in the Committee recommending the names of the persons it considered ideal for appointment and that this is not binding on the President.

Hon. Members, following the above arguments, the Chair issued interim directions to the effect that the Departmental Committee on Administration and National Security had extended its mandate and powers, and that consequently the Motion was inadmissible and that debate could not proceed on it. In the interim directions, the Committee was directed to go back and redo its work, re-do its report and bring it back to the House in line with the National Police Service Commission Act and the Constitution of Kenya. In the meantime, the Chair undertook to deliver a communication on the way forward in the matter.

Hon. Members, arising from the interim directions issued from the Chair, a number of questions have been raised with the Speaker as to the import of those directions, the current status of the Committee report and the way forward in this matter. Questions have been raised as to whether the report of the Committee could be removed from the

House when it had already been laid before the House, notice of its Motion and the Motion on the report moved.

The Chair of the Departmental Committee has also sought directions on what exactly is expected of his Committee. The present communication seeks to give further clarification and directions on these matters. Hon. Members from the contributions made to this matter, and further to the directions given by the Chair on Tuesday the 22nd May, 2012 the issues that remain for my determination are as follows:-

(i) whether or not the Committee overstepped its mandate in its consideration of the nominees for appointment to the National Police Service Commission;

(ii) if so, the manner in which the Motion for the adoption of the report of the Departmental Committee on Administration and National Security on the vetting of the nominees to the National Police Service Commission should proceed.

Hon. Members Section 6 of the National Police Service Commission Act (Act. No.30 of 2011) sets out in elaborate detail the processes attendant to the appointment of the chairperson and members of the National Police Service Commission. The Act provides for a multidisciplinary selection panel whose mandate is to invite applications from interested persons, consider the applications received, shortlist the applicants and eventually interview the shortlisted applicants and forward the names of the successful applicants to the President. The President is then required to select the chairperson and the members of the Commission from the names forwarded to him by the selection panel, and to forward the names of the successful applicants to the National Assembly for approval. The role of the National Assembly is provided for in subsection (6) of Section 6 of the Act as follows:-

> *"The National Assembly shall within 21 days of the day it next sits after receipt of the names of the applicants under subsection (5) vet and consider all the applicants, and may approve or reject any or all of them".*

Hon. Members, on 8th March 2012, the names of the nominees were committed to the Departmental Committee on Administration and National Security for vetting in terms of Section 6(6) of the Act. In its report the Committee has indicated that it not only considered the nominees of His Excellency the President to the position of chairperson of the National Police Service Commission, but that it interviewed all the ten candidates who were shortlisted by the selection panel for the position.

Hon. Members, the Powers and Privileges Act, Cap.6 of the Laws of Kenya, and the Standing Orders empower a Committee to summon any person to appear before it.

Section 14 of the Act provides that the Assembly or any standing Committee may, subject to the provisions of Sections 8 and 20, order any person to attend before it and give evidence or produce any paper, book, record or documents in the possession or under the control of that person. The Act further provides that these powers may be exercised by any other Committee which is specially authorized by a resolution of the Assembly to exercise those powers in respect of any matter or question specified in the resolution. From these provisions it is clear that it is open to a Committee, taking all matters into consideration, to invite any persons, including persons whose names are indicated as having been shortlisted, to appear before the Committee. In doing so, a Committee nevertheless, needs to remain alive to the principle of separation of powers and its application to the process of parliamentary approval of nominees for public appointment. It should be broadly understood that the mandate of making nominations for appointments belongs to the Executive, and that it is the role of the Legislature to determine the suitability or otherwise of the nominees and to make appropriate recommendations to the Executive.

Accordingly, just as the Executive cannot appoint persons who have not been approved by the House, the House too cannot originate the names of the nominees to be appointed. So long as this is recognized and accepted, a Committee may interview any persons it wishes in order for it to form a view on the suitability of both the persons nominated and the process undertaken by which the nominations were made. The Committee can also, in its report, make recommendations as to the suitability of the person nominated or of other persons all together. Therefore, in so far as a Departmental Committee may invite and speak to any person, and further in so far as the recommendations of the Committee in relation to these latter persons as contained in its report do not bind the Executive, I am not persuaded that I can find unconstitutionality either in the process adopted by the Committee or in its outcome.

Hon. Members, the Committee in its report made a number of recommendations for consideration by the House, some of which relate to the matters raised by Mr. Ababu Namwamba in his point of order, and to the subsequent contributions by his colleagues. The Committee made some observations and recommendations on the constitutionality, or otherwise, of the process undertaken by the Executive; as I have ruled before it is not every claim, whether by a Committee or by an individual Member alleging unconstitutionality is so.

It may be that the Committee's view is not shared by the House and that Members of the House are able to urge and persuade a contrary view. Likewise, it may also be the case that when all the Members have read and interrogated the report of the Committee and have made their contributions thereon in debate, the claim of unconstitutionality is abandoned or it becomes apparent that it is unmeritorious. The point, therefore, is that unless the claim of unconstitutionality is apparent on the face of

the record and further, unless the processes in the House cannot remedy such unconstitutionality, it may be well to allow the House to ventilate fully on the matter.

In the present case, I am not persuaded that a claim of unconstitutionality has clearly been made out so as to require that the report of the Committee be stopped from proceeding according to the procedures of the House at the preliminary level. I have also considered the possible outcomes of a debate on the Motion which are, of course, an approval of the report of the Committee with or without amendment or a rejection thereof. For the reasons I have recited above, the nature of the report of this Committee is such that none of these outcomes will have an unconstitutional result that is binding in its effect.

For all the reasons I have stated, I find that it is the prerogative of this House, which should not be denied without adequate ground, to exercise its collective wisdom and discretion and to determine the manner in which it proposes to dispose of the report of the Departmental Committee on Administration of Justice and National Security.

On the Motion of the Committee *"THAT, this House adopts the Report of the Departmental Committee on Administration and National Security on the vetting of the nominees to the National Police Service Commission (NPSC) laid on the Table on Tuesday, 15th May, 2012",* it is open to the House to approve and, therefore, agree in toto with the Committee in its report or agree with the report with such amendments as may be made by the House or reject the report of the Committee in its entirety. In making this determination, I wish to emphasize and draw the particular attention of the House to recommendation No.1 of the Committee in its report which is to this effect and I quote: -

"Recommendation No.1 - The nomination of the six persons to the NPSC was unconstitutional within the context of Articles 246(2) (a) (i) and 166(2) of the Constitution. Pursuant to Section 6(9) of the National Police Service Commission Act, 2011, the Committee recommends the names of the six nominees be referred back to the President to submit fresh nominations".

A very clear finding in recommendation which the House will agree or disagree with; approve or disapprove and, the consequences are obvious, are they not?

Hon. Members, I, therefore, urge and direct that the debate on the Motion for the adoption of the report of the Departmental Committee on Administration and National Security on the vetting of the nominees to the NPSC be proceeded with from the point at which it was interrupted. I direct that this business be placed on the Order Paper at the immediate next Sitting of the House.

Thank you.

14. GUIDANCE ON TWO PRIVATE MEMBERS BILLS BEFORE THE HOUSE

Thursday, 13th September 2012

Mr. Deputy Speaker:
Hon. Members, you will recall that on Tuesday, 11th September, 2012, when the Alcoholic Drinks (Amendment) Bill, 2012, came up for the First Reading, the Member for Mt. Elgon, hon. Fred Kapondi, rose on a point of order seeking the direction of the Chair, as to whether it was proper to proceed with the First Reading of The Alcoholic Drinks (Amendment) Bill, 2012, Bill No.39 of 2012 by the Member for Naivasha, hon. John Mututho in light of an earlier similar titled Bill sponsored by himself which was awaiting Second Reading.

In summary, the following issues were raised for determination by the Chair:-

(a) Whether the Alcoholic Drinks (Amendments) Bill, Bill No.19 of 2011 published by hon. Fred Kapondi was similar to the Alcoholic Drinks (Amendment) Bill, 2012 published by the hon. John Mututho.

(b) Whether it was procedurally in order for two Bills to be published in respect of the same subject matter.

Hon. Members, you will further recall that the Chair did then make preliminary observations on the issues raised, but was inclined to adjourn debate so as to study the matter in detail and give a comprehensive ruling or direction.

The foundation of the arguments brought forward by the hon. Member for Mt. Elgon is that The Alcoholic Drinks Control (Amendments) Bill, Bill No.39 of 2012 published in the name of hon. John Mututho is similar in content as The Alcoholic Drinks Control (Amendment) Bill, Bill No.19 of 2011, which is sponsored under the Bill by the hon. Mututho must, therefore, be set aside.

Specifically the hon. Kapondi stated and I quote verbatim:- "I want your direction on this particular order because I have a similar amendment that passed through the First Reading on 21st July, 2011. It is currently pending in Second Reading. It is an amendment to the so-called Mututho Law. So, it is important to give guidance on whether it makes sense to have two private Members' Bills before the House."

Before I address the arguments put forward in this matter, it is, perhaps useful to remind the Members of the provisions of Standing Order No.104 (2)(3) under which a Bill is published only after the Speaker certifies that a Member's legislative proposal be proceeded with and be published.

The Alcoholic Drinks Control (Amendment) Bill, Bill No. 39 of 2012 was published on 27th August 2012 under direction of the Speaker and is, therefore, compliant with the provisions of this Standing Order.

Hon. Members, the Standing Order do not contain clear rules regarding simultaneous publication, introduction and disposal of Bills, which relate to the same subject. However, a study of relevant Parliamentary precedence in other jurisdictions is useful. In the United Kingdom, there is no general rule or custom, which restrains the presentation of two or more Bills relating to the same subject and containing similar provisions. But if a decision of the House has already been taken on one such Bill, for example, if the Bill has been given or refused a Second Reading, the other is not proceeded with, if it contains substantially the same provisions.

In the Australian House of Representatives, it is not unusual for Standing Orders to be suspended to enable related Bills to be considered together in order to meet the convenience of the House. A suspension of Standing Orders to enable a Member of related Bills to be guillotined in one Motion has also included provisions to allow groups of the Bills to be taken together.

Hon. Members, a review of the two Bills shows similarity as well as differences. For example, both The Alcoholic Drinks Control (Amendment) Bill of 2011 and The Alcoholic Drinks Control (Amendment) Bill of 2012 contain different provisions to amend sections 29, 12, 24,32, 47, 68 and 70 of the Alcoholic Drinks Control Act of 2010.

In addition, The Alcoholic Drinks Control (Amendment) Bill, published by the hon. John Mututho contains addition sections; namely, 1, 3, 4, 5, 6, 7, 10, 11, 13, 14, 15, 16, 17, 18, 19, 21, 25, 26, 31, 34, 37, 45, 60, 65, 66 and 67 of the Act. There are, therefore, areas of convergence as well as divergence in both Bills.

Hon. Members, as you may be further aware, we currently have a number of Bills which relate to the same broad subject matter and which are in cognizance at various stages of consideration by the House. This include the Sugar (Amendment) Bill, Bill No.17 of 2012 by the hon. John Mututho, which is awaiting Second Reading and the Sugar (Amendment) Bill, Bill No.62 of 2011 by the Minister for Agriculture, which was read a Second Time yesterday and is awaiting Committee of the whole House. Two, Traffic (Amendment) Bill, Bill No.8 of 2012 by the hon. Jakoyo Midiwo, which awaiting Committee of the whole House and the Traffic (Amendment) Bill, Bill No.29 of 2012 by the hon. Minister for Transport, which is awaiting Second Reading. Three, the Public Procurement and Disposal (Amendment) Bill of 2012 by the hon. Olago

Alouch, published last week and the Public Procurement (Amendment) Bill, 2011 by the hon. Eugene Wamwalwa, which is pending Committee Stage.

Hon. Members, you may also recall that in the year, 2007, the Tobacco Control Bill, 2007 published by the hon. John Gor Sungu was almost word for word with the Tobacco Control Bill, 2007 published by the Minister for Health.

Hon. Members, having reviewed the submissions made by hon. Kapondi and the relevant precedents including comparative precedence that he has just cited, the Chair rules that the existence of The Alcoholic Drinks (Amendment) Bill, 2012, Bill No.19 of 2011 by hon. Kapondi does not by and of itself stop The Alcoholics Drinks Control (Amendment) Bill, Bill No.39 of 2012 by hon. Mututho from proceeding to the First Reading.

The case would have been different if as it has happened before, the text of amendment was exactly or substantially the same in both Bills. In such events, the Chair would have no alternative but to rule that the second Bill be not proceeded with in the present case, observing some similarities but noting that on the whole, the Bills are different. I rule that in such a case, there is no bar to the publication and progress to the second Bill. However, in respect of each state of the legislative process, the House shall dispose of the Bill that is first published before dealing with the second or subsequent published Bills on the same subject.

Hon. Members, the foregoing notwithstanding, the Chair is in receipt of a letter dated 11th September, 2012 from the Member for Naivasha, hon. John Mututho, in which the Member indicates that the Government has expressed willingness to take over his Bill and that he has subsequently surrendered the Bill to the Minister for Public Health and Sanitation who should handle the Bill from the First Reading to conclusion. In terms of Standing Order No.123, the Member in charge of a Bill may, without notice, move that the Bill be withdrawn, either before the commencement of the business or on the order of the day for any stage of the Bill being read.

Hon. Member, as the Bill in question has not been read the First Time, and the House is, therefore, not seized of the Bill, the import of the letter by hon. Mututho is to withdraw from sponsorship of the Bill and the Bill can, therefore, come up for First Reading on republication by the Government as indicated in the letter by hon. Mututho. As far as the House is concerned, it is not seized of any Bill by hon. Mututho at this stage. He has opted to surrender it to the Government which can process it from the start.

15. GUIDELINES ON CONSIDERATION OF THE DRAFT ELECTIONS (REGISTRATION OF VOTERS) REGULATIONS

Thursday, 4th October 2012

I would like to guide the House on the procedure which shall apply to the consideration of the Draft Elections (Registration of Voters) Regulations, 2012 appearing under Order No. 8. The regulations will be considered in two stages, first, when the Order for the Motion is read, I will call upon the Minister to move the Motion. Once seconded, I will proceed to propose the Question. The purpose of this Motion is to initiate debate on policy and principle of the Draft Regulations and the debate should take a maximum of one hour. Upon conclusion of this debate, the House will dissolve to the Committee of the whole House, in which case the House will, in the Committee, consider each regulation in the Draft Regulations in a manner similar to a Committee stage of a Bill. The purpose of moving into Committee is to enable hon. Members to examine each of the proposed regulations and schedules one after the other and move amendments where necessary as in a Committee Stage of a Bill.

In the Committee of the Whole House, I will call upon the Minister for Justice, National Cohesion and Constitutional Affairs to move the Motion: *"That pursuant to Section 109(3) of the Elections Act, Act.No.24 of 2011, this House approves the Draft Elections (Registration of Voters) Regulations, 2012, laid on the Table of the House on Thursday, 30th August, 2012."* This is essentially the Motion for approving the Draft Regulations. The Clerk will read each regulation and schedule one after the other as contained in the Draft Regulations, 2012. At the end of the consideration, the Chair will ask the Minister to move the Motion which is: *"That the Committee doth report to the House its consideration of the Draft Election (Registration of Voters) Regulations 2012 and its approval thereof with or without amendments."*

If the Question is agreed to, the House will resume, herald in the Third and last phase of the consideration of the Draft Elections Regulations. When the House resumes, the Chair of the Committee of the whole House will report thus: *"That the Committee has considered the Draft Elections (Registration of Voters) Regulations, 2012 and approved the same without or with amendments"*.

Finally, I will call upon the Minister to move the Motion: *"That the House do agree with the Committee in the said Report"*. After the Motion is seconded, I will propose and later put the Question for the decision of the House, indicating the conclusion of the matter.

16. CONSTITUTIONALITY OF DEPLOYMENT OF THE KDF IN BARAGOI AND GARISSA

Thursday, 13th December 2012

Hon. Members, you will recall that on Wednesday, 21st November 2012, the Member for Gem Hon Jakoyo Midiwo rose on a point of order seeking the guidance of the Speaker on the constitutionality of the involvement of officers of the Kenya Defence Forces in Baragoi in Samburu District and in Garissa.

In summary, the Hon Member sought guidance as follows:-

(a) whether the involvement of officers of the Kenya Defence Forces in Baragoi and Garissa did not require the prior approval of the National Assembly as it amounted to assistance and cooperation with other authorities in situations of emergency or disaster within the meaning of Article 241(3)(b) of the Constitution; or

(b) whether the involvement of officers of the Kenya Defence Forces in Baragoi and Garissa required the prior approval of the National Assembly as it amounted to a deployment to restore peace in an area affected by unrest or instability within the meaning of Article 241(3)(c) of the Constitution.

The Minister of State for Provincial Administration and Internal Security Hon. Katoo Ole Metito on a Ministerial Statement issued in the House on 21st November, 2012 contended that the National Security Council on 13th November, 2012 directed the deployment of the Defence Forces to assist in Samburu County and other areas, alongside the Kenya Police Service, for purposes of assistance and cooperation pursuant to Article 241(3)(b) and did not require the approval of the National Assembly.

The Member for Gem was of the contrary view and contended that the deployment of the Kenya Defence Forces in Baragoi and Garissa required the prior approval of the National Assembly as it amounted to a deployment to restore peace in an area affected by unrest or instability.

Article 241 of the Constitution, which is in contention, in this case, provides:

"The Defence Forces—

(a) are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;

(b) shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and

(c) may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly."

Hon. Members, as I observed on Tuesday 4th December, 2012 last week, it is in the public domain that the issue as to whether or not the involvement of the Kenya Defence Forces relates to one or other scenario envisioned under Article 241(3) (b) and (c) of the Constitution, is a matter that is currently pending before the High Court in High Court Petition No 538 of 2012 (Washington Jakoyo Midiwo versus The Minister of Internal Security, The Minister of Defence and the Attorney-General).

As I promised then, I would only be in a position to pronounce myself on the matter raised by Hon. Midiwo, after perusal of the pleadings in Court bearing in mind the principle of sub judice.

Hon. Members, may I take this opportunity to remind the House of the principles of national security as set out in Article 238, (2) (a) and (b) of the Constitution which are as follows:

"(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles-

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms."

The Constitution has, in order to safeguard the rule of law, democracy, human rights and fundamental freedoms, laid a clear process on how our Defence Forces may be deployed. It behoves all State organs to be alive to these principles in the deployment of the Kenya Defence Forces. The issues raised by Hon. Midiwo are weighty and the manner in which they are dealt with will set the precedent and form a firm basis on how such deployment should be undertaken.

Article 241(3)(b) and (c) anticipate that it is for the National Government after assessing the security situation to either deploy the Defence Forces to assist and cooperate with other authorities in instances of emergency or disaster and report to the National Assembly or deploy them to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly. The National Assembly

will, using its Rules of procedure, facilitate the National Government to have the matter deliberated upon by the House.

Turning to the matter in Court, in his petition dated the 22nd of November, 2012, the Hon. Midiwo (petitioner) seeks the following declarations, amongst others, from the High Court:

(a) A declaration that the 1st, 2nd and 3rd respondents have contravened the provisions of Article 241(3)(c) of the Constitution of the Republic of Kenya by deploying the Kenya Defence Forces to Baragoi, Samburu, Turkana and Marsabit areas without obtaining Parliamentary approval for the deployment;

(b) A declaration that the 1st, 2nd and 3rd respondents have contravened the provisions of Article 241(3)(c) of the Constitution of the Republic of Kenya by deploying the Kenya Defence Forces to Baragoi, Samburu, Turkana and Marsabit areas in the absence of any evidence of actual unrest, instability or civil disobedience in those areas to justify the use of military force.

Hon. Members, I note that the issues raised by the Member on 21st November 2012 are exactly the same issues which are pending for determination before the High Court in the aforesaid case.

Hon. Members, going back to where I was, Standing Order No. 80 contains the rules on how this House determines whether a matter is sub judice or not because paragraph (1) of the said Standing Order in particular prohibits reference to any matter which is sub judice. Under paragraph (2) of the said Standing Order, a matter is considered to be sub judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.

Is the current matter active within the meaning of Standing Order 80 (2)? Under paragraph 3 (c) of Standing Order 80, civil proceedings are considered to be active when arrangements for hearing, such as setting down the case for trial have been made, until the proceedings are ended by judgment or discontinuance.

The daily Cause List of the High Court indicates that High Court Petition No 528 of 2012 has been listed for hearing commencing on 10th December 2012 before Justice Majanja. The matter having been listed for hearing as stated above is therefore active within the contemplation of Standing Order 80(3) and any pronouncement on the matter by Mr. Speaker may prejudice its fair determination by the Court.

I also note that the HANSARD proceedings of the House on Wednesday, 21st November 2012 are part of the record of pleadings filed in Court. This is indeed a

testament of how the proceedings of this House may very well prejudice fair determination of the matter in court.

Hon. Members, as I have stated in my previous Communications relating to matters in Court, in the Commonwealth tradition, the sub judice rule arose out of a desire by Parliament to exercise restraint such that its comments and debate do not influence Courts to the detriment of litigating parties and witnesses in court proceedings. The doctrine is additionally premised on the Constitutional principle of separation of powers by which Parliament should not be seen as trying to deal with issues that properly belong to the Judiciary.

This is not to say Parliament cannot express itself on a matter in Court - far from it. Indeed, in my ruling made on 10th September, 2009 on the matter relating to the appointment of the Director and two Assistant Directors of the then Kenya Anti-Corruption Commission which was being jointly considered by the Committee on Justice and Legal Affairs and on Delegated Legislation, I stated:

> *"It must be noted that court proceedings are presided upon by judicial officers properly trained in law and who have taken an oath to discharge the functions of their office without fear or favour and without extraneous influences being brought to bear on their work."*

In the same ruling, I made the following observation:

> *"I take the view that as a general proposition, this House, in line with the precedents from other similar jurisdictions, should not abandon a matter over which it is seized on the ground only that the matter has become the subject of litigation in a court of law. Indeed as my learned predecessor, Speaker Kaparo, had occasion to say on 13th April 1995:* ***"The effectiveness of the National Assembly will be seriously undermined if Members should pre-empt debate on matters before the House by resorting to court"****."*

Hon. Members, if this House, as happened in the present case, begins to consider any matter before it is the subject of litigation, the House will not give up jurisdiction of the matter easily or at all, for the reason only that some litigation has subsequently commenced on the matter. To hold otherwise would be to invite every person who is apprehensive of the action that this House might take on any matter to rush to court and thereby gag the House from further deliberation on the matter. This surely cannot have been the intention of the sub judice rule. The Chair will guard carefully against the abuse of the procedures of this House in that manner.

Whereas I cannot hesitate to deliver a ruling on a matter of great public interest that has been raised in the House, two issues constrained me from making any ruling on the matter raised by Hon. Midiwo.

One, the fact that the issues raised by the Member on 21st November 2012 are exactly the same issues which are pending for determination before the High Court under High Court Petition No. 538 of 2012.

Hon. Jakoyo Midiwo, after raising the matter in the House, went to court to seek determination and, in particular, sought constitutional interpretation of the matter. The High Court under Article 165 (3) paragraph (b) of the Constitution has jurisdiction to hear any question respecting the interpretation of the Constitution, and specifically the question whether anything said to be done under the authority of the Constitution is inconsistent with, or in contravention of, the Constitution. The hon. Member for Gem has, after raising this matter in the House, proceeded to seek the interpretation of the High Court under Article 165(3) paragraph (b) of the Constitution.

Hon. Members, bearing in mind the foregoing circumstances and in particular that the hon. Member for Gem, the originator of the matter in this House, is one of the parties in the High Court case, I decline to give a considered ruling now on the matter raised by the hon. Member, and leave it to determination by the court, with the legitimate expectation that the same will be expedited given its import with regard to interpretation of the Constitution. I thank you hon. Members.

Hon. Members, obviously you understand what that means. If you believe in yourselves, do your business here.

APPENDIX:

Speakers of the House*

No	Speaker	From	To	Name of House	Parliament
1	Justice William Kenneth Horne	June 3, 1948	Oct 4, 1955	LegCo	8th and 9th LegCo
2	Sir William Cavendish-Bentinck	Oct 4, 1955	Mar 1, 1960	LegCo	10th & 11th LegCo
3	Sir Humphrey Slade	Oct 25, 1960 June 7, 1963 Jan 5, 1967	June 7, 1963 Jan 5, 1967 Feb 6, 1970	LegCo House of Reps National Assembly	11th & 12th LegCo 1st Parliament 1st Parliament
4	Frederick Mbiti Gideon Mati	Feb 6, 1970	Apr 12, 1988	National Assembly	2nd, 3rd, 4th, 5th Parliaments

5	Moses Kiprono arap Keino	Apr 12, 1988	May 12, 1991	National Assembly	6th Parliament
6	Prof. J. Kimetet arap Ng'eno	June 11,1991	Jan 26, 1993	National Assembly	6th and 7th Parliaments
7	Kausai Francis Xavier ole Kaparo	Jan 26, 1993	Jan 15, 2008	National Assembly	7th, 8th, 9th Parliaments
8	Kenneth Marende	Jan 15, 2008	Mar 28, 2013	National Assembly	10th Parliament
9	Justin B. N. Muturi	Mar 28, 2013	August 7, 2017	National Assembly	11th Parliament

**The House has transformed from the Legislative Council (Legco) of the colonial period (1907-1962), to a House of Representatives in a bicameral Parliament at independence (1963-1969), to the National Assembly in a unicameral Parliament (1970 - 2012) and to a National Assembly in a bicameral Parliament (2013-2017) as we know it today.*