PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

THE NATIONAL ASSEMBLY SPEAKERS' CONSIDERED RULINGS AND GUIDELINES

11TH PARLIAMENT

2013 -2017

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National Assembly Speakers' Considered Rulings and Guidelines

(11th Parliament)

First Edition

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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 the *'National Assembly Speakers' Considered Rulings and Guidelines'* issued by Speaker Justin B.N. Muturi, EGH, MP during the 11th Parliament. The *National Assembly Speakers' Considered Rulings and Guidelines* provides an easily accessible collection of rulings and other important precedents, 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 Eleventh 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 Eleventh (2013-2017) 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 Justin B. N. Muturi, EGH MP during the 11th Parliament (2013 – 2017).

FIRST SESSION (2013)

Speakers' Considered Rulings and Guidelines (2013)

Contents

1. PROCEDURE ON STATEMENT HOUR UNDER STANDING ORDER NO. 44 (2)

Wednesday, 12th June 2013

This is the Communication from the Chair regarding procedure on Statements under Standing Order No. 44(2).

You may recall that the Deputy Leader of the Minority Party and Member for Gem, hon. Midiwo, rose on a point of order on 23rd May 2013, to seek the Speaker's guidance on status of Statements that were being sought in the House by hon. Members, pursuant to the Standing Order No. 44(2)(c).

The Deputy Minority Leader's request was based on the fact that in the new constitutional dispensation, the Executive is not in the House. In his request, he said:-

> *"I think it will be overreaching for a committee chair to purport to issue a Statement or answer on behalf of the Government"*.

He also sought to know the role of the Majority Leader in the House as pertains to responses to Statements. Several Members have also approached me seeking guidance as to the best way a chairperson of Committee, the Leader of the Majority Party and the Leader of the Minority Party in particular may issue Statements and the scope, or limit, of such Statements, if any. The issues raised by the Deputy Leader of the Minority Party are fundamental, and will essentially determine how this House will operate in a presidential system of governance.

Hon. Members, before I give my guidance on this matter, let me take the House through the brief history of the place of the Order "Statements" and Statements Hour in Section 17(3) of the old Constitution, which provided that:-

> *"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"*.

It is, therefore, clear that in addition to being Members of the National Assembly, Ministers were, in the previous dispensation, responsible to the House. In this regard, the successive Parliaments under the previous constitutional order devised ways of holding the Cabinet Ministers to account on the Floor of the House. This gave rise to the famous Question Time. The practice of requesting for Statements started in the Eighth Parliament. At that time hon. Members would rise on a Point of Order to

request for Statements. However, this was limited to matters of urgent national importance that would not wait, or await, a response through normal Questions. The practice continued during the Ninth Parliament and was codified in the Standing Orders adopted by the 10th Parliament in January 2008 as a separate Order named "Statements".

During Statements time, the Ministers would respond to Statements requested by Members in the plenary. In addition, every Wednesday, at 3.30 p.m., the Prime Minister would also either respond to Questions or give Statements to the House. Indeed, this was a popular time in the House. However, this remained outside the matters considered as business of the House. Hon. Members, that is now history.

Allow me now to focus on the present circumstance. Article 136 of the Constitution provides for direct election of the President by the people of Kenya and he is both the Head of State and Head of Government. Cabinet Secretaries on the other hand, are appointed by the President with the approval of the National Assembly. Article 153(2) and (3) provides that Cabinet Secretaries are accountable, individually and collectively, to the President for the exercise of their powers and the performance of their functions.

It is therefore clear that, the Executive branch, which the President heads, is distinct from the Legislative and Judicial branches of Government, which are all independent of one another. This separation of powers serves to check and balance certain actions of either branch of Government. This is far different from the parliamentary system, where there is a clear fusion of powers between the Executive and the Legislative branches.

Hon. Members, in our case, therefore, the tools for holding the Government to account will significantly change to be in tandem with the new dispensation. Article 153(3) of the Constitution of Kenya provides that:-

> *"A Cabinet Secretary shall attend before a committee of the National Assembly, or the Senate, when required by the Committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible."*

Hon. Members, it is important to note that this is in the Constitution. Thus, the interaction between the Executive and the Legislature is in the parliamentary committees.

Hon. Members, hitherto, and prior to the adoption of the current Standing Orders, we had Members' Half-Hour Statements, which was provided for under Standing Order

No. 24 of the 2008 Standing Orders where every Thursday at 6.30 pm or 7.00 pm, if it was an allotted day, the Speaker would interrupt the business of the House to allow Members to raise any matter. A Member would issue a written notification to the Speaker before 3.00 p.m. on the day the Statement was to be made, or before 1.00 p.m. if the Statement required a response from the Government. We have retained this in Standing Order No. 43 of the current Standing Orders. The Speaker allows an interruption of business on Tuesdays at 6.00 p.m. to facilitate Members to make general statements of topical concern with a time limit of three minutes for contribution.

Hon. Members also had an opportunity to make Personal Statements in the former dispensation provided for under Standing Order No. 76 of 2008 Standing Orders, whereby with indulgence of the House, a Member would explain matters of a personal nature, although there was no Question before the House, and without the House allowing any debate on the matter. This has been retained under the current Standing Order No. 84.

Hon. Members, I have had an opportunity to also benchmark our practice with other similar jurisdictions, and in particular noted that in the Philippines, which also has a bicameral Parliament and a presidential system like ours, most of these matters are dealt with in committees. However, if a Minister desires to appear before a committee, he or she may, with the concurrence of the House, set a date and hour for his appearance to answer to any matters pertaining to his or her department.

Hon. Members, quite new in our Standing Orders and practice is the Statements Hour, which is under Standing Order No. 44; it comes every Thursday not later than 3.00 p.m. During the Statements Hour, three different types of business may be transacted.

One, a member of the House Business Committee (HBC), designated by the Committee for that purpose, has ten minutes to present and lay on the Table a statement informing the House of the business coming before the House in the following week.

Two, the Leader of the Majority Party, or the Leader of the Minority Party as the case may be, or their designees, may make a statement relating to their responsibilities in the House or the activities of a committee;

Three, a member may request a statement from a committee chairperson relating to matters under the mandate of the committee and the Speaker may either appoint a day for the statement or direct that the statement be issued on the same day.

This is the part of our Standing Orders that the Deputy Leader of the Minority Party, and, indeed, many hon. Members sought my clarification on. The House will agree with me that the use of parts two and three of that Standing Order is becoming quite controversial. There is a real threat of introducing Question Time, yet it is clear that no Member can give answers for the Executive in this House. There is also the risk of pre-occupying committees with responding to Statements, other than focusing on their programmes. In any case, neither the Leader of the Majority Party nor chairs of committees can hold brief for the Executive. However, they can seek replies from the Executive and deliver such replies to the House.

Hon. Members, I now wish to guide the House on the matters raised by the Member for Gem regarding the roles of the Leader of the Majority Party as follows: From an institutional perspective, the Leader of Majority Party has a number of duties. Scheduling Floor business is a prime responsibility of the Leader of Majority Party. Although scheduling the House's business is a collective activity of the majority party, the Majority Party Leader has a large say in shaping the Chamber's overall agenda, in determining when, whether, how, or in what order legislation is taken up. In addition, the Leader of Majority Party is active in constructing winning coalitions for the party's legislative priorities; acting as a public spokesman, defending and explaining the party's programme and agenda, serving as an emissary to the President, especially when the President is of the same party, and facilitating the orderly conduct of the House's business.

Hon. Members, I now wish to issue guidelines on the use of Statements Hour under Standing Order 44 henceforth as follows-

(a) where a member of the HBC designated by the Committee presents and lays on the Table a statement informing the House of the business coming before the House in the following week, the statement must be strictly restricted to informing the House of the business coming to the House in the following week;

(b) where the Leader of the Majority Party, or the Leader of the Minority Party, as the case may be, or their designees, make a statement relating to their responsibilities in the House or the activities of a committee, their statements should be strictly restricted to their responsibilities in the House. However, the Leader of Majority Party may also respond to matters of urgent national scope, arising from Statements sought**.** However, this will be limited to matters of national scope that, in the opinion of Mr. Speaker, would not be referred to a particular committee, either due to their nature or due to their urgency. Further, the Statements should not be more than two, at any one particular time on Thursdays. In this case, the

Leader of the Majority Party will be expected to seek an answer from the relevant arms of the Executive and read the Statement to the House.

The Speaker may allow minimal interventions thereafter. In this regard, I will require the Leader of Majority Party to restrict himself to the actual response given by the Executive as opposed to his own opinion.

(c) Where a member requests a Statement from a committee chairperson relating to matters under the mandate of the committee, the Speaker may either appoint a day for the Statement, or direct that the Statement be issued on the same day. However, the Statement sought must be restricted to matters within the mandate of the committee, and which have been exhaustively dealt with and concluded by the committee, or where the chairperson is authorized by Members of that committee to issue preliminary reports to the House. In this case Members will be allowed to seek Statements on Thursdays on the Floor of the House. Chairpersons will be required to take over the requests and prioritize them according to the committee's programme.

Committees, therefore, will not be obliged to deviate from their programmes to address Statements. The Member who requested the Statement will be expected to attend the meeting of the committee and also interrogate the matter requested. The Committee may, thereafter, choose to report back to the House by way of a Statement or a report in response. In this case, the discretion to report back to the House will, therefore, be that of the committee, and not of the chairperson. If a report of a committee arising from a Statement is adopted by the House, it will form part of the resolution of the House for the Committee on Implementation to follow up.

Hon. Members, this direction is meant to allow committees to conduct oversight functions without interference, or premature demands, in them from the House. The use of the Statements offered by chairpersons of committees to respond to Statements should not, therefore, be too regular a feature, but a rear intervention with the sanction of the committee.

Thank you very much.

2. LACK OF DECORUM AND GROSS DISORDERLY CONDUCT

Wednesday, 3rd July 2013

This is further Communication from the Chair on a matter of lack of decorum and gross disorderly conduct in the House in breach of Standing Orders. Hon. Members, you are all aware that debate in this House in the past one week has not been decorous and the rules of the debate have largely been breached. I am equally concerned at the very fast degeneration in propriety of manners, behavior and speeches. We have witnessed some Members creating actual disorder, using or threatening violence against colleagues and/or abusing their privilege. We have seen behaviour that has bordered on disrespect for the presiding officers during proceedings in Committee of the whole House. Some Members have in the past week exchanged insults in the most despicable of ways and even attempted to rough up colleagues. Other Members even threatened to take away the Mace! This state of affairs, which is unacceptable, will surely erode public confidence and bring the institution of the National Assembly to disrepute.

Hon. Members, I wish to appeal to you to familiarise yourselves with the provisions of Standing Orders regarding rules of debate and order in the House and in the Committee of the whole House particularly Standing Order Nos.98, 102, 103, 104 and 107 - 112 of the National Assembly Standing Orders which should provide you good guidance on the breaches and sanctions that follow. These Orders are designed to ensure that you exercise your privilege of free speech with good sense and good taste, maintaining courtesy of language towards other Members in debate. Personal references, unbecoming language and insults during the debate do not augur well for the House.

Members are reminded of the provisions of Standing Order No. 87(3) which *inter alia* states and I quote: "It shall be out of order to use offence or insulting language whether in respect of Members of the House or public." One main duty of the presiding officers in the House is to maintain order and if the rules are breached or the situation deteriorates would recourse to removal of a Member from the House for a certain period, or if the situation worsens, the offending Member or Members may be named and suspended from the House altogether.

Standing Order No.107 defines "grossly disorderly conduct" as where "a Member concerned creates actual disorder, knowingly raises a false point of order, uses or threatens violence against a Member or other person, persists in making serious allegations without, in the Speaker's opinion, adequate substantiation, otherwise

abuses his or her privileges, deliberately gives false information to the House, votes more than once in breach of these Standing Orders, commits any serious breach of these Standing Orders or acts in any other way to the serious detriment of the dignity or orderly procedure of the House."

The Speaker or the Chairperson of the Committees is expected to order any Member whose conduct is grossly disorderly to withdraw immediately from the precincts of the Assembly on the first occasion, for the remainder of the day's sitting and on the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of suspension.

If the situation was to get worse and the Speaker or the Chairperson deems that his or her powers are inadequate, the Speaker or Chairperson may name such Member or Members resulting in a suspension in accordance with Standing Orders No.108.

The Mace of the Assembly has come to be associated with the authority of the Speaker and the House as a whole. While the Speaker is officiating over the House, the Mace must be in its proper place on a Table before him or her. No business may be conducted in the House unless the Mace is present. I wish to remind you of the need to honour these symbols of authority and for the orderly conduct of the House.

There is a parting shot to this though, the punishment for disgracing or removing the Mace is even severe; an offender will face the full wrath of the House and would be considered a grave disorderly conduct that may attract expulsion from the Sittings of the House for a period that, under Article 103 of the Constitution of Kenya, may lead to the lose of a seat of a Member. The Members are reminded that certain actions that we take for granted have indeed grave implications and consequences.

This august House has an obligation to espouse decorum, behavior and deportment which bespeak of us as hon. persons and we owe this to the society. We do not have a choice! I also wish to remind you that your presiding officers are your leaders, the face of your Assembly who carry your image and dignity. I encourage you to respect them and to honour their decisions.

Thank you.

3. LAPSE OF PENDING MATTERS AT THE END OF A PARLIAMENT

Wednesday, 10th July 2013

Hon. Members, you will recall that on 3rd July 2013, hon. Sabina Chege, M.P., Chairperson of the Departmental Committee on Education, Research and Technology rose on a point of order seeking guidance on the matter of the Report of the Committee on Delegated Legislation of the 10th Parliament on the degazettement of Legal Notice No.16 of 21st February 2003, and in particular the status of the recommendations of the Committee in view of the fact that the report of the Committee on the matter was not adopted by the 10th Parliament.

Indeed, records of the House indicate that the Committee on Delegated Legislation on 3rd January 2013 tabled a Report arising from a petition from the Kenya National Union of Teachers (KNUT) on the legal status of Legal Notice No. 16 of 2003. The Standing Orders in force then – Standing Order No. 210 – required the Committee to which a petition had been committed to respond to the petitioner by way of a report addressed to the petitioner(s) and laid on the Table of the House.

In addition, a notice of Motion to adopt the Report of the Committee, which is a rare practice in the Commonwealth jurisdiction, was given. However, the Motion was never debated before the term of the 10th Parliament came to an end on 15th January 2013. Like in all other parliamentary jurisdictions, the effect of the end of the term of the Tenth Parliament was that all proceedings pending before the House lapsed, including the Motion in question.

Hon. Members, it is my considered opinion that the issue canvassed by the hon. Member was adequately dealt with in the 10th Parliament; a Committee of that House investigated the matter, made recommendations and laid a report on the Table of the House. The matter actually lapsed.

Hon. Members, the rules of this House do not permit re-opening of matters that were spent in the previous Parliament as no one Parliament can impose its will on an in-coming Parliament. Standing Order No.141(4) provides that a Bill, the consideration of which has not been concluded at the end of the term of a Parliament shall lapse. This similarly applies to Motions.

However, not all is lost. A petition, as described in the Australian House of Representatives Practice, Fifth Edition is a formal and public way of expressing a grievance and even if an immediate action is not taken on it, it assists in the creation

of a climate of opinion which can influence or result in action, and it draws public attention to a grievance.

That is the position as at this moment relating to that Motion. Thank you

4. ADMISSIBILITY OF THE NATIONAL POLICE SERVICE AND THE NATIONAL POLICE SERVICE COMMISSION BILLS

Wednesday, 25th September 2013

This is Communication from the Chair relating to the constitutionality of the National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013.

Hon. Members, you will recall that on 23rd July, 2013, during the First Reading of the National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013, the Member for Suba, hon. John Mbadi, rose on a point of order seeking the direction of the Chair as to whether the consideration of the two Bills by the House was constitutional.

Several Members contributed to the debate, including the Leader of the Majority Party, hon. A. B. Duale, the Member for Rarieda, hon. Nicholas Gumbo, the Member for Kigumo, hon. Jamleck Kamau, the Member for Kipipiri, hon. Gichigi, the Member for Mbita, hon. Milly Odhiambo, the Member for Budalangi, hon. Ababu Namwamba, the Member for Eldama Ravine, hon. Moses Lessonet and hon. Njoroge Baiya, the Member for Githunguri.

Hon. Members, I am saying that in summary, the following issues were raised for determination by the Chair:- One, whether the consideration of the National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013 was contrary to the Constitution and the Standing Orders. Two, whether Clause 3 of the National Police Service Commission (Amendment) Bill 2013 that seeks to amend Section 10, Sub-section 1, paragraph K of the National Police Service Commission Act 2013 was contrary to Article 246, Clause 3 of the Constitution.

Hon. Members, you will recall that the Chair undertook to rule on these matters before the House proceeds to consider these Bills at the Second Reading. Let me dispose of the first issue on whether consideration of the National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment Bill) 2013 by the House was contrary to the Constitution and the Standing Orders.

Hon. Members, you are all aware that all the business that comes before the House is approved by the Speaker, pursuant to Standing Order No. 47(3). Amongst the issues the Speaker considers in approving the business, is the constitutionality of that business. Indeed, Standing Order No.47(3) and Articles 3 and 10 of the Constitution oblige the Chair to respect, uphold and defend the Constitution. To this extent, the National Police Service (Amendment) Bill 2013 and the National Police Service Commission (Amendment) Bill 2013, having been duly approved for publication by the Speaker pursuant to Standing Order Nos. 47 and 114 are properly before the House.

Hon. Members you will however recall that my predecessors have previously ruled on numerous other occasions in the past, but not withstanding the approval of any business by the Chair under the Standing Order, the issue of constitutionality can be raised by a Member at any stage of consideration of any business by the House The request for consideration of the constitutionality of a particular business, however, must be specific. It is through being specific that the Chair is capacitated to revisit the issue. In this respect, the Chair has had the occasion to re-look at the arguments advanced by the Member for Suba and noted that the hon. Member did not attempt to bring to the attention of the Chair any specific provision in either of the two Bills whose constitutionality he was contesting. This, therefore, settles the first question.

As regards the second issue, as to whether Clause 3 of the National Police Service Commission (Amendment) Bill 2013 that seeks to amend Section 10, Sub-section 1, paragraph K of the National Police Service Commission Act 2013 was contrary to Article 246, Clause 3 of the Constitution, the Member for Rarieda hon. Nicholas Gumbo, raised this issue as an example of the provisions in the Bill that contradict the Constitution. Indeed, this was the only specific provision that was identified by the Members during the debate as a provision that contradicts the Constitution.

The Chair has looked at the provisions of Clause 3 of the National Police Service Commission (Amendment) Bill 2013 which seeks to amend Section 10, Sub-section 1, paragraph K of the National Police Service Commission Act 2013 by adding the words "on disciplinary matters relating to transfers, promotions and appointments" immediately after the words " of the service." Hon. Members if the proposed amendment was to be passed by the House, the amended Section 10, Sub-section 1, Paragraph K of the National Police Service Commission Act 2013 would read as follows:-

> *"In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall hear and determine appeals from members*

of the service on disciplinary matters relating to transfers, promotions and appointments."

The issue raised by Hon. Eng. Gumbo is whether this provision would be contrary to Article 246(3) of the Constitution which provides as follows:

> *"The Commission shall: (a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service; (b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and (c) perform any other functions prescribed by national legislation."*

Hon. Members as you will notice from plain reading of the proposed amendment, there exists absolutely no contradiction to the proposed amendment with Article 246(3) of the Constitution. Indeed, Article 246(3) (a) vests in the National Police Service Commission the power to recruit and appoint persons to hold or act in offices in the Service, confirm appointments and determine promotions and transfers within the National Police Service. In my view, the proposed amendment merely seeks to empower the Commission to administratively hear and determine disputes arising out of the exercise of its constitutional powers and there is no negation, in my opinion, of the provisions of the Constitution as alleged by hon. Eng. Gumbo. This now obviously settles the second question.

Hon. Members, in conclusion, this House has set precedence on these matters. My predecessors have ruled that a question of constitutionality of a proposal before the House cannot be subjected to a vote, but to the conscious decision of the Speaker. I have scrutinized the two Bills and I do not find any provision that will offend our Constitution.

I am also aware that these two Bills were referred to the relevant Departmental Committee for consideration. Should the Committee have a contrary view I will be guided accordingly and advise the House how to proceed. In this regard, there is an opportunity available at the Second Reading to bring up any such matters.

I now rule that the two Bills are admissible for proceeding to the Second Reading.

5. COMMITTAL OF UWEZO FUND REGULATIONS TO THE COMMITTEE ON DELEGATED LEGISLATION

Tuesday, 22nd October 2013

Hon. Members, the next Communication is by way of guidance on procedure. The *Uwezo* Fund Regulations and Explanatory Memorandum have been tabled, pursuant to Section 11(1) of the Statutory Instruments Act (Act No.23 of 2012), which provides as follows:

> *"11(1) Every Cabinet Secretary responsible for a regulation-making authority shall, within seven (7) sitting days after the publication of statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament"*.

The Cabinet Secretary, National Treasury, vide a letter dated 17th October, 2013, transmitted the Regulations to the Clerk for approval by the House, in accordance with Section 24 of the Public Finance Management Act (Act No.18 of 2012). In this regard, I wish to guide Members as follows:-

(i) the Regulations now stand committed to the Committee on Delegated Legislation for review and scrutiny, pursuant to Section 12(1) of the Statutory Instruments Act (Act No.23 of 2012) and Standing Order No. 210;

(ii) in considering the Regulations, the Committee will be guided by principles of good governance, rule of law and shall in particular ensure that the Regulations comply with the provisions of Section 13 of the Statutory Instruments Act;

(iii) the Committee will also be guided by the provisions of Standing Order No. 210 (3) to set up the parameters to consider when reviewing the Statutory Instrument;

(iv) when the Committee resolves that the Regulations are in order, the Clerk will convey the resolution of the Committee to the National Treasury for further action, in which case the Committee will not make a Report to the House; and,

(v) on the other hand, if the Committee does not accept all or any part of the Regulations, it may recommend that the Assembly resolves that all or any part of the Regulations be annulled or make further recommendations on amendments and Sub-section 4(b)(i) and part 3 of Standing Order No.210 shall

apply, in which case the Committee shall table its Report in the House within 14 days from the date hereof for the House to consider.

Hon. Members, I now refer the *Uwezo* Fund Regulations and the Explanatory Memorandum to the Committee on Delegated Legislation to review and consider.

Hon. Members, copies of the regulation are available at the main reception. I thank you.

6. TIMELINES FOR PROCESSING LEGISLATIVE PROPOSALS AND BILLS FORWARDED TO COMMITTEES

Tuesday, 29th October 2013

Hon. Members, I have received requests from hon. Members asking that I provide guidance on the matter of inordinate delays in processing draft Bills or legislative proposals forwarded to the Departmental Committees for pre-publication scrutiny and in the processing of Bills committed to the relevant Committees after First Reading.

In line with Standing Order No.114, a legislative proposal for which a Member or a Committee is in charge must be accompanied by a memorandum containing:

a) a statement of the objects and reasons for the Bill;
b) a statement of delegation of legislative powers and limitation of fundamental rights and freedom if any;
c) an indication whether it concerns county governments; and
d) a statement of its financial implication and if the expenditure of public monies will be involved should the Bill be enacted, an estimate where possible, of such expenditure prior to submitting it to the Speaker.

Hon. Members, when all these requirements have been met and the Clerk also satisfies himself that the draft is in good order, two things then follow:

(a) If I am of the opinion that a legislative proposal is a draft money Bill I will arrange that the legislative proposal be referred to the Budget and Appropriations Committee. Pursuant to Article 114 of the Constitution, such a proposal is proceeded with only in accordance with the recommendations of that Committee after taking into account the views of the Cabinet Secretary responsible for Finance;

(b) in respect of legislative proposal for which no Committee is in charge, refer the legislative proposal to the relevant Departmental Committee for pre-publication scrutiny. The Departmental Committee is expected to submit its comments on the legislative proposal to the Speaker within 14 days of receipt of the legislative proposal – ***I emphasize*** 14 days.

This process is referred to as pre-publication scrutiny, a practice borrowed from the UK House of Commons. Our requirement for pre-publication scrutiny was introduced to replace the unpopular practice where a Member, who was not a member of the Executive, intending to introduce a Bill was required to first seek leave of the House by way of a Motion. It is also informed by Article 114 of the Constitution.

It is important to know that only those draft Bills emanating from individual legislators, particularly proposals introduced at the behest of a citizen in accordance with Article 119 of the Constitution and those introduced by Members on their own behalf require pre-publication scrutiny. I hasten to state that Bills prepared by Committees and those introduced by the Leader of Majority Party on behalf of the Executive do not have to be subjected to a pre-publication scrutiny. This is because the input of experts, stakeholders and the public generally shall have been sought by the time the sponsors are identified.

In our fledgling practice, the Budget and Appropriations Committee or the relevant Committee may make any recommendations or comments on the draft Bill. Based on those recommendations, I may render either that the draft Bill be not proceeded with or that it be accepted. If I certify that the proposal be accepted, the proposal is then published as a Bill.

Hon. Members, I am aware that quite a few Bills are, for various reasons, still pending in the Budget and Appropriations Committee and others before Departmental Committees long after they were committed to those Committees, disadvantaging the Members who introduced those legislative proposals. This is a matter we must urgently deal with.

Hon. Members, I will now guide on the next process, which is referral of Bills to Committees after First Reading. I know that you are all conversant with Standing Order No.127, which requires a Departmental Committee to which a Bill is committed to facilitate public participation and take into account the views and recommendations of the public when the Committee makes its Report to the House. The Committee or a Member designated by the Committee for that purpose shall be expected to present the Committee's Report to the House within 20 calendar days of such committal.

Upon such presentation, or if the Committee's Report is not presented when it becomes due, the Bill may then be ordered to be read a Second Time. If for any reason, at the commencement of the Second Reading the Report of the Committee will not have been presented, the Committee concerned will be expected to report progress to the House and failure to present the Report shall be noted by the Liaison Committee for necessary action. The House Business Committee has also recently introduced a Bill tracking system to deal with the speed at which the proposals are passing through pre-publication and Departmental Committee stages on committal after First Reading. I invite hon. Members to pay attention to the trackers, which are also available in Room 8 and on the Parliamentary Website. The trackers are updated every Friday.

I also direct Committees to which legislative proposals have been referred for pre-publication scrutiny to expedite the briefs/reports to me on the respective Bills. I have occasionally encouraged Committees to form sub-committees whenever appropriate to ease this process. In this regard, commencing 5th November, 2013, should a Committee exceed or have exceeded the 14-day limit, I may have no other choice but to approve the legislative proposal for publication, so that this House can make a decision on the particular Bills, one way or the other.

To this end, save for matters in respect of which a deadline is set by the Constitution, statutes, the Standing Orders, or a resolution of this House, all Committees are advised to prioritise consideration of Bills before considering any other business.

In addition, should a Committee exceed the period for scrutiny of Bills referred to them after First Readings, the House Business Committee will invoke the provisions of Standing Order 127 without exception – that is to order that the Bill be tabled for Second Reading. Indeed, the House Business Committee has already started applying this rule by listing Bills for Second Reading at the expiry of the 20-day period, irrespective of the reports of the relevant Committees.

Hon. Members, these directions are in keeping with the Parliamentary principle that the law-making role of an individual Member of Parliament, and indeed this House, should only be curtailed or delayed, if at all, by the collective will of the House itself.

Thank you

7. SCOPE OF OVERSIGHT POWERS OF SELECT COMMITTEES, REFERENCE TO SUBSTANCE OF PROCEEDINGS AND COMITY BETWEEN THE LEGISLATURE AND THE JUDICIARY

Tuesday, 29th October 2013

Hon. Members, I wish to issue guidance on three important matters you have requested that I urgently put to rest. The matters are:-

(i) The scope of oversight powers of select committees and whether committees have relevant expertise needed to carry out specialised investigations;

(ii) The question of reference to the substance of proceedings in select committees before the committee makes its reports to the House; and,

(iii) The fate of a recommendation of a report of a committee on a matter that has been determined through a judicial process and related issues.

Let me commence with the first issue, which is the question of the scope of oversight powers of select committees and whether Parliamentary Committees have relevant expertise needed to carry out specialised investigations.

Hon. Members, you will recall that on Tuesday, 22nd October 2013, the Member for Ugenya, hon. David Ouma Ochieng, rose on a point of order and sought the guidance of the Chair on the scope of authority and powers of committees of the National Assembly, under Standing Order No. 216(5), to investigate, inquire into and report on all matters relating to the mandate, management, activities, administration and operations of the assigned Ministries and departments, and particularly in relation to functions of oversight and specialised investigative agencies. Other hon. Members, including the Leader of the Minority Coalition, and the Member for Suba, also raised similar matters.

Hon. Ochieng sought to know whether committees should engage in what he termed as "primary investigations" and whether in fact the House has the relevant competence to conduct complex forensic investigations. He wondered why days after His Excellency the President undertook to set up an inquiry into the complex matter of the Westgate Mall terror attack, the Departmental Committee on Administration and National Security and the one on Defence and Foreign Relations, could not wait until the relevant specialised agencies completed investigations, so that they could engage on its oversight. He also sought to know what then the role of oversight agencies,

including constitutional commissions, independent offices and specialised investigative agencies would be, if Parliament took over primary inquiries, which are the core functions of those agencies.

On his part, Hon. Francis Nyenze, the Leader of Minority Coalition, wondered why the chairpersons of the two key Committees investigating the Westgate Mall terror attack rushed to appear to make conclusions, claiming to defend the offices they were investigating over alleged omissions or commissions before the joint committees concluded their investigations.

In addition, most Members who rose wanted to know what the scope of the investigations by committees would be. They sought to know why the House and its committees cannot provide enough time for various Government agencies to conclude investigations before Parliament is seized of the matter citing, the case of the US Congress that had to wait for specialized state agencies to conduct investigations on the Twin Tower terror attack before embarking on a further oversight function.

Hon. Members, this issue, indeed, raises more questions. Is it really in the greater public interest that we, as Parliament, hop at every opportunity to investigate? In what circumstances does Parliament take over investigations from specialized state agencies and at what cost to the investigations? Does Parliament have the competence to take over complex investigations requiring forensic studies? Why would the committees of the House not resort to the same agencies for expertise and technical support while conducting the investigations anyway? These are some of the matters that you have requested me to consider.

Hon. Members, these questions are not new. As a matter of fact, in the past, committees of Parliament have found themselves investigating matters that the Executive has already set up a process of inquiry. One such case is that of the famous or infamous "Artur Brothers Inquiry" where investigations by a committee of Parliament ran almost parallel to a similar process following the appointment of the "Kiruki Commission of Inquiry".

Indeed, the then Minister for Justice and Constitutional Affairs, hon. Martha Karua sought the intervention of the Speaker, claiming that by carrying out parallel investigations, the Committee chaired by the then Member for Kabete, Hon. Paul Muite was violating the Commission of Inquiry Act. In making a ruling on the matter, the then Speaker, Francis ole Kaparo observed:-

> *"A commission is a creature of the Executive through an Act of Parliament. If the Commission of Inquiry was formed before the relevant Departmental*

Committee(s) was seized of the matter to be inquired into, then good sense would have dictated that Parliament may have to await the findings of the Commission of Inquiry. The same good sense that would have also dictated the setting up of the Commission of Inquiry would have awaited the results of the Parliamentary Inquiry. But this is just a good sense. I do not think that the setting up of a Parliamentary inquiry would by that very fact stop an already ongoing Commission of Inquiry and vice versa. Each has a different reporting authority. This situation is clumsy but I see nothing legally wrong with it. Each in theory at least, is trying to establish the truth to the appointing authority. The results may, indeed, be fascinating. Neither the Commission of Inquiry nor the Parliamentary Committee inquiries can stop the executive from conducting its own parallel investigations to establish whether or not any crimes have been committed by any person or persons and charge those persons in a court of competent jurisdiction."

While ruling on a similar matter, Speaker Humphrey Slade had observed that, parliamentarians are eyes and ears of the citizen. He also noted that, an investigation by Parliament attempts to answer the very immediate and urgent questions and provides a platform for ventilation of preliminary matters. He concluded that this role of Parliament is so central to parliamentary democracy that it is impossible to imagine its removal or abridgement in any way or form.

He concluded:-

"the power to scrutinize executive actions or omissions and to bring the Executive to account is the inalienable right of this House. It cannot be taken away in any form or guise whether through a commission or otherwise."

Hon. Members, I have no reason to deviate from these historic precedents. I, however, hasten to add that it is almost obvious that parliamentary committees lack expertise to carry out specialized investigations. However, committees are at liberty to hire such expertise. In addition, from my own experience in cases of this nature, parliamentary findings are rarely conclusive. In the end, Parliament may recommend amongst other things, that the various specialized organs of the State carry out further investigations in any matter that a Committee of this House may have been investigating including carrying out forensic analysis of the evidence adduced in the committee.

Indeed, on the example cited by the Leader of Minority Party regarding the "Nine-Eleven Attacks", the Congress of the United States of America formed a joint committee whose membership was drawn from the Senate and the House of Representatives. Thereafter, the National Commission on Terrorist Attacks from the

United States of America, popularly known as the "9/11 Commission" was formed. In their report, the 9/11 Commission indicated:-

> *"We have built upon the work of previous several commissions and we thank the Congressional Joint Inquiry whose fine work helped us to get started."*

This clarification now settles the first matter raised by hon. Ochieng including the question of whether Parliament should proceed to carry out primary investigations. I want to encourage the Members of the joint committees investigating the Westgate attack to benefit from the two reports that I have referred to. In particular, I want to encourage them to compare the gravity of importance and seriousness that go into such investigations, including the manner of treating information and evidence obtained from the committee proceedings.

Hon. Members, I now turn to the second question relating to the reference of the substance of proceedings slated before the committees before they table their reports.

Several Members sought an interpretation of Standing Order No. 86 that provides:-

> *"No Member shall refer to the substance of the proceedings of a Select Committee before the Committee has made its report to the House."*

Hon. Members wanted to know whether it is every Member of the House and not necessarily a Member of the very select committee whose report is anticipated that should not make any reference to the substance of the proceedings. What is the substance of proceedings of a Select Committee? To rest this matter, I wish to refer to Erskine May, Parliamentary Practice (23 ed.), page 142. It says:-

> *"The publication or disclosure of debates or proceedings of committees conducted with closed doors or in private or when the publication is expressly forbidden by the House, or of draft reports of committees before they have been reported to the House will constitute a breach of privilege or contempt."*

In the case of the Petition before the Departmental Committee on Justice and Legal Affairs touching on some members of the Judicial Service Commission, I want to remind the House that this process should be accorded the highest levels of gravity. It is, indeed, very repressing and an abuse of the privilege for any hon. Member of this House to make public pronouncements, of whatever nature of this matter.

As a lawmaking organ, it is not incumbent upon all of us to lead by example? It is, therefore, wrong to publish in any way or to disclose debates or proceedings of

committees conducted in closed doors or indeed, in private. It is also wrong for any hon. Member to disclose debates or contents of proceedings of a committee if such disclosure is expressly forbidden by the House. You are also not allowed to disclose contents in whole or in part, of draft reports of committees before they have been reported to the House. It does not matter whether you are a Member, a friend of the committee or that you may have accessed the information in any other way as a Member. Any such act will constitute a breach of privilege or contempt and the necessary sanctions shall follow.

In the event that a committee may want to express an opinion on a matter, it is always fair that the committee first agrees on the content of that opinion or statement or even better, makes a preliminary report containing the collective views of the committee.

Hon. Members, I know most of you are serving for the first time and, therefore, may have been ignorant of this requirement. Now that I have made this communication, I will not take kindly any attempt by a hon. Member to violate the provision of Standing Order 86, whether within the precincts of the National Assembly or not. This also goes to Chairs of committees who may purport to make conclusive statements on proceedings before their committee.

Hon. Members, lastly, I was asked to give guidance on the fate of recommendation of a report of a committee on a matter that has been determined through a judicial process. This issue touches on the concept of the comity between the Legislature and the Judiciary. Having perused several authorities in the Commonwealth, and also in the USA; it is my considered finding that –

(i) A recommendation of a Committee is not final until the report is considered by the House and a decision made in one way or the other. However, should the House adopt a report of a Committee purporting to invalidate or nullify a matter determined by a court exercising its judicial powers, then it becomes very difficult for anyone to implement such a resolution. This is because our Parliament does not have appellate jurisdictions or judicial processes. As a matter of fact, the practice of parliamentary appellate jurisdictions was primarily practised in the United Kingdom (UK) in the UK Parliament, where the House of Lords also acted as a court of appeal. However, this practice ended on 1st October, 2009, when the appellate jurisdiction was transferred to the Supreme Court.

    In this regard, it will probably be more useful for Parliament to require that the aggrieved party makes an appeal before a higher court. It has been urged that if Parliament makes a resolution that is not implementable, or one that purports to unduly reverse a court process, then such resolution would be in vain. I am on

record asking committees to refrain from making Parliament act in vain because that is not what the membership of this House was elected to do; certainly not to act in vain.

(ii) Similarly, many courts have held that, a matter touching on a legislative role of a House, or Houses of Parliament, or indeed, a matter of procedure in a House or between Houses of Parliament cannot be a question to be determined through a judicial process by a court of law. In a landmark case in the UK where a petitioner challenged the validity of the Finance Act of 1964 because it provided for expenditure on nuclear weapons contrary to international law, the court held that a statute cannot be challenged on the grounds that it was illegally made or made for unlawful purpose, or made unlawfully. The Court also held that, if this were possible, it would then amount to denial of supremacy of Parliament. On the same subject, Section 15 of Mason's Legislative Manual provides as follows; and I quote:

> *"A legislative body having the right to do an Act in law must be allowed to select the means of accomplishing such act within reasonable bounds. Under a constitutional provision declaring that each House shall determine the rules of its proceedings, the fact that a House acted in violation of its rules, or violation of parliamentary law is a matter clearly within its power and does not make its action subject to review by the courts."*

In this regard, it is urged that should a court clothe itself the powers of the legislature and purport to make determination on matters relating to procedures of a House or the House of Parliament, and therefore question the supremacy of Parliament, then such determination by such court would only be in vain. I doubt any court worth its salt would want to travel that route.

Hon. Members, this concept of comity between the Judiciary and the Legislature is the very core that separates the two institutions and which we must all jealously protect and respect.

Thank you

8. PROCEDURE FOR DEBATING THE UWEZO FUND REGULATIONS

Wednesday, 13th November 2013

Hon. Members, as we proceed with this Order, I would like to guide the House on the procedure which shall apply to the considerations of the Public Finance Management (*Uwezo* Fund) Regulations, 2013.

As stated in the Communication from the Chair on Wednesday, 13th November, 2013, the regulation will be considered in two stages: First, when the Order of the Motion is read, the Leader of Majority Party will move the Motion:-

THAT, the Speaker do now leave the Chair.

The purpose of this Motion is to initiate general debate on the policy and principle of the draft regulations. This debate should take a maximum of one hour. Upon conclusion of this debate, the House will resolve into Committee of the whole House. The purpose of moving into committee is to enable hon. Members to examine each of the proposed regulations one by one, as in Committee Stage of a Bill.

Hon. Members, I have received formal requests in the Chambers from some of you on the amendments contained in the Order Paper, particularly on the application of the requirements of Article 114 of the proposed amendments.

From the outset, I note that in addition to the amendments proposed by the Committee, there are other amendments proposed by individual hon. Members.
As a matter of example, the amendments proposed by the hon. Member for Kipkelion, urges Parliament to allocate the *Uwezo* Fund at least, 1 per cent of all the revenue to the National Government, calculated on the basis of the most recently audited revenue, as approved by the National Assembly; calculated on the basis of revenue allocation to the National Government, the Division of Revenue Act, 2013. This amendment implies that Parliament will allocate, at least, Kshs7.1 billion every subsequent year.

The Committee has also proposed amendments that have a similar effect. Another example is a proposed amendment by the Member for Nairobi County to Regulation No. 15 which seeks to increase the membership of the *Uwezo* Fund management committee by two members per county and per every constituency. This amounts to increasing the national membership by 580 members. This may affect the administrative cost of the Fund.

Indeed, the Member has another amendment that proposes to deem the *Uwezo* Fund as a supplement to the Constituencies Development Fund (CDF). Clearly, these are the kind of amendments that ought to have been examined by the Committee, having consulted the Cabinet Secretary for the National Treasury. I know the Committee in its amendments had consulted the Cabinet Secretary for Devolution and Planning. However, this does not meet the constitutional threshold for matters spelt out in Article 114 which requires that the Cabinet Secretary for the National Treasury be consulted on money matters. This is also the case for several other amendments proposed by the Committee and others proposed by individual Members.

Hon. Members, in this regard I now order the following proposed amendments inadmissible for consideration in the Committee of the whole House: One, the proposed amendments to Regulation 7 and Paragraph 1(d) of Regulation 18 as proposed by the Committee. Second, the proposed amendments to Regulations 7 and 20 by the Member for Kipkelion. Third, the proposed amendments to Regulation 15 and the proposed New Regulation 19A as proposed by the Member for Nairobi County.

Hon. Members, finally when the House resorts to Committee to consider the regulations, the Clerk will read each regulation one after the other for the Committee to consider the regulations and the proposed amendments sequentially in accordance with the procedure contained in the Standing Order Nos.132 and 133. At the end of the consideration, the Chair will ask the Leader of Majority Party to move the Motion which is:

THAT, the Committee do report to the House its consideration of the Public Finance Management (Uwezo Fund) Regulations 2013 and its approval thereof with or without amendments.

Hon. Members, if the Question is agreed to the House will resume allowing the third and last phase of the consideration of the regulations. When the House resumes, the Chair of the Committee of the whole House will report that the Committee has considered the Public Finance Management (*Uwezo* Fund) Regulations 2013 and approved the same with or without amendments.

Finally, I will call upon the Leader of Majority Party to move the Motion, *"THAT the House do agree with the Committee in the said report"*. After the Motion is seconded, I will propose the latter and later put the Question for the decision indicating the conclusion on the matter.

Thank you.

9. CONFLICT OF MANDATE BETWEEN AUDIT AND DEPARTMENTAL COMMITTEES

Thursday 5th December 2013

Hon. Members, there have been some concerns raised by Committees. Therefore, I need to make this Communication relating to mandates of the audit Committees and Departmental Committees.

Yesterday, during the afternoon sitting, the Member for Eldas, hon. Aden Keynan, sought the guidance of the Chair on matters related to apparent conflict of mandates between the Public Accounts Committee and the Public Investments Committee on one hand and the Departmental Committees as listed in the Second Schedule to the Standing Orders. You will recall that even though I promptly offered certain directions, I also promised to give further guidance on the matter. Indeed, this afternoon, hon. Mohamed Mahamud has raised a similar concern.

Prior to the request made in the House yesterday, several Chairpersons of Committees have approached me in my office and requested my guidance. From the submissions made by the Chairpersons, the alleged conflict of mandates has occasioned the carrying out of parallel inquiries by watchdog Committees on one hand and Departmental Committees on the other within State agencies. Having listened to the Chairpersons and indeed, other Members, I have been asked to give guidance on the following three matters:-

(i) Whether it is the Public Accounts Committee or the Public Investments Committee that ought to examine the reports of the Auditor-General and accounts of statutory State agencies such as the Central Bank and those established under the Roads Act among others such as the Kenya National Highways Authority, the Kenya Rural Roads Authority and the Kenya Urban Roads Authority;

(ii) Whether the appearance of State Corporations managements before the PAC amounts to delving into the mandate of the PIC;

(iii) Whether the Departmental Committees ought to examine matters of financial or commercial affairs of State Corporations such as those of procurement of goods and services.

Hon. Members, the Standing Order No.205 provides for the establishment of the PAC and its mandate as "responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure".

On the other hand, on the functions of the PIC, let me draw your attention to the provisions of subsection (6) of the Standing Order No.206, which lists the functions of the PIC as:-

" (a) examine the reports and accounts of the public investments;

(b) examine the reports, if any, of the Auditor General on the public investments; and

(c) examine in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments are being managed in accordance with sound financial or business principles and prudent commercial practices."

Hon. Members, as you are aware, following submission of audited accounts of Government Ministries before the National Assembly in accordance with the Public Audit Act, the reports containing the report of the Auditor-General stand referred to the Public Accounts Committee (PAC) for examination. It is possible that in the examination of accounts of a particular ministry, the Auditor-General in his report may raise reservations touching on expenditure made by a ministry and passed on to a State corporation under them. This is mostly the case for the accounts of such State departments as that of roads, which may refer to expenditure passed on to the roads agencies under the ministry.

In this regard, it is only fair that the Accounting Officer of that ministry is accompanied by officers of the State corporation when appearing before the Public Accounts Committee to answer to matters of those particular accounts. However, let me hasten to guide that at such moments, what the Public Accounts Committee would be examining will be the accounts of the concerned ministry, but not the accounts of the particular State corporation. Therefore the principal witness before the committee would be the Accounting Officer of the ministry and not the Chief Executive Officer of the State corporation.

The corporation may appear before the Public Investments Committee (PIC) to answer to the specific questions of the accounts as audited under Section 12 of the Public Audit Act or the respective statutes under which corporations are established. The Public Accounts Committee has no mandate of examining accounts of State

corporations as that is the mandate of the Public Investments Committee which examines audited accounts of State corporations. Indeed, the State Corporations Act, Cap. 446(15), provides that the Chief Executive Officer of a State corporation may be summoned by the Public Investments Committee to answer on behalf of the board, any question arising from a report including a special report of the Auditor-General concerning the particular State Corporation.

However, the Public Investments Committee has extended jurisdiction, this is so because of the provisions of Standing Order No. 206(6)(c), which provides that the Committee examines the reports, if any, of the Auditor-General on the public investments. In addition, the Committee is mandated to also examine in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments are being managed in accordance with sound financial or business principles and prudent commercial practices. The use of the words "public investments" refers to a State corporation as you find in the State Corporations Act Cap. 446(2), and also includes any other corporation, where the Government has made investments.

Indeed, this has been our practice since the establishment of the two committees. As a matter of fact, the Public Accounts Committee is the oldest of our committees and exists in many other jurisdictions, even outside the Commonwealth. The committee therefore enjoys an almost unfettered ranking, not just in our Parliament but also in those other jurisdictions where the committee exists. Similarly, the Public Investments Committee was introduced in our committee system during the term of the Seventh Parliament. The Committee therefore enjoys ranking order close to that of the Public Accounts Committee. However, let me indicate from the outset that the ranking order, I have referred to, does not in anyway imply that these two committees are superior to any other committee of the House. It is nevertheless important that we recognize their place in our House and in the history of our young democracy. I, therefore, will not expect these two Committees to appear to be at conflict as to what matters fall under them, that has always been clear. That, now in my view should settle the first and second questions raised.

Honourable Members, on the last question, relating to whether the Departmental Committees should opt to examine matters of financial or commercial affairs of State corporations such as those of procurement of goods and services, I wish to commence by drawing your attention to the provisions of Standing Order No.216(5), which lists the mandate of Departmental Committees as being:-

"(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 progamme 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 analyze 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;
(f) to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments); and

(g) make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

Hon. Members, to make it clear that the departments refereed to under this sub-section are the State departments also known as ministries, and should not be confused with State corporations. It therefore follows that the mandate of the Departmental Committees is indeed very clear and distinct from that of the PIC or PAC. We will not therefore expect the PAC or PIC to delve into such matters as review of pieces of legislation, vetting of appointments or matters of administration of ministries or State corporations. As a matter of fact, Standing Order No. 206(7) which covers the Public Investments Committee, prevents that Committee from examining matters of day to day administration of State corporations.

I will therefore not expect the PAC or PIC to examine matters such as the process of hiring of Chief Executive Officers or staff of a State Corporation because this is a matter of administration which is exclusive to Departmental Committees. I also will not expect a joint sitting of either PAC or PIC with a Departmental Committee as their mandates are very distinct. At the same time, allow me draw your attention to Standing Order No. 206(6)(c), which allows the Public Investments Committee to also examine in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments are being managed in accordance with

sound financial or business principles and prudent commercial practices. This relates to value for money, and such other specialized audits.

Honourable Members, this is where the matter of procurement of goods and services comes in as an exclusive expression. I would add that this is different from day to day administration. Should the Committee intend to examine matters of procurement, I would expect them to order a special audit from the Auditor General after being satisfied that the matter requires a special audit. As a matter of fact, that was the wisdom that had informed Parliament in the making of the previous National Audit Commission, in which the Chairs of PAC and PIC, sat as Members.

Honourable Members, I hope that this now settles this matters once and for all, but I may however give further guidance on related matters on a case by case basis, if anything arises that has not been addressed in this communication or one that the Liaison Committee does not address.

10. CONSTITUTIONALITY OF NATIONAL POLICE SERVICE COMMISSION (AMENDMENT) BILL

Wednesday, 13th November 2013

Honourable Members, the next communication relates to the issue of constitutionality of the National Police Service Commission (Amendment) Bill 2013. You will recall that on 12th November, 2013, during the Second Reading of the National Police Service Commission (Amendment) Bill 2013, the Member for Ugunja, Hon. James Opiyo Wandayi, rose on a point of order seeking the direction of the Chair as to whether the consideration of the Bill, by the House was constitutional.

In summary, the Hon. Wandayi, sought the guidance of the Chair as to whether clause 3 of the Bill that seeks to amend section 10 of the National Police Service Commission Act, so as to provide for the definition of "disciplinary control" envisaged under Article 246(3)(a) is contrary to Article 246(3)(b), that expressly gives the Police Service Commission the mandate to exercise disciplinary control or remove persons holding or acting in offices within the services. Since the Bill has been put down for Committee of the whole House today, I wish to give the guidance sought by the Hon. Member. Other Hon. Members including Hon. Ababu Namwamba, Hon. David Ouma Ochieng and Hon. Millie Odhiambo also sought the same clarifications.

Honourable Members, you will recall that the Chair undertook to rule on this matter before the House proceeds to consider the Bill at the Committee Stage.

Article 246(3) of the Constitution provides as follows:-

"The Commission shall-

(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;

(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and

(c) perform any other functions prescribe by national legislation."

Hon. Wandayi, and other Members contend that there is nowhere in the Constitution, where this mandate is alluded to another body other than the National Police Service

Commission, and that the proposed amendment is basically trying to weather down the powers of the National Police Service Commission, in contravention of the provision of Article 246 of the Constitution. However, Article 245 of the Constitution expresses a contrary spirit in the following words and I quote.

Article 245(4)

> *"The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service (NPS), but no person may give a direction to the Inspector-General with respect to–*
>
> *(a) the investigation of any particular offence or offences;*
>
> *(b) the enforcement of the law against any particular person or persons; or*
>
> *(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service."*

Hon. Members, Article 245 (4), therefore, contemplates the Inspector-General of police to exercise some powers in relation to the employment assignment, promotion, suspension or dismissal of any member of the National Police Service.

Further, Article 252 of the Constitution contemplates further legislation on the manner in which constitutional commissions perform their functions.

Article 252 provides as follows:-

"(1) Each commission and each holder of an independence office–

(a) may conduct investigations on its own initiative or on an a complaint made by a member of the public;

(b) has the powers necessary for reconciliation, mediation and negotiation;

(c) shall recruit its own staff;

(d) may perform any functions and exercise any powers prescribed by legislation in addition to the functions and powers conferred by this Constitution."

Hon. Members, in this respect, the National Police Service Commission Act, 2013 has gone ahead at Section 10(2) to provide for the Commission to delegate to the concerned Inspector-General the recruitment, appointment and promotion of police officers under the rank of Sergeant.

The proposed Clause 3 of the Bill seeks to introduce a new subsection 10(4) into the Act whose principal aim is to clearly vest the development, formulation and prescription of disciplinary procedures and mechanism in the National Police Service Commission.

The Commission fulfills its constitutional obligations through its officers and agents, and the Inspection-General is only one such officer for the fulfillment of the functions of the Commission.

Indeed, the hon. Member for Ugunja did, in his own remarks, say that the conscience of unconstitutionality is more in the National Police Service (Amendment) Bill, 2013 than in the National Police Service Commission (Amendment) Bill, 2013. It is my hope that when the National Police Service (Amendment) Bill 2013 come up for the Second Reading or Committee of the whole House Stage, hon. Members will have an opportunity to bring to the attention of the Chair which specific provisions they consider to be unconstitutional. At that point, the Chair will be at liberty to correct or even reject any clauses brought to his attention that infringe on the Constitution.

Hon. Members, I therefore, find nothing unconstitutional in Clause 3 of the Bill or any other clause, and direct that the NPSC (Amendment) Bill 2013 proceeds to the Committee Stage. However, I wish to thank hon. Wandayi and other hon. Members who have consistently brought this matter to my attention.

Thank you.

SECOND SESSION (2014)

Speakers' Considered Rulings and Guidelines (2014)

Contents

1. PROCEDURE TO APPLY WHEN CONSIDERING THE SENATE AMENDMENTS

Tuesday 18th February 2014

Hon. Members, I wish to make this guidance before the Leader of Majority Party moves the Motion under this Order. I would like to guide the House on the procedure which I shall apply on the consideration of the Senate Amendments to the Public Finance Management (Uwezo Fund) Regulations, 2013.

As you will recall, hon. Members, the regulations were considered and passed by this House on 19th November 2013. Thereafter, the regulations were sent to the Senate for approval as is required by Sections 24, 25 and 205 of the Public Finance Management Act, 2012. The Senate considered the regulations and returned them to this House on the last day of the last Session, after which I referred the Senate Amendments to the Committee on Delegated Legislation for consideration.

Hon. Members, Standing Order Nos.145 to 148, outline the procedures to be followed in considering the amendments by the Senate. The regulations will be considered in three stages. First, the Leader of Majority Party will move the Motion, which is:-

THAT, the Senate Amendments to the Public Finance Management (Uwezo Fund) Regulations, 2013, be now considered.

The purpose of this Motion is to initiate general debate on policy and principal of the Regulations. This debate should take a maximum of 45 minutes and should be confined to the Senate Amendments, since the House had generally debated the Regulations in the last Session. Upon conclusion of that debate, the House will resolve into Committee of the whole House to examine the amendments proposed by the Senate. The Senate proposals are contained in today's Order Paper, this is the second stage. The amendments have also been incorporated in the regulations as circulated by the Clerk's office and highlighted.

The third and final stage will be reporting by the Chair of the Committee of the whole House to the House. This is similar to the procedure of reporting on a Bill committed to the Committee of the whole House. However, there will be no Third Reading since the Regulations are not a Bill. Instead, the resolution of the House on the Motion that the House doth agree with the Committee in the said report will suffice.

Hon. Members, it is my hope that the Leader of Majority Party and the Chair of the Committee on Delegated Legislation have given proper guidance to Members to

enable them consider the amendments appropriately and ensure that they are passed without any further delay.

Thank you.

2. EXECUTION OF ORDER ON STATEMENTS

Tuesday, 4th March 2014

Hon. Members, before we conclude Order No. 7, on Statements, I wish to update you on some recent developments regarding the execution of this Order.

Statements have continued to elicit great interest from hon. Members. In the last Session, there were over 400 requests for Statements. In this Session, within only three weeks of our sittings, we have had over 120 requests for Statements, most of which are still awaiting approval.

You will all agree with me that the manner in which this House has continued to discharge this Order is not only inadequate, but also does not meet the acceptable standards of holding the Executive to account. The system of requesting answers on very important national matters from Chairpersons of Committees has been tested for about one year now. However, the efficacy of the system is very uncertain. In addition to overloading the committees with work outside their core mandates, the Chairpersons cannot be held accountable for information given or even on commitments given on the Floor of the House.

Hon. Members, it is on this basis that the Procedure and House Rules Committee, under my chairmanship, is conducting a comprehensive review of the usage of Statements. Indeed, a task force, acting under my guidance, was given 27th February, 2014 to 1st March 2014 to look into ways of actualizing provisions of Article 153 of the Constitution. Paragraph (3) of the said Article requires Cabinet Secretaries to attend before committees to answer any questions concerning matters under their competence. On the other hand, Paragraph (4) of the same Article requires Cabinet Secretaries to provide Parliament with full and regular reports concerning matters under their control.

It is the view of the Committee that the framers of the Constitution left it to the House to determine how to actualize these two paragraphs of the Constitution. Without pre-empting the work of the Committee I wish to inform hon. Members that the effect of the proposed review of the Standing Orders is to have special sessions of the House to enable Cabinet Secretaries to appear in the House to respond to Members' queries directly.

It will also afford the Cabinet Secretaries a forum to explain any aspect of Government policy in addition to those aspects enunciated by the Leader of Majority Party in the House. For those not responded to on the Floor, requests will either be forwarded to

the relevant committee where the Cabinet Secretaries will continue to appear to answer the queries or give written responses sought from the concerned Cabinet Secretary.

Hon. Members, the House may wish to note that initial findings by the task force have revealed that although presidential systems do not possess the same procedures for the routine questioning of Ministers as parliamentary systems do, such systems have a variety of devices for obtaining responses from Ministers, including regular question times. This is the case in Rwanda, Senegal, Chile, Brazil and the Philippines, to mention just a few.

Hon. Members, my Committee will be informing you of this new development as soon as the work is concluded and necessary transitional issues finalized. In this regard, Members are invited to make written submissions to the Committee on how to improve Part X of our Standing Orders. Since the proposed changes also touch on the functioning of other arms of Government, the Committee will conduct sufficient stakeholder consultations, including engaging the Executive on this matter.

Finally, when the report is concluded, it will be brought to this House for debate and decision. The changes envisaged are likely to take effect after the first break in this Session. The review envisioned will be in line with my commitment to ensuring that our Standing Orders and operations remain dynamic, true to the spirit of the Constitution and, most importantly, responsive to Members' needs. I seek your support in this regard.

In the meantime, Members should continue to exercise patience regarding requests for Statements that have been submitted as it is not possible to schedule them as Members may desire, because at this time, as you all know, we are already in the Budget-making cycle, and all committees are engaged in that process. I, therefore, appeal for your utmost patience and consideration.

I thank you.

3. PROCEDURE FOR CONSIDERATION OF DELEGATED LEGISLATION

26th March 2014

Honourable Members, as you may be aware, there are currently several sets of delegated legislation pending before the House for consideration in accordance with statutory requirements. The House has not previously been engaged in the practice of considering statutory instruments on a wider scale than it is now being called upon to do owing to recent changes in the law relating to statutory instruments. It has therefore become necessary for the Chair to clarify to the House the procedure to be followed by the House with respect to consideration of delegated legislation as outlined both in our Standing Orders and in the written law.

The consideration of statutory instruments by the House is governed by the Statutory Instruments Act, 2013 (*Act No 23 of 2013*) and Standing Order 210 of the Standing Orders. Both section 2 of the Act and Standing Order 210(6) define a statutory instrument to mean *"any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."*

The Statutory Instruments Act, 2013 came into operation on the 25th January 2013. Before the coming into force of this Act, the laying of statutory instruments before the House was previously governed by section 34 of the Interpretation and General Provisions Act (Cap 2 of the Laws of Kenya) but this section was repealed by section 27 of the Statutory Instruments Act, 2003. The new procedure for consideration of statutory instruments by the House is now as laid out in Part IV of the Statutory Instruments Act, 2013.

Before I expound on the procedure for consideration of statutory instruments by the House as laid out in the Act, it should be noted that both the repealed section 34 of the Interpretation and General Provisions Act and Part IV of the Statutory Instruments Act, 2013 do not contemplate any process of approval of a statutory instrument by the House. It is presumed that the House, in delegating the power to make statutory instruments, has already signified its approval of that statutory instrument. It is for this reason that both the repealed section 34 of the Interpretation and General Provisions Act and the existing Part IV of the Statutory Instruments Act, 2003 are cast in a language that contemplates the involvement of the House only in instances of annulment of the whole or part of the statutory instrument as opposed to approval of the whole or part of the statutory instrument.

The said repealed section 34 of the Interpretation and General Provisions Act provided as follows-

> *"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 the 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"*

The same principle of involvement only in annulment is now espoused in Part IV of the Statutory Instruments Act, 2013.

I will now expound on the procedure for consideration of statutory instruments by the House as sequentially set out in Part IV of the Statutory Instruments Act, 2013.

Under section 11 of the Act, every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the Clerk for tabling before the House together with an explanatory memorandum in the manner prescribed in the Schedule. Upon receipt of the statutory instrument and the memorandum, the Clerk enters this instrument into the register required to be maintained under the Act.

I must observe with great regret that there has been little compliance by the Cabinet Secretaries with this provision and I urge the Leader of the Majority Party to follow up with the appropriate channels on this issue as lack of compliance with this requirement is fatal to the statutory instrument being sought to be made. Under section 11(4) of the Act, if a copy of a statutory instrument that is required to be laid before the House is not so laid within seven (7) sitting days after its publication, the statutory instrument ceases to have effect immediately after the last day for it to be so laid.

Under section 12 of the Act, every statutory instrument tabled stands referred to the Committee on Delegated Legislation. Section 13 of the Act then sets out principles which the Committee should be guided by in carrying out its scrutiny of the statutory instrument.

Section 16 requires the Committee, in so far as its practically possible, to confer with the regulation-making authority for which the statutory instrument has been made before tabling the report to House for their information and modification where necessary. It is at this stage that the Committee shares with the regulation making authority its desired modifications to the regulations, if any.

Upon completion of the scrutiny, section 15 of the Act requires the Committee to make a report to the House **containing only a resolution that the statutory instruments that stands permanently referred to the Committee be revoked**.

Under section 17 of the Act, the Committee shall state in its report the overall objective of the statutory instrument, the identity of the portion of the statutory instrument in relation to which the report has been made and an indication of the manner in which it offends the criteria set out in section 10 of the Act and the recommendations thereof.

Under section 18 of the Act, when a report on a statutory instrument has been tabled in the House, the statutory instrument shall be deemed to be annulled if the House passes a resolution to that effect.

Under section 19 of the Act where the House has adopted a report or a resolution that a statutory instrument be revoked, the instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.

It is apparent that Part IV of the Statutory Instruments Act does not contemplate the full involvement of the House in the regulation making process. As such, the House is not required to approve or make any amendments to the statutory instrument. Rather, the House is only required to annul the whole or any part of the statutory instrument that the House is not happy with. In making the annulment of the whole or any part of the regulation, the House is required to give it reasons which will guide the regulation making authority in formulating new provisions to replace the ones annulled by the House.

Indeed, a reading of sections 15, 18 and 19 of the Act clearly contemplate an annulling resolution by the House. There is no contemplation of an amending or approving resolution. The Committee report to the House must therefore comply with this statutory requirement.

This is in consonance with Article 94 (6) of the Constitution which requires Parliament, in delegating any legislative authority, to specify the purpose and objectives for which the authority is delegated, the limits of that authority, the nature and scope of the law to be made and the principles and standards applicable to the law made under that authority. Parliament should therefore only come in to check the procedural exercise of that power and not exercise the power itself.

The provisions of the Statutory Instruments Act have in fact been clearly expounded on by Standing Order 210 of our Standing Orders.

Although Part IV of the Statutory Instruments Act may be argued to apply to those statutory instruments that have been published in the Gazette, Standing Order 210

applies the same procedure to all statutory instruments submitted to the House irrespective of whether publication has taken place or not. The procedure outlined in this communication therefore applies to all statutory instruments that are submitted to the House prior to publication and after publication.

Under paragraph (2) of Standing Order 210, whenever a statutory instrument is submitted to the Assembly pursuant the Constitution, any law or these Standing Orders, the statutory instrument shall, unless a contrary intention appears in the relevant legislation, be laid before the Assembly by the Chair of the relevant Departmental Committee, or any other member and shall thereafter stand referred to the Committee on Delegated Legislation.

The Committee is then obliged to scrutinize the statutory instrument in accordance with the criteria set out in the Act and upon completion of its scrutiny, there is no contemplation of any motion for approval or amendment of the statutory instrument, except for a motion of annulment where the Committee has recommended so.

Of particular emphasis is paragraph (4) of the Standing Orders which provides as follows-

(4) If the Committee-

> *(a) resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument.*
>
> *(b)does not accede to the statutory instrument, the Committee may recommend to the House that the Assembly resolves that all or any part of the statutory instrument be annulled.*

The Committee therefore only reports back to the House in the instances where it is desired to annul the whole or part of the statutory instrument. Where there is no desire to annul the whole or any part of a statutory instrument, that resolution is communicated to the Clerk who then communicates to the relevant state department or the authority that published the statutory instrument.

It is my hope that the foregoing exposition will clarify to the House and the Committee on Delegated Legislation the procedure that should be adopted in the consideration of the statutory instruments that are pending before the House. Indeed, under Standing Order 47(3), the Chair will not allow debate on any motion or report that is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament. The power to make regulation, once delegated under an Act of Parliament should not be exercised by the House itself unless if the House amends that particular piece of legislation.

4. CONSIDERATION OF MONEY BILS

Tuesday, 22nd April 2014

Hon. Members, this Communication relates to the manner of considering Money Bills and proposed amendments to Money Bills in the Committee of the whole House. The Communication arises from an undertaking made by the Deputy Speaker on 3rd April 2014 during the consideration of the Value Added Tax (Amendment) Bill, 2013 sponsored by the Member for Suba, hon. John Mbadi.

You will recall that on that day the said Bill was scheduled to be considered in the Committee of the whole House. However, the Committee did report progress and was granted leave to sit again. This was necessitated by the fact that most of you attempted to challenge the ruling of the Deputy Speaker on the fate of most of the proposed amendments to the Bill at the time. From the outset, I must say that even though the ensuing debate set off insightful discourse on the application of Article 114 of the Constitution, an attempt to challenge the ruling made from the Chair on a matter of application of a provision of the Constitution in parliamentary practice is unprecedented in our legislative history and ought to be discouraged at all times. Hon. Members, I have since been seized of the matter and wish to make the following observations:

Firstly, most of the Members who spoke sought guidance on the following three issues:-

(i) The extent of application of Article 114 of the Constitution and whether its strict application in our legislative process would amount to gate keeping for the Executive and limiting the legislative role of the House.

(ii) Whether after a Bill has been proposed, proposed amendments should also be subjected to the requirements of the provisions of Article 114 of the Constitution or should be subjected to the collective decision of the House in the exercise of its legislative action.

(iii) Whether in the event the relevant Committee envisaged under Article 114 of the Constitution, having consulted the Cabinet Secretary responsible for finance, recommends that a specific proposed amendment should not be considered, such amendment ought to be included in the Order Paper for the day.

Hon. Members, these matters are not new to us. Indeed, some of these issues were largely canvassed in this very House during the consideration of the Finance Bill, 2013. I will, therefore, offer summary guidance. The first and second questions relate

to the extent of application of Article 114 of the Constitution. For avoidance of doubt, Sub Article 2 thereof states as follows and I quote:

> *"If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter mentioned in the definition of "a Money Bill", the Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance."*

Hon. Members, Article 114(3) lists the items that constitute a Money Bill. First on that list is a Bill containing provisions dealing with taxes. It, therefore, follows that the Bill sponsored by the Member for Suba is a Money Bill. How then is the Assembly supposed to proceed when faced with amendments to a Money Bill? Again, the provisions are very clear and I quote:

> *"The Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance."*

This provision, in my view, is clear and absolute.

Hon. Members, in construing this Article, we are guided by Article 259 of the Constitution which requires us to interpret the Constitution in a manner that promotes its purposes, values and principles and further permits the development of the law. The same Article 259 also requires every provision of the Constitution to be construed in the doctrine of interpretation that the law is always speaking. One notable observation is that our Standing Orders fail to make sufficient enabling provisions to give effect to Article 114. This is one clear area for development of law and I challenge my Committee on Procedures and House Rules to carefully study and make recommendations.

However, if one would impartially apply his or her mind to provisions of Article 259 of the Constitution to address the first and second issues raised earlier on, the question of gate keeping would not arise at all. It is logical that an amendment to a Money Bill would itself amount to making a Money Bill. Since the substantive Bill would have been subjected to the requirements of that Article before publication as provided for in our Standing Order No. 114(3) and Standing Order No.231 it follows, therefore, that any proposed amendment to the Bill should also be subjected to the same standard. To imagine that such amendments would be brought to the House for a decision without the test of the provisions of Article 114 would amount to two things; either assuming that one Article does not exist or to attempt to introduce a process of

circumventing the requirements of Article 114 to introduce items that have the effect of a Money Bill. I have no doubt that a House worth its salt would avoid that route at all costs.

As to whether the application of that Article would limit the legislative function of the House, it is my view that the legislative function of this particular House as laid out in Articles 94 and 95 of the Constitution is almost inexhaustible. However, the same Constitution in Article 114 and other provisions also sets certain standards and criteria for the exercise of that legislative function of the House. It is these criteria that this Assembly is today being asked to remain faithful to.

Hon. Members, whilst the makers of our Standing Orders may not have adequately provided enabling procedures for the application of Article 114 of the Constitution in the rules of procedure, the Article is almost replicated in Standing Order No. 114(3)(a) and Standing Order No. 231. As a matter of fact, Standing Order No. 256 relating to exemption of business from the Standing Orders prohibits the moving of any Motion that would attempt to suspend or set aside the requirement of Standing Order No. 231 on restrictions with regard to certain financial measures. This is the spirit for the application of Article 114 of the Constitution, that there cannot be an exemption to its application.

As regards publication of amendments in the Order Paper or amendments that have not been recommended by the Budget Committee for consideration by the Assembly, it is my view that such amendments ought not to be published in the Order Paper.

I so direct that this shall henceforth be the procedure; the Clerk should, therefore, communicate the recommendations of the Committee to the respective Members wishing to make amendments. However, to enable a coordinated and neat application of these processes, Members ought to give ample time to the Budget Committee to consult the Cabinet Secretary and make its report.

Hon. Members, having said that, I want to uphold the ruling made by the Deputy Speaker on 3rd April 2014. The ruling was based on the written recommendation of the Budget and Appropriations Committee which is the relevant Committee for the purposes of the said paragraph 3 of Article 114 of the Constitution. In that ruling, the Deputy Speaker ruled that following the recommendations of the Committee, only the proposed amendments by the Member for Balambala would be considered in the Committee of the whole House. However, even those amendments can only be admitted if read in the manner recommended by the Committee and if moved by the sponsor of the Bill.

I also direct that this procedure shall apply today to the Division of Revenue Bill which is listed in today's Order Paper.

I thank you.

5. PREMATURE DISCLOSURE OF COMMITTEE EVIDENCE

Wednesday, 4th June 2014

On Wednesday, 23rd April 2014, the Leader of Majority Party rose on a point of order to challenge the admissibility of the Report of the Public Accounts Committee (PAC) on the hire of an aircraft for the Deputy President for a tour of four African nations in May 2013. The challenge was premised on the premature disclosure and publication by the *Nation* Media Group and the *Standard* Media Group of the evidence and findings of the Committee prior to the tabling of the Report.

The Leader of Majority Party claimed that the Report of the Committee was published by one of the dailies on its headlines for two consecutive days, and particularly on the second day, with factually the entire Report and Committee's recommendations carried almost word for word. He sought to know a number of issues, including the date when the Committee adopted the Report and if it was adopted before the House went on the April short recess, why the report was not tabled then, and whether the Report was tabled within the first 14 days after its adoption in compliance with paragraph (6) of Standing Order No. 199. He also sought to know whether the Members of the Committee or its secretariat could have occasioned the premature disclosure.

He similarly wanted to know if the Report tabled by the Chairperson of PAC is the same Report whose contents and findings the newspapers carried, and if so, what that Act portends to the integrity of Parliament. Reacting to the matter, the Chairperson of PAC, Hon. Ababu Namwamba, denied the allegations and affirmed that the Report he had just tabled was becoming public for the first time. He assured the House that PAC did exercise due diligence and was confident of the integrity and sanctity of the Report he had just tabled.

Hon. Members, from the outset, unauthorized disclosure of Committee evidence, documents, proceedings or Reports is not a new thing. Invariably, the motivation to disclose information ranges from carrying favour with a journalist to advancing party political advantage. Again, not all disclosures will necessarily interfere with the work of a Committee and such would not necessarily be considered to constitute contempt. However, the disclosure of certain information held by Committees such as in-camera evidence or other confidential documents has a real potential to interfere with the work of Parliamentary Committees by undermining the operations of Committees and should be taken seriously. An unauthorized disclosure of an incomplete Report has even more serious consequences.

Most parliamentary jurisdictions have longstanding rules regarding the custody of records of the House and the requirements for the Speaker to authorize their release. These principles stem from the privilege of houses of parliament to control their own proceedings. Even more, most jurisdictions have adopted a standing rule or order that deals specifically with unauthorized disclosure of Committee proceedings. For instance, in the New South Wales Legislative Assembly, Standing Order No. 297 provides and I quote: *"A Member or any other persons shall not disclose evidence, submissions or other documents and information presented to the Committee which have not been reported to the House, unless such disclosure is first authorized by the House or the Committee"*.

Similarly, Standing Order No. 240 of the House of Representatives of New Zealand states as follows: "The proceedings of a Select Committee or a Sub-committee other than during the hearing of evidence are not open to the public and remain strictly confidential to the Committee until it reports to the House".

Our own Standing Orders put such a caveat in Standing Order No. 86 which provides as follows: "No Member shall refer to the substance of proceedings of a Select Committee before the Committee has made its report to the House".

Despite these provisions, some Committee Members in a number of parliaments have unwittingly continued to disclose information from Committees. Thus, in recent years it has become common for parliaments to place the onus for investigating unauthorized disclosures on the relevant Committees as opposed to a privileges committee or the House itself. This approach requires Committees to determine whether the source of unauthorized disclosure can be determined and whether in view of the Committee Members, the leakage is serious enough to interfere with the work of the Committee and therefore constitute contempt. It is then for the House to determine whether contempt has been committed, and what punishment should be handed down.

Erskine May, a foremost authority in parliamentary practice and procedures in the book titled, "*The Parliamentary Practice (23rd Edition*," at pages 776 to 777 notes and I quote:

> *"If Committee evidence or Reports are prematurely disclosed, certain procedures should be followed;*
>
> *the Committee should carry out its own investigations to attempt to discover a source of a leak, in particular by formally asking all Members of the Committee and the Committee staff if they can explain how the leak came about; the*

committee then decides whether or not the leak constitutes a substantial interference, or the likelihood of such with the work of the Committee, with the entire Committee system or with the functioning of the House; the Committee thereafter informs the liaison Committees so that it may take a view; it is the views of the Liaison Committee that inform the special report of the original Committee to the House to the effect outlining the action it has taken and conclusions it has reached; such a special report would automatically be referred to the Committee on Standards or Privileges without a debate to the House so that it is then for the Committee to consider the matter and make a report to the House where upon the House will consider its recommendations."

Hon. Members, of particular noting is step number two as pointed out by Erskine May relating to whether the leak constitutes a substantial interference with the work of a Committee. This is important in terms of deciding what action to take. The type of material that is disclosed is also important in determining what course of action ought to be taken.

The 122nd Report of the New South Wales Senate Committee of Privileges, "*Parliamentary privilege*" unauthorized disclosure of Committee proceedings, of June, 2005 at page 37 consider that, the disclosure of a draft Committee Report would usually not be so serious as to constitute contempt. Exceptions would be disclosures resulting in serious consequences thus the Report quoted above and I quote, *"It is up to the parliamentary Committee concerned to undertake the necessary disciplining of its Members other than raising the questions as contempt. It is only in circumstances such as divulging of a draft Report which may jeopardize court proceedings or police investigations that the Committee of privileges would entertain advising other Committees that the matter should be raised as contempt."*

However the disclosure of in-camera or confidential evidence is a much more serious matter and it is usually treated as contempt regardless of the circumstances. The release of its in-camera evidence undermines the operations of a Committee, in that persons providing information or evidence to Committees in confidence may lose that confidence in the Committee process and future witnesses may not be as forthcoming as they would have been. It is often difficult for Committees to determine who is responsible for an unauthorized disclosure and accordingly, it is difficult for any deterrent action to be taken. It is also inevitable that the people with the greatest motive for premature disclosure of evidence or information would be Members of the Committees themselves.

However, I hasten to add that the fact that most unauthorized disclosures are considered to be insufficiently serious to warrant an extensive investigation does not

remove the real potential that exists for interference with the operations of Parliamentary Committees, if in-camera or other confidential material is disclosed.

Hon. Ken Obura, you cannot be walking in late and you start standing on the gangways greeting other Members. Members, to quote the Australian House of Representatives Practice, Fifth Edition at page 687:-

> *"A Committee's or sub-Committee's evidence, documents, proceedings and report may not be disclosed or published to a person other than a Member of the Committee or parliamentary employee assigned to the Committee, unless they have been reported to the House their publication has been authorized by the House, the Committee or the sub-Committee"*.

This is a blanket prohibition which precludes an unauthorized disclosure of all or part of a report or its content.

Members, having established the practice on how incidences of unauthorized disclosure are treated in comparative jurisdictions, I now wish to respond to the issues raised by the Leader of Majority Party. Firstly, I have established that the Report in question was adopted by the Committee and signed by the Chairperson on 3rd April 2014. Pursuant to Standing Order No. 199(6), the Report should have been tabled within 14 days' period, which should have ended on 18th April 2014. However, as you are aware, the House went on recess on 3rd April 2014 and reconvened on 22nd April 2014.

On the question of whether the Report tabled is the same Report on whose contents and findings the two dailies carried, a perusal of the Report reveals that the articles published in the newspapers are an almost accurate and extensive lifting from the Report of the Committee as later tabled in the House. One of the dailies even had the temerity to state that it had in its custody a copy of the Report. The House may wish to note that when the matter was raised by the Leader of Majority Party, the Chairperson of the PAC categorically stated that the Committee was not part of the leakage. He continued to state and I quote:

> *"I want to assure the House that the Committee has exercised due diligence. We have been careful not to release even a scrap of paper relating to this matter while we were discussing it. This Committee will definitely get to the root source of this leakage, rumour mongering or speculation on this Report. I assure this House on the integrity and the sanctity of the Report that we have just tabled"*.

Members, there is no doubt that the Report was leaked before it was tabled in the House. Since it is not possible at this stage for me to determine who may have released the contents of the Report to the media, I wish to send a strong reminder to all Committees that it is in the interest of this House that the evidence received by a Committee, its proceedings, a draft Committee report, should never be disclosed by any person before the Committee has reported to the House. This rule applies to all persons who have access to Committees' information including Committee Members and their staff. It also applies to any witness who gives evidence to a Committee, any person who provides a written submission to a Committee and any person to whom Committee information has been improperly disclosed. This many include another Member, staff of a Member, a public officer or a staff of a media house.

Members, I would also like to warn all recipients of unauthorized disclosures and they should know that they have an obligation to immediately inform the Clerk of the National Assembly or the Committee Secretariat when they receive such information and the circumstances of such receipts. Good manners, as civility, obligates a recipient of such unauthorized information to surrender the information to the Committee secretariat as soon as possible and not disclose the information to any other person, or record or copy it in any other way. Everyone should know that any contravention of the rule against unauthorized disclosure may constitute contempt of Parliament for which this House will not hesitate to take necessary punitive action to mitigate against such breaches. Obviously, the act of leaking the report lowers public confidence in the Committee, the Committee system and brings to disrepute the dignity of Parliament generally.

On the second question of who leaked the Report, I leave the Members of the PAC to be pricked by their conscience even as they carry out investigations as promised by the Chairperson. Regarding the subtitle of the Report, it has also come to my attention that the Committee has baptized the Report "The Hustler's Jet Inquiry". Perusal of the evidence adduced and the Committee Report indicate that the words have not been used by any of the witnesses for anyone reading the report to understand its usage. A report of a Committee is normally accorded a formal reference for the record of the House. Any reference to it by any other name is unacceptable and amounts to introducing extraneous issues. I will therefore give direction on this matter.

Members, it is not uncommon for the Speaker, who is the Chairperson of all Committees to give such directions as necessary on Committee work if in his opinion, certain matters contained in the Committee Report are likely to contravene the Standing Orders or the practice of the House. Indeed, on 2nd July 1996, the then Speaker, hon. Francis ole Kaparo, directed that the use of a certain word in a report of the PAC report had flouted the provisions of the Standing Orders and ruled that the

word be deleted and substituted with another word. The then Speaker ruled that: "Hon. Members, it has been brought to my attention that certain recommendations of the outgoing PAC contravene the provisions of Standing Order No. 76 and I have therefore, directed the Clerk of the House, who is also the Secretary of the Committee to make sure that all recommendations are correctly recorded in accordance with the Standing Orders of the House. Instructions given specifically followed that the word "President" should be deleted from wherever it appears in the recommendations and the word "Government" be substituted in place thereof.

In the instant case of the Report before us today, the use of the word "hustler" in this context is superfluous as the aircraft in question has a clear reference and, therefore, the use of the word 'hustler" could not convey the true position on the matter under inquiry. I, therefore, rule and direct that the word "hustler" in this Report is un-parliamentary and I direct the Clerk of the National Assembly to cause the sub-title "The Hustler's Jet Inquiry" to be deleted forthwith and the Report to be republished minus the offending words for consideration by the House.

I thank you, Hon. Members

6. CAUTION REGARDING GROSS MISCONDUCT

Wednesday, 18th June 2014

Hon. Members, before we move to the next order, I wish to make this communication which relates to a caution regarding gross misconduct.

Hon. Members, as you are aware, it is the duty of the Speaker to maintain order in the House pursuant to Standing Orders and specifically Standing Order 98, which states as follows:-

> *"Order shall be maintained in the House by Mr. Speaker and in the Committee of the Whole House by the Chairperson of such Committee; but disorder in the Committee may be censured only by the House on receiving a report thereof"*

In this regard, you will recall that on Tuesday, 17th, 2014; I read to the House the provisions of Standing Order 107 explaining what constitutes gross disorderly conduct.

Hon. Members, I have no doubt you are also aware of the mechanism provided by the Standing Orders at the National Assembly, Powers and Privileges Act, Chapter Six of the Laws of Kenya on how to deal with misconduct or disorder within the House. Just to mention, I wish to draw the attention of the hon. Members to the provisions of Standing Order 107 (2) which provides as follows:-

"The Speaker or the Chairperson of the Committee shall order any Member whose conduct is grossly disorderly to withdraw immediately from the precincts of the Assembly-

(a) On the first occasion, for the reminder of that day's sitting;

(b) On the second occasion or subsequent occasion during the same session for a maximum of three sittings days including the day of the suspension."

Hon. Members, you will recall that Hon. Member for Mbita, hon. Millie Grace Odhiambo-Mabona, was suspended from the service of the House for gross misconduct for three sittings days. This is the second time in this session that hon. Member has been suspended.

While the greatest majority of the House Membership conducts themselves honorably, the attention of the Speaker and that of hon. Members in general has been drawn to

the continued isolated cases of gross disorderly conduct. It is, therefore, clear that a good percentage may not understand the consequences of repeated gross disorderly conduct and what suspension entails. Most important is the consequence for refusal to withdraw from the Chamber when ordered to do so. May I take this opportunity to read for you the provisions of Standing Order 111 and I quote:-

> *"If any Member shall refuse to withdraw when required to do so by or under the Standing Order, the Speaker or the Chairperson of the Committee, as the case may be, having called the attention of the House or Committee to the fact that recourse to force is necessary in order to compel such Member to withdraw, shall order such Member to be removed and such Member shall thereupon without question put be suspended from the service of the House during the reminder of the session and shall during such suspension forfeit the right of access to the precincts of Parliament and Serjeant-At-Arms shall take necessary action to enforce the order."*

For avoidance of doubt, the provision of Standing Order 2 on what a session constitutes states; and quote:- "Session" means the sitting of the House commencing when it first meets after a general election on a day provided for in Standing Order 27, as regular sessions of the House and terminating when the National Assembly adjourns at the end of calendar year of at the expiry of the term of Parliament. If for any reason invokes the provisions of Standing Order 111, then it follows that a Member will be suspended for the reminder of the session and will be a stranger until the commencement of the next session which usually commences on February of each year. This will expose such to the provisions of Article 103 of the Constitution.

In the case of the Hon. Member for Mbita, I am informed that she even made unpalatable remarks and gestures to the Speaker and the House. Such conduct would undoubtedly demean and lower the dignity of the House. Therefore, following the concerns that the conduct of Hon. Millie Odhiambo-Mabona, MP, as raised within the Parliamentary community and more so because she has previously directed such demeaning gestures to the Chair, I refer the matter to the Committee of Privileges to consider the matter and make a report to this House.

In this regard, I order that the Committee meets on Tuesday 24th June, 2014 in the Speaker's Board Room, First Floor, Parliament Buildings, at 10.00 a.m. to consider the matter, among other issues.

Hon. Members, I therefore, wish to caution you to take note and fully comply with the procedure but hasten to add that I remain optimistic that no hon. Member will breach

the rules that the House has set for itself to warrant or necessitate suspension from the Assembly.

Thank you

7. SPECIAL MOTIONS FILED UNDER ARTICLE 152 (6) OF CONSTITUTION

Tuesday, 10th June 2014

This relates to special Motions filed under Article 152(6) of the Constitution of Kenya. Every Member has a right under Article 152(6) of the Constitution to move the House to remove a Cabinet Secretary. Before giving Notice of such a Motion under Article 152(6) of the Constitution, the Member must, however, deliver to the Clerk a copy of the proposed Motion in writing, stating the grounds and particulars in terms of the said Article, upon which the proposed Motion is made. The Notice must be signed by the Member and signed in support by at least, one quarter of all the Members of the Assembly.

I wish to notify the House that pursuant to the aforementioned provisions, I have received a Notice of Motion from Hon. Mithika Linturi, MP, of his intention to move a Motion for the removal of the Cabinet Secretary for Devolution and Planning, Ms. Ann Waiguru, in accordance with the provisions of the said Article of the Constitution.

The Mover of the proposed Motion has satisfied all the requirements and the Motion has been forwarded to the House Business Committee, which sits this evening at the rise of the House to allocate time. Once they have allocated time, the Order Paper on which the Motion is listed, must set all the grounds and particulars upon which the proposed Motion is made, the name of the Member sponsoring the Motion and the names of the Members in support of the Motion.

Holding the Executive to account is an alienable right of Parliament which, while performing its oversight role under the Constitution, exercises the powers delegated to it by the people of Kenya under Article 1 of the Constitution. Thus, Members bringing Motions as per the provisions of Article 152(6) of the Constitution are, indeed, exercising that role of oversight.

Hon. Members, in a 1999 Report prepared at the request of the Speaker of the National Assembly in South Africa, by one Hakkoder Saras Jaguath and Fred Shelter of the Faculty of Law, University of Cape Town entitled, Report on Parliamentary Oversight and Accountability, the authors stated as follows:-

> *"Oversight is the function of the Legislature, which flows from the separation of powers and the concept of responsible Government like law making, which entails certain powers. Foremost amongst these is the power to hold the Executive accountable, monitoring the implementation of laws goes to the heart*

of the oversight tool. The Legislature is in this way able to keep control over the law it passes and to promote constitutional values of accountability and good governance, thus oversight must be seen as one of the central tenets of democracy---".

Thus, oversight must be seen as one of the central tenets of democracy. Accountability is also designed to encourage open Government. It serves the function of enhancing public confidence in Government."

In brief, this oversight role of Parliament entails overseeing the effective management of Government departments in order to improve service delivery and the rule of law. Hon. Members, this cardinal role of Parliament must, however, be exercised responsibly and with decorum. Whereas Members are at liberty, upon stating the grounds and particulars in terms of Article 152(6) of the Constitution, the proposed Motion such as the one I have referred to for removal of Cabinet Secretaries, the entire process should be structured and should uphold the integrity of the House.

The Chair is dismayed to learn through other means, of intention by certain Members to exercise this right under the provisions of Article 152(6) of the Constitution without those Members first having the courtesy to make the proposals known to the Office of the Clerk. I wish to remind Members that provisions of Standing Order No. 85 prohibit Members from anticipating debate on matters that are likely to be brought before the House within reasonable time. Special Motions include the Motion for removal of Cabinet Secretaries as they are given priority in the House. Prosecuting matters relating to these Motions outside the Chamber compromises the sanctity of the Floor of the House as a forum for debate among the people's representatives.

Hon. Members, Special Motions, as I have already stated, require that they should be dealt with without delay. Indeed, Standing Order No. 64(2)(a) and (b) give timelines on actions to be taken by the Speaker and the House when a Motion of this nature is delivered to the Clerk of the National Assembly. However, there is no time limit given to the proposer of the Motion to give notice once the House Business Committee (HBC) has allocated time for its debate. A reading of the relevant Standing Orders presupposes that the entire process should be resolved either way within a reasonable time. The intention to move the Motion and the processes preceding the hearing itself must not be allowed to hang like a sword of Damocles on the head of any State Officer nor be allowed to drag on indefinitely. The Damocles must either fall or be removed and the Speaker will demand justice and fairness for public officers for which the House has a right to remove when Members are exercising this oversight role. Obviously, the Speaker will not countenance endless fishing expeditions.

Accordingly and using Standing Order No.1 (1) which reads as follows: "In all cases where matters are not expressly provided for by these Standing Orders or by other Orders of the House, any procedural question shall be decided on by the Speaker". I, therefore, order that whenever a Special Motion is filed and having been approved by the Speaker and time for its debate has been allocated, the Member who intends to move the Motion must give notice of the Motion within three sitting days, a failure to which the Motion shall be deemed to have been withdrawn and shall not be moved again in the same Session except with the leave of the Speaker.

In the case of the Motion by hon. Linturi, the three days period will start counting from tomorrow morning's sitting. I also wish to direct that Members should refrain from commenting on the substance of the Motion intended to be filed under the provisions of Article 152(6) of the Constitution and Standing Order No.66. Any Member wishing to introduce such Motions should, as a matter of courtesy, first discuss with the Clerk so that proper procedures are followed. Thereafter, they need to approach the Clerk of the National Assembly who will advise on the process and, in particular the need to have a clearly stated heading of the Motion with the grounds and particulars upon which the proposal is made and stated in general terms. This will enable Members who are in support of such a Motion to understand the contents and vote for what they are signing. This is more important as Standing Order No. 64(5) provides that any signature appended to the list accompanying the Motion cannot be withdrawn.

I thank you, hon. Members

8. WITHDRAWAL BY CORD COALITION OF ITS SUPPORT FOR THE CENSURE MOTION AGAINST CABINET SECRETARY JOSEPH OLE LENKU

Thursday, 26th June 2014

Hon. Members, this Communication relates to the withdrawal of CORD Coalition sponsorship of the Motion to discuss the conduct of the Cabinet Secretary for Interior and Coordination of National Government.

Hon. Members, Article 95(5)(a) of the Constitution vests the role for reviewing the conduct of the Office of the President, the Deputy President and other State officers in the National Assembly. To give effect to part of that role, our own Standing Order No.87 (1) provides:-

> *"87(1) Neither the personal conduct of the President, nor the conduct of the Speaker or of any judge, nor the judicial conduct of any other person performing judicial functions, nor any conduct of the Head of State or Government or the representative in Kenya of any friendly country or the conduct of the holder of an office whose removal from such office is dependent upon a decision of the House shall be referred to adversely except upon a specific substantive Motion of which at least three days' notice has been given."*

Hon. Members, it is on this basis that the Member for Kisumu Central gave notice of a Motion on Tuesday, 24th June, 2014 asking the House to express dissatisfaction with the conduct of the Cabinet Secretary for Interior and Coordination of National Government, Mr. Joseph ole Lenku. The Motion which was sponsored by the CORD Coalition had followed the usual channels, including approval by the Speaker and prioritisation by the House Business Committee.

For avoidance of doubt, a censure Motion is not a special Motion and is different from a Motion for removal of a State officer from office. Indeed, such Motion is an ordinary Motion meant to discuss the conduct of a public officer, but its discussion may be accorded priority should it obtain party sponsorship as provided for under Standing Order No. 47(5)(a).

Hon. Members, I have since received a letter dated 25th June 2014 from the Leader of Minority Party, indicating that the party has withdrawn its support for the Motion. The letter of the Leader of Minority Party conveys as follows:-

"The Motion ought not to be accorded the privilege and precedence of a party sponsored Motion."

The effect of the withdrawal of the CORD Coalition's sponsorship of the Motion now causes the Motion to be an ordinary one. This means that the Motion, whose notice was given by the Member for Kisumu Central, will hence go through the ordinary process of balloting like any other Motion before being scheduled for debate in the House.

Thank you.

9. REFERAL OF DIVISION OF REVENUE BILL TO MEDIATION COMMITTEE

Thursday, 19th June 2014

Hon. Members, you will recall that yesterday the 18th of June 2014, the House adopted the Report of the Budget and Appropriations Committee on the Division of Revenue Bill, 2014 and consequently rejected the amendments of the Senate to the Division of Revenue Bill, 2014.

As you all know, Article 112 (2) (b) requires that if after the National Assembly, being the originating House, reconsiders a Bill referred to it by the Senate and rejects the Bill as amended by the Senate, the Bill shall be referred to a mediation Committee appointed under the provisions of Article 113 of the Constitution.

Hon. Members, the resolution of the House yesterday adopted the report of the Budget and Appropriations Committee and rejected the Senate amendments to the Division of Revenue Bill, 2014. This implies that the Speakers, or the two Houses, must now form a Mediation Committee in a manner contemplated by Article 112 of the Constitution and our own Standing Order 149.

In this regard, having consulted the Leaders of the Majority and Minority Parties, and in accordance with Article 113 (1) of the Constitution, I have appointed the following hon. Members to be members of the Mediation Committee on the Bill on the part of the National Assembly:-

1. The Hon. Mutava Musyimi, MP – Chairperson, Budget and Appropriations Committee
2. The Hon. Mary Emaase, MP – Vice-Chairperson, Budget and Appropriations Committee and;
3. The Hon. John Mbadi Ngong'o, MP – Member of Budget and Appropriations Committee.

Hon. Members, it is, indeed, with a heavy heart that I wish to remind the House of the provisions of Article 113 (4) of the Constitution, which provides that if the Mediation Committee fails to agree on a version of a Bill within 30 days, or if a version proposed by Committee is rejected by either House, the Bill is defeated. The possibility therefore, exists of the Division of Revenue Bill, 2014, being lost and thus throwing the Budget process for the counties into disarray.

It is important to emphasize that if the Division of the Revenue Bill, 2014, is lost, the biggest causalities will be the county governments as Article 224 of the Constitution

requires enactment of the Division of Revenue, before they can commence any budgetary action. The said Article provides that:-

> *"On the basis of the Division of Revenue Bill, passed by Parliament under Article 218, each county government shall prepare and adopt its own Annual Budget and Appropriation Bill in the form and according to a procedure proscribed in an Act of Parliament."*

It is also important to emphasize that the loss of the Division of Revenue Bill, does not affect the budgetary process of the National Government, which continues in the manner contemplated under Article 221 of the Constitution.

Hon. Members, allow me to revisit certain provisions of this Article for clarity purposes.

Article 221 (1) states as follows:-

> *"At least two months before the end of each financial year, the Cabinet Secretary responsible for Finance shall submit to the National Assembly* ***– I emphasis, "National Assembly" -*** *Estimates of the revenue and expenditure of the National Government for the next financial year to be tabled in the National Assembly.*
>
> *(2) The Estimates mentioned in Clause (1) shall –*
>
> *(a) Include Estimates of expenditure from the Equalisation Fund, and*
> *(b) be in the form, and according to the procedure prescribed by an Act of Parliament.*
>
> *(3) The National Assembly shall consider the Estimates submitted under this Clause together with the Estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively.*
>
> *(6) When the Estimates of national Government expenditure and the Estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorize the withdrawal from the Consolidated Fund of the money needed f for expenditure, and for the appropriation of that money for the purposes mentioned in the Bill.*

(7) The Appropriation Bill mentioned in Clause (6) shall not include expenditures that are charged on the Consolidate Fund by this Constitution or an Act of Parliament."

It is, therefore, clear that unlike the county governments which are tied to the enactment of the Division of Revenue Bill by Article 224; Article 221 does not tie the national Government to the enactment of Division of Revenue Bill.

Indeed, the House has already approved the Estimates of the National Government expenditure and the Estimates of expenditure for the Judiciary and Parliament, as contemplated in Article 221 (6) and will soon be considering the Appropriation Bill as required by the Constitution.

Hon. Members, you will recollect that the reason why the Division of Revenue Bill is being referred to a Mediation Committee is because of the amendment made to the Bill by the Senate; which, as reported by the Budget and Appropriations Committee, was an unconstitutional amendment, as there was no agreement between the national Government and county governments as relates to the financing of level five hospitals, as required by Article 187 (1) of the Constitution.

The level five hospitals still remain within the jurisdiction of the county governments as no legal arrangements have been made for the transfer of this function as contemplated by the Senate amendment.

Hon. Members, last year I delivered several communications in which I stated my finding that a reading of Articles 93(2) and 95(4) of the Constitution relating to Article 218(1)(a) of the Constitution and, therefore, the allocation of national revenue between the levels of government is a function of the national Assembly. In addition, a reading of Articles 93(2), 96(3) of the Constitution relates to 218(1) (b) of the Constitution; therefore, the Senate determines the allocation of national revenue amongst counties. However, the Senate sought an advisory opinion from the Supreme Court on this matter and the substance of the Supreme Court opinion is well within the knowledge of the House. It is my hope that the fears that informed my previous findings on this matter will not come to pass as this may pose great disruptions to the budgetary process as envisaged in the Constitution.

Finally, listening to the debate on the Motion yesterday, it became apparent that prior consultations had taken place at various forums on the Division of Revenue Bill, 2014, and the agreements reached at these consultations informed the content of the Bill as originally published, amended and passed by the National Assembly. It is my hope

that the Mediation Committee will build up on this consensus at the earliest possible opportunity, so as to put the budgetary process for the county governments into focus.

I thank you.

10. TIMELINES FOR CONSIDERATION OF STATUTORY INSTRUMENTS

Thursday, 3rd July 2014

Hon. Members, you will recall that on Wednesday 26th March 2014, I gave a Communication regarding the procedure for scrutinizing statutory instruments by this House. Whereas the Communication then focused on providing guidance on the procedure for considering statutory instruments, I also underscored the necessity for the House to, in so far as is practically possible, have the statutory instruments considered in good time.

In fulfillment of the requirements of Section 11 of the Statutory Instruments Act, 2013, 14 statutory instruments have since been tabled before the House. As required by Section 12(1) of the said Act, these instruments effectively stood referred to the Committee on Delegated Legislation for consideration. Upon committal, the Committee on Delegated Legislation is supposed to:-

(a) scrutinize the statutory instruments for compliance with the matters specified under Section 13 of the said Act, together with such other requirements as may exist in the Interpretation and General Provisions Act relating to subsidiary legislation;
(b) concur with the regulation making authority in the manner contemplated under Section 16 of the Statutory Instruments Act, 2013; and,
(c) table a report in the House containing only a resolution that the statutory instrument, or part thereof, is to be revoked, as contemplated under Section 15 of the Statutory Instruments Act, 2013.

Although it is not expressly provided for in the Act, good practice in other jurisdictions also require the Committee to consult the relevant departmental committee responsible for the subject matter of the statutory instruments before submitting its report to the House.

Section 18 of the Act requires the Committee in tabling the report before the House to state the overall objective of the statutory instrument, identify the part of the statutory instrument in relation to which the report has been made and indicate the manner in which it offends the criteria set out in Section 10 and the recommendation of the Committee.

Hon. Members, our own Standing Order No.210(4) outlines two procedural steps to be followed by the Committee after consideration of the statutory instrument. Firstly, if the Committee resolves that the statutory instrument be acceded to, this resolution is

conveyed to the Clerk of the Assembly, who shall then convey that resolution to the relevant State department or the authority that published the statutory instrument. Secondly, where the Committee resolves that the statutory instrument, or part thereof, should not be acceded to, the Committee is then required to recommend to the House that the Assembly resolves that all, or any part, of the statutory instrument be annulled.

Of the 14 statutory instruments that have been committed to the Committee on Delegated Legislation so far, the House has only considered a report on one instrument namely; The Public Finance Management (Uwezo Fund Regulations 2013). The Committee has since tabled a report on the Constituency Development Fund Regulations 2014, which is awaiting approval by this House. The Clerk of the House has not received any resolution from the Committee that any of the remaining instruments be acceded to for the purpose of conveying this resolution to the relevant regulation making authority, as contemplated under Standing Order No. 210(4); this essentially leaves the following 12 statutory instruments still pending with the committee:-

1. The Environmental Management and Co-ordination Act (E-Waste Management) Regulations of 2013;
2. The National Honours Regulations of 2013;
3. The National Transport and Safety Authority (Operations of Public Service Vehicles) Regulations of 2014;
4. The National Payment Systems Regulations of 2014.
5. The Government Financial Management (Hospital Management Service) Regulations 2009;
6. The Environmental Management and Co-ordination (Waste Tyre Management) Regulations 2014 plus explanatory Memorandum, Certificate of Compliance and Regulatory Impact System;
7. The Leadership and Integrity Act Regulations of 2014;
8. The National Land Commission Regulations on Review of Grants and Dispossessions of 2014;
9. The County Land Management Boards Regulations of 2014;
10. The Child Welfare Society of Kenya Order, 2014.
11. The National Construction Authority Regulations, 2014.
12. The National Social Security Fund Act Regulations, 2014.

Hon. Members, statutory instruments formulated by respective regulation making authorities require approval of this House before they have the force of law. Unless this House approves a statutory instrument, it can neither be implemented nor have the force of law. Our Standing Orders have delegated the approval aspect to the Committee on Delegated Legislation, which is required to come back to the House,

only in those instances where an annulment of a particular part or the whole of a statutory instrument is desired.

In this respect, the plenary of the House, therefore, considers only proposals of annulment of the whole or part of the statutory instrument. Although, the Statutory Instruments Act of 2013 and Standing Order No. 210 do not expressly specify a time limit within which the Committee must consider the statutory instrument, it is worth noting that in contrast with other committees which have a wide range of mandate, this Committee is solely charged with the responsibility of considering delegated legislation.

In my view, the limiting of the mandate of this Committee in considering delegated legislation is guided by the principle and nature of urgency within which such regulations ought to be given the force of law. This House ought not to abdicate the duty conferred on it by the Constitution, by delaying consideration and approval of statutory instruments requiring the force of law. Hon. Members, allow me to draw your attention to Standing Order No. 127(4) that obliges chairpersons of committees in respect of matters relating to legislation to table their reports within 20 calendar days of committal of a Bill to committee.

If, I were to invoke the provisions of Standing Order No.1 and impose a similar yard stick, it then follows that the Committee on Delegated Legislation is obliged to either accede to the statutory instruments by notice to the Clerk or table its report recommending for annulment within a similar period of 20 calendar days.

Hon. Members, in view of the forgoing, I wish to issue the following directions:-

1. That for those statutory instruments for which the Committee has neither tabled a report recommending annulment as required by Sections 15 and 17 of the Act, nor notifying the Clerk of its resolution to accede to the statutory instrument as required by Standing Order No. 210(4)(a), I direct that the Committee finalizes and reports back to the House, where it desires an annulment of the whole or part of the statutory instrument or notify the Clerk of its resolution to accede to the statutory instrument on or before 15th July, 2014.
2. In the event that the Committee fails to comply with the timelines under paragraph one, the Committee shall be deemed to have acceded to the statutory instruments and the Clerk shall upon the expiry of the specified time indicated above communicate the accession to the relevant regulation-making authority.
3. That for purposes of future practice, I direct that in accordance with Standing Order No. 1, whenever the Committee fails to notify the Clerk of its resolution to accede to a statutory instrument or table its annulment report in the House within

20 calendar days after committal of the statutory instrument to it, the Committee shall be deemed to have acceded to the statutory instrument and the Clerk shall, upon the expiry of the specified time, communicate the accession to the relevant regulation-making authority.

I thank you, Hon. Members

11. EFFECTS OF FAILURE TO DECLARE INTEREST IN A MATTER UNDER CONSIDERATION

Wednesday, 23rd July 2014

Hon. Members, this is a communication on declaration of personal interest by Members.

You will recall that on Wednesday June 26th, 2014, the Chairperson of the Departmental Committee on Education, Research and Technology rose on a point of order, seeking guidance from the Speaker regarding failure by the Member for Homa Bay, hon. Peter Kaluma, to declare interest in a matter for which he had sought a Statement from the Committee. Amongst the issues raised in the Statement were, one, the sources, terms and conditions for funding for building projects undertaken in the university. Two, measures being taken to ensure that the office of the Vice Chancellor is occupied by a duly appointed person, Thirdly, reason, other than discrimination, as to why some persons holding doctor of philosophy degrees and distinctions in their various fields of study remain engaged as Assistant Lecturers, contrary to tradition.

Hon. Members, the Chairperson had heard that hon. Peter Kaluma had represented one Dr. Helena Korir in a suit against Kenyatta University, the subject matter of which was related to the Statement sought. The Chairperson further indicated that some of the witnesses presented to give evidence included the said Dr. Helena Korir, amongst others, thus necessitating direction in view of provisions of Standing Order No.90. She also claimed that the matter was likely to be active in court and, therefore, *sub judice*.

From the outset, it should be noted that it is the responsibility of Members to declare any interest that they may have in any matter before the House. Most parliamentary jurisdictions have long-standing rules and norms regarding the declaration of interest by Members. Erskine May, an authority on parliamentary practice and procedure in the book entitled "Parliamentary Practice," which is the 24th edition, notes that,

> *'In debate a Member is required to declare any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have, or maybe expecting to have."*

In the UK House of Commons, Members are also expected to declare non-registrable interest, which might be thought to influence them.
Such interests have been held to include financial interest, financial interest of close family members or any other circumstances which, though exempt from the

requirements to register, might be thought to have a bearing on a Member's financial position. Members are also expected, by practice, to declare non-financial interests.

In the case of the European Parliament, Article 31 of the Code of Conduct. Four members of the European Parliament with respect to financial interests and conflict of interest, state that,

> *" A conflict of interest exist where a member of the European Parliament has a personal interest that could improperly influence the performance of his or her duties as a member. Therefore, Members shall disclose before speaking or voting in plenary or in one of the Parliament's bodies, or if proposed as a rapporteur, any actual or potential interest in relation to the matter under consideration, where such conflict is not evident from the information declared".*

Our own Standing Orders No.90 states that,

1. A Member who wishes to speak on any matter, in which the Member has a personal interest, shall first declare that interest.
2. Personal interest include pecuniary interest, propriety interest, personal relationships and business relationships. Further Article 75(1) of the Constitution states that a State office shall behave whether in public or official life, in private life or in association with other persons in a manner that avoids any conflict between personal interest and public official duties. In addition Article 122 (3) requires that a Member shall not vote on any question in which the Member has pecuniary interest.

The spirit of the Constitution thus expects of Members to at all times declare any personal interest that they may have in any matter before the House. This rule applies not only to debate in the House but also to almost all proceedings of the House, or its Committees in which Members have an opportunity to speak such as debate in Committees, presentations of public petition or meetings of a select committee at which evidence is heard.

In the House of Commons, for example, the Committee on Standards and Privileges regards it as a very serious breach of the rules if a Member fails to register or declare an interest which was relevant to proceedings he had initiated. Precedents on this matter include a resolution on June 22nd 1858 by the House of Commons that:

> *"It is contrary to the usage and derogatory to the dignity of the House that any Member should bring forward, promote or advocate in the House any*

proceedings or measure in which they may have acted or been concerned for the consideration of any pecuniary fee or reward."

Invariably the main propose of a declaration of interest is to ensure that fellow Members of the House and the public are made aware at the appropriate time when a Member is participating in the proceedings of the House of any past, present or expected future financial interest which might reasonably be thought to be relevant to those proceedings. This rule is based on one of the maxims of equity that he who comes to equity must come with clean hands, and he who seeks equity must be equity. The norm of the House has been that Members declare their interests in matters before the House, in which case they may choose to contribute or abstain from further contribution.

Hon. Members, having established the general practice on the declaration of interest by Members, the questions that confront us now are threefold. One, what sanctions do we apply to a Member who fails to declare interest? Secondly, if we were to nullify his or her entire matter as placed before the House, is it the Member that we will be punishing, or his or her constituents? Lastly, is it possible to discern and separate the issues in which interest ought to have been declared and mete sanctions separately?

Hon. Members, in an attempt to answer these questions I am guided by our Standing Orders, the practices I have referred to and the tenets of equity. However, I am also reminded that equity regards substance rather than form. For that reason, formalities no matter how important ought not to frustrate justice.

Having said that, I now wish to respond to the issues raised by the Chairperson of the Departmental Committee on Education, Research and Technology as follows. One, the representation of one Dr. Helena Korir by the Member for Homa Bay as her advocate, though in a private capacity, should have been declared before or during the presentation of the matter to the Committee and, by extension, to the House. The client relationship that existed and which had a correlation with the present contestations creates interest on the part of the hon. Peter Kaluma. As a rule, the failure to declare interest amounts to abuse of privilege. However, out of the matters that the Member had raised in his statement only Item 3, the one regarding the discrimination of staff, required the declaration of interest by the Member for Homa Bay.

Since the Member failed the basic tenets of equity on that particular matter, I, therefore, direct that the Committee proceeds with the prosecution of the rest of the matters raised in the Statement save for the item which relates to the alleged

discrimination of staff. The said item is dropped forthwith and should not be addressed by the Committee.

Secondly, whereas the Chairperson alluded to a matter that she claimed was active in a court of law, the claim does not meet the threshold required for a matter to be declared *sub judice*. The Chair failed to prove her claim. I, therefore, do not see anything that would require me to invoke the provision of Standing Order No.89.

I thank you.

12. PLACE OF MINORITY REPORTS AND ADMISSIBILITY OF COMMITTEE REPORT ON REMOVAL OF IEBC COMMISSIONERS

Wednesday, 30th July 2014

Hon. Members, I have this Communication to make. This is with regard to the place of minority reports and admissibility of the report of the Departmental Committee on Justice and Legal Affairs on the matter of the removal of IEBC Commissioners.

Hon. Members will recall that earlier in the day, during the Morning Sitting, the Member for Ugenya, Hon. David Ochieng', through a point of order, sought the guidance of the Speaker on the admissibility of the Report of the Departmental Committee on Justice and Legal Affairs on the petition for removal of the Chairperson and eight other members of the Independent, Electoral and Boundaries Commission. The Member also sought to know the place of a minority report in a report of a Committee as contemplated in Standing Order No.199. The Member was supported by the Member for Ugunja, hon. Opiyo Wandayi.

Having perused through the verbatim report for the morning sitting, I must thank the two Members for raising these matters, which are, indeed, weighty and have implications on the interpretation of our rules of procedure. In summary, the Members sought guidance on the following matters:-

(i) The place of a minority report in a report of a committee of the House.
(ii) Whether the report of the Departmental Committee on Justice and Legal Affairs on the Petition for the removal of the Chairperson and members of the IEBC as tabled on 17th July, 2014, is admissible.

Hon. Members, to begin with, there is a universally accepted principle of democracy and I quote:-

"The majority shall have their way, but the minority shall also have their say".

This principle does not decree that the majority ought to emasculate the voices of the minority, nor does it give the minority a blanket cheque to say anything under the sun. To the contrary, this principle encourages the majority in any group to recognise and take into account the views of the minority in that group.

In the courts, particularly the higher courts, it is not uncommon for judges in a bench to make differing determinations on a matter. However, the decision of the court is carried by the majority of the members constituting the bench. In parliamentary parlance, the application of this principle is not new. In the Commonwealth of New

Zealand, the Speakers have reached a common ruling on this matter, which I wish to quote from a publication called the Speakers' Ruling, 2011. This particular authority is rather long, but due to its importance on the matter before us, I will quote most of it.

> *"Differing views should be fairly reflected in reports. There is a strong presumption that this will occur. Members who are in the minority have a legitimate expectation that all reasonable steps will be taken to ensure that this convention is followed even though in their Standing Order No.242, it gives discretion to committees. That discretion should only be exercised as a last result when text supplied by a minority is significantly misleading or intemperately expressed and reasonable efforts to find a compromise has been unsuccessful.*
>
> *Where possible, Members should give some advance warning that they are likely to enter different views, so that their perspectives can be incorporated. There is no such thing as a minority report. There is only one report presented to the House by a Select Committee. The minority or differing views may be indicated in a report. No committee is obliged to indicate diverging views in a report. A majority of the committee can refuse to include other views if it wishes, but a majority cannot rewrite a minority's views so that, effectively, the majority is putting words in the minority's mouth. That would misrepresent divergent views. A minority does not have a blank cheque to include whatever it wishes in the report. A majority can refuse to admit different views all together. If a minority views are objectionable or too long, there may be a trade off whereby the minority agrees to curl its contribution, but this must be done consensually. The majority cannot just rewrite the minority's views. A minority contribution, like every contribution, must be relevant to the subject before the Committee".*

The Chairperson rules on relevance. The indication of a minority report is a mechanism to allow the House to be acquainted with the completeness of the issues about which there has been disagreement, before the House can make a resolution."

Hon. Members, on the other hand, Erskine May, a foremost leading authority on parliamentary practice, holds this view:-

> *"A report from a Committee embodies the conclusions agreed to by the majority of its members and members to dissent from the report may not make minority reports to be appended to it, nor can members enter their protests against a report. If a member disagrees to certain paragraphs in the report, or to*

the entire report, they can record their dissent by dividing the committee against those paragraphs or against the entire report as appropriate.

Members can also put on record their observations and conclusions as opposed to those of the majority by proposing an alternative draft report or moving amendments to the draft. Any alternative draft or amendments on which a division takes place is recorded in full in the minutes of proceedings of the committee. Where a committee is unable to agree on a report, it can make a special report to that effect, together with the evidence taken before it; or it can merely report the evidence taken before it to the house without any observations or expression of opinion."

Hon. Members, this now brings me to the practice in our own Parliament and the provisions of our Standing Orders. It is common knowledge that our practice allows Members with dissenting views to have those views recorded in the report of the committee. As a matter of fact, before the coming into force of the current Standing Orders, the practice has been to allow a mention of the differing views and name of the Member or Members dissenting. This was the case during the case of the Departmental Committee on Health on the matter of irregularities on the rolling out of the Civil Servants Outpatient Medical Scheme by the National Hospital Insurance Fund (NHIF). In that Report, the then Member for Kasipul Kabondo recorded dissenting views.

Similarly, the then Chairperson of the Departmental Committee on Education, Research and Technology recorded dissenting views in his Committee's first Report on the nomination of the persons to the Teachers Service Commission (TSC). In this last example, the Chairperson went ahead to move the Report of the Committee as this was his duty, notwithstanding that he had differing views on most of the recommendations made by the Committee. This practice has now been codified in our current Standing Orders under Standing Order No. 199(5) and (6), which reads:-

"199(5) A report having been adopted by a majority of Members, a minority of dissenting report may be appended to the report by any member of members of the committee.

6. A report of a select committee, including any minority report, together with the minutes of the proceedings of the Committee and with note or record of any evidence by the committee as the committee may deem fit, shall be laid on the table of the house by the chairperson of the select committee, the vice-chairperson, or by a member authorized by the committee on its behalf, within 14 days of the conclusion of its proceedings."

Hon. Members, the reading of these rules indicate that, as an advance of our previous practice, those with minority views have been accorded the higher privilege as they are allowed to have their views recorded substantially, and not just a mere mention and, in a rare occasion, have a dissenting report appended to the main report. This is in keeping with the spirit of our new Constitution to protect the rights of both the majority and the minority.

However, should a committee not reach consensus, this does not imply that there should be two reports of a committee or a separate report compiled by the minority. The rule of thumb is that there can only be one report of a committee. That is the report that has been supported by the majority of the membership of the committee, which may contain, as part of it, a minority report.

Hon. Members, this now brings me to the question as to whether the Report of the Departmental Committee on Justice and Legal Affairs contains in it a minority report. To address this question, I wish to draw the attention of the House to pages 27, 28 and 29 of the Report. Indeed, the title of item 6.0 of the Report is "Report on Minority Views".

That part has captured not only the reasons and named the Members with differing views, but also the recommendations of the minority Members of the Committee. The minutes of the Committee for its sittings, particularly those of 15th and 16th July, 2014, have also captured those views fairly. This is by far a liberated procedure as compared to our previous practice, and which meets the threshold required under Standing Order 199(5) and (6).

Looking at the reasons for dissenting and the alternative recommendations of the minority in this Report, I am satisfied that adequate opportunity has been given to the minority to propose an alternative draft Report, including recommendations for which different shades of opinion have been offered for the House to make an informed decision. It is my finding, therefore, that the Report of the Committee is admissible. Therefore, Order No.9 on the Order may be entered upon.

Hon. Members, I am aware of an allegation that was made during the Morning Sitting to the effect that part of the House may not be accorded fair opportunity to debate this matter. This is far from the truth. As a matter of fact, I want to indicate that since the debate on this matter is likely to be politically emotive, as I have noticed, it is the intention of the Speaker to accord each Member a fair opportunity to speak their minds. In order to enable this to happen, I will not entertain frivolous points of orders

from either side of the House. Each Member speaking should be allowed to speak their mind. But all of you must also keep within the limits of our rules of debate.

Thank you.

13. STATUS OF COUNTY ALLOCATION OF REVENUE BILL

Tuesday, 19th August 2014

Hon. Members this Communication relates to the business appearing under Order Nos. 8, 9, 10 and 11. As you are aware, the National Assembly received the county Allocation Revenue Bill 2014 from the Senate and read it a First time in the Assembly on the 7th of August 2014. The Bill is now scheduled for completion of second reading and Committee of the whole House today. When the House embarked on considering this Bill last week, several Members expressed reservations with some of the provisions contained in it and wish to propose amendments. Indeed, my office has received two proposals seeking to amend the County Allocation of Revenue Bill 2014 which has since been circulated.

Hon. Members, the Constitution of Kenya, Article 111(2), confers on the National Assembly two options for considering a special Bill that concerns county Governments, and which originates in the Senate.

Firstly, the House may amend the Bill, this is the most familiar and preferred avenue used in considering and concluding proposed legislation. Secondly, Article 111(2) further empowers the National Assembly to veto a special Bill. The Oxford dictionary defines "veto" as "a constitutional right to reject a decision or proposal made by a law making body". That same Article, read in conjunction with Standing 151, require any amendment, or veto, to be supported by at least two-thirds of all Members, which translates to 233 Members.

I wish to remind the House that this is a special Bill concerning county governments. Whereas failure by this House to concur with the Senate on ordinary Bills, either in part or entirely, leaves such Bills referred to the mediation committee, this particular Bill has no such option. Therefore in the unlikely event that the House fails to meet the above mentioned threshold, Article 111(3) of the Constitution, contemplates that the Bill shall be deemed to have been passed in the form adopted by the Senate, and the Speaker shall refer it to the President for assent.

Hon. Members, the second matter relates to the business under order No. 10. This is a special Motion seeking extension by a period not exceeding 9 months from 27th of August 2014 the prescribed period for passage of Bills listed in the Motion. Ample time is definitely required for quality disposal of these Bills. The time now available to this House, being barely nine calendar days, will not suffice for Parliament to competently consider and pass such crucial Bills. I, therefore, find that there are, indeed, exceptional circumstances as contemplated in Article 261(3)(b) of the

Constitution to justify the extension. In this regard, may I draw the attention of the Members to Article 261(2) of the Constitution, which provides that for this Motion to be passed, it must also receive the support of at least two-thirds of all Members of the National Assembly.

The third and final issue is in respect of business appearing under Order No. 11, the Constitution of Kenya (Amendment) Bill No.2 of 2013 which was sponsored by hon. Lelelit Lati, MP. This Bill is seeking to amend some constitutional provisions touching on equalization fund established under Article 204 of the Constitution. The Second Reading of this Bill was concluded and it is only awaiting putting of the question, so as to move it to the next stage. The procedure of amending the Constitution through Parliamentary initiative as provided under Article 256(1)(d) envisages that an amendment Bill shall be passed in both second and third readings if it is supported by not less than two-thirds of all the Members of the House.

It is on this premise, or the commonality of prosecuting business appearing under orders Nos. 8, 9, 10 and 11, that the House Business Committee schedules these three matters to be dealt with on the same day. I therefore urge you hon. Members to ensure that you have your cards in readiness for electronic voting at the opportune time.

Having said that, and in order to expedite the consideration of this business, I now direct that we proceed to deal with business appearing under order No. 8, after which we should go to the business appearing under order Nos. 9 and 10; they are arranged accordingly.

I thank you hon. Members.

14. STAY OF PROVISIONS ON COMMITTEE ON GENERAL OVERSIGHT

Tuesday, 21st October 2014

Hon. Members, I am in receipt of a Communication from His Excellency the President dated 17th October 2014, touching on the amendments to the Standing Orders requiring the attendance of the Cabinet Secretaries before the Committee on General Oversight.

His Excellency the President has called for a stay of these provisions and review of the same in view of the doctrine of separation of powers. Before I give direction on how to address the matter raised by His Excellency the President, allow me to give a prognosis of review of the rules of procedure of the House that have been undertaken in the recent past to enhance parliamentary oversight of the Executive, particularly using Statements and Questions.

Hon. Members, in our endeavour to create a proper interface between the House and the Executive on the oversight role of the Legislature, the procedure under the House Rules Committee has since the inception of this Parliament considered a number of options to be used in actualizing the provisions of Article 153(3) of the Constitution, bearing in mind the principle of separation of powers amongst the three arms of the Government.

The Executive interacts with Parliament through several ways including the Presidential Speeches at the opening of a new Session of Parliament and during the Special Sittings of Parliament, submission of Budget Estimates by the Cabinet Secretary for Finance, provisions of full and regular reports by the Cabinet Secretaries on matters under their control as provided for in Article 153(4)(b), interaction with Parliamentary Committees on audit matters or policy matters, consideration of Bills, consideration of Sessional Papers and Petitions submitted by the public among others.

One other method of holding the Executive to account is through Parliamentary Questions. Questions give hon. Members an opportunity to ask the Government to clarify its stance on a particular issue or commissions or omissions in executing its mandate.

Hon. Members, you may wish to note that the then Members of the Standing Order Committee of the Tenth Parliament had a big task in preparing and aligning the Standing Orders of the House to the new constitutional dispensation, given the change from unicameralism to bicameralism and from a semi-presidential system to a pure

presidential system of government, where Cabinet Secretaries are accountable to the President for the exercise of their powers and the performance of their functions.

The task of implementing the new Standing Orders, respecting the new Constitution was left to this Eleventh Parliament. Just as there has been challenges faced in implementing the Constitution in all levels and sectors of the three arms of Government, for which His Excellency the President has alluded to in His Communication to the Speaker, the Legislature has added its fair share of these challenges. Whereas we have done relatively well in the legislative and budgeting processes, the role of Committees in other oversight roles still has teething problems. For example, the House has since amended the Standing Orders to allow the Auditor-General to present before the Public Accounts Committee his findings on examinations of the accounts showing appropriations of the sums voted by the House to meet the public expenditure and other such accounts, and the Cabinet Secretary for Finance to pronounce before the House the Budget highlights and revenue raising measures at the same time as his counterparts in the East African Community.

One area, however, that has created challenges is that of holding Executive to account by seeking information through Statements or Questions. Question Time is the highlight of the parliamentary agenda. A study carried out by the Inter-Parliamentary Union (IPU) found out that a large majority of parliaments, indeed, 67 out of the 88 researched on, set aside time for oral questions to the government. The study also revealed that regular question time is rare among countries with a presidential system, but it does occur. For example, in Philippines, which is a pure presidential system, Members of the House of Representatives put questions to the Executive Branch who appear in the House to answer questions.

Indeed, Section 22 of Article VI of the Constitution of Philippines states that the Heads of Departments, which in this case means the Cabinet Secretaries, shall attend the House and answer questions when requested by the House. In our own case, Article 153(3) requires Cabinet Secretaries to attend before a Committee of the House and answer any question concerning a matter for which a Cabinet Secretary is responsible.

In the last two sessions of Parliament, Members have had to seek answers and information on matters affecting their respective constituencies through Statements which required Committees to interact with the Cabinet Secretaries and respond to Members' queries in the House. As we are all aware, this method presented its own challenges, including the Leader of Majority Party and Chairpersons of Committees appearing to be holding brief for the Executive while responding to request for Statements yet the Executive and the Legislature are delinked. This was further compounded by the fact that the Chairpersons should offer leadership when their

respective Departmental Committees are carrying out their oversight role on the Executive. The worst scenario was when the Deputy Minority Whip, who also happens to be a member of a Committee, responded to a Statement in the House calling to question the use of Statements for holding the Executive accountable when even the minority were responding on behalf of the Executive.

It was also found out that majority of the Departmental Committees were spending most of their time seeking information and responding to Statements instead of focusing on the cardinal legislative matters under their mandate in the new Constitution, like Budget scrutiny and introduction and review of Bills. The Procedure and House Rules Committee, aware that holding the Executive to account using questions is the practice the world over, whether in parliamentary or presidential system, therefore, proposed the amendments of the Standing Orders to do away with the Statements and created the Committee on General Oversight to actualize provisions of Article 153(3) of the Constitution. Whereas the formation of the Committee is within the provisions of the Constitution, there have been concerns from several quarters that the operation of the Committee might infringe on the doctrine of the separation of powers and, in particular, provisions of Article 153(2) which provides that the Cabinet Secretaries are accountable individually and collectively to the President for the exercise of their powers and the performance of their functions. Indeed, His Excellency the President, has in his Communication to the Speaker, raised this particular concern and I quote:

> *"The framers of the Kenyan Constitution adopted the principle of separation of powers and in presidential systems, a strict separation is often a fundamental constitutional principle. In rare instances would such a system encapsulate "question time" in appreciation of the distinct separation whose fabric runs through the entire system of government."*

In conclusion, the President states thus:-

> *"Constitutionally based separation of powers doctrine will require that provisions relating to the Executive Branch, officials appearing before parliamentary Committees as envisaged under Article 153(3) of the Constitution be implemented in a manner that will not unnecessarily upset the delicate balances between the Executive and the Legislative branches."*

Hon. Members, you are all aware that the implementation of the new Constitution requires interpretation by several organs of the State. We, in the National Assembly, are alive to the provisions of Article 259(1) of the Constitution which requires the interpretation of the Constitution 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.

It is neither the intention of the Speaker nor, indeed, this august House to be insensitive and indifferent to the issues that have been raised concerning the establishment of the Committee on General Oversight.

His Excellency the President, in his Communication has made the following two recommendations or suggestions namely;

1. There be a stay of the newly introduced Standing Orders, New Part XXIA (The Committee on General Oversight - Standing Order No.170A to 170L) as they relate to the answering of questions by Cabinet Secretaries before the Committee on General Oversight.

2. The National Assembly considers revising the newly introduced Standing Orders to emphasize the principle of separation of powers.

Hon. Members, from the foregoing and in order to ensure that the National Assembly discharges its oversight role without let or hindrance and for the House to address itself to the issues raised in the Communication from the President and using the powers conferred upon me by provisions of Standing Order No.1(1), which states that *"In all cases where matters are not expressly provided for by these Standing Orders or by other Orders of the House, any procedural question shall be decided by the Speaker,"* I, therefore, rule as follows:

1. That the operation of the Committee on General Oversight be and is thereby suspended forthwith to enable the National Assembly seek ways to engage on how best to handle the matters that have been raised regarding its establishment. The Procedure and House Rules Committee will spearhead these consultations and for which the Communication from the President is now hereby referred to for consideration and advice accordingly.

2. The Cabinet Secretaries shall, once a week on every Tuesday between the hours of 10.00 a.m. and 12.30 p.m. when the House is sitting, be required to attend before Committees of the National Assembly to answer questions submitted by Members concerning matters for which the Cabinet Secretaries

are responsible. The provisions relating to questions that applied to the Committee on General Oversight shall apply *mutatis mutandis* to questions in the Committees. In other words, questions will be approved by the Speaker and thereafter transmitted to the concerned Cabinet Secretaries who will then appear before Committees to answer those questions.

3. A maximum of three Committees will meet every Tuesday to give opportunity to Cabinet Secretaries to answer questions submitted to them and on that day, the concerned Committees shall invite the Members who have given notices of the questions to be replied to in the Committees and, indeed, all other Members who may be interested to appear to ask any other supplementary questions.

4. The Leader of Majority Party shall, in consultation with the Executive co-ordinate and determine when the Cabinet Secretaries will appear to respond to questions and shall, every Thursday before 5.00 p.m. submit to the Clerk a list showing questions scheduled for reply the following Tuesday for publication in the Order Paper.

5. The agenda of the Committees having questions showing the schedule of questions listed for response and the order in which the questions shall be taken in the committees shall be appended on the Order Paper of every Tuesday of the week.

6. On the day Cabinet Secretaries are appearing to respond to questions, the questions must be dealt with conclusively and any question not asked shall be carried over to the next meeting of the Committee to be included in the agenda of the Committee when it next meets to consider the questions.

7. To ensure optimum use of parliamentary time, no issue that has been interrogated in Committees during question time will be revisited in the normal business of the Committees and no Cabinet Secretaries will be required to appear again before a Committee of the House on the same or similar question.

8. The Committees having questions will sit every Tuesday within the precincts of Parliament starting 10.00 a.m. and each Committee will have a maximum of 50 minutes to deal with questions falling within its mandate as will have been raised.

9. Press representatives are invited to cover the proceedings and where possible live television coverage will be availed by Parliament.

I thank you, hon. Members

15. WITHDRAWAL OF "MONEY BILL" AMENDMENTS FROM THE ORDER PAPER OWING TO NON-COMPLIANCE WITH ARTICLE 114 OF THE CONSTITUTION

Tuesday, 28th October 2014

Hon. Members, before we go into the business at No. 8 on the Order Paper, I would like to make the following Communication.

Hon. Members, you will note from today's Order Paper that under Order No.8, this House is scheduled to consider the Mining Bill, 2014 (Bill No.9 of 2014) at the Committee Stage. A number of amendments both by the Departmental Committee on Environment and Natural Resources and individual Members are lined up for consideration. In particular, I wish to draw your attention to the following amendments: (a) the proposed amendments to Clauses 156 and 157, and the proposed New Clause 157A, by hon. Joyce Lay, MP, and (b) the proposed amendments to Clause 156 by hon. Makali Mulu, MP. The said amendments appear on pages 485 and 486 of the Order Paper.

Hon. Members, I have carefully considered the aforesaid amendments and I am convinced beyond doubt that they clearly fall within the meaning of "money Bill" as contemplated by Article 114 of the Constitution. As I have reiterated severally in the past, amendments falling within the meaning of money Bills can only proceed upon recommendation of the Budget and Appropriations Committee of this House, after it has taken into account the views of the Cabinet Secretary responsible for finance. There is no indication that the proposed aforesaid amendments have been considered by the Budget and Appropriations Committee as contemplated by Article 114 (2) of the Constitution.

That being the case, this House cannot be called upon to consider them during the Committee Stage, and they accordingly stand withdrawn from the Order Paper. It is so ordered.

16. CONSTITUTIONALITY AND ADMISSIBILITY OF THE SECURITY LAWS (AMENDMENT) BILL, 2014

Thursday 11th December 2014

Hon. Members, you will recall that today during the Morning Sitting, several Members rose on points of order to seek the Chair's direction regarding the Security Laws (Amendment) Bill, 2014. In a nutshell, the following issues were raised:-

(a) whether the Bill has undergone public participation as envisaged under Article 118 of the Constitution;

(b) whether the relevant Departmental Committees have been accorded an opportunity to consider issues related to their mandates;

(c) whether the following provisions of the Bill are in contravention of the Bill of Rights:-

  (i) whether Clause 4 that provides for the Cabinet Secretary to designate areas for public meetings is contrary to Article 37 of the Constitution, which gives every person the right to peacefully, and while unarmed, assemble, demonstrate, picket and present petitions to public authorities;

  (ii) whether Clause 18 that allows the court to extend the holding of a suspect in custody for more than 24 hours contradicts Article 29 of the Constitution on the right of a person not to be deprived of freedom of the person;

  (iii) whether Clauses 25 and 26, which provide for stay of an order granting bail to an accused person where the office of the Director of Public Prosecutions gives indication of intention to appeal against such an order contradicts Article 49 of the Constitution on the right of the arrested person to be released on bond or bail; and

  (iv) whether the limitation of fundamental rights and freedoms in the Bill complies with the requirements of Article 24(2)(b) of the Constitution as to its drafting style.

Hon. Members, as you are aware the Bill was published on 8th December 2014, and read for the First Time on 9th December 2014, after the House approved a Motion for reduction of publication period from 14 to one day. Standing Order No. 127(3), which implements Article 118 of the Constitution, obliges that the Departmental Committee to which a Bill has been committed facilitates public participation and takes into account the views and the recommendations of the public when the Committee makes its report to the House.

I am aware that the Clerk issued an advertisement in the daily newspapers which appeared on 10th December 2014, inviting interested members of the public to give their views on the Bill on or before Monday 15th December 2014 at 5.00 p.m. The advertisement also indicated that the committee will be holding sittings to conduct hearing on the same Bill on Wednesday 10th, Thursday 11th and Monday 15th December 2014.

To this extent, the House has complied with the requirements of the Standing Order No.127 (3), as read together with the provisions of Article 118 of the Constitution. What is awaited is the report of the committee. However, the precedent of this House has been that the absence of a report of a committee does not prevent any Bill from proceeding to Second Reading.

Hon. Members, the issue of whether the relevant Departmental Committees have been accorded an opportunity to consider the issues related to their mandate--- As you are all aware, once a Bill is read for a First Time, it is committed to the relevant Departmental Committee for consideration. Members and committees of the House, therefore, automatically become seized of a Bill immediately after the First Reading, and Members and the committees are at liberty to bring any amendments as may be necessary when the Bill proceeds to the Committee Stage.

Indeed, at the First Reading of a Bill, there is no Question put. The Bill is deemed to belong to the entire House. It is, therefore, important for the Members and the committees to keep themselves up to date with the proceedings of the House.

Hon. Members, on several specific issues raised notably by hon. Ababu, with regard to the purported limitation of rights and fundamental freedoms in the Bill; I have considered those issues in the light of Article 24 of the Constitution. This Article contemplates limitation of fundamental rights and freedoms either by the Constitution itself or by law, so long as that limitation complies with the criteria set out in Article 24 (1) of the Constitution.

The said Article 24 (1) provides as follows:-

> *"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:*
> *(a) the nature of the right or fundamental freedom;*
> *(b) the importance of the purpose of the limitation;*
> *(c) the nature and extent of the limitation;*

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Hon. Members, I do not belabour the fact that the limitation by law referred to in Article 24 (1) can only be done by Parliament, as it is the sole law-making authority under Article 94 of the Constitution.

However, Parliament is under constitutional obligation to satisfy itself that the criteria specified in Article 24 (1) are met before curtailing any right or fundamental freedom. It is only fair that the House must be accorded an opportunity to make this determination by way of a decision.

Whereas Standing Order 47(3)(b), empowers the Speaker to either direct that a Motion is inadmissible on account of unconstitutionality or to direct that a Motion be moved with amendments so as to conform with the Constitution, that power of the Speaker must not be used to curtail debate and decision by the House on a matter contemplated by the Constitution itself.

I must exercise great caution not to invoke Standing Order 47(3) (b) at the detriment of curtailing the right of the House to accept or refuse to pass a particular legislative proposal, especially where this right of the House is allowed by Article 24 (1) of the Constitution.

The other constitutional matter raised by hon. Simiyu as regards whether the drafting style of the Bill accords to the requirements of Article 24 (2)(b) of the Constitution, is a matter which can be addressed at the Committee Stage of the House by making the necessary amendments to the drafting style.

I, therefore, rule that the Security Laws (Amendment) Bill 2014 is properly before the House and should proceed to Second Reading, so that the House can make a decision as to whether or not to accept the Bill as proposed or make any amendments as may be necessary to reflect the wishes of the House.

I thank you, hon. Members

THIRD SESSION (2015)

Speakers' Considered Rulings and Guidelines (2015)

Contents

1. ALLEGED BREACH OF PRIVILEGE BY MEMBERS OF THE PUBLIC ACCOUNTS COMMITTEE (Thursday, 5th March, 2015)

You will recall that yesterday during the afternoon sitting, the Leader of the Majority Party, Hon. Aden Duale, MP, sought the guidance of the Chair on the recent claims of malpractices within the PAC as a whole including its Chairperson. In particular, the Leader of the Majority Party sought directions on the following issues:-

(i) Whether the claims made by Members of the PAC against the Chair and against each other constitute a breach of the privileges and/or conduct of Members of Parliament; and

(ii) Whether following the allegations, the PAC would be in order to continue discharging its mandate of offering oversight of other Government institutions and agencies on behalf of this House.

Several Hon. Members, including the Deputy Speaker, Hon. Midiwo, hon. Manje, Hon.Wandayi, Hon. Yusuf, Hon. Osele, Hon. Ngeno, Hon. Abdikadir, Hon. Baiya and the Chairperson of PAC subsequently contributed to the debate, raising issues peripheral to those raised by the Leader of the Majority Party. Amongst the issues raised were:-

(i) whether criminal culpability accrues to a group of persons or to an individual person and whether it is prudent to condemn a whole membership, either of a committee or of the whole House, merely on account of an allegation that is directed, or is concerned with a particular individual;

(ii) whether the House should entertain allegations against its Members without substantiation by the person alleging as required under Standing Order No. 91;

(iii) whether a matter that has been investigated by a committee and the outcome delivered in the committee can be revisited by the plenary of the House or by another committee of the House;

(iv) whether allegations of breach of privilege or the ethics of Members of the House should be dealt with by their respective political parties or by the House.

Hon. Members, before I make my decision known to the House, allow me to revisit the question of the place of the PAC as I had done sometime last year. There has been growing interest in parliamentary accountability and oversight as part of the wider interest in stronger political institutions and structures.

The popularity of parliamentary public accounts committees is regarded as having originated in the nineteenth century in Britain with the establishment of a Select

Committee of Public Accounts in the year 1861, which was a precursor to earlier notably sporadic committees and commissions of public accounts. This trend has developed in most parliaments with many legislatures having equivalent of public accounts committees to scrutinize government funds. In this regard, watchdog committees like the Parliamentary Public Accounts Committees have been established to deal with these matters. In our case the PAC and the Public Investments Committee (PIC) have been established by Standing Orders Nos. 205 and 206, respectively.

The Committee draws its power from the provisions of the Constitution of Kenya, 2010, in particular Articles 95 and 229, which give the National Assembly powers to appropriate funds for expenditure by the national Government and other State organs through approval of the Budget and subsequently oversight over the national revenue and its expenditure. On the other hand, the Auditor-General is required to audit and report on accounts of the national Government and other State organs, amongst others, and submit such reports to Parliament.

Hon. Members, the Auditor-General thus has a direct responsibility to Parliament and the Committee whose work is made more credible by the support of the Auditor-General. It follows, therefore, that the work and the reports of the Public Accounts Committee (PAC) must, of essence, maintain the values of accountability, integrity, reliability and latitude of independence from any person or authority.

Erskine May, a leading authority on parliamentary practice notes that the oversight role of PACs is concerned with whether policy is carried out efficiently, effectively and economically, rather than with the merits of government policy itself.

The primary role of those committees therefore is the safeguarding of public interest. The stature of PACs has traditionally been placed above other Committees and they are seen as the apex for financial oversight and scrutiny. The Committees, most of which are usually headed by Members of the Opposition or Minority Parties in many jurisdictions, are seen as embodiment of the overall oversight image of Parliament.

Hon. Members, that brief now brings me to the question of whether the Speaker or the House has jurisdiction on a matter that has been canvassed or, indeed, settled in a committee.

Faced with a similar question, Speaker Statham of the New Zealand House of Representatives ruled in 1921 that:-

"The House has no cognisance of anything taking part before a Committee, unless it is reported by the Committee through its Chairperson, or the matter relates to a question of privilege."

Later in 1979, Speaker Harrison of the same House, upholding the ruling of his predecessor observed that:-

"The Speaker has no jurisdiction or authority whatsoever to get involved in proceedings of a select committee, unless approached by the Chairperson following a resolution of the Committee calling the Speaker to adjudicate on any matter, or if the matter is one of the privilege of the House or personal privilege of a Member of that Committee."

Hon. Members, you will recall that the Leader of the Majority Party indicated that his submission was a question of privilege and had posed the question whether the House should bury its head in the sand as if nothing had happened. The question, therefore for me to determine is whether the matters raised yesterday afternoon constitute privilege.

Hon. Members, the Mason's Manual on Legislative Procedure, 2010 Edition, Section 220, defines a question of privilege as one that relates to the body or to its members in such a manner as to affect proper functioning of the body. The Manual goes to note that:-

"It is necessary that these questions be under immediate control of the body. They relate to the rights and privileges of the body or to any of its members in their official capacity, or to the comfort and the convenience of the body or its members in the performance of their official duties."

The Manual further indicates in Section 222 that questions of privilege take precedence over all other questions except a motion of adjournment or an objection to the quorum of the House. I put emphasis on the words "immediate" and "precedence."

According to the New Zealand House of Representatives Parliamentary Practice, *"A Member may raise a matter of privilege at any time during a Sitting… and it must be in connection with something affecting the House or its Members in their capacity as such." (Page 744)*. In addition, Section 100 of the Rules of the Philippines House of Representatives provides that questions of privilege are those affecting the duties, conduct, rights, privileges, dignity, integrity or reputation of the House or its members, individually or collectively.

Hon. Members, the allegations and counter-allegations of bribery or inducement made by the Members of the Public Accounts Committee PAC against themselves, including against the Chairperson are matters of public notoriety. You will all agree with me that a matter of this magnitude cannot be swept under the carpet on the basis that the Committee had dealt with it. The public who bestowed you with the honour of representing them in this august House deserves answers.

From the foregoing, I find that the matters raised by hon. Duale and other Members who spoke after him, indeed, relate to the privilege of the House and are therefore subject to the consideration and decision of the House as what goes on in the Committees affect the integrity and reputation of the House and its Members, individually or collectively, and cannot be wished away.

The next question that arises is, now that those are matters of privilege, what then do we do?

Hon. Members, to answer this question, allow me now to interrogate relevant provisions of the Constitution of Kenya, the Leadership and Integrity Act, 2012, the Public Officer Ethics Act, 2003 and the National Assembly (Powers and Privileges) Act (Cap 6 Laws of Kenya).

The allegations of compromises, prejudices, deceit or corruption against the members of the Public Accounts Committee relate to financial probity of State Officers which is governed by Article 76 of the Constitution of Kenya. In particular, I draw your attention to Article 76 (2)(b) which provides that:-

> *"A State officer shall not seek or accept a personal loan or benefit in circumstances that compromise the integrity of the State Officer."*

This provision is replicated under Section 12 of the Leadership and Integrity Act, 2012. A similar provision is provided for under Section 11 of the Public Officer Ethics Act, 2003. Section 6 of the Leadership and Integrity Act further prescribes a general code of conduct of State Officers. It provides as follows:-

(a) This part prescribes a general Leadership and Integrity Code for State Officers.

(b) The provisions of Chapter Six of the Constitution shall form part of this code.

(c) Unless otherwise provided in this Act, the provisions of the Public Officer Ethics Act shall form part of this code.

(d) If any provision of this Act is in conflict with the Public Officer Ethics Act, 2003 this Act shall prevail.

Hon. Members, having made those observations, let me now interrogate the relevant legal provisions governing the consequences of any alleged breach of privilege or code of conduct of Members of Parliament. Firstly, Article 75(2)(a) of the Constitution provides that "where a person contravenes Article 76 of the Constitution, he or she shall be subject to the applicable disciplinary procedure for the relevant office."

Secondly, Section 3, (10) of the Public Officer Ethics Act, 2003 provides that:-

> *"…(10) The responsible commission for a public officer for which no responsible commission is otherwise specified under this section is the commission, committee or other body as prescribed by regulation."*

Thirdly, Section 41(2) of the Leadership and Integrity Act provides as follows:-

> *" (2)Where an allegation of breach of the code has been made against a State officer in respect of whom the Constitution or any other law provides the procedure for removal or dismissal, the question of removal or dismissal shall be determined in accordance with the Constitution or that other law.''*

Lastly, Section 10(4) of the National Assembly (Powers and Privileges) Act, (Cap 6 Laws of Kenya) provides as follows:-

> *"(4) The Committee of Privileges shall, either of 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) 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 interests of the Assembly or the Members thereof.*
>
> *(5) The Committee of Privileges shall, after such inquiry as is referred to in subsection (4), report its findings to the Assembly together with such recommendations as it thinks appropriate".*

Though our rules of procedure are silent on the manner of disposing questions of privilege, comparative jurisdictions from the Indian Lok Sabha, for instance, provide

under their Rule 225, that the House may consider a question of privilege or refer it to a Committee of Privileges and the Speaker may issue such directions as may be necessary for regulating the procedure in connection with all matters connected with the consideration of the question of privilege either in the Committee of Privileges or in the House. Erskine May notes that the acceptance by a Member of either House of a bribe to influence his conduct in connection with any matter submitted or intended to be submitted before the House is contempt and an abuse of privilege and is of gross affront to the dignity of the House and an attempt to pervert the parliamentary process implicit in Members' free discharge of their duties to the electorate.

It is, therefore, my considered opinion that a general reading of the aforementioned provisions and practices in comparable jurisdictions and practice, suggest that it is within the purview of the Committee of Privileges of this House to inquire into the alleged conduct of any Member who commits a breach of privilege or code of conduct. May I also hasten to add that issues of conduct of Members within the precincts of Parliament is solely the mandate of the Committee of Privileges and other outside investigative bodies may only deal with the matters if the Committee of Privileges recommends so and the House approves the recommendations.

Further, a study of the practice in the Commonwealth of Canada reveals the following:-

a) A House has authority to require the attendance of any of its Members, whether they are Ministers or not. It should be borne in mind that the House has always claimed a right to exercise a substantial degree of control over its own Members when the matter in any way relates to privileges of the House, including in respect of attendance upon the service of the House, attendance before another House and even conflicts between Members.

b) When a Member has been ordered to appear before the House or a Committee, the Member is under the same obligations to answer questions before the Committee just like a member of the public. Further, where a Member objects to a question in a Committee, the objection must be raised and determined by the Committee and not by the House.

Arising from the above and in order to protect the integrity of the National Assembly of the Republic of Kenya as a whole and to give a fair hearing to Members of the Public Accounts Committee, I now direct as follows:-

i. THAT, the Committee of Privileges enquires into the matters of alleged breach of privileges and/or code of conduct of the membership of the Public Accounts

Committee, including recent claims of compromises, corruption and deceit, and submit a report to this House in accordance with Section 10(5) of the National Assembly (Powers and Privileges) Act (Cap 6 Laws of Kenya) within 21 days from the date of this Communication. The House will be expected to deliberate on the report within three days thereafter. The Committee is at liberty to interrogate the submissions made by the individual Members in the Committee on 26th February 2015, which are captured in the HANSARD of this House, including any related correspondences by any Member of the Committee to the Clerk of the National Assembly or the Speaker. May I also remind the Committee that, given the seriousness of an allegation of bribery, the standard of proof required to substantiate the claims ought to be very high. At this juncture, I want to refer to the Committee a letter of complaint handed over to me by the Chairperson of the Public Accounts Committee, hon. Ababu Namwamba;

ii. THAT, invoking the provisions of Standing Order No.1, the operations of the Public Accounts Committee are hereby suspended until the expiry of the period that I have prescribed or such earlier time the House shall make a resolution following an earlier submission of the report by the Committee of Privileges. Let me make it clear that, this direction does not amount to disbanding the Committee or discharging any Member from the Committee.

iii. THAT, hon. Moses Cheboi, the First Chairperson of Committees, is hereby appointed to chair the Committee of Privileges during the period of this inquiry on behalf of the Speaker. The Committee of Privileges is at liberty to co-opt not more than three other sitting Members who have served for more than one term to assist them in the inquiry. Such co-opted Members will, however, not be allowed to vote in the Committee nor will they be counted for purposes of quorum. The Committee should hold its first meeting on Monday, 9th March 2015 at 2.30 p.m.

iv. THAT, the Committee of Privileges develops, for consideration by this House, a code of conduct for Members of Parliament as required under Section 37 of the Leadership and Integrity Act, 2012. This should be submitted on or before the end of August this year.

Having said that, let me make it clear that by referring this matter to the Committee of Privileges, it is not to put the Public Accounts Committee under trial, but it is to allow the relevant body of this House as required by the law and practice of the House, to attend to the allegations of breach of privilege and/or code of conduct so as to assist the House to make a decision. Similarly, the Chairperson of the Public Accounts

Committee asked me to confirm whether anybody is at liberty to divulge information shared with the Speaker in confidence. Certainly, an attempt to do so will be out of order. However, I can confirm that the submission the Chairperson was referring to was formally made to the Speaker in writing and seeking guidance. It was neither personal nor peculiar. Indeed, the matters contained in that letter were canvassed during the Committee's meeting of 26th February 2015. The letter is the one that I have submitted to the Committee.

As I conclude, I wish to call upon the Members of this House to search their souls and conscience as to whether some of our actions befit the status of Members of this House. One famous British politician, commonly known to many people as the war general, Winston Churchill, stated that:-

> *"If you have integrity, nothing else matters. If you do not have integrity, nothing else matters"*.

May I also paraphrase a saying of Confucius, one of the greatest philosophers from the book that I am reading. He said:-

> *"The strength of a nation derives from the integrity of Parliament"*.

In our case, this strength is founded in Article 94(2) of the Constitution of Kenya, which provides that Parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty. We, therefore, must have moral authority to be the peoples' representatives and to perform the mandate they have bestowed upon us.

2. COMMENTING ON AND PREMATURE RELEASE OF COMMITTEE PROCEEDINGS (Wednesday, 11th March, 2015)

Hon. Members, I indicated that I was to make some Communication. This Communication relates to the issue of commenting on and premature release of the proceedings of committees.

As you are aware, on 5th March 2015, I directed that the Powers and Privileges Committee inquires into the matters of alleged breach of privileges and/or code of conduct of membership of the Public Accounts Committee (PAC), including recent claims of compromises, corruption and deceit, and submit a report to this House.

It is indeed true that the Committee has commenced the inquiry. However, my attention has been drawn by the Committee of Privileges to the continued reporting and premature disclosure of the Committee proceedings and Members making comments contrary to provisions of the House rules. Standing Order No. 86 provides that:-

> *"No Member shall refer to the substance of the proceedings of a Select Committee before the Committee has made its report to the House."*

It is fair for me to restate that your committees are established on the authority of the Constitution and specifically Article 124. With regard to the Powers and Privileges Committee, the provisions of the Parliamentary Powers and Privileges Act apply.

Arising from the above, I wish to caution Members to refrain from commenting and/or disclosing matters before the Committee until such a time when the Committee has tabled its Report in the House. Any Member commenting on matters before the Committee or making disparaging remarks against their fellow Members in whatever forum in breach of the Standing Orders, will be held personally responsible, and will face the full wrath of the House. I urge Members with any information relevant to the inquiry to present it either before the Committee or to any Government investigative agency.

I wish to advise that some of these comments and/or remarks amount to libel. Given the fact that they are being peddled away from the Committee sittings, or in the Chamber and are, therefore, not privileged, they are actionable. Further, pursuant to Standing Order Nos.198 and No.252, I have also granted leave to the Committee to conduct its proceedings in camera, but may brief the media on the progress of the inquiry without going into the substance of the proceedings. Therefore, Members who

wish to make any presentations are at liberty to approach the Committee and give their comments and information, if any.

3. GUIDELINES ON THE MANAGEMENT AND OPERATIONS OF COMMITTEES (Tuesday, 17th March, 2015)

Hon. Members, in the recent past, there has been concern on the manner in which committees are being managed and particularly by Chairpersons and hon. Members. It is on the basis of these concerns that I am issuing this Communication to address critical issues that affect the management and operations of committees. The importance of committees cannot be gainsaid and, as alluded to during the just concluded Leadership Retreat in Mombasa; committees serve as the reference point for legislation, oversight and involvement of the public in the affairs of the Legislature in the manner contemplated in the Constitution. It is the manner in which committees conduct their business that builds up or destroys the image of the Legislature.

Management of committees, as you are aware, is vested in the Office of the Speaker and Liaison Committee in terms of Standing Order No. 217(2), the chairpersons of committees, Standing Order No.180 and the Office of the Clerk. The four offices, working in synergy, enable the operations of committees to run efficiently and effectively thereby ensuring that the House executes its legislative and oversight mandate as provided for under Article 95 of the Constitution.

While the Speaker, Liaison Committee and the chairpersons of committees offer strategic leadership and direction, the Office of the Clerk is facilitative in nature and has, over the years, come to be regarded as the backbone of the committee system in all parliamentary democracies. In our case, the Office and the role of the Clerk is provided for under Article 128 of the Constitution, the Parliamentary Service Commission Act and the Powers and Privileges Act, as well as our own Standing Orders.

Hon. Members, in day-to-day operations, committees are managed by committee clerks and other officers who give procedural advice to the committee, take minutes of the committee proceedings, receive and preserve documents on behalf of the committees and carry out other important logistical and administrative duties. The secretariat also assists in official communication, arranging appearance of witnesses and advising chairpersons and members on procedures in committees. In essence, the committee secretariat is responsible for coordinating the affairs of the committee and ensuring that the committee gets the needed support to be effective in discharging its mandate.

The effectiveness of any oversight committee has, therefore, a bearing on the services provided by the committee secretariat and the synergy between the secretariat and the chairperson of the committee. I urge all chairpersons to accord the secretariat the

necessary support in the discharge of their duties and, more importantly, in the application of the Standing Orders and the unwritten practices of the House.

Second, on conduct of meetings, hon. Members, in the recent past, there has been a worrying trend in the frequency at which committee members are holding meetings to the exclusion of the secretariat and, more so, the committee clerks. There are allegations that Members sit without the secretariat to strategize on how to alter committee reports in favour of persons under investigations and this is in the public domain. This must stop. I urge all Members not to be party to those despicable schemes. Otherwise, we shall have no Parliament to speak about.

Clerks are "Officers of the House" and just as is the case with the House which cannot sit without the Clerks-at-the-Table, committees should not meet or transact any business without the secretariat. A committee meeting is, therefore, not complete in the absence of a committee clerk and secretariat and will, henceforth, be treated as an informal gathering or a *Kamukunji*.

Committees are within their powers to exclude, on the other hand, any person or even the public from its proceedings for justifiable reasons pursuant to Article 118 and Standing Order No.254. But such exclusion however, does not apply to committee clerks who are part and parcel of the committee architecture.

Third, on official communication, hon. Members, I have also noted with concern the manner in which committees conduct their official communication with Government institutions and other agencies, as well as the private sector. There is a growing and worrying trend where chairpersons write directly to Government officials on various issues before committees in total disregard of the official channels of communication. Some chairpersons and members of committees even summon Cabinet Secretaries, Heads of Parastatals and other Government officials through phone calls and the media. I have addressed this matter in my previous Communications and I wish to reiterate that all correspondence from the National Assembly communicating House and/or committee resolutions must be through the hand of the Clerk and all official documents tabled before committees shall be under the custody of the Clerk. Committee chairpersons and members have no business in writing letters to Cabinet Secretaries on official businesses of committees or even in the storage of official documents before the committees.

Fourth, on attendance of committee meetings, hon. Members, the attendance of committee sittings by members is important for an effective oversight committee. It has been brought to my attention that some committees are finding it extremely difficult to

raise quorum within the required time as provided for in Standing Order No.185, which states as follows:-

> *"Unless quorum is achieved within thirty minutes of the appointment time, a meeting of a committee of the House shall stand adjourned to such further time or day as the chairperson of the committee may appoint."*

Committees are also unable to sustain quorum during deliberations of Bills, Sessional Papers, inquiries and Petitions before them. This has brought embarrassment and loss of dignity to committees and Parliament as a whole, especially when witnesses have been invited and meetings do not take off or end up with one or two Members conducting the business of the committee. It has been reported that in many instances, a member asks a question but is not even available to listen to the response by the Cabinet Secretary or any other accounting officer. This is a shame and must end.

Furthermore, there have been instances when committees fail to raise the requisite numbers necessary for adoption of reports, thus draft reports remain pending before committees for unnecessarily long periods as was the case with the Departmental Committee on Labour and Social Welfare on the Tassia Infrastructure Project Inquiry and the PAC Report on the Judiciary, among others. I exhort Members to fully participate in committee sittings to enrich their deliberations and be seized of the matters under consideration to enable committees to come up with impeccable findings and recommendations. Let us all ensure that retreats and field visits are properly utilized to conduct businesses and not picnics and beach holidays as is alleged. There must be value for money on any committee activities.

I wish to remind Members that they should attend committee meetings without fail. If they fail, the provisions of Standing Order No.187 will apply where failure to attend four (4) consecutive meetings without the permission of the chairperson or the Speaker will lead to automatic removal of that member from that committee. Any Member discharged from a committee in a situation such as this for non-attendance will not be eligible for re-appointment to any other Committee. I urge chairpersons of committees to co-operate with the clerks to provide lists of attendance on every committee sitting for purposes of administering Standing Order No.187.

As agreed in the Leadership Retreat recently in Mombasa, I hereby direct that the provisions of these Standing Orders and recording of sittings of committees and on quorum be implemented to the letter. I need to remind ourselves that those who desire not to attend or be members of committees can as well indicate such desires to the appointing authority; namely, the leadership of the political parties.

Five, on committee reports, hon. Members, committees communicate to the House through their reports. It is, therefore, imperative that committees prioritize consideration of Bills, Sessional Papers, statutory instruments, audit reports and Petitions and submit reports within the statutory timelines. Some committees have taken inordinately long to conclude inquiries, engaging in unending investigations while others re-open inquiries even after going for report writing. An example is the Departmental Committee on Agriculture, Livestock and Co-operatives which has been inquiring into the sugar crisis in western Kenya for the past one year and only managed to table its report last week.

The delay in concluding inquiries and producing reports on time leads to unnecessary speculation and fuels rumours of rent-seeking, among others. This waste of public resources on unending "investigations" will not be acceptable. Moving forward, an inquiry by a Committee should not take more than two months to conclude and a report submitted thereafter pursuant to Standing Order No. 199. Should there be need to extend, the chairperson of the committee will have to move a Motion in the plenary for extension of time. With regard to consideration of Bills by Committees, hon. Members, Standing Order No.114 (3)(b) provides thus:

> *"Upon receipt of the legislative proposal from the Clerk under paragraph (2) the Speaker shall –*
>
> *(b) in respect of a legislative proposal for which no committee is in charge, refer the legislative proposal to the relevant committee for pre-publication scrutiny and comments and the committee shall submit its comments on the legislative proposal to the Speaker within fourteen days of receipt of the legislative proposal" .*

Most committees have failed to meet this requirement in terms of undertaking the pre-publication scrutiny and in producing reports of such scrutiny within the required time. The wisdom behind the pre-legislative scrutiny is to harmonise views and reduce the number of amendments brought on a Bill during Committee of the whole House. This has, however, not worked as evidenced by the many amendments brought by committee chairpersons on Bills that were referred to them for pre-legislative scrutiny.

This has been attributed to the fact that committees do not conduct pre-publication scrutiny of Bills. Committees have also failed in their duty in terms of producing reports on Bills after the First Reading, pursuant to provisions of Standing Order No. 127 (3)(4) and (5). Committees have been accused of giving preference and more attention to issues appearing in the Press particularly on procurement in Government places and other public institutions, instead of Bills and other legislative agenda. While it is within the mandate of committees to deal with issues of public interest, it should not be the main preoccupation chasing, or being seen to chase reports appearing in newspapers. I urge committees to take legislation and other business before them more seriously and report within the stipulated time frames.

Finally, hon. Members, this being a House of procedure and rules, I, therefore, urge you Members to conduct your official business within the provisions of the Constitution, statutes and our own Standing Orders and, particularly, respect the rules against anticipating debates and commenting on reports which have not been tabled before the House, consideration of which is before committees.

4. CENSURE MOTION AGAINST THE SPEAKER (Tuesday, 24th March, 2015)

Ruling by Hon. Deputy Speaker

You will all agree with me that a censure Motion against the Speaker is both rare and extremely unique business. Speakership in the Kenyan National Assembly and in similar jurisdictions in the Commonwealth embodies the power, dignity and honour of the House. The main features attached to the Office of the Speaker are authority and impartiality. Members aggrieved by the conduct of the Speaker can only discuss his or her conduct by way of a specific substantive Motion such as the one which is in the House about to be debated. As the case is now, the Mover seeks to discuss the conduct of the Speaker and censure him on allegations of a general nature. It is therefore incumbent upon the Mover to give specific instances where the Speaker is alleged to have made the contemptuous, malicious and unfounded allegations against Members as alluded in the Motion. It will be out of order for any Member to introduce extraneous matters other than those contained in the Motion on the Order Paper and as stated by the Mover in moving since doing so would negate the aim of giving a three day notice.

Hon. Members, for avoidance of doubt, allow me now to attend to the question of how this Motion relates to a Motion for removal of Speaker as contemplated under Article 106 (2)(c). The said provision states:-

> *"The office of Speaker or Deputy Speaker shall become vacant -*
>
> *(c) if the relevant House so resolves by resolution supported by the votes of at least two-thirds of its Members."*

The wording of such a Motion will be patently different from what we have under Order No. 9 today. Clearly therefore, this Motion by the Member for Kibwezi West is not a Motion under Article 106 (2)(c) of the Constitution of Kenya 2010. I wish to appeal to all Members to observe decorum and courtesy in the use of language during the debate. The expected standards of debate must be strictly observed to ensure that we listen to one another without unnecessary interruptions. It will be out of order to use offensive or insulting language in respect of Members, other persons or to make claims without substantiation as required under Standing Order No. 91. This is not an occasion to make disparaging remarks on the person or the character of the Speaker or indeed any other Member.

Finally, the Speaker has decided that he will not preside over the House today because this would amount to sitting in judgment over his own case. I want to assure

the House that I will be fair to all Members when enforcing the rules of the House as founded in the Standing Orders and as established in the accepted tradition without fear or favour.

5. EXPUNGING PROCEEDINGS/WORDS FROM THE HANSARD (WEDNESDAY, 29TH APRIL, 2015)

On 23rd April, 2015, the Member for Ol Jorok, Hon. John Waiganjo, rose on a point of order seeking the Speaker's direction on the matter of expunging of information from the Official Report of the House, popularly referred to as HANSARD.
Among the issues canvassed for determination by Hon. Waiganjo were:-

(i) The extent to which a HANSARD report can be edited;
(ii) The privileges and immunities in law enjoyed by the HANSARD;
(iii) Whether expunging of information from the HANSARD is an affront to the proceedings of the House or not;
(iv) Where the Speaker derives authority to direct the expunging of information from the HANSARD;
(v) In whose interest would such expunging be done;
(vi) What the Speaker intends to accomplish by directing the expunging of information from the Official Report of parliamentary proceedings.

The hon. Member argued that Standing Order No. 248 does not make any reference to the expunging of information from the record of the House. He added that the HANSARD is a vital component of parliamentary democracy in that it captures the speeches, the votes and the debates in the House and is the only complete, accurate and permanent record of the House, and is a sacrosanct document.

Hon. Members, Hon. Waiganjo's contention is that nothing at all should be removed or added to what an hon. Member says so that the expression and intention of the Member changes because of any alteration to the HANSARD record, and that any change to the HANSARD should only be to ensure the readability of the text but not to change or remove anything. He is also of the opinion that the Speaker or any presiding officer should not expunge any record merely because it is "unpalatable, ignominious, archaic or it is not good enough".

Lastly, the Hon. Member contends that "expunging of information from the HANSARD is an affront to the culture of openness which ought to be entrenched by subjecting parliamentary proceedings to public scrutiny" and suggests that if any expunging were to happen, "it ought to be with the Leave of the House and not the Speaker's personal prerogative." He contends that since the matter is not directly provided for under the Standing Orders, the common practice of invoking Standing Order No.1 (giving discretion to the Speaker to decide on matters not provided for) may result in not capturing the spirit of the hon. Member's contribution;

I wish to respond to those various issues as follows:-

What is HANSARD? First, I agree with Hon. Waiganjo that the HANSARD is an authoritative document particularly for ascertaining accuracy of law as passed among other proceedings, and to the courts of law when interpreting law. The name "HANSARD" has been used for two centuries. This was due to the fact that T.C. HANSARD was the first printer, and later the publisher of the official series of Parliamentary debates way back in 1803. The HANSARD - the Official Report as rightly put by Hon. Waiganjo, is the edited verbatim report of proceedings of Parliament. It is the traditional name of the transcripts of Parliamentary debates in Britain and many Commonwealth countries.

To quote *Erskine May*, a Treatise on Parliamentary Practice (23 Edition, p. 260), HANSARD is *"a full report, in the first person, of all speakers alike, a full report being defined as one which, though not strictly verbatim, is substantially the verbatim report, with repetitions and redundancies omitted and with obvious mistakes corrected, but which on the other hand leaves out nothing that adds to the meaning of the speech or illustrates the argument."*

The Canadian Parliament defines the House of Commons Debates, commonly known as the *Debates* or as HANSARD, as "the report *in extenso* of the debates which take place in the House and in a Committee of the Whole, with due regard to necessary grammatical, vocabulary and editorial changes".

To what extent can a HANSARD Report be edited? That was Hon. Waiganjo's second question. In most jurisdictions, each Member of Parliament is given an opportunity to read the transcript prepared of what he or she said and, if necessary, to make minor corrections. Indeed, our own Standing Order No. 248(2) states and I quote; "Every member shall have an opportunity to correct the draft verbatim report of his or her contribution, but not so as to alter the substance of what the Hon. Member actually said."

In most jurisdictions members are allowed to suggest corrections to errors and minor alterations to the transcription but may not make material changes in the meaning of what was said in the House. This is a long standing practice of the House that editors of the HANSARD may exercise judgment as to whether or not changes suggested by Members constitute the correction of an error or a minor alteration. The editors may likewise alter a sentence to render it more readable but may not go so far as to change its meaning. Editors must ensure that the HANSARD is a faithful reflection of what was said; any changes made, whether by hon. Members or editors, are for the sole purpose

of improving the readability of the text, given the difference between the spoken and written word.

And as Speaker Cameron, from the Australian South Wales State Legislature would aptly put it, and I quote, "If we get to the stage where speeches are recorded precisely as they are delivered, without the help of those benevolent corrections in matters of detail made by the staff, it may well be the source of embarrassment to many Hon. Members." In order for corrections and alterations to be considered, the Members' corrections must be returned within stipulated deadlines. Returned corrections must be clearly approved by the Member or an authorised delegate. Where a Member does not forward corrections within the stipulated time, it is assumed there are no suggested modifications to be made.

In Canada, substantial errors in the HANSARD, as opposed to editorial changes, must be brought to the attention of the House by means of a point of order, as soon as possible after the sitting, if a Member wishes to have the verbatim record changed. Such mishaps may be attributed to a misstatement on the part of the Member, or to a transcription error. A Member may correct the record of his or her own statement, but may not correct that of any other Member. When a question arises in the House as to the accuracy of the record, it is the responsibility of the Speaker to look into the matter. On occasion, the Speaker has seen fit to order the printing of a corrigendum to the HANSARD.

It is therefore evident that a HANSARD report may be edited but only to the extent to which there is no deviation to the substance of what actually happened. In the House of Representatives of the Parliament of Australia, very much like our practice here, Members are allowed to peruse and revise the drafts of their speeches in a long established practice. However, even though this is a long held tradition, this right to make corrections to their remarks is limited and any changes which alter the sense of the words used in a debate or introduce new matters are not admissible.

It is therefore proper and desirable that minor alterations be made by the Member who makes the statements in the House or by the Parliamentary staff who prepares the report but only in so far as it is only limited to the construction and grammatical flow of the sentence. The Speaker may also direct that a HANSARD report be corrected or altered for different reasons. The very obvious ones are expletives or hate speeches which escape the attention of the Presiding Officer as uttered at the spur of the moment.

Hon. Members, I can stop there and allow those Members to make their way in quickly.

Hon. Members, Hon. Waiganjo went on to ask a question: "Is expunging information from the record or HANSARD Report an affront to the proceedings of the House? On whether this is an affront to the proceedings of the House, it should be noted that while Members have the freedom of speech as protected in the privileges and

immunities accorded to the speeches, the speeches have to be within a dignified, decorous and acceptable code.

Under Rule 380 of the Rules of Procedure and Conduct of Business of the Indian Lok Sabha, the Speaker is vested with the power to order expunction of words, which in the opinion of the Speaker are defamatory or indecent or unparliamentary or undignified from the proceedings of the House. Similarly, the Speaker may order expunction of words which are defamatory or insinuatory in nature or levels allegations against a high dignitary or authority or organisation. Beside indecent and defamatory words, there are phrases that have over time been considered unparliamentary in various Parliaments. In cases where a Member uses the phrase or words and fails to withdraw, the Speaker can order that they be expunged from the records of proceedings. In most cases, the Speaker will issue an order to expunge any information immediately the words are uttered. The text form of those speeches is equally privileged. The removal of otherwise undignified phrases would therefore not be considered as injurious to the freedoms and privileges of the House.

He asked: "What privileges and immunities in law does the HANSARD Report enjoy?" Since Members' speeches in the House are privileged, it is corollary that the text form of those speeches be equally privileged. The National Assembly (Powers and Privileges) Act, Section 4 states that no civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to the National Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise. However, once words or certain statements have been expunged, they are no longer privileged and shall not be used or quoted elsewhere.

Where does the Speaker derive the authority to determine that proceedings stand expunged from the records now that it is not provided for in the Standing Orders? Different jurisdictions have developed different practices, with some allowing the Speaker some discretion to expunge while others require a resolution of the House for any matter to be expunged. In the Lok Sabha of India, the Speaker has a direct authority from the House Rules. In our case, Standing Order 1 allows the Speaker to determine all matters in all cases where there is no express provision in the Standing Orders.

In the Parliament of New South Wales, the Speaker cannot personally expunge any matter. A Motion to expunge a question and answer from the records could be put, by concurrence, without notice. But benevolent corrections must be made. Speaker Brown in ruling he made in New South Wales Legislature, held that a Speaker could not alter HANSARD records. Quite similar to the New South Wales practice is the Parliament of Western Australia where the Speaker has no authority to expunge any matter from the record except with the House resolution.

Allow me to also quote: **"***The Hansard Style Guide of the Bermuda House of Assembly and Senate"* which, while it allows HANSARD to record expletives, the offending words can be formally withdrawn, but that does not strike them from the record—unless the Presiding Officer orders them to be expunged. If words are ordered

to be removed from the record (expunged) by the Presiding Officer, HANSARD removes those words and inserts an editorial comment in square brackets and bolded where the text has been removed that reads: "Certain words were ordered expunged from the record."

Honourable Members, while our Standing Orders do not directly provide for expunction of HANSARD records, our traditions, precedents and practice do. Virtually all Speakers have had to expunge objectionable or reckless utterances, inaccurate votes or records when the need has arisen. Our practice has never required a resolution of the House for the Speaker to expunge any matter from record. The discretion has largely been left to the Presiding Officer, and particularly the substantive Speaker.

On October 11, 1995 the Speaker ordered the expunction of two documents earlier in the day laid by Hon. James Orengo purportedly from some Presidential Escort Officers blowing the whistle on the killing of the late Dr. Robert Ouko. He ordered the expunction because the documents were not signed. On October 4, 2007 Speaker Francis ole Kaparo ordered that adverse remarks made by Members against Hon. Gideon Moi, and without a substantive Motion, during debate on the 15th Public Investments Committee Report to be expunged.

On 25th November 2010, the Speaker, Hon. Kenneth Marende, ordered the expunction from the records of the House, the mentioning of Dr. Kilemi Mwiria as Hon. Bahari instead of referring to him as the Member for Bahari. On 13th March 2012, when Hon. Shebesh questioned the authenticity of a document earlier presented to the House by Hon. Charles Kilonzo on an International Criminal Court matter (ICC), Hon. Njuguna made unsubstantiated remarks about the British Government and the Kapenguria Six. He was ordered by the Speaker to withdraw the remarks which he did. Consequently, the Speaker ordered the offending remarks to be expunged from the record of the House.

From the foregoing, it is clear that the Speaker, being the custodian of the Standing Orders and under the powers conferred upon him by the provisions of the Standing Order No.1, may order for expunging of words that are unparliamentary or are of expletive nature. This long-held practice still stands and I hereby affirm it as elucidated above.

6. PLACE OF DEPARTMENTAL COMMITTEE RECOMMENDATIONS IN BUDGET AND APPROPRIATIONS COMMITTEE REPORTS (WEDNESDAY, 27th MAY, 2015)

Hon. Members, this morning the Member for Gem, Hon. Jakoyo Midiwo, rose on a point of order and raised several issues regarding the place of the recommendations of Departmental Committees in the Report of the Budget and Appropriations Committee. He was supported by contributions from several Members, including the Leader of the Majority Party, hon. A.B. Duale, Hon. Eseli Simiyu, Hon. Benjamin Langat, Hon. Peter Kaluma, Hon. Ndung'u Gethenji and Hon. Richard Onyonka, among others. The Chairman of the Budget and Appropriations Committee, Hon. Mutava Musyimi, argued that the Committee, in his understanding, is not obligated to take in its entirety the recommendations of the Departmental Committees when submitting its Report to the House. From the points raised by Members, I have deduced the following as the issues for determination:-

i. Whether the Budget and Appropriations Committee is at liberty not to take into consideration the recommendations of Departmental Committees on the Budget Estimates of line Ministries and Departments under their purview when discussing and reviewing the Estimates of Revenue and Expenditure.

ii. Whether the Report of the Budget and Appropriations Committee on the Estimates of Revenue and Expenditure can be amended by the House.

iii. The power of Committees to summon persons including Cabinet Secretaries.

Hon. Members, on the first question of whether the Budget and Appropriations Committee is at liberty to take into account the recommendations of Departmental Committees, I am guided by the provisions of Standing Order No.235 and, particularly, paragraphs (4) and (5), which states as follows:-

> *"235(4) Each Departmental Committee shall consider, discuss and review the Estimates according to its mandate and submit its report and recommendations to the Budget and Appropriations Committee within twenty-one-days after being laid before the House.*
>
> *(5) The Budget and Appropriations Committee shall discuss and review the Estimates and make recommendations to the National Assembly, taking into account the recommendations of the Departmental Committees, the views of the Cabinet Secretary and the public"*

Hon. Members, my understanding of "taking into account" is that the Budget and Appropriations Committee is expected to consult and acknowledge the views and recommendations of Departmental Committees when submitting its final Report to the House. Given the critical role that Departmental Committees play, the House has

assigned them key functions to enable them oversee Ministries and Departments of Government that fall under their mandates. Indeed, Standing Order No. 216 (5) outlines the functions of the Departmental Committees, which include to investigate, inquire into, report on all matters relating to their mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments; study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation; study, asses and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives, among others.

Consequently, the Departmental Committees have capacity to objectively assess the successes of Ministries and Departments in their implementation of the budget in which programmes, objectives and expected results would have been stated.

Hon. Members, it is, therefore, my view that the contributions of Departmental Committees contained in their reports to the Budget and Appropriations Committee ought to be treated with the seriousness they deserve, and not just swept under the carpet because the Departmental Committees are deemed to be experts in the relevant line Ministries that they oversee.

I am aware that the Budget and Appropriations Committee has the onerous task of balancing the requests to fit within the Budget envelope. However, they must take into account recommendations of the Departmental Committees when making their final Report to the House. If the Budget and Appropriations Committee wants to deviate from such recommendations, civility demands that they consult the relevant Departmental Committees and explain justification for their decision to deviate.

As regards the second issue, as to whether the Report of the Budget and Appropriations Committee on the Estimates of the National Government, the Judiciary and Parliament can be amended by the House, I am again guided by the provisions of Section 39 (3) of the Public Finance Management Act, 2012, which provides *inter alia,* that the National Assembly may amend the Budget Estimates submitted so long as an increase in expenditure in a proposed appropriation is balanced by a reduction in expenditure in another proposed appropriation, or a proposed reduction in expenditure is used to reduce the deficit.

In addition, Article 221 of the Constitution of Kenya and, in particular, paragraphs 3 and 6 in part state that the National Assembly shall consider the estimates of revenue and expenditure which will have been approved.

The use of the words "consider" and "approved" in the said Article of the Constitution connotes that the House, when considering the estimates, has power to amend the estimates.

From the foregoing, it is my view that the Report of the Budget and Appropriations Committee is amendable provided that the amendments are informed by a decision of the relevant Departmental Committee and the requisite balancing is achieved.

Hon Members, on the issue of failure by the Cabinet Secretary (CS) for Foreign Affairs to appear before the Departmental Committee on Defence and Foreign Relations, the Constitution is explicit on this matter. Article 125 read together with Article 153(3) empower Committees to summon Cabinet Secretaries (CSs) before them to answer questions concerning any matter for which the Cabinet Secretary is responsible. Indeed, Committees have unfettered powers to ask and receive information and demand appearance of the CS as contemplated by Article 125 of the Constitution, which gives the Committees the powers to summon as those of the High Court.

The CSs should note that failure to appear before a Committee of the House when required to do so contravenes the provisions of the Constitution stated above and, more so, failing to appear before the relevant Committee to present the budget estimates of the Ministry is so grave that the consequences arising thereof are far-reaching.

I take this opportunity to advise CSs to accord the business of the House the seriousness that it deserves and inform them that the House will not hesitate to take the necessary sanctions provided in the Constitution.

As elucidated above, I rule that amendments submitted by the Departmental Committee on Defence and Foreign Relations, having sat and resolved to do so, could be admissible in the circumstances.

Finally, Honourable Members, the critical role played by the National Assembly in the budget-making process has presented a new experience to all of us. New matters arise each time we are considering estimates and related legislations. It, therefore, follows that we might have to continuously update our manuals and procedures to respond to the changing environment in financial procedures and the challenges that come with it. Indeed, you will notice that for the first time in three years, the Report of the Budget and Appropriations Committee and the Order Paper contain a schedule showing the money proposed to be granted to various Votes, and which is the reason why Members have been able to pinpoint what they are calling allocations to organizations which they had reduced their monies in the Budget Policy Statement (BPS).

Hon. Members, be this as it may, I want to direct that having heard the request put forward, and which I think everybody seems to be agreeing with, that the Budget and

Appropriations Committee meets with all chairpersons and vice-chairpersons of the various Departmental Committees tomorrow at 2 p.m. in this plenary Chamber to consider the various reports of the Committees as reflected in the Report of Budget and Appropriations Committee. Thereafter, if the need arises, the Budget and Appropriations Committee may agree with the chairpersons of committees when to meet next. It is also directed that the CS for the National Treasury and all his technical team make themselves available to the consultations that will be taking place here and then.

I thank you honourable Members

7. REFERRAL OF PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL/ PUBLIC AUDIT BILL, 2014 (Thursday, 11th June 2015)

Hon. Members, this Communication relates to referral by His Excellency the President of the Public Procurement and Asset Disposal Bill, 2014 and the Public Audit Bill, 2014.

Hon. Members, you may recall that during the first part of this Session, the National Assembly passed the Public Procurement and Asset Disposal Bill, 2014, and the Public Audit Bill, 2014, which had constitutional deadlines. Thereafter, I presented the Bills for assent to His Excellency the President on 27th May 2015 in accordance with the provisions of the Constitution and our Standing Orders. However, on 10th June 2015, His Excellency the President, by way of a memorandum, referred the Bills back to the National Assembly for reconsideration pursuant to the provisions of Article 115(1)(b) of the Constitution.

Hon. Members, on the Public Procurement and Asset Disposal Bill, 2014 the President has expressed reservations on Clauses 51 and 124. Consequently, the President recommends amendment of sub-clause (3) of Clause 51 and deletion of sub-clause (4) of Clause 124 and the insertion of a new sub-clause (4) therefor.

Regarding the Public Audit Bill, 2014, the President has made recommendations on Clauses 4, 8, 16, 19 and 66. The President has also recommended the insertion of new Clauses 11A and 40A.

Hon. Members, it is important from the outset to note that these two Bills were considered by the two Houses of Parliament. In this regard, the consideration of the Presidential Memoranda will be by both the National Assembly and the Senate.

Hon. Members, let me remind you that I have always observed that some provisions of our Standing Orders, especially those related to the consideration of Presidential Memorandum on a Bill, do not accord with the Constitution. For instance, the provision of Standing Order No.155, which commits Presidential Memoranda on a Bill considered by both Houses to a joint committee, seems to offend the provisions of Article 115 of the Constitution. While the provision of Standing Order No.155 foresees the adoption of a report of a joint committee of the two Houses, the Constitution requires that any amendment to a Presidential recommendation, or a total rejection of the recommendations, should be supported by a vote of at least two-thirds of the Members of the National Assembly and two-thirds of the delegations in the Senate. With this in mind, this may be said to be one of the instances where we cannot use the Standing Orders in considering the matters at hand.

Hon. Members, in view of the foregoing, I will issue a comprehensive guidance on how to proceed with the above matters on Tuesday, 16th June 2015. In the meantime,

the memoranda stand committed to the Departmental Committee on Finance, Planning and Trade for consideration.

Thank you.

8. SUSPENSION OF OPERATION OF STANDING ORDER NO. 155 (Tuesday, 16th June 2015)

Hon. Members, I wish to make this Communication on the manner of considering a Presidential Memorandum on a Bill concerning county governments. You will recall that on Thursday, 11th June 2015, I indicated that I would be giving guidance on the manner of considering Presidential Memoranda on Bills considered in both Houses of Parliament. This was occasioned by the Messages received from His Excellency the President on Bills recently concluded by Parliament including the Public Procurement and Asset Disposal Bill, 2014, the Public Audit Bill, 2014 and the Public Procurement and Asset Disposal (Amendment) Bill, 2013.

The provisions of our Standing Orders are not in tandem with the expectations of the Constitution. Specifically, the provisions of Standing Order No. 155 which commit Presidential Memoranda on a Bill considered by both Houses to a Joint Committee; this clearly offends the provisions of Article 115 of the Constitution. While Standing Order No. 155 foresees the adoption of a report of a Joint Committee of the two Houses, Article 115 of the Constitution requires that any amendment to the President's recommendations or indeed, a total rejection of the recommendations should be supported by a vote of at least two-thirds of the Members of the National Assembly and two-thirds of the delegations in the Senate. I have put emphasis on the use of the word "and" and in the requirements provided by the Constitution.

Hon. Members, for the avoidance of doubt, Article 115(4) of the Constitution which stipulates the process for the referral of a Bill by the President states as follows:

> *"Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported—*
>
> *(a) by two-thirds of members of the National Assembly; and*
>
> *(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate."*

The interpretation of this, hon. Members, is that the provisions of Standing Orders become vacant in relation to the provisions of the Constitution. In the consideration of Presidential Memoranda, the Constitution provides for three possible outcomes from Parliament. These are:-

(i) Parliament may amend the Bill in the light of the President's reservations and recommendation. This requires a simple majority of both Houses;

(ii) Parliament may pass the Bill a second time without amendment; or,

(iii) Parliament may pass the Bill with amendments that do not fully accommodate the President's reservations and recommendations.

The second and third outcomes require a vote supported by at least two-thirds of the Members of the National Assembly and two-thirds of the delegations in the Senate.

Having said that, Hon. Members, with regard to the consideration of a Presidential Memorandum on a Bill concerning county governments, I wish to guide as follows:-

The President's Memorandum ought to be submitted to the House that originated the Bill as happens currently.

The Presidential Memorandum review process should start in the originating House whereupon it should be read and submitted to the relevant Departmental Committee, if necessary, and thereafter considered in that House in the Committee of the whole House. At this stage, any amendment or total rejection of any of the President's reservations and recommendations should be subjected to the two-thirds majority requirement.

After passage, the Speaker of the originating House should then submit the Presidential Memorandum in its original form and any decision including any amendments or total rejection proposed by that House to the Speaker of the second House.

The second House should then consider the Memorandum in its original form together with the decision made by the originating House and, while in the Committee of the whole House, make its own resolution, including amendments or total rejection of the President's reservations and recommendations. In making the amendments or rejections, the two-thirds majority vote requirement is mandatory.

The Speaker of the second House should then convey the decision of the that House to the Speaker of the originating House indicating –

a) the decision of the second House on the Presidential Memorandum in its original form;
b) the decision of the second House on the amendments or total rejection proposed by the originating House; and,
c) any new amendment, or total rejection proposed by the Second House.

The originating House will then consider the Presidential Memorandum for a second time only if there are any new amendments or total rejection proposed by the second House.

The Speaker of the originating House thereafter conveys the decision of Parliament to the President.

Hon. Members, while this considered guidance seeks to clear the lacuna at present experienced in the consideration of Presidential Memoranda to a Bill concerning county governments, a more purposeful consideration of the procedure will soon be developed during the review of our Standing Orders. In the meantime, and in exercise of the provisions of Standing Order No.1 of the National Assembly Standing Orders, I forthwith suspend the operation of Standing Order No. 155, as it clearly contradicts the provisions of Article 115 of the Constitution.

I thank you, Hon. Members.

9. GUIDANCE ON CONSIDERATION OF PRESIDENTIAL MEMORANDA ON BILLS (Tuesday, 23rd June 2015)

Hon. Members, you will recall that on Tuesday, 16th June 2015 the Chair issued a guide on the manner of considering Presidential Memoranda on Bills concerning county governments. Article 115 of the Constitution requires that any amendment to the President's recommendations, or a total rejection of the recommendation, should be supported by a vote of at least two-thirds of the Members of the National Assembly. In the consideration of Presidential Memoranda, the Constitution provides for three possible outcomes from Parliament:-

1. Parliament may amend the Bill, in light of the President's reservations and recommendations.
2. Parliament may pass the Bill a second time without amendments. This requires a simple majority in both Houses.
3. Parliament may pass the Bill with amendments that do not fully accommodate the President's reservations and recommendations.

The first and the third outcomes require a vote supported by at least two-thirds of the membership of the National Assembly – that is 234 Members. During Committee of the whole House, any amendment that may involve deletion, insertion or substitution of any of the words proposed by the President, or a total rejection of any of the President's reservations and recommendation should be subjected to the two-thirds majority rule.

Hon. Members, there is a Supplementary Order Paper, which you should have been presented with. We are now moving to the Supplementary Order Paper.

10. THE SPECIAL STATUS OF THE COUNTY ALLOCATION OF REVENUE BILL (Thursday, 2nd July 2015)

This Communication relates to the business appearing as Order No.10, but before we go there, I need to draw the House's attention to what has been done by the Clerk's Department in the interest of expediency.

As you all know, our own Standing Order No.124 provides that not more than one stage of a Bill may be proceeded with, on the same day except with the leave of the House. Yesterday, we concluded debate on the County Allocation of Revenue Bill, Senate Bill No.05 of 2015, whose Question has just been put and has been carried. So, the second stage has technically been concluded today. Therefore, in keeping with our rules, the assumption is that the next stage, which is going into the Committee of the whole House, is on the same day.

However, there are exceptional circumstances when the House can grant leave, or when the House can resolve that a matter is one that does not require leave. I am saying this, Hon. Members, because we are in the habit, sometimes, that even when the entire House is agreed on something and a Question is put, one or two Members raise their voices in opposition in jest. In this particular situation, if that were to happen, it technically would mean that you have refused to proceed to the next stage. This is a Bill which affects the Budget of county governments. They are not able to do their budgets until they receive this Bill. It is only fair that having dispensed with the technical stage a while ago we, as a House, proceed to the Committee of the whole House today. Of course, that is just my plea in the interest of devolution, but should the House feel that it does not want to proceed with the two stages, then it can express itself as it wishes.

I was drawing your attention to this fact because the assumption by the Office of the Clerk is that the County Allocation of Revenue Bill, Senate Bill No.05 of 2015, has been considered to be treated like an Appropriation Bill or the Division of Revenue Bill. It has been put on the Order Paper for the simple reason that the Second Stage, which we have just finalised, technically, also ended yesterday when you concluded debate on it.

Therefore, Hon. Members, I feel that even as we apply this procedure, I need to put the Question, so that I can know whether the House wishes to proceed to grant leave to proceed to the next stage, which is Committee of the whole House, to consider this very crucial Bill for the counties. Am I understood clearly now?

11. CONSTITUTION OF JOINT COMMITTEE TO CONSIDER PRESIDENT'S RESERVATIONS (Tuesday, 7th July 2015)

Hon. Members, as you are aware, on June 18th 2015 the National Assembly considered the Presidential Memoranda on the Public Procurement and Asset Disposal Bill 2014 and passed it fully while accommodating the President's reservations. Subsequently, and in accordance with the Constitution and our Standing Orders, I conveyed the decision of the House to the Senate. However, the Senate, by way of a Message dated 24th June 2015, invoked the provisions of Senate Standing Order No.158 and returned the Memorandum to the National Assembly proposing the formation of a Joint Committee of the Houses of Parliament to examine the Memoranda.

Hon. Members, you will recall that in an earlier Communication, I had observed that some provisions of our Standing Orders are not in tandem with the expectations of the Constitution. Specifically, the provisions of Standing Order No.155 which is also replicated in Standing Order No.158 of the Senate Standing Orders and which commits Presidential Memoranda on a Bill considered by both Houses to a joint committee, partially offend the provisions of Article 115 of the Constitution. While Standing Order No.155 foresees the adoption of a report of a joint committee of the two Houses, Article 115 of the Constitution requires that any amendment to the President's reservations or, indeed, a total rejection of the reservations should be supported by a vote of, at least, two-thirds of the Members of the National Assembly and two-thirds of the delegations in the Senate.

Similarly, my colleague, the Speaker of the Senate, in Communication, seems to have also observed that part of the Senate Standing Order No.158 relating to the manner of considering the President's Memorandum does not accord with the requirements of Article 115 of the Constitution. My colleague the Speaker of the Senate, therefore, requests that the two Houses form a joint committee in the manner provided for in Standing Orders relating to formation of joint committees, so as to give the two Houses an opportunity to jointly consider the President's reservations. He also observed: "This, however, does not take away the prerogative of each House to make a separate decision on the Presidential Memorandum".

Hon. Members, I find the request contained in the Message to be fair and reasonable even though it is coming rather late as far as the Presidential Memoranda on the Public Procurement and Asset Disposal Bill 2014 and, indeed, Public Audit Bill 2014 are concerned. You know too well that the National Assembly has already considered the two Memoranda and the House has since become *functus officio*. Nevertheless,

the character of bicameralism requires all of us to be accommodative and supportive of its complexities.

In this regard, therefore, I hereby direct that pursuant to the provisions of Standing Order No. 213 (3) and Rule 9 of the Houses of Parliament Joint Sitting Rules, the Committee on Selection embarks on the process of nominating five Members for appointment by the House, as Members of the joint committee for the purposes of considering the Presidential Memoranda on the Public Procurement and Asset Disposal Bill 2014 and, indeed, the Public Audit Bill 2014.

Due to the urgency of this matter, the Committee on Selection should conclude that business before 2.30 p.m. tomorrow, Wednesday, 8th July 2015, so as to accord the House an opportunity to consider the Motion to approve the names of the persons nominated to serve in the joint committee during the afternoon sitting of the following day. Hon. Members, let me also confirm that in accordance with the provisions of Standing Order No. 213(6) and Rule 9(6) of the Joint Rules, unless a decision is reached by consensus, any vote to be taken in the joint committee shall be by separate Houses. In view of the fact that National Assembly has already deliberated on and made a decision on the Presidential Memoranda on the Public Procurement and Assets Disposal Bill 2014 and the Public Audit Bill 2014, the membership of the National Assembly in the joint committee will be expected to convey and uphold the decision made by the National Assembly on 18th June 2015 and 23rd June 2015 on the two items since they cannot invalidate the resolutions passed on those two dates.

I thank you.

12. PROCEDURE FOR THE REMOVAL OF CABINET SECRETARY (Wednesday, 8th July 2015)

Hon. Members, before we go to the next Order, I wish to make the following Communication which is related to the procedure for the removal of a Cabinet Secretary (CS). This Communication relates to Order No.9 appearing on today's Order Paper, which is the Motion asking the House to resolve that the President dismisses the Cabinet Secretary for Education, Science and Technology.

I have chosen to make this Communication firstly on account of the fact that this is the first time that a Motion of this nature has progressed up to this stage and, secondly, because this process is quasi-judicial.

Hon. Members, for the avoidance of doubt, Clauses 6 to 10 of Article 152 of the Constitution provides as follows, and I quote:-

> *"(6) A member of the National Assembly, supported by at least one-quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary-*
>
> *(a) on the ground of a gross violation of a provision of this Constitution or of any other law;*
>
> *(b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or,*
>
> *(c) for gross misconduct.*
>
> *(7) If a motion under Clause (6) is supported by at least one-third of the members of the National Assembly—*
>
> *(a) the Assembly shall appoint a select committee comprising eleven of its members to investigate the matter; and,*
>
> *(b) the select committee shall, within ten days, report to the Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated.*
>
> *(8) The Cabinet Secretary has the right to appear and be represented before the select committee during its investigations.*
>
> *(9) If the select committee reports that it finds the allegations*
>
> *(a) unsubstantiated, no further proceedings shall be taken; or,*
>
> *(b) substantiated, the National Assembly shall—*
>
> *(i) afford the Cabinet Secretary an opportunity to be heard; and,*

(ii) vote whether to approve the resolution requiring the Cabinet Secretary to be dismissed.

(10) If a resolution under Clause (9)(b)(ii) requiring the President to dismiss a Cabinet Secretary is supported by a majority of the members of the National Assembly—

(a) the Speaker shall promptly deliver the resolution to the President; and,

(b) the President shall dismiss the Cabinet Secretary."

Having said this, Hon. Members, Standing Order Nos.61, 64 and 66 come into perspective. My reading of the said provisions of the Constitution and the Standing Orders lays down the following seven steps to be followed during consideration of this Special Motion.

The first step relate to the manner of drafting the Motion and collecting the requisite number of signatures (at least 88), seeking the Speaker's approval on the Motion, and finally giving Notice of the Motion in the House. Those three steps have already been fulfilled by the hon. Member including collecting the requisite number of signatures in support of the Notice of Motion. However, even though 95 signatures were appended to the Notice of Motion as originally submitted to my office and to the House, that number has reduced by one as the name and signature of the Member for Bungoma County, Hon. Reginalda Wanyonyi, MP, has appeared twice in the list.

Honourable Members**,** it is important at this point to explain how the various thresholds in this process are arrived at. To begin with, Article 122(4) of the Constitution provides that:-

"In reckoning the number of members of a House of Parliament for any purpose of voting in that House, the Speaker of that House shall not be counted as a member."

So, happily, I am not to be counted. Consequently, the denominator of the membership of the National Assembly on a question of determining the numbers required during Division is 349 Members as opposed to 350.

Secondly, any decimal points resulting from calculations of thresholds are rounded off to the next whole number, based on the parliamentary parlance that a mathematical fraction of a Member equates to a full whole number of an individual Member, irrespective of the fraction or even the size of the Member.

In this case, therefore, the one-quarter of the total National Assembly membership

required for purposes of the Notice of the Motion is 87.8 Members, which is rounded off to 88 Members. In addition, Standing Order No. 66(3) requires that the Order Paper on which such a Motion is listed sets out the name of the Member sponsoring the Motion and the names of the Members supporting the Notice of Motion. It is for this reason, therefore, that today's Order Paper, as published, contains not only those names, but also the particulars upon which the Motion is made.

It is also important to bear in mind that Standing Order No. 68 requires that a Motion for the removal of a person from office takes precedence over all other business on the Order Paper for that day.

This now brings me to the fourth step in this procedure, which is the discussion of the Motion in this House. Since this is a Special Motion, Standing Order No. 61(2)(a) requires that the Motion be discussed by the House within seven days following the giving of the Notice of Motion. It is for this reason that this Motion is appearing in today's Order Paper, being the sixth day following the giving of the Notice.

At this juncture, it is important for you to note that for this Motion to move to the next level, it has to be supported by, at least, one-third of the total voting membership, namely 117 Members, when the Question is finally put. It is equally important to also note that so long as the Motion obtains the support of, at least, 117 Members, it will move to the next stage even if those opposing it number more than 117 Members. If the Motion attains this threshold of 117 Members when I finally put the Question, the following two actions, comprising the fifth step, will take place:-

i. I will require the Committee on Selection to immediately retreat into a meeting for the purpose of nominating 11 Members to the Select Committee that shall investigate the matter in detail.

ii. The Chairperson of the Committee on Selection will be expected to move a Motion tomorrow afternoon, namely, Thursday, 9th July 2015, for approval of the nominees to the Select Committee, which requires a simple majority.

The sixth step is where the Select Committee investigates the allegations and particulars contained in the Motion. The Committee will be expected to hear the Cabinet Secretary (CS) either in person, through a representative or both in person and through a representative. I must offer caution at this earliest opportunity that this process is and must remain *quasi-judicial*, including the requirement of affording witnesses the opportunity to be heard in the examination of all the particulars of the claims. The Committee shall ensure that it submits its report to the House within 10 days of its formation.

If the Committee reports to the House that the allegations against the CS cannot be substantiated, no further proceedings shall be undertaken. If, on the other hand, the Committee concludes that the allegations against the CS are substantiated sufficiently, the Committee shall table its report in the House, together with a Notice of Motion for adoption of the said report, ushering in the next step.

The seventh step is for the National Assembly to prioritise the debate on the report of the Select Committee. It is important for Members to note that the debate will have to be concluded within 14 days of the giving of the Notice of Motion for the adoption of the Committee's report in line with Standing Order No. 61(2)(b). A date on which the CS shall appear before the House to provide further clarifications and/or respond to matters arising from the findings of the Committee shall be set. This avenue shall accord the CS an opportunity to be heard before the House makes its decision on the matter. The Committee's report, together with any other evidence adduced, including notes or papers presented to the Committee, shall be availed to the CS, at least, three days before the day scheduled for his appearance before the House.

If the Motion to adopt the report of the Select Committee obtains the support of the majority of the House membership, which is 50 per cent plus one Member--- It is equal to 174.5 plus one, which is 175.5. The figure required would be 176 Members, when the Question for the adoption of the report is put. If carried by that number, the Motion shall be adopted and I will promptly deliver to the President the resolution requiring the President to dismiss the CS.

As the House dispenses with the Special Motion currently before the House, it is important to adhere to the required timelines and thresholds stipulated in both the Constitution and our Standing Orders, and the general procedure outlined herein above.

Finally, the limitation of time on this Motion will be guided by the resolution of the House made on 11th February 2015 regarding the manner of allotting speaking time in a debate on any Motion, including a Special Motion. This is clearly shown as Item No. I on page 635 of today's Order Paper. However, any Member is at liberty now to move a Motion for the reduction of the stated time limits, so long as he or she does so in good time.

13. COMMITTEES REPORTING ON PENDING BUSINESS (Wednesday, 14th October 2015)

Hon. Members, this Communication regards pending business before committees. As you are aware, Parliament conducts a lot of its work through committees. In fact, matters pertaining to public petitions, Bills and legislative proposals are routinely referred to various parliamentary committees for consideration. However, it has been noted that on many occasions, there has been inordinate delays in the processing of certain business by some committees.

Hon. Members, as part of its mandate to monitor and oversee implementation of business in the House as contemplated under Standing Order No. 171(5), the House Business Committee (HBC) is of the view that Committee Chairpersons ought to regularly apprise the House on the progress of business before them. This should take the form of brief reports to be presented when determined by the Speaker and should not take more than 10 minutes each. Such reports should provide a summary of Bills, legislative proposals, petitions, statutory instruments and any other business referred to the committees by the House or by the Speaker.

I have, therefore, determined that this reporting will commence from next week Wednesday, 21st October 2015 in the afternoon. The process shall begin with two Departmental committees following the order in which these committees are listed in the Second Schedule of the Standing Orders. Thereafter, we will also accord an opportunity to other Select Committees to provide progress reports on matters before them.

Consequently, next week, I expect the Chairpersons of the Departmental Committee on Administration and National Security and the Departmental Committee on Agriculture, Livestock and Cooperatives to brief the House on the status of pending business before their respective committees. Due to the heavy financial outlay before the Departmental Committee on Finance, Planning and Trade, some of which have statutory and fiscal deadlines, I will also allow the Chairperson of that Committee to give a status report on the business pending before the Committee during the same Sitting.

To this end, committees are notified that in addition to budgetary approvals, request to hold meetings outside Nairobi including foreign travel will be approved on the basis of conclusion of committee work and should it be necessary, I will not hesitate to suspend travel by any committee that plans to undertake such travels or visits before completing pending business before them.

In conclusion, I also wish to implore upon the Liaison Committee to assist the House in administering these requirements.

14. PROCESSING OF SPECIAL MOTIONS ON REMOVAL OF STATE OFFICERS (Thursday, 22nd October 2015)

Hon. Members, this Communication relates to processing of Special Motions under Articles 145, 150(2), 152(6) and 251 of the Constitution.

Hon. Members, as you may be aware, instances have arisen in the recent past when this House has been made to grapple with procedural issues relating to Special Motions arising out of the provisions of Article 145 of the Constitution (Removal of the President by impeachment) and Article 152(6) of the Constitution (Removal of Cabinet Secretary) and Article 251(1) (Removal from office of a member of a constitutional commission).

In this regard, it is, therefore, necessary to revisit and clarify the procedures outlined in our Standing Orders as relates to the processing of these Special Motions.

First, this clarification is necessary in light of recent pronouncements by the courts of law which have brought new interpretation dimensions. My office has also recently received inquiries from various actors including but not limited to the Kenya National Commission on Human Rights (KNCHR) on the threshold required in impeachment processes of State officers.

Secondly, this Communication is necessitated by the emerging incidences where Members who had initially signed the Special Motions request to withdraw their signatures before the Motions are considered by the House thereby, raising questions on whether a Member can withdraw a signature once appended on a list.

Hon. Members, before revisiting the procedures relating to the impeachment processes, it is paramount that we examine the provisions in the Constitution relating to the impeachment process.

The provisions relating to the removal of the President by impeachment are found in Article 145 of the Constitution, which provides as follows:-

> *145 (1) A member of the National Assembly, supported by at least a third of all the members, may move a motion for the impeachment of the President—*
>
> *(a) on the ground of a gross violation of a provision of this Constitution or of any other law;*

(b) where there are serious reasons for believing that the President has committed a crime under national or international law; or
(c) for gross misconduct.

By virtue of Article 150(2) of the Constitution, this provision also applies to the impeachment of the Deputy President. The provisions for the removal of a Cabinet Secretary from office are found in Article 152(6) of the Constitution which reads as follows:-

"A Member of the National Assembly, supported by at least one quarter of all the Members of the Assembly, may propose a Motion requiring the President to dismiss a Cabinet Secretary-
(a) on the ground of a gross violation of a provision of this Constitution or of any other law;
(b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or
(c) for gross misconduct."

The removal from office of members of constitutional commissions or the holders of independent offices is governed by Article 251 of the Constitution which provides as follows:-

"(1) A member of a commission (other than an ex-officio member) or the holder of an independent office, may be removed from office only for-
(a) serious violation of this Constitution or any other law including a contravention of Chapter Six;
(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise."

Hon. Members, from a close reading of the Constitution, the grounds for the removal of the President, the Deputy President, Cabinet Secretaries and members of constitutional commissions and holders of independent offices are largely similar. Further, other than the difference in the threshold required to support the motion, the constitutional provisions relating to the removal of the President, Deputy President and the Cabinet Secretary are similar in wording.

The American impeachment process, a constitutional based remedy, provides a legislative mechanism for investigating and trying allegations of some forms of serious

conduct on the part of the President, the Vice-President and 'civil officers of the United States' of America (USA). The fundamental issue that each House of Parliament contemplating impeachment of a State officer must confront is whether the conduct in question falls within the constitutional parameters. In the USA, the thresholds are of such nature as 'treason, bribes or other high crimes and misdemeanours.'

In most jurisdictions where the legislatures have been given powers of removal, the impeachment process is a complex and cumbersome mechanism. The thresholds are not precisely defined in the Constitution itself and, therefore, it is the responsibility of the House to determine grounds and particulars based on their respective constitutions. In most cases, the constitutional framework is skeletal, providing minimum guidance as to the nature of the proceedings and leaving the void to be filled, to a great extent, by the House rules, procedures and precedents.

Moving on to our National Assembly procedures for impeachment of the President, the Deputy President and Cabinet Secretaries, Part XIV of our Standing Orders clearly outline the procedure for removal from the respective state offices. In particular, the procedure for the removal of the President by impeachment is outlined under Standing Order No.64, which provides as follows:-

> *"(1) Before giving notice of Motion under Article 145(1) of the Constitution, the Member shall deliver to the Clerk a copy of the proposed Motion in writing-*
>
> *(a) stating the grounds and particulars in terms of Article 145(1) of the Constitution upon which the proposed motion is made;*
>
> *(b) signed by the Member; and,*
>
> *(c) signed in support by at least a third of all Members."*

By virtue of Standing Order No.65, this procedure also applies for the impeachment of the Deputy President.

The procedure of removal of a Cabinet Secretary by the House is outlined under Standing Order No.66, which states as follows:-

> *"(1) Before giving notice of motion under Article 152(6) of the Constitution, the Member shall deliver to the Clerk a copy of the proposed motion in writing-*
>
> *(a) stating the grounds and particulars in terms of Article 152(6) of the Constitution upon which the proposed Motion is made;*
>
> *(b) signed by the Member; and,*
>
> *(c) signed in support by at least one quarter of all the Members of the Assembly."*

Hon. Members, having looked at the relevant provisions of the Constitution and the Standing Orders, it is now important to look at the recent developments in the courts of law in relation to impeachment processes. You will recall that Articles 145, 150(2), 152(6) and 251(2)(a)(b) of the Constitution require, as a ground for removal from office of the President, the Deputy President, Cabinet Secretary or member of a constitutional commission or independent office, a threshold of either gross violation of the Constitution or other laws or gross misconduct. Under Article 75(3) of the Constitution, a person who has been dismissed or otherwise removed from office for misconduct in a state office is disqualified from holding any other state office.

At the preliminary level, the *Concise Oxford English Dictionary* defines the word "gross" as "blatantly wrong or unacceptable". The High Court of Kenya, in the case of Martin Nyaga Wambora and 30 others versus the County Assembly of Embu and four others (Embu Constitutional Petition Nos.7 and 8 of 2014) considered the issue of the required threshold for determining what amounts to a gross violation of the Constitution or a gross misconduct in impeachment processes. The High Court, under paragraphs 232, 233, 234, 235 and 236 of its judgement, made precedent setting pronouncements, of which I seek your indulgence to read out the relevant pronouncements as follows:-

> *"232. It has been argued that the gross violation attributed to Mr. Wambora had not been demonstrated. Gross violation of the Constitution or any other law is a ground for removal from office as provided under Article 181(1)(a). The question that then arises is how you qualify gross violation. Who is the one to assess that the allegations amount to gross violation?"*
>
> *"233. In stating what amounts to gross violation, the Supreme Court of Nigeria in Hon. Muyiwa Inakoju and others versus Hon. Abraham Adeolu Adeleke held that-*
>
> *(i) The word "gross" in the sub-section does not bear its meaning of aggregate income. It rather means generally in the context 'atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking'. All these words express some extreme negative conduct. Therefore, a misconduct which is the opposite of the above cannot constitute gross misconduct. Whether a conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in a vacuum but in relation to the facts of the case and the law policing the facts.*
>
> *(ii) Gross misconduct is defined as-*

(a) A grave violation or breach of the provisions of the Constitution; and

(b) A misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.

(iii) By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a governor or deputy governor. Only a grave violation or breach of the Constitution can lead to the removal of a governor or deputy governor. "Grave" in the context does not mean an excavation in earth in which a dead body is buried, rather it means, in my view, serious, substantial, and weighty.

234. With regard to what amounts to gross violation, the Court in Wambora 1 observed at paragraph 253:-

"….whatever is alleged against a governor must:

(a) Be serious, substantial and weighty.

(b) There must be a nexus between the governor and the alleged gross violations of the Constitution or any other written law.

(c) The charges framed against the governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.

(d) The charges as framed must state with degree of precision the Article(s) or even sub-Article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated."

235. On appeal, the Court of Appeal sitting at Nyeri as regards what amounts to gross violation, held at paragraph 46 in Wambora 1 Appeals that:

"We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter Six (Leadership and Integrity) of the Constitution; or intentional and/or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya's constitutional system and under Article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the

constitutional Articles whose violation amounts to gross violation include:

i. *Chapter 1 on the sovereignty of the people and supremacy of the Constitution more specifically Articles 1, 2, and 3(2) of the Constitution.*
ii. *Chapter 2 - Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.*
iii. *Article 10 on national values and principles of good governance.*
iv. *Chapter 4 on the Bill of Rights.*
v. *Chapter 6 - Articles 73 to 78 on leadership and integrity.*
vi. *Chapter 12 - Article 201 on principles of public finance.*
vii. *Chapter 13 - Article 232 on values and principles of public service.*
viii. *Chapter 14 - Article 238 on principles of national security.*
ix. *Article 259(11) on advice and recommendation.*
x. *Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap.63 of the Laws of Kenya)."*

236. A body exercising its quasi-judicial function should be very careful in deciding what amounts to gross violation or misconduct. The Supreme Court of Nigeria in the case of Hon. Muyiwa Inakoju already referred to above, warned that:

> *"It is not a lawful or legitimate exercise of the constitutional function in Section 188 for a House of Assembly to remove a governor or a deputy governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the governor or deputy governor in a particular moment or the governor or deputy governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office.*
>
> *The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the governor or deputy governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a*

governor or deputy governor in every wrong doing. A governor or deputy governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why Section 188 talks about gross misconduct. Accordingly, where misconduct is not gross, the Section 188 weapon of removal is not available to the House of Assembly."

Hon. Members, indeed, as stated earlier, I have also recently received inquiries on the need to amend the Standing Orders to clearly identify the issues of threshold in impeachment processes. However, although the Standing Orders have not addressed the issues of threshold, in light of the foregoing judicial pronouncements by the courts of law, the rule of law requires that the Special Motions brought before the House under Articles 145, 150(2), 152(6) and 251 of the Constitution, should comply with the foregoing thresholds established by the courts of law. In any event, in our particular case, the courts of law under Article 165 have the power to interpret the provisions of the Constitution.

It is important for the House to note that the question of determining what constitutes gross violation of the Constitution or gross misconduct is one that clings and hangs on the impeachable authority of the House and is excisable in two instances under the Standing Orders; firstly, at the point of the approval of the Motion for impeachment or dismissal and secondly, at the point of investigations conducted by the relevant select committee.

In the first instance, Standing Order 47(3)(b) and (e) requires the Speaker to take into account constitutional and evidential requirements while determining the admissibility or otherwise of a Motion including all Special Motions brought under Part XIII of the Standing Orders, which relates to Special Motions.

In this respect, the Speaker would in effect be examining whether the Special Motion as presented contains and meets the threshold of the grounds envisaged under the relevant Article of the Constitution. This implies that a duty is imposed on the Speaker to examine the facts as stated in the Special Motion amounting to alleged gross violation of the Constitution or gross misconduct and to this extent the Speaker must be guided by the interpretation precedent set by the courts of law.

In the second instance, Article 145(3) vests the impeachment authority of Parliament in respect of the President and the Deputy President on a Select Committee of the Senate which is mandated to investigate and report to the Senate, whether it finds the allegations against the President or Deputy President substantiated and in this case whether the grounds stated amount to gross violation of the Constitution or any other

law and gross misconduct. Subsequently, if the allegations are substantiated, the Senate is mandated pursuant to Article 145(6)(b) to take a vote to approve the resolution requiring the President or Deputy President to be impeached.

Similarly, Article 152(7) of the Constitution vests the impeachment authority of a Cabinet Secretary on the National Assembly on a Select Committee which is mandated to investigate and report to the House whether it finds the allegations against the CS substantiated and in this case whether the grounds stated amount to gross violation of the Constitution or any other law and gross misconduct.

Subsequently, if the allegations are substantiated, the House is mandated pursuant to Article 152(9)(b) to take a vote to approve the resolution requiring the CS to be dismissed. This implies that a duty is imposed on the Special Committees of the Houses to examine and interrogate the facts as stated in the Special Motion amounting to alleged gross violation of the Constitution or gross misconduct and to this extent, the findings of the Special Committees must be guided by the interpretation precedent set by the courts of law.

Hon. Members, in respect of removal from office of members of constitutional commissions and independent offices, Article 251(6) of the Constitution places the obligation to make the finding on the thresholds at the second instance on an independent tribunal constituted in accordance with that Article.

The second issue which has precipitated this communication is the emerging incidences where some Members who had initially signed a Special Motion request, through letters to the Speaker, to withdraw their signatures in support of the Special Motion, before the Motion is considered by the House as provided for under the Standing Orders.

Both Standing Orders 64 and 66(1) require the Hon. Member to deliver to the Clerk a copy of the proposed Motion in writing before giving the Notice of Motion to impeach or dismiss, as may be the case under the relevant Article of the Constitution.

The copy of the proposed Motion given to the Clerk is required to be accompanied by the proposed Motion in writing signed by the Member, and signed in support by at least one-quarter of all the Members. For instance, Standing Order 66 provides as follows:-

> *"(1) Before giving notice of Motion under Article 152(6) of the Constitution, the Member shall deliver to the Clerk a copy of the proposed Motion in writing-*
>
> *(a) stating the grounds and particulars in terms of Article 152(6) of the Constitution upon which the proposed Motion is made.*
>
> *(b) signed by the Member, and*

(c) signed in support by at least one quarter of all the Members of the Assembly.

(2) A Motion under paragraph (1) shall be disposed of in accordance with Standing Order 56(2).

(3) An Order Paper on which the Motion under paragraph (1) is listed shall set out-

(a) the grounds and particulars upon which the proposed Motion is made;

(b) the name of the Member sponsoring the Motion; and,

(c) the names of the Members in support of the Motion.

(4) Any signature appended to the list as provided under paragraph (3) shall not be withdrawn."

Hon. Members, Standing Order 66(4) provides that any signature appended to the list as provided for under paragraph (3) shall not be withdrawn. On the other hand, paragraph (3) refers to the list of signatures set out in the Order Paper and not the one attached to the copy of the Notice of Motion sent to the Clerk under paragraph (1).

Hon. Members, the Standing Orders are, therefore, clear that a Member can withdraw a signature given in support of a Special Motion before the Special Motion is listed in the Order Paper. However, this creates unpredictability and uncertainty on the impeachment processes and may also create room for abuse of the impeachment processes where Hon. Members may be unduly influenced or coerced to withdraw signatures that were earlier appended on a list.

Looking at comparable jurisdictions, the need for predictability and certainty in the conduct of the business of the House and the need to adopt a practice that resonates with the practice in other jurisdictions cannot be overstated. Indeed, the practice in the Parliament of Uganda is such that once signatures have been appended to a Special Motion, the signatures cannot be withdrawn. Their rules of procedure provide for a sequence of events as follows:-

1. A Member who is desirous of moving a motion for the removal of the President shall notify the Clerk in writing of his or her intention, citing the grounds for the proposed motion and giving detailed particulars supporting such ground.
2. The Clerk shall, within three days, upon receipt of the notice of a motion, notify by causing the notice, grounds and particulars supporting the proposed Motion to be pinned on Hon. Members' notice board.
3. The Clerk shall on the date and time of pinning the notice of motion on the Members' notice board also cause to be prepared and deposited with the Sergeant-at-Arms, for a period of ten working days, a list of all Members of Parliament with an open space against each name for purposes of appending of signatures which list shall be titled "SIGNATURES IN SUPPORT OF THE NOTICE OF MOTION TO REMOVE THE PRESIDENT."
4. After one third of the Members have appended their signatures on the list signifying support for the proposed motion, the Sergeant-At-Arms shall, with

immediate effect, forward the list to the Clerk who shall not later than twenty four hours transmit the notice of motion, the grounds and all supporting particulars and signatures to the Speaker.

5. Any signature appended to the notice shall not be withdrawn.
6. If within the ten days referred to in sub-rule (5), less than a third of the Members have appended their signatures on the same, the notice shall lapse.

Hon. Members, it is important to remind Members that the office of the Clerk is a technical office which assists members with the processing of various technical instruments that form the various business of the House. It is, therefore, important for members to consult with this office before embarking on the process of collecting signatures as is the process in Uganda.

Hon. Members, in light of my foregoing exposition and in conclusion thereof, I now direct as follows:-

1. That all Special Motions brought before the House under Articles 145, 150(2), 152(6) and 251 of the Constitution should comply with thresholds established by the courts of law as to what constitutes gross violation of the Constitution or gross misconduct under the Constitution.
2. That the question of determining what constitutes gross violation of the Constitution or gross misconduct is one that clings and hangs on the impeachable authority of the House and is exercisable in two instances – firstly, at the point of the approval of the Special Motion for impeachment or dismissal by the Speaker pursuant to Standing Order 47(3)(b) and (e) which requires the Speaker to be satisfied of the constitutional and evidential propriety of the Special Motions. Secondly, at the point of investigations conducted by the relevant Select Committee or tribunal, pursuant to the provisions of the relevant Article of the Constitution.
3. That in order to facilitate the Speaker and the House to comply with the obligation under paragraph 2, averments made in the Special Motions should be accompanied by the necessary evidence including annexures and sworn testimonies in respect of the allegation as may be necessary.
4. That Members wishing to bring a Special Motion within the confines of Articles 145, 150(2) and 152(6) of the Constitution should get drafting assistance from the office of the Clerk before embarking on the collection of signatures and before submitting to the Clerk a copy of the proposed Motion as contemplated in the Standing Orders.
5. That for purposes of certainty and good order in the conduct of the business of the House and notwithstanding the provisions of Standing Order 66(4), no withdrawal of signatures will in future be permitted where the Member has sought assistance from the Office of the Clerk as indicated above, prior to embarking on the collection of signatures.

6. That the Procedure and House Rules Committee re-looks at the Standing Orders with a view to incorporating the best practices on the issues raised in this Communication during the next review.

15. WITHDRAWAL OF PROPOSED AMENDMENTS TO STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL (WEDNESDAY, 28TH OCTOBER 2015)

Hon. Members, I have the following two Communications to make. The first Communication regards the withdrawal of proposed amendments to the Statute Law (Miscellaneous Amendments) Bill, National Assembly Bill No. 57 of 2015.

Before proceeding to business under Order No. 12 on today's Order Paper, I wish to bring to the attention of the House that I have received a letter from the Leader of the Majority Party, dated 27th October 2015, requesting the withdrawal of several proposed amendments to the Statute Law (Miscellaneous Amendments) Bill, National Assembly Bill No. 57 of 2015. In the letter, the Leader of the Majority Party requests to withdraw proposed amendments to the Independent Policing Oversight Authority Act, 2011 and part of the proposed amendments to the Universities Act, 2012.

As regards the Independent Policing Oversight Authority Act, 2011, the letter notes:-

> *"The proposed amendments, though not unconstitutional, significantly erode the independence of the Authority without which the Authority would find it difficult to perform its functions free from Executive interference. In this regard, those changes ought to be addressed in a substantive amendment Bill to the Independent Policing Oversight Authority Act and not as a miscellaneous amendment. It is my observation that the amendments to the Independent Policing Oversight Authority Act, 2011 should be introduced substantively on their own not through a miscellaneous amendment law."*

Regarding the Universities Act, 2012, the Leader of the Majority Party proposes to withdraw all amendments to the Act except those related to Sections 22 and 39. It is noted that:-

> *"The Bill proposes to amend Sections 2, 5, 20, 35, 39 and 51(a) of the Act. My office has received a draft proposal for publication of a separate Bill to amend the same sections except for Section 39. The proposed Bill is quite comprehensive and includes other proposed amendments to the Universities Act, 2012. In this regard, I wish to drop all proposed amendments to the Act, save for the amendments to Sections 22 and 39 in favour of the proposed new Bill."*

It is worth mentioning that this is not the first time that a request of this nature has been made during the consideration of a Bill of this kind. Having considered the request, I am persuaded that there is merit in the withdrawal and I have consequently acceded to the request. The effect of this is that the proposed amendments to the

specific sections of the two Acts will not be considered in the Second Reading, Committee Stage and the Third Reading of the Bill. For that reason, the Bill will be dealt with as though the said sections were not part of the Bill.
I thank you

16. MODALITIES OF ENGAGING THE CHIEF JUSTICE IN THE NATIONAL ASSEMBLY AND ITS COMMITTEES (Thursday, 19th November, 2015)

Hon. Members, this Communication relates to modalities of engaging the Chief Justice of the Republic of Kenya in the National Assembly and its Committees.

Hon. Members, You will recall that on Thursday, 12th November 2015, at the commencement of consideration of the Motion to adopt the Report of the Public Accounts Committee on the Special Audit Report of the Judicial Service Commission (JSC) and the Judiciary of May 2014, the Leader of Majority Party rose on a point of order and drew the attention of the House to contents of a letter from the Chief Justice dated 27th October 2015.

The said letter, which was addressed to the Speaker, was copied to the Leader of the Majority Party, the Leader of the Minority Party, the Chairperson of the Public Accounts Committee (PAC), the Chairperson of the Departmental Committee on Justice and Legal Affairs, the Chairperson of the Budget and Appropriations Committee and the Clerk of the National Assembly, among other persons. Other Members, including the Chairperson of PAC, the Hon. Nicholas Gumbo, the Hon. John Mbadi, the Hon. Olago Aluoch, the Hon. Priscilla Nyokabi, the Hon. Peter Kaluma, the Hon. Dalmas Otieno and the Hon. David Ochieng, among others, also contributed and offered their views on the matter.

Hon. Members, from the issues raised by Members and the contents of the letter, I have deduced the following issues are requiring of my determination:-

1. Whether a Committee of this House or, indeed, the House, can require the attendance, in person, of the holder of the office of the Chairperson of the Judicial Service Commission, (JSC) and, if so, what capacity does that portend to his other offices that he holds?

2. Whether PAC can re-open the Report on the JSC and the Judiciary that has already been tabled in the House as requested by the Chief Justice of the Republic of Kenya in his letter of October 27, 2015, given the additional information now available; and,

3. Whether the two arms of Government, that is, the Judiciary and Parliament, should develop a more structured way through which to engage in matters of accountability.

Hon. Members, on the first issue of whether the Chairperson of JSC is expected to appear before a Select Committee of the House when required to do so, it is imperative to first be conscious of the other constitutional offices represented by the holder of that office. The Chief Justice (CJ) of the Republic of Kenya holds three key offices. He is the Head of the Judiciary as provided for in Article 161(2)(a) of the Constitution, the President of the Supreme Court of Kenya as provided for in Article 163(1)(a) and that he is also the Chairperson of JSC as provided for in Article 171(2)(a).

Indeed, there are various jurisdictions that operate under a similar model to the one we have in our country. For example, in addition to heading both the Judiciary and the highest Courts, the CJ also chairs the equivalent of a Judicial Service Commission in the Philippines, Nigeria, Pakistan, South Africa, Malaysia, Ghana and Sri Lanka. In the United States of America and India, the CJ is also in charge of administration and supervisory responsibilities of the Judiciary.

In jurisdictions such as Australia, Japan, New Zealand, the United Kingdom and Canada, administrative and managerial functions are not within the purview of the CJ. For instance, whereas the Lord Chief Justice of England and Wales is the Head of the Judiciary and President of the Courts of England and Wales, he is not in charge of administrative and supervisory matters, which are undertaken by the Judicial Appointments Commission. On his part, the CJ of Canada chairs the Canadian Judicial Council but has no role in routine administration of the Judiciary, as this is a task vested on the Commissioner for Federal Judicial Affairs who reports directly to the Minister of Justice.

Hon. Members, this particular issue would have been a lot easier to address if we were operating in a system similar to the United Kingdom or Canada, where the CJ does not also oversee the administration of the Judiciary. However, that is not the case. Different jurisdictions have diverse ways of engaging the CJ, particularly in cases where he or she heads the body responsible for recommending persons for appointment as judges, reviewing conditions of service for judges and judicial officers, among other administrative functions. For example, Section 5 of the United Kingdom's Constitutional Reform Act of 2005 provides that, and I quote:-

> *"The Chief Justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom."*

Arising from this, the Lord President of the Court of Session, who is the equivalent of the CJ in Scotland, laid before the United Kingdom Parliament in January 2012 written representations regarding the Scotland Bill 2012. Likewise, the Lord Chief Justice of England and Wales appears annually before the Committee of the House of Commons to give evidence on issues of constitutional importance and on a regular basis before the Justice Committee of the House of Commons. As a matter of fact, on Tuesday 26th October, 2010, the Rt. Hon. Lord Judge, Chief Justice of England and Wales and Rt. Hon. Lord Justice Goldring, Senior Presiding Judge of England and Wales, appeared as

witnesses before the British House of Commons Justice Committee on their administrative, disciplinary and budgeting responsibilities in the Judiciary.

Hon. Members, in determining whether or not the CJ of the Republic of Kenya should appear before a Select Committee of the National Assembly when required to do so, I wish to refer the House to Article 125 of the Constitution on Powers to Call for Evidence, which states, and I quote:-

> *"(1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.*
>
> *(2) For the purposes of Clause (1), a House of Parliament and any of its committees have the same powers as the High Court—*
>
> *(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;*
> *(b) to compel the production of documents; and,*
> *(c) to issue a commission or request to examine witnesses abroad."*

In addition, Section 14 of the National Assembly (Powers and Privileges) Act, Cap. 6, on power to order attendance of witnesses provide, and I quote:-

> *" (1) The Assembly or any standing committee thereof may, subject to the provisions of Sections 18 and 20, order any person to attend before it and to give evidence or to produce any paper, book, record or document in the possession or under the control of that person."*

Hon. Members, from the foregoing, it is clear that any witness invited by or summoned to the National Assembly or its Committees is obliged and expected to attend and appear before the Assembly or its Committees without fail. The Constitution is explicit on this.

The JSC, just like any other Commission, as provided for in Article 248(2) of the Constitution of Kenya, remains accountable to the accountability institutions as set out in the Constitution and other legislation, including and not limited to the National Assembly.

It is for that reason that the Judicial Service Commission's accounts are always audited by the Auditor-General, whose reports are then forwarded to the National Assembly for consideration. One of the key roles of the National Assembly, as stated in Article 95 (4)(c) and 5(b) of the Constitution, is to exercise oversight over national revenue and its expenditure, and oversight of state organs.

According to *Mason's Manual of Legislative Procedure, 2010 Edition*, under the Chapter on Investigations by Legislative bodies, sub-section 6 says that the Legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought and an ulterior purpose in the investigation or an improper use of the information cannot be imputed. The manual further states, in sub-section 10:-

> *"An investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature."*

In our case, expenditure is reviewed through the Public Accounts Committee (PAC) and the Public Investments Committee (PIC), whereas operational matters are reviewed through Departmental Committees. While it is important to recognize the position of the Chief Justice as the Head of Judiciary, it is imperative too to note that the bearer of the Office of Chairperson of the Judicial Service Commission (JSC) is expected to appear before this House or its Committees, when he or she is invited to do so.

Pursuant to Article 226 (3) of the Constitution, the accounts of all Government and State organs are audited by the Auditor-General. Once laid in the House, PAC calls the Accounting Officers to respond to audit queries as contained therein. The law has clearly prescribed who the accounting officers are for State organs. If, however, in the course of investigation, evidence is adduced to the fact that certain holders of public offices have either directed, approved or acted in a manner contrary to law or lawful instructions, then such public officers shall be personally liable for such actions and investigative Committees will have power to summon and examine such persons without let. This is a power that is inherent and reposed in the Legislature and exists as an indispensable incident as stipulated in Article 125 of the Constitution. It is upon state organs, particularly the Commissions, to clearly draw a line between what is policy and day-to-day administrative matters. It would help if they largely restrain themselves to policy direction and leave execution of those policies to the relevant bodies and/or officers working in those State organs.

Hon. Members, on the second issue of determination on whether PAC can re-open the Report on the Judicial Service Commission and the Judiciary as requested by the Chief Justice, it is prudent to consider the submissions by the Chairperson and Members of the said Committee that they tried in vain to have the Chairperson of the Judicial Service Commission meet the Committee. In addition, the Committee has submitted that the Chairperson of JSC was given ample time within which to present additional supporting documents on the matters that were under inquiry. Moreover, the

additional information by the Chairperson of the JSC was submitted on 27th October 2015, 16 weeks after the Report was laid in the House by the Committee. You all know too well that the laying of a Committee Report in the House signifies the conclusion of the work of the Committee in the particular task. The remainder is for the House to debate the Report and make what it may make of it.

Hon. Members, on the notion that contents of the said Report have been overtaken by events, it is critical to note that in the typical production of reports of an audit nature, there is always the possibility that the situation would have changed by the time the report is concluded. You know too well that this happens severally in reports of PIC and PAC and less frequently in cases of inquiries that are carried out by Departmental Committees. Changes in circumstances or situations do not necessarily invalidate the findings of a Committee. It is also possible that such changes may have been attributed to the commencement of the parliamentary investigations themselves. How many times have persons been asked to temporarily vacate offices, dismissed from office or even arraigned in court in the middle of parliamentary investigations or after the report is laid in the House? As a matter of fact, new information coming after the Report has been laid is useful in two ways:-

1. it may present an opportunity to the Committee or, indeed, any Member in possession of the information, to move to the House to amend the Report to reflect the new or additional information; and,

2. such additional information may assist the particular Committee and the Committee on Implementation to report the present position of the matter in question at a later time.

Coincidentally, PAC and PIC are also expected to follow up on the implementation progress of their reports by way of the Annual Treasury Memorandum on the Implementation Status of the Committee's Recommendations as adopted by the House. This ensures that the audit reservations do not keep recurring. Should the matters recur in the subsequent audit report of the Auditor-General, this also presents another opportunity for the Committee to address the matter in its current status, including any additional information that may have been submitted after the initial Report was tabled.

Hon. Members, this leads me to the third and final issue for determination concerning modalities of engaging the Chief Justice in his various capacities. Members who have served in this August House for at least two terms may recall an arrangement utilized by the two watchdog committees, namely PAC and PIC; in resolving various audit issues a few years ago. At the end of every year, the two Committees would, after

taking evidence, but before compilation of reports, pick out the salient policy issues that were recurring in audit reports and separately discuss them with key State and public officers in a sitting referred to as the "Meeting of the Big Five". The "Big Five" in this case included the then Controller and Auditor General, the Attorney General, the Head of Public Service, the Permanent Secretary in charge of the Treasury and the Directorate of Personnel Management. The meeting would avail opportunity for discussion, at policy level, of recurring audit concerns, with the objective of ensuring that such matters were comprehensively addressed and policy framework for mitigation and deterrent measures would also be explored.

Hon. Members, in light of Standing Order 1(2), which provided that in matters not provided for, the Speaker shall largely rely on forms, precedents, customs, procedures and traditions of this House, I wish to borrow a leaf from this old parliamentary practice and from the wise counsel proffered by the Member for Rongo Constituency, Hon. Dalmas Otieno. In this regard, the two watchdog Committees, namely PAC and PIC; should consider setting up meetings of what would now be referred to as the "Big Six" to handle matters of policy nature at the end of their annual audit inquiries. The Membership of the "Big Six" should ideally be composed of the Chief Justice in his capacity as the Chief Justice and Head of the Judiciary, the Auditor-General, the Attorney-General, and the Cabinet Secretary for National Treasury, the Controller of Budget and the Chairperson of the Budget and Appropriations Committee. The Speaker of the National Assembly as the Chairperson of the Parliamentary Service Commission may be in attendance. Such a meeting will be chaired by the Chairperson of PAC or Chairperson of PIC as the case may be, and should address, at policy level, ways of dealing with recurring audit queries and cross-cutting issues in the three arms of the Government.

Further, in the event that the Chief Justice appears before a Committee of this House in his capacity as the Chief Justice, the respective Chairperson will chair such meeting as is the practice in the House of Commons. Only in very exceptional circumstances would the Speaker, who is also the Chair of all Committees of the House, chair such a meeting.

Hon. Members, in conclusion, I wish to state as follows:-

One, that any witness invited by or summoned to the National Assembly or its Committees is obliged to appear before the Assembly or its Committees without fail. This includes the Chairperson of the Judicial Service Commission (JSC) or the holder of that office in that capacity or personal capacity. Should the Chief Justice (CJ) be required to appear before a Committee of this House in his capacity as the CJ, the respective Chairperson will chair such a meeting.

Two, that the Report of the Public Accounts Committee (PAC) on the Special Audit Report of the JSC and the Judiciary of May, 2014, slated for debate in the House, will not be re-opened for re-consideration by the Committee.

However, in light of any additional information, the Committee or, indeed, any Member is at liberty to propose any amendment(s) in accordance with Standing Order No.54 after the Question of the Motion has been proposed.

Three, that in keeping with our parliamentary practice, should the particular audit reservations or queries recur in subsequent audit reports of the Auditor-General on JSC, PAC is obliged to take into account any new information, when making its subsequent report to the House.

Finally, that PAC and PIC should consider setting up meetings of the "Big Six" as proposed to handle matters of a policy nature at the end of their annual audit inquiries, with a view to considering policy measures aimed at addressing the salient cross-cutting audit reservations and matters that require policy direction in the three arms of Government.

The House is accordingly informed.

FOURTH SESSION (2016)

Speakers' Considered Rulings and Guidelines (2016)

1. Reconstitution of the Public Accounts Committee (PAC) (February 9, 2016)
2. In Camera debate on the attack on El Adde KDF Camp (Wednesday, 10th February 2016)
3. Constitutionality and Money Bill implications of the Military Veterans Bill (Wednesday, 17th February 2016)
4. Admissibility of amendments to the Report of the Departmental Committee on Agriculture regarding the crisis facing the sugar industry in Kenya (Thursday, 18th February 2016)
5. Disorderly Conduct (Tuesday, 15th March 2016)
6. Procedure for processing amendments to Bills at Committee Stage (Tuesday, 22nd March 2016)
7. Procedure for consideration of Annual Reports submitted to Parliament by Constitutional Commissions and Independent Offices (Tuesday, 29th March 2016)
8. Discharge of a Member from a House Committee (Thursday, 14th April 2016)
9. Examination of Audited Reports of Political Parties (Wednesday, 4th May 2016)
10. Discharge of Members of the Justice and Legal Affairs Committee by the Coalition For Reforms and Democracy (CORD) (Thursday, 16th June 2016)
11. Second Basis for Equitable Sharing of National Revenue Allocated to Counties deemed approved by the National Assembly after expiry of 60 Days without action (Wednesday, 22nd June 2016)
12. Timelines in filling vacancies in select committees (Wednesday, 29th June 2016)

13. Referral of a Court Order to the Committee of Privileges (Wednesday, 6th July 2016)

14. Guidance on presentation and reporting of Public Petitions in the House (Thursday, 28th July 2016)

15. Consideration of Statutory Instruments (Tuesday, 2nd August 2016)

16. Amendment of Special Motion on the IEBC (Thursday, 25th August 2016)

17. Implementation of NTSA (Operation of Motor Cycles) Regulations, 2015 (Thursday, 1st September 2016)

18. Consideration of the Election Laws (Amendment) Bill, 2016 (Thursday, 1st September 2016)

19. Amendments with money Bill effect must conform to the requirements of Article 114 (Wednesday, 12th October 2016)

20. Subjudice: In the matter of alleged violation of Labour Laws and Tax Evasion by BIDCO Africa Limited (Thursday, 27th October 2016)

21. Withdrawal of the Statute Law (Miscellaneous Amendments) (No. 2) Bill (Tuesday, 22nd November 2016)

22. Application of Standing Order 176 on discharge by parliamentary parties of their Members from Committees (Wednesday, 30th November 2016)

23. Participation of aspirants of elective positions in Harambees (Thursday, 1st December 2016)

24. Procedure of recommitting Clauses of a Bill (Thursday, December 22, 2016)

1. RECONSTITUTION OF THE PUBLIC ACCOUNTS COMMITTEE

February 9, 2016

Hon. Members, I earlier indicated that I have a communication to make, being the first Communication of 2016. This is with regard to the reconstitution of the Public Accounts Committee.

Hon. Members, today's sitting marks the beginning of the Fourth Session of the 11th Parliament. I therefore take this opportunity to welcome you all back to the National Assembly.

On 17th December 2015, I issued a communication wherein*, inter alia*, I encouraged the Budget and Appropriations Committee, the PAC and the PIC to conclude any pending matters as their terms would come to an end upon commencement of the Fourth Session, in accordance with the Standing Orders.

In reaction to this, the Chairperson of PAC, in a letter dated 17th December 2015 addressed to the Speaker of the National Assembly, expressed the view that the current PAC ought to serve for the remainder of the parliamentary term as it meets the provisions of Standing Order No. 205(6). This is on the rationale that the current PAC was reconstituted following the disbandment of the Committee earlier established in 2013 under Standing Order No.205.

Hon. Members, Standing Order No. 205(6) states as follows:-

> *"The Public Accounts Committee constituted immediately following the general election shall serve for a period of three calendar years and that constituted thereafter shall serve for the remainder of the parliamentary term"*

The first PAC in the 11th Parliament was constituted on 16th May 2013. However, following allegations of breach of privilege and/or code of conduct by its membership, the Committee of Privileges, in its Second Report, recommended that the House resolves to rescind its resolution of 16th May 2013, and that the Committee on Selection proposes another list of membership for the PAC. Consequently, following the adoption of the Second Report of the Committee of Privileges in April 2015, the PAC was reconstituted.

Key among the recommendations of the Report was the exclusion of five Members of the former committee from nomination to the PAC, being in R321 but only for the period of the Third Session (R322). This was perhaps meant to cater for instances

where a reconstitution may be occasioned by other conditions including resignation of Members from a committee or upon discharge of a Member(s) from a committee under Standing Order No.176.

Hon. Members, the Motion for the reconstitution of the Committee was passed on 22nd April 2015. Effectively, therefore, the inaugural PAC served between 16th May 2013 and April 2015, while the succeeding Committee began its period of service on 22nd April 2015.

Standing Order No.205 contemplates a term of Parliament to be served broadly by two successive committees, each not going beyond a period of three years. The current Committee has, to date, only served a period of less than one year.

Indeed, a Committee of the House only exists and has powers to act as far as expressly directed by the House which brings it into being. While not negating the provisions of Standing Order No. 205 and the power of the House to appoint Members to committees, a unique situation may arise where for the convenience of the House and smooth operations, a request from a committee should be considered as is the case here, where the PAC, as appointed by the House on 22nd April 2015 is asking to serve the remainder of the parliamentary term as envisaged in the Standing Orders.

Consequently, I have considered this matter and I am of the view that

1) The Committee that was appointed by the House on 22nd April 2015 meets all the requirements for appointment of Members to the Committee and, therefore, satisfies the provisions of Standing Order No. 205(6) and need not be reconstituted;
2) It is observed that any disruption of the operations of the Committee as currently constituted may adversely affect its work noting that it is less than one year since the Committee was reconstituted and the Committee has enormous workload to dispose of some of which have a direct implication on the budgetary process and operations of the devolved governments, and;
3) The Committee on Selection is hereby directed to expedite the nomination of Members to the Budget and Appropriations Committee and PIC, the Committee of Privileges and the Committee on Appointment for approval by the House.

2. IN CAMERA DEBATE ON THE ATTACK ON EL ADDE KDF CAMP

Wednesday, 10th February 2016

Honourable Members, Hon. Rasso had written to the Speaker in good time requesting that the House debates the matter of the attack on the KDF camp in El-Adde, Somalia. His request complies with all the requirements of Standing Order No. 33(1). He also has the requisite numbers. Looking at Standing Order No. 252(2), as well as Article 118(2) of our Constitution, I have weighed the matters likely to be raised in this Motion for Adjournment.

I find these exceptional circumstances that may require that the House debates this matter in-camera. While allocating time, whoever will be in the Chair, will be required to ensure that the galleries are cleared of people so that the House can debate this matter from 5.00 p.m. for one-and–half hours.

[The House sat in Camera from 5.00pm to 6.30pm]

3. CONSTITUTIONALITY AND MONEY BILL IMPLICATIONS OF THE MILITARY VETERANS BILL

Wednesday, 17th February 2016

Honourable Members, you will recall that the Military Veterans Bill, National Assembly Bill No. 34 of 2013 sponsored by the Member for Eldas Constituency, Hon. Adan Keynan, was introduced in the House on 14th November 2013.

The Bill seeks to provide for the welfare and benefits of military veterans and their dependants and also to establish the department of military veterans and an advisory council in the Executive. You may also recall that the House considered and passed the Bill at the Second Reading on 4th December 2014. The Bill is now, therefore, due for consideration in the Committee of the whole House.

Honourable Members, the foregoing notwithstanding, my attention has been drawn to letters from the Cabinet Secretary for Defence and the Chairperson of the Departmental Committee on Defence and Foreign Relations dated 20th January 2016 and 11th March 2014, respectively, questioning the constitutionality of the Bill. Their contention is that the said Bill is a money Bill in terms of Article 114 of the Constitution in so far as it is proposes to establish a Government department headed by a Director-General, an advisory council and a military veterans appeals board. They further contend that the establishment, administration and operations of those bodies will inevitably occasion imposition of charges on a public fund and may offend the provisions of Article 132(4)(a) of the Constitution regarding the establishment of departments in the Executive.

It is my considered view that the issues raised in this respect are, indeed, very fundamental and will determine how this House will proceed with the said Bill.

Standing Order No. 114(3)(a) states:-

> *"Where the Speaker is of the opinion that a legislative proposal is a draft money Bill in terms of Article 114 of the Constitution, he may direct that the legislative proposal be referred to the Budget and Appropriations Committee and shall be proceeded with only in accordance with the recommendations of the Budget and Appropriations Committee after taking into account the views of the Cabinet Secretary responsible for finance and examining the manner in which the legislative proposal affects the current and future budgets"*

In this regard, I approved the publication of the said Bill on 28th October 2013, having been guided by the recommendation of the Departmental Committee on Defence and Foreign Relations vide letter dated 29th August 2013, which indicated that the Committee had no objection for its publication and on the strength that the Budget and Appropriations Committee's recommendation that the Bill be renamed the "Veterans Societies Bill", would not accord with the substance of the Bill.

Honourable Members, upon publication of the Bill, constitutional objections have since been made as aforementioned not only by the relevant Committee, but also by the office which is being obliged to implement the Bill upon passage into law. It is now apparent that the recommendations of the Budget and Appropriations Committee may not have been fully incorporated prior to publishing of the said Bill. The Budget and Appropriations Committee had stated in their Report that:-

> *"The Committee noted that the Bill has expenditures that shall be borne by the Exchequer and the spiral effect it might have on the economy and the retirement benefits of other retired public servants. The Committee recommended the following:-*
>
> i. *The draft Bill should be renamed the "Veterans Societies Bill".*
> ii. *The sponsor of the Bill should study existing policies regarding pensions and see how the Bill can be improved to be in tandem with such other policies.*
> iii. *The proposal incorporating the above amendments can proceed as drafted."*

The Bill, having been published in the format that had been presented to the two Committees and taking into consideration the comments of the Budget and Appropriations Committee vide their letter of 22nd October 2013, it follows that the provisions of Article 114 of the Constitution must apply.

It is worth noting that the question of constitutionality of a Bill can be entertained at any stage before the passage of a Bill. In this regard, I hereby defer any further proceedings on the said Bill in the House until the Budget and Appropriations Committee addresses itself on the money status of the Bill and makes its recommendation known to the House in accordance with the provisions of Article 114 of the Constitution.

In addition, the Departmental Committee on Defence and Foreign Relations is at liberty, in carrying out its business, to consider the other issues of constitutionality in the Bill, while taking into account the matters raised in the letter from the Cabinet Secretary for Defence. More particularly, the Departmental Committee is to consider

the facts of the establishment of Government departments by the legislature as opposed to the constitutional provision that is a function of the Executive.

In the consideration of the Bill, the Budget and Appropriations Committee should invite the Cabinet Secretary for the National Treasury in accordance with Article 114 of the Constitution, while the Departmental Committee on Defence and Foreign Relations will also be required, among other things, to invite the Cabinet Secretary for Defence and the Office of the Attorney-General to shed light on other issues of constitutionality surrounding this Bill. Thereafter, I will guide the House on how to proceed with the consideration of the said Bill in its next stage, while taking into account the recommendations of the two Committees. I thank you.

4. ADMISSIBILITY OF AMENDMENTS TO THE REPORT OF THE DEPARTMENTAL COMMITTEE ON AGRICULTURE REGARDING THE CRISIS FACING THE SUGAR INDUSTRY IN KENYA

Thursday, 18th February 2016

Honourable Members, before proceeding to the Motion listed as Order No.10, I wish to make this Communication, as I promised yesterday. The Communication relates to the admissibility of proposed amendments by Hon. Benjamin Washiali on the Report of the Crisis Facing the Sugar Industry in Kenya and admissibility of Papers laid on the Table of the House by Hon. Jakoyo Midiwo.

Honourable Members, as you would recall, debate on the Motion for adoption of the Report of the Crisis Facing the Sugar industry in Kenya commenced on Tuesday, 16th February 2016, but was not concluded by the time the House rose at 6.30 pm on that day. Upon resumption of debate during the afternoon sitting of yesterday, 17th February 2016, the Member for Mumias East, Hon. Benjamin Washiali, moved several amendments to the Report whose notice had been published in the Order Paper.

The import of his amendments, which are also published in today's Supplementary Order Paper on pages 37 and 38, is threefold. Firstly, Hon. Members, the Member for Mumias East successfully moved the House to delete Paragraph 101 of the Report, which he justifiably claimed was inadvertently restated in the Report. It was repeating what is contained in Paragraph 92. That particular amendment was carried by the House.

Secondly, the Member also moved the House to make two observations, by way of new Paragraphs 101(A) and 101(B). In moving this second amendment, I allowed the

Member to also move the third part of his proposal, which was to amend the Report by inserting three new recommendations which he rightfully claimed were corroborated by the proposed observations and were, therefore, inseparable.

Honourable Members, the Member for Mumias East concluded moving these two amendments and requested the Member for Mukurweini, the Hon. Kabando wa Kabando, to second his proposal. It was at this juncture that the Deputy Leader of the Minority Party, Hon. Jakoyo Midiwo, rose on a point of order claiming that the proposed amendments would offend the provisions of Standing Order No.48 relating to Amendment of Notice of Motion. You will recall that several other Members rose and spoke on that particular point of order. Further, the Deputy Leader of the Minority Party claimed that the Member for Mumias East has been doing business with Mumias Sugar Company Limited and as such, he ought to have declared his interest before moving the amendment To substantiate his claim, the Deputy Leader of the Minority Party had several papers, whose admissibility I was later asked to determine. Further and most importantly, the Member for Kisumu West, the Hon. John Olago Aluoch, also claimed that the proposed amendments would offend the provisions of Standing Order No. 56 relating to scope and relevance of amendments to a Motion. Related to this was the procedural question of the admissibility of the amendments, particularly to the extent that the House was being asked to make certain observations whose evidence was not adduced by anyone at the time of taking evidence before the Departmental Committee on Agriculture, Livestock and Cooperatives or, indeed, in the House.

In this regard, the Member sought clarification from the Hon. Speaker on whether the Member for Mumias East was in order to move his amendments and yet, he was a member of the Departmental Committee on Agriculture, Livestock and Cooperatives and, therefore, had the opportunity to dissent on record during the adoption of the Report by the Committee, or seek a minority report in accordance with the provisions of Standing Order No. 199(5).

It is indeed evident that the debate on the adoption of this particular Report is one that has elicited unique arguments which raises several key issues that the Speaker needs to make a determination on before the debate on the Report resumes. You will recall that before I deferred the debate yesterday evening, I dismissed the claim by the Deputy Leader of the Majority Party challenging the amendments on the basis of Standing Order No.48. As a matter of fact, I did say that the provisions of that Standing Order would have been applicable to the Chairperson of the Departmental Committee on Agriculture, Livestock and Cooperatives, had he chosen to move those amendments at the time he was moving the Motion for the adoption of the Report.

Having said that, the issues that now remain for my determination as deduced from yesterday's debate are as follows:-

i. Should the Speaker admit the Papers laid by the Deputy Leader of the Minority Party claiming to link the Member for Mumias East with contracts at the Mumias Sugar Company? Would they be relevant to the Motion under debate so as to obligate the Member for Mumias East to declare his interest in the Motion in keeping with the provisions of Standing Order No.90?
ii. In light of the provisions of Standing Order No.56 and to the extent that the amendments proposed by the Member for Mumias East contain a proposal asking the House to make certain observations whose evidence was not adduced in the House or before the Committee as expressly claimed by the Chairman of the Committee, should the Speaker admit the amendments on the observations and the consequent three recommendations which flow from those observations which the Mover claimed to be inseparable?

Honourable Members, permit me now to examine each of the issues raised.

Firstly, I will answer the question on whether the Papers tabled by the Deputy Leader of the Minority Party allegedly linking Hon. Benjamin Washiali with Mumias Sugar Company are admissible.

The Papers as tabled before the House consist of copies of deposit vouchers from various banks for varying dates and amounts between the years 2011 and 2012. However, I must say, Hon. Members, after carefully scrutinizing these documents, I am unable to confirm the authenticity and genuineness of the said vouchers. As such, the vouchers as presented are in my opinion inadmissible as records of this House and I accordingly so rule.

Further, the Papers also consist copies of correspondences dated 2011, 2012 and 2013 on the letterhead of Mumias Sugar Company Limited and are addressed to M/s Warm and Barn Hill Company Limited of P.O Box 384-50102, Mumias. The correspondences seem to be award letters of contracts for grading and spot gravelling of several roads. The letters appear to bear signatures of officials of Mumias Sugar Company Limited. My decision is based on the rendition of a precedent set by my predecessor the Hon. Kenneth Marende, on September 10th, 2009, on documents tabled by then Minister for Justice, National Cohesion and Constitutional Affairs where he indicated that presence of a letterhead and signatures on a copy of a document of this nature may suffice for the purposes of admitting the document as part of the records of the House.

In this regard, copies of letters bearing the letterhead of Mumias Sugar Company Limited are inadmissible as records of this House. Hon. Members, having made that determination, the next question is whether the Papers are relevant for purposes of establishing in terms of Standing Order No. 90, whether the Hon. Member for Mumias East ought to declare personal interest on matters concerning the Report. The relevant question is one that calls into question the issue of whether the correspondence relates to the Hon. Member or whether a link either directly or indirectly exists that can be proven between the Hon. Member and the issue at hand - in this case the Motion before the House on the adoption of the Report on the crisis facing the sugar industry.

Honourable Members, as you would recall, yesterday I inquired from Hon. Benjamin Washiali whether he knew Warm and Barn Hill Company Limited to which the letters have been addressed. The

Hon. Member is on record as having said that he did not know the company and had never heard of it. In view of the foregoing, the chain process is, indeed, rendered nugatory as there exists no correlation or link between the Member for Mumias East, Mumias Sugar Company and the Report before this House. To this effect, I am, therefore, of the view that in the absence of any other evidence to demonstrate the contrary, the Papers consisting the correspondences tabled before the House, though admissible as I had stated earlier, fail the relevancy test. However, it is important to note that the Member for Homa Bay Town, Hon. George Peter Kaluma, during yesterday's debate, undertook to confirm that Hon. Benjamin Washiali, indeed, does business with Mumias Sugar Company Limited.

Pursuant to Standing Order No. 91(2), if a Member has sufficient reason to convince the Speaker that the Member is unable to substantiate allegations instantly, the Speaker shall require that such Member substantiates the allegations not later than the next sitting day. In this regard, and in the absence of any evidence, as clearly seen from Standing Order 91(2), I have no option but rule that, at the moment, the allegations made against Hon. Benjamin Washiali are, at the moment, unsubstantiated. I will be allowing the Member for Homa Bay Town to substantiate his allegations at a later time in this sitting. However, I must hasten to remind Members to refrain from the temptation of drifting away from the Motion before the House, which is, the Adoption of the Report on the Crisis Facing the Sugar Industry in Kenya. In this regard, I will not entertain any attempts to use the privilege of this House to casually slander the Member for Mumias East or, indeed, any other Member of this House in the pretext of debating the particular Motion before us this afternoon, or any other business.

Honourable Members, allow me to now proceed and examine the last issue, which was whether the amendments proposed by Hon. Benjamin Washiali are indeed admissible, in light of Standing Order No. 56(1).

This particular, rule of procedure states that every amendment shall be relevant to the Motion which it seeks to amend and shall not raise any question which, in the opinion of the Speaker, should be raised by a substantive Motion after notice is given.

Honourable Members, having examined the Report, it is clear that the Member for Mumias East did not sign his consent for the adoption of the Report in the Committee. However, closer examination of the Report also indicates that there is no record of the hon. Member dissenting with the opinion for the adoption of the Report. As you are all aware, failure to sign a report cannot be interpreted to simply infer a protest or dissent. Indeed, failure to sign a report is an action that can be implied or explained by various lines of thoughts, including and not limited to the Member being absent during the adoption of the report or mere acts of inadvertent omissions, unwillingness or negligence.

Having said that, allow me to examine our Standing Orders in determining how dissent is recorded in reports.

Standing Order No. 199(5) on reports of the committees provide that a report, having been adopted by a majority of members, a minority or dissenting report may be appended to the report by any member of the committee. A close reading of this provision indicates that a Member seeking to dissent or protest adoption of a report needs to make clear dissenting views which should be on record in terms of a minority report being appended to the majority report.

Honourable Members, this is also the practice in comparable jurisdictions. Indeed, referring to Erskine May on Parliamentary Practice, 24th Edition, on the issue of minority reports, it reads:-

> *"If a member disagrees to certain paragraphs in the report, or to the entire report, he can record his dissent by dividing the committee against those paragraphs, or against the entire report as appropriate. Members can put on record their observations and conclusions, as opposed to those of the majority, by proposing an alternative draft or minority report---"*

Further, referring to Mason's Manual of Legislative Procedure, the minority members of a committee may collectively or individually present views with the committee report. A member of a committee who does not agree with the report may be permitted to state his views following the filing of the committee report.

Honourable Members, as seen from our Standing Orders and other comparable jurisdictions, it is, indeed, clear that a Member who does not agree with a report ought to have his or her dissenting views recorded and as provided for in our Standing Orders, the protest should be in form of a minority report. Hon. Benjamin Jomo Washiali, as a Member of the Committee, therefore, ought to have had his dissenting views recorded or a minority report appended to the majority Report which is before this House. Had the Member done this, he would have been at liberty to move the House to delete the majority report so that only his minority report or views would be adopted by the House in the end.

Honourable Members, further moving on to examine the amendments by the hon. Member, what in short he is requesting this House to do is to make observations and recommendations which fundamentally alter the observations and recommendations as presented in the Report that is before this House by the Committee. It is clear from the Report and the remarks of the Committee Chairperson yesterday that no evidence was adduced in the Committee to allege the observations which the Member for Mumias East is now asking the House to make, consider and vote on. This begs the question: On what basis would the House be considering or even confirming those observations and proceed to make recommendations? On the converse, would it not have been prudent for the Committee to apply the provisions of Article 125 to require the attendance of persons before it so as to examine any evidence to support or discharge the claims which are now being offered by the Member for Mumias East? It is my view that allowing the House to involve itself in merely confirming observations that contain fundamental claims that fail the test of examination for validity and authenticity, would be a clear disregard of the very import and the power given to the Committees of this House and the House in Article 125 of the Constitution, to call witnesses before it. Under the provisions of Article 125, the House and its Committees have quasi-judicial authority to exhaustively examine witnesses as the Member would want.

In this regard, therefore, I am of the opinion that such amendments ought to have been raised as a substantive Motion for quasi-judicial examination before the Committee, or carried in a minority report to the House. Since the Member also claimed that the amendments relating to his proposed observations are inseparable from the proposed recommendations, both of which the House has not had the benefit of any report, I find that both the purported observations and the consequent proposed recommendations are inadmissible.

In summary, I hereby make the following determinations:-

1. THAT, the copies of bank deposit slips and vouchers laid before the House yesterday by the Deputy Leader of the Minority Party are not admitted as records of this House.
2. THAT, the copies of the correspondences laid before the House yesterday by the Deputy Leader of the Minority Party, while admitted as records of this House, are not relevant to the Motion as they do not disclose any conflict of interest on the part of the Member for Mumias East.
3. THAT, in light of the finding in (2) above, I do not see anything obligating the Member for Mumias East to declare his interest on the Motion before the House under Standing Order No. 90.
4. THAT, the inseparable amendments proposed by the Member for Mumias East relating to the observations and the recommendations are inadmissible as they offend the provisions of Standing Order No. 56(1), and will not be entered upon by this House.

Be guided accordingly.

I thank you.

5. DISORDERLY CONDUCT OF MEMBERS

Tuesday, 15th March 2016

Honourable Members, you will recall that on Tuesday, 1st March, 2016, the Member for Cherangany, Hon. Wesley Korir stood on a point of order during consideration of the Motion resolving to hold sittings on Thursday mornings for purposes of considering Bills that have constitutional timelines. In his discourse, the Hon. Member informed the House on the urgency of the anti-doping legislation which as per international accords with the World Anti-Doping Agency (WADA) ought to be passed by 5th April 2016. On this account, I directed the Hon. Member to move with speed to have his legislative proposal prioritised. You will likewise recall that on Tuesday, 8th March 2016, Hon. Korir brought up the matter once more, this time bemoaning lack of quorum in three sittings of the Departmental Committee on Labour and Social Welfare that were ostensibly meant to deliberate on his legislative proposal on the anti-doping law. Upon the revelation of this matter, I directed the said Committee to meet on Thursday, 10th March, 2016 to consider this crucial legislative proposal for the sake of our Kenyan athletes who continue to bring great glory, honour and recognition to this county.

Honourable Members, during the Sitting of Wednesday, 9th March 2016, the Vice-Chairperson of the Departmental Committee on Labour and Social Welfare, Hon. Tiyah Galgalo, tabled a report on the status of the anti-doping legislative proposal, in which she highlighted the progress the Committee had made on the matter. Hon. Galgalo cited the appearance of the Cabinet Secretary for Labour, Social Security and Services, and quorum as the challenges encountered in the abortive meetings of 1st and 3rd March, 2016. She further informed the House that the sponsor of the said draft law, Hon. Korir, had actually failed to turn up in the scheduled meetings of 3rd and 8th March, 2016. Concerning this latter statement, Hon. Korir maintained that he had not only appeared at the said meetings but alleged that he had seen fellow Members of the Committee appearing at the venues for the sole purpose of signing the attendance register after which they immediately left. He claimed:

> *"People came, signed and went away; then I am told that I have not been appearing before the Committee. That is a lie. The Vice-Chair must substantiate and say whether I have not been appearing because people come in, sign and go."*

Honourable Members, you will additionally recall that on account of the divergent views canvased by the Vice-Chairperson of the Committee and the sponsor of the legislative proposal on anti-doping law, I instructed the Director of Committee

Services to provide me with a report of the work and activities undertaken by the Departmental Committee on Labour and Social Welfare. I have since received the report which, among other things, highlights the Committee's activities and the progress made on Hon. Korir's legislative proposal. As to the allegations made by Hon. Korir, the report states that the Hon. Member did not turn up at the appointed time for the scheduled meetings of 3rd and 8th March 2016.

Indeed, the report from the Director of Committees goes on to affirm that apart from the quorum factor, Hon. Korir's failure to turn up at the appointed time was the key reason that the two meetings were adjourned. The report further clarifies that no Member signed any attendance register since the two meetings had adjourned due to lack of quorum pursuant to Standing Order No.185, which states:-

> *"Unless quorum is achieved within thirty minutes of the appointed time, a meeting of a committee of the House shall stand adjourned to such further time or day as the chairperson of the committee may appoint."*

Honourable Members, you may, with understandable regret, recall the unfortunate incidents last year in which Members of two Committees openly accused their colleagues of various forms of impropriety which they sadly could not substantiate. As you are aware, some were reprimanded by this noble House in line with the recommendations of the Committee of Privileges.

I shall not bear any assumed culture of making unsubstantiated insinuations and more so when the allegations are made by a Member against other Members of this august House. Indeed, you will recall that before Hon. Korir made his allegations on the Floor on the afternoon of Wednesday, 9th March 2016, I advised him against making unsubstantiated claims contrary to Standing Order No.91 and the attendant consequences of Standing Order No.107. He, in spite of my warning, proceeded to make his allegations nevertheless which now stand unsubstantiated as the report from the Director of Committees shows.

In order not to belabour the issue further and for purposes of discouraging any similar unfounded allegations by any Member, I hereby rule as follows: That on account of making allegations that have neither been substantiated by the Member himself, the Departmental Committee on Labour and Social Welfare or the records available from the Directorate of Committee Services, Hon. Wesley Korir is in breach of Standing Order No.91(1); and, that the Member's conduct breached Standing Order No.107 on grossly disorderly conduct but, being an active athlete and Member of this House, I shall exercise my sympathy on the Member and hereby order, on this occasion only, that he withdraws his allegations against other Members having attended and signed attendance registers and give a suitable apology to this House in line with Standing

Order No.91(2) within three sittings of this ruling. If the Member is present, he can proceed to withdraw and make the appropriate apology.

In concluding, I wish once again, to remind Members to desist from making unsubstantiated allegations against fellow Members which only serve to lower the dignity of this House and cast aspersions on its membership.

The Member and, indeed, the House stands accordingly guided.

[IN THE COURSE OF THE SAME SITTING, HON WESLEY KORIR ENTERED THE CHAMBER AND APOLOGIZED]

6. PROCEDURE FOR PROCESSING AMENDMENTS TO BILLS AT COMMITTEE STAGE

Tuesday, 22nd March 2016

Honourable Members, this Communication relates to amendments to Bills at Committee Stage as I promised last week.

In the recent past, a trend has developed where Members submit amendments to Bills just before the House moves to Committee Stage. In some instances, this has introduced new perspectives to the Bills thereby opening up debate. Indeed, I have had complaints from some Members who have felt that the House is being ambushed with new amendments to Bills and for which a decision is required.

The Clerk's Office has also received complaints from the officers who sit in the Committee where they have advised against such moves. We have had to delay consideration of some Bills as Members file their proposed amendments late, a case in point being the Community Land Bill that is pending before the House. It is, therefore, imperative that this process be aligned with our own Standing Orders.

Standing Order No.133 guides the procedure in Committee of the whole House on a Bill. In particular, paragraph (2) states:

> *"No amendment shall be moved to any part of a Bill by any Member, other than the Member in charge of the Bill, unless written notification of the amendment shall have been given to the Clerk twenty-four hours before the commencement of the sitting at which that part of the Bill is considered in Committee"*

Honourable Members, going forward and for the good order during the Committee of the whole House, the following guidelines will be strictly adhered to:-

1. All proposed amendments to Bills should be submitted at least 24 hours before commencement of consideration of that specific Bill as per the Standing Orders
2. Amendments for which no notice has been given will not be allowed or circulated except as approved by the Speaker prior to the consideration of the Bill in the Committee of the whole House.
3. Debate shall not be reopened during Committee Stage save for two or three Members speaking only for or against the proposed specific clause and/or proposed amendments thereto before the Chair puts the Question. All debate is, therefore, encouraged to take place during the Second Reading of any Bill.

4. The provisions of Standing Order No.133 will be observed in totality to the extent stated above. I thank you.

7. PROCEDURE FOR CONSIDERATION OF ANNUAL REPORTS SUBMITTED TO PARLIAMENT BY CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

Tuesday, 29th March 2016

Honourable Members, this Communication relates to the manner for consideration of annual reports submitted to Parliament by constitutional commissions and independent offices.

Hon. Members, you will recall that on Thursday 10th March 2016 the Member for Rarieda, Hon. Gumbo, MP; while on a point of order, sought the Speaker's direction on how the House should address itself to annual reports submitted to Parliament by constitutional commissions and independent offices in accordance with Article 254(1) of the Constitution.

The commissions and independent offices contemplated above are the ones established and listed under Article 248 (2) and (3) of the Constitution, respectively. In his submissions, Hon. Gumbo underscored that the reports contain matters that concern the people of Kenya and that in keeping with the mandate of the National Assembly, we deliberate and resolve such issues as envisaged under Article 95(2) of the Constitution and there is need for direction on how to deal with such reports.

Hon. Gumbo added that whereas the Constitution provides that such reports ought to be tabled, it is silent on how the House should express itself on the same reports and the manner in which such reports ought to be considered.

Honourable Members, the matter of accountability raised by Eng. Gumbo resonates well with the spirit of the Constitution of Kenya, which sets high benchmarks for financial probity, accountability and transparency. Indeed, Article 254(1) of the Constitution obligates constitutional commissions and independent offices to submit their annual reports to the President and Parliament.

As a matter of fact, the constitutional commissions and independent offices occupy a central role in architecture of governments. Indeed, Article 249(1) of the Constitution envisions the objects of those commissions and independent offices as being to protect the sovereignty of the people; secure the observance by all state organs of democratic values and principles, and promote constitutionalism.

On reflection on the weighty nature and the spirit and intent by which constitutional commissions and independent offices are anchored in the Constitution, I agree with

Hon. Gumbo that reports generated and presented to Parliament by these bodies ought not to be wished away. There is, indeed, an urgent necessity to put in place a framework on how to consider such reports.

Honourable Members, the Constitution is alive to the fact that Parliament, as the representative institution in democratic governance is responsible for, and must at all times pronounce itself on any matter(s) as and whenever submitted to the House. Whereas Article 254(1) of the Constitution is silent on how Parliament should address itself to the reports submitted by constitutional commissions and independent offices, the manner of consideration and the timeline within which consideration of such reports should be concluded, a parallel can be drawn from the provisions relating to consideration of other forms of reports submitted to Parliament, particularly audit reports such as the ones that have been tabled by the Leader of the Majority Party.

Article 229 of the Constitution states:

> *"Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action."*

On the same thread, Hon. Members, it has been the practice of this House that whenever a report(s) is tabled before the House, the Speaker has either outright or on discretion referred the report to a relevant Committee of the House for consideration. Thereafter, the House has always considered the report of that Committee in light of the observations and/or recommendation(s) of the Committee to which the matter was delegated. It is on this backdrop that even though Article 229 of the Constitution does not expressly commit financial reports presented to Parliament by the Auditor-General to the Public Accounts Committee (PAC) for consideration, the Committee continues to dutifully scrutinize the said reports on behalf of the House as and when referred to the Committee.

In view of the foregoing, annual reports submitted by constitutional commissions and independent offices undoubtedly require thorough scrutiny by the House. If I were to invoke the provisions of Standing Order No.1 and apply the provisions of Article 229 it would then follow that this House should consider the reports submitted by constitutional commissions and independent offices and take appropriate action, taking into account the observations and recommendations contained in the reports being tabled in the House by the relevant Committees of this House after scrutinizing the reports submitted by the commissions and independent offices.

For avoidance of doubt, I wish to guide the House as follows:

1. THAT, the annual reports from constitutional commissions and independent offices, upon being tabled in the House, shall stand referred to the relevant Departmental Committee within whose purview the mandate of the constitutional commissions and/or independent offices falls. The Departmental Committees of the House will then consider the reports according to their respective mandates. Nothing shall preclude the Departmental Committees from setting up sub-committees of themselves for expedient disposal of such reports; and
2. THAT, for purposes of the future practice in respect to such reports, I direct in accordance with Standing Order No.1, that consideration of the said reports shall proceed in a manner similar to that accorded to consideration of audit reports by the PAC and within the timelines stipulated under Article 229(8) of the Constitution, which is three months. Thereafter, the House will debate and consider the reports of the Departmental Committees and take appropriate action as necessary.

It is now my singular honour and privilege to invite His Excellency the President of the Republic of Kenya to address this Special Sitting of Parliament.

8. DISCHARGE OF A MEMBER FROM HOUSE COMMITTEE

Thursday, 14th April 2016

Honourable Members, you may recall that, on Tuesday, March 22, 2016, the Member for Lunga Lunga Constituency the Hon. Khatib Mwashetani, sought guidance of the Speaker on the implication of Article 124 of the Constitution and Standing Orders 19 and 176 in relation to the discharge of a Member of the House from Committees. Specifically, the Member contested his discharge from the House Business Committee and Budget and Appropriations Committee by the Coalition for Reforms and Democracy (CORD). He was concerned that the correspondence for his discharge from the said committees originated from the CORD Coalition Whip and not from his party, the Forum for the Restoration of Democracy, Kenya (Ford-Kenya). The Member therefore sought to know whether the manner in which he was discharged from the Committees was procedural. A number of Members contributed to the ensuing debate including the Leader of the Majority Party, Hon. Aden Duale, the Hon. John Mbadi, the Hon. Johnson Sakaja, the Hon. Peter Kaluma and the Hon. Samuel Chepkong'a amongst others.

Honourable Members, from the issues canvassed, I deem the following matters as requiring determination -

(i) Whether the Hon. Khatib Mwashetani was procedurally discharged from the House Committees in accordance with the provisions of Standing Order 176; and

(ii) Whether Standing Orders 19 and 176 are in contravention of Article 124 of the Constitution.

Before proceeding to these matters, it is important to note that the issues raised hereto are not new in parliamentary practice and indeed to this House. In the UK House of Commons, appointment of Members to Committees is the prerogative of parties represented in the House. In that jurisdiction, Members are nominated through a Motion in the House in the name of a Member. Further, it is a general practice in the House of Commons that in proposing nominations for appointment into Committees, parties elect members of those committees in a **secret** ballot by whichever transparent and democratic method they choose. A Member *(other than a Chair elected by the House)* cannot formally resign from a committee unless and until a motion discharging him from membership is agreed to by the House. Notably, appointment to

membership of Committee is usually for the remainder of a term of the House. Members with disciplinary matters before the parties ordinarily opt to resign from Standing Committees, but may choose to retain membership in *adhoc* Committees or Committees established for the sole purpose of discussing a particular Bill.

Hon. Members, at this juncture, I am reminded that Speaker Francis ole Kaparo numerously reminded the House *that 'every rule of the Standing Orders has a reason, rich history and mischief it seeks to prevent'*. Further, lawyers are wont to sayings that whenever you make a law, make one that you will trust anyone with, including your opponent and worst enemy. To this end, attempts to amend the Standing Orders should be well thought out and be considered fully.

Hon. Members, our history behind Standing Order 176 on discharge of Members from Committees is quite rich and will interest the House. To begin with, during the appointment of Members to the Select Committee to Review the Constitution of Kenya in the Eighth Parliament, an issue arose as to the nomination process of the proposed Members. Political Parties observed that their Members were included into the membership of the committee without being consulted. Specifically, the Democratic Party, SAFINA party and the Social Democratic Party (SDP) were concerned with the nomination of their members to the Committee. It was then felt that the then ruling party, KANU was usurping the power of the political parties by directly appointing their members to Committees. At that time, the House was not involved in the appointment of Members in Committee, but the decision of the parties to appoint members to respective committees would be communicated to the House by way of statement by the Leader of Government Business on behalf of the House Business Committee.

Similarly, after the coming into power of the NARC government in 2003, several Members of the then opposition parties were appointed to the Executive as Ministers/Assistant Ministers and also to House Committees without consultation with the respective parties contrary to section 17(5) Presidential and National Assembly Elections Act *(now repealed)*. KANU, which was then the Official Opposition Party felt that the ruling party sought to weaken the opposition by "buying off" Members of the Opposition. Indeed, during the life of that Parliament, three (3) Members of the PIC, which I chaired, were on diverse dates appointed as Ministers and Assistant Ministers in the Cabinet, against the will of the Party. The general feeling in the Official Opposition, then led by the current President, was that there were attempts to weaken the party. Parties at that time were helpless as they could not withdraw Members appointed to Committees by the ruling party.

Hon. Members, though not prevalent during the 10th Parliament, there were instances where the same issues arose. A case in point was that of the Departmental Committee on Justice and Legal Affairs, the Chaired by the Hon. Ababu Namwamba, MP. The Committee was in limbo for more than one year as one of the coalition partners attempted to de-whip its Members from the Committee. I am sure the matter is very fresh to members who served in the House, including the Hon. Njoroge Baiya. The then Speaker, Kenneth Marende then noted that he could not effect the discharge as the Standing Orders were silent on the matter. The ensuing disagreements saw the mandate of the committee being taken over by the Constitutional Implementation Oversight Committee, then chaired by the Hon. Abdikadir Mohamed. In the subsequent review of the Standing Orders, records indicate that the House was unanimous in passing the new provision giving parties powers to de-whip their Members as in other multi-party jurisdictions. I want to jog the memory of the Deputy Leader of the Minority Party, Hon. Midiwo who, together with the then Member for Gichugu were very vocal in the push for change of the rules to empower parties to discharge their Members from Committees.

Hon. Members, away from the brief history and before determining the matters at hand, it would be key to understand the appointment process to Committees in our current case. Standing Order 174(1) on the Criteria for nomination states and I quote,

"In nominating Members to serve on a select committee, the Selection Committee shall ensure that the membership of each committee reflects the relative majorities of the seats held by each of the parliamentary parties in the National Assembly."

From the above, it is observed that nomination to Committees is the preserve of *'Parliamentary Parties in the National Assembly'* except for certain instances for example where a Member is an independent Member. A question then arises as to what really constitutes a *'Parliamentary Party'*?

Hon. Members, Standing Order 2 defines "a Parliamentary Party" *as a party or coalition of parties consisting of not less than five per cent of the membership of the National Assembly*. Consequently, a Parliamentary Party is that party or coalition of parties with not less five percent of the membership of this House, that is, eighteen (18) Members. Members are therefore nominated to serve in Committees of this House by the Parliamentary Parties in the National Assembly. Subsequent to this, Standing Order 176(1) provides that the *"a Parliamentary Party that nominated a Member to a Select Committee, may give notice, in writing, to the Speaker that the Member is to be discharged from a select Committee"*.

Hon. Members, as you are all aware, FORD-Kenya as a political party has less than eighteen Members in the House and on its own, is not a Parliamentary Party in as far as our rules apply. It therefore follows that FORD-Kenya as a political party has no capacity to either nominate or discharge a Member to or from a Select Committee of this House. Indeed, it is true that the Hon. Khatib Mwashetani was nominated to the House Committees by the Cord Coalition and not FORD-Kenya. Sequentially therefore, any attempt to de-whip the Member can only be initiated by the CORD Coalition which in this case is the Parliamentary Party to which he belongs. Indeed, I am aware that FORD- Kenya, vide a letter dated February 08, 2016 and signed by the Secretary-General had directed the Minority Chief Whip *"to immediately de-whip Hon. Khatib Mwashetani from all parliamentary committees"*. I am satisfied that the discharge of Hon. Khatib Mwashetani from House Committees was procedurally done in as far as our rules apply.

Honourable Members, on the constitutionality or otherwise of Standing Orders 19 and 176 in as far as they relate to Article 124 of the Constitution, it is noted that firstly, Standing Order 19(3) deals with the manner in which the Leader and the Deputy Leader of Majority Party may be removed from office which is by way of a majority of votes of all members of the largest party or coalition of parties in the National Assembly. Standing Order 176 as has been seen earlier deals with the discharge of Members from House Committees. Article 124(1) of the Constitution provides that *'each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.'* Mechanisms such as the committee system and the offices of the Leader of the Majority and Minority Parties are intended for orderly operations of Parliament as an institution. In this regard therefore, as far as I am concerned, Standing Orders 19 and 176 cannot be termed as unconstitutional as they provide a mechanism for internal conduct and organization of the House and appointment and discharge of Members into Committees is a matter affecting conduct of business of Committees.

Honourable Members, the above matters are weighty even with deep consideration. Indeed, it is important to note that some of the issues raised and specifically on Standing Order 176 are already before the Procedure and House Rules Committee having been raised by Hon. Samuel Chepkong'a by way of proposed amendments to the Standing Orders. I know the Committee will be making a progress report which may indicate the direction that the matters will be taking. I have requested the Committee, in its report to the House, to incorporate the aspects of fair hearing and due process in the discharge mechanism without taking away the powers of parties to de-whip their Members.

Accordingly, I call upon Hon. Mwashetani, and indeed all of us, to await the conclusion of this matter by the Committee. In the interim, and in the absence of any amendments Standing Orders 19 and 176 still apply on all matters relating to the discharge of Members.

I thank you

9. EXAMINATION OF AUDITED ACCOUNTS OF POLITICAL PARTIES

Wednesday, 4th May 2016

Honourable Members, you recall that on Thursday, 21st April, 2016, the Leader of the Majority Party, Hon. Aden Duale rose on a point of order seeking guidance from the Speaker on the manner of consideration and examination of audited reports of political parties. This was after an observation that the Auditor-General has been submitting reports of political parties to the National Assembly but no examination has been done so far. This was noted as being of great concern as majority of Members are, indeed, affiliated to political parties. A number of Members contributed to the ensuing debate including Hon. Jakoyo Midiwo, Hon. Ababu Namwamba, Hon. Samuel Chepkong'a, Hon. Wesley Korir and Hon. James Nyikal among others.

Honourable Members, in most jurisdictions, the need for increased accountability and openness among political parties has grown in the recent past. This has been as a result of, among other things, increased public awareness as well as legal requirement on account of allocation of public monies to these institutions. Indeed, many countries, including Kenya have well established laws and practices that guide the funding and accounting by political parties.

Most countries have signed or ratified the 2005 United Nations Convention against Corruption (UNCAC) which states that all countries should consider taking appropriate legislative and administrative measures to enhance transparency in the funding of candidates for elected public office and, where applicable, the funding of political parties.

In the African context, the overarching guidance comes from the African Union Convention on Preventing and Combating Corruption, which states in Article 10 that each state party shall adopt legislative and other measures to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties, and incorporate the principle of transparency into funding of political parties. More and more countries in Africa offer funding to political parties from the State.

Honourable Members, in the Federal Republic of Germany, political parties derive their existence through the Grundgesetz or the Basic Law. Article 21 of the Basic Law provides for the freedom to form political parties to participate in the formation of free will of the people. As a general rule, the political parties so formed are expected to function on the basis of democratic principles and publicly account for their assets and sources and use of their funds. However, a comprehensive legislation, the law on

Political Parties, enacted in 1967 and amended in 1994, governs the structure, constitution and financial matters of the political parties. In this case, of interest would be the financial provisions of the law which include:-

The political parties are entitled for state funding to the tune of 0.70 Euros for each vote cast in the preceding Bundestag (House of Representatives) election subject to an annual limit of 133 million Euros as per Article 18 The political parties have to submit an annual account to the President of the Bundestag giving details of the income, expenditure, assets and liabilities. The annual accounts are to be audited and certified by a registered chartered accountant as per Article 23.

If the President is not satisfied by the accounts submitted by a political party, he can get the accounts audited by an auditor nominated by him. For avoidance of doubt, the President of the Bundestag of Germany is the equivalent of the Speaker of the National Assembly of Kenya.

The President of the Bundestag shall report to the Bundestag regarding his finding on the accounts of political parties and the report shall be published as Bundestag's published paper for public scrutiny.

From the foregoing, it is observed that in the Federal Republic of Germany, the President of the Bundestag is required to receive the reports of political parties and convey the same to the Bundestag. Organizations that fail to conclusively account for their fund risk losing their legal status as political parties.

In the United Kingdom, the Political Parties Election and Referendum Act, 2000 governs political parties, their conduct and other related matters. There exists an independent body, the Electoral Commission, which oversees all the electoral processes. All political parties are required to register with the Electoral Commission with set financial structures which should be approved by the Commission. The Treasurer of the party is required to keep up-to-date accounting records showing the daily financial transactions. At the end of each financial year, the party is required to submit the annual accounts to the Commission. These accounts are then opened for public inspection and scrutiny.

In Denmark, there is no specific authority entrusted with monitoring the adherence to political financing rules by political parties, related entities or election of candidates. Further, there is no public authority established to check the relevant accounting records of such entities and persons. However, the General Audit Office, which is an independent institution under Parliament, examines the soundness of all state accounts, that is, checks that they are without significant errors and deficiencies and this office is in accordance with the Public Funding Act. The office is empowered to

demand accounting records from the beneficiary parties that have received public funding in order to examine how such funding has been spent and in this context, may check the accounts of political parties.

Honourable Members, France has an elaborate legislation, the Electoral Code, which governs affairs of political parties particularly their finances. The Code works on three basic principles namely:-

(i) that money should not decide the outcome of the ballot nor favour the richest candidate;
(ii) that a candidate must not be dependent on a generous donor; and,
(iii) that the State should reimburse the electoral expenses to offset the obligations put on the candidates.

The code allows for State funding of political parties as key contributors to public suffrage. The control and verification of books of accounts of political parties is done by the Electoral Commission which verifies that political parties respect their accounting and financial obligations, ensures that the parties' accounts are published in the official journal of France and brings any matter presenting possible penal violations before the public prosecutor.

Honourable Members, closer home in South Africa, political parties receive funding from the taxpayer according to the proportion of votes that they receive. This funding is regulated by the Public Funding of Represented Political Parties Act 103 of 1997 and the amounts allocated to each party are publicly available through the Electoral Commission. Every political party to which monies are allocated from the Fund must keep, with a bank registered in the Republic of South Africa, a separate banking account into which all monies so allocated to the party must be deposited; and appoint an office-bearer or official of that party as its accounting officer with regard to all monies from time to time allocated to that party from the Fund. As soon as possible after the end of each financial year, the Electoral Commission prepares a report regarding its management and administration of the Fund during that financial year, the allocations made from the Fund to the respective political parties during that year, the amounts spent during that year by each political party in connection with prescribed purposes, and the balance of the Fund and any amounts owing to or by the Fund as at the end of that year.

This report is also submitted to the Auditor-General for auditing. Within 30 days after receipt of the Auditor-General's report, the Electoral Commission must submit that report to parliament together with the audited financial statements of the Fund and the audited Commission's report.

Hon. Members, our case is not different from those cited above. To begin with, public funding of political parties is provided for under the Political Parties Act, 2011. Specifically, Section 31 requires political parties to keep proper books and records of account of the income, expenditure, assets and liabilities related to their operations.

Further, political parties shall, within three months after the end of each financial year, submit to the Auditor-General their accounts in respect of that year for auditing and onward submission to the Registrar of Political Parties and tabling before the National Assembly. Notably, the Registrar of Political Parties may at any time request the Auditor-General to carry out an audit of the accounts of a political party.

Generally, all audited accounts of public funds are examined in the National Assembly by the Public Accounts Committee (PAC). However, as stated by some of the Members who spoke on 21st April, it is evident that the Committee is currently overwhelmed by the examination of all the other funds.

Honourable Members, during the 10th Parliament, a similar predicament was experienced. At the time, the examination of audited reports for all public funds appropriated was noted to be immense for the PAC. This was so considering that there were other entities, among them the local authorities and other devolved funds such as the Constituencies Development Fund (CDF), the Roads Maintenance Levy Fund, the Tourist Trust Fund, the Small and Micro Enterprise Fund and the Community Development Trust Fund that needed to be examined. This saw the establishment by the House, by way of amendment of the Standing Orders, of the Local Authorities and Funds Accounts Committee (LAFAC) during the Second Session of the 10th Parliament.

The Committee was mandated to examine accounts of expenditure in local authorities and all other funds laid on the Table of the House. This went a great way in easing the work of PAC and helped to fast-track examination of the audited accounts of those other funds and local authorities.

Honourable Members, the matter of consideration and examination of the audited accounts of political parties is an important issue for this House and, indeed, the democratic principles of this nation. It is, therefore, imperative that we approach issues raised clearly with a view of finding a working formula, aware that the current PAC is undoubtedly overwhelmed by the amount of work before it.

As the Member for Seme observed during the short debate on the matter, we need, as a House, to look for what is practical in our case in dealing with the said reports. Indeed, several options have been fronted. Key among them are:-

a. That the House establishes a Committee to exclusively deal with the audited reports of political parties. That Committee would likely be composed of equal Members from either coalition in the House with representation from independent Members. Notably, the Committee would likely be chaired by an Independent Member.
b. That the PAC realigns its operations and establishes subcommittees to deal with designated sectors. To this end, there would be a subcommittee to specifically look into the audited accounts of political parties.

Honourable Members, Article 124 of the Constitution empowers a House of Parliament to establish committees and Standing Orders for the orderly conduct of its proceedings. It is, therefore, upon this House to determine which way the matter will go as it reflects on the issues raised. This is a matter I will more willingly encourage consultation and cooperation rather than issue direction on the way forward. For doing so, I would be assuming the role of this House, as mandated under Article 124 of the constitution.

In the meantime, PAC has a fiduciary duty to this House to see to it that the political parties' audited accounts are examined and reports thereof tabled in the National Assembly for consideration. Should there be need for declaration of interest when certain political parties' audited accounts are being examined, a concerned Member or Members must first declare that interest and the chair will determine whether continued participation in the proceedings is tenable.

10. DISCHARGE OF MEMBERS OF THE JUSTICE AND LEGAL AFFAIRS COMMITTEE BY THE COALITION FOR REFORMS AND DEMOCRACY (CORD)

Thursday, 16th June 2016

Honourable Members**,** I wish to report to the House that my office is in receipt of a letter from the Minority Party Whip, notifying that the Coalition for Reforms and Democracy (CORD) has discharged the following Members from the Departmental Committee on Justice and Legal Affairs:-

1. The Hon. David Ouma Ochieng, M.P.
2. The Hon. Neto Agostinho, M.P.
3. The Hon. Kaluma Peter, M.P.
4. The Hon. Fatuma Ibrahim Ali, M.P.
5. The Hon. Ben Momanyi Orari, M.P.
6. The Hon. T. J. Kajwang', M.P.
7. The Hon. (Bishop) Mutua Mutemi, M.P.
8. The Hon. Olago Aluoch, M.P.
9. The Hon. Christine Oduor Ombaka, M.P.
10. The Hon. Benjamin Andai, M.P.
11. The Hon. Mwamkale William Kamoti, M.P.

Honourable Members, in the letter, the CORD Coalition alleges that its decision to discharge its membership from the said Committee arose from perceptions that appropriate consideration may not have been accorded to the input of its Members on certain matters before the Committee. In particular, the coalition cites the matter of the Independent Electoral and Boundaries Commission (IEBC) and other electoral reforms. It is my view that both the leadership of CORD and Jubilee coalitions in this House ought to listen to one another and avoid taking any action or making certain pronouncements that are likely to erode the ongoing crucial engagements on electoral reforms and electoral institutions already taking place outside this House.

In this regard, I humbly beseech the leadership of CORD Coalition in this House to reconsider its decision, especially due to fact that, as your Speaker, I have not received any complaint formally or informally from Majority or Minority parties in the House, or from any Member of the Departmental Committee on Justice and Legal Affairs, regarding the affairs of the Committee or indeed any other Committee of the House.

Nevertheless, Standing Order No.176 is absolute that the Speaker has no role in the process of discharging Members from committees, save for the practice that the

Speaker conveys such information to the House. Pursuant to the provisions of the said Standing Order, therefore, the affected Members are accordingly informed and the discharges take effect immediately. I also hasten to add that the discharges do not invalidate the transaction of the business of the Committee so long as the requisite quorum is achieved.

11. SECOND BASIS FOR EQUITABLE SHARING OF NATIONAL REVENUE ALLOCATED TO COUNTIES DEEMED APPROVED BY THE ASSEMBLY AFTER EXPIRY OF 60 DAYS WITHOUT ACTION

Wednesday, 22nd June 2016

Honourable Members, as you may recall, I conveyed to the House a Message from the Senate on 21st April 2016 regarding the approval of the Second Basis for Equitable Sharing of National Revenue Allocated to Counties. Article 217 of the Constitution stipulates that the National Assembly may consider the Senate's resolution on the formula and vote to approve it with or without amendments, or reject it in full within 60 days.

Yesterday, Tuesday, 21st June 2016, was the **sixtieth day** from when the Message was conveyed to this House. Therefore, the provisions of Article 217(5)(a) of the Constitution come into play.

For clarity, the said Article states as follows:-

> *"If the National Assembly –*
>
> > *(a) does not vote on the resolution within sixty days, the resolution shall be regarded as having been approved by the National Assembly without amendment; or"*

Since there was no decision made by the House to either amend or reject the formula, the National Assembly is deemed to have approved the formula as passed by the Senate. I will, therefore, proceed to communicate this Message to the Senate for conclusion of that process of considering the Second Basis for Equitable Sharing of National Revenue.

The House stands guided accordingly.

12. TIMELINES IN FILLING VACANCIES IN SELECT COMMITTEES

Wednesday, 29th June 2016

This Communication relates to the timelines for filling vacancies in Select Committees occasioned by resignations and/or removal. As you may recall, on 16th June 2016, I issued a Communication to this House regarding the discharge of the following Members of the Coalition for Reforms and Democracy (CORD) from the Departmental Committee on Justice and Legal Affairs:

1. Hon. David Ouma Ochieng, MP
2. Hon. Neto Agostinho, MP
3. Hon. Kaluma Peter, MP
4. Hon. Fatuma Ibrahim Ali, MP
5. Hon. Ben Momanyi Orori, MP
6. Hon. T. J. Kajwang', MP
7. Hon. Bishop Mutua Mutemi, MP
8. Hon. Olago Aluoch, MP
9. Hon. Christine Oduor Ombaka, MP
10. Hon. Benjamin Andayi, MP
11. Hon. Mwamkale William Kamoti, MP

Whereas the discharge of the said Members took effect immediately, pursuant to the provisions of Standing Order No. 176(2), I am reliably informed that the Committee on Selection is yet to receive names from CORD nominating any Members to fill the vacancies left by the discharged Members. Standing Order No. 173(3) prescribes the timeline for filling a vacancy in a Select Committee arising from resignation or removal of a Member. For clarity, the said Standing Order reads as follows:-

> *"A vacancy occasioned by resignation or removal of a member from a select committee shall be filled within fourteen days of the vacancy."*

In this regard, I wish to draw the attention of the CORD Coalition and, indeed, the House that today Wednesday, 29th June, 2016 is the thirteenth day from when the discharge of the said members took effect, implying that only one day is remaining for the said vacancies to be filled. The coalition is, therefore, advised to hasten submission of nominees to the Committee on Selection for appointment by the full House to fill the said vacancies.

Honourable Members, I wish to draw the attention of the House to the fact that it is our practice that Committees must all be fully constituted. Therefore, failure by any side of the House to fill vacancies will necessitate the Speaker taking other necessary and appropriate action.

13. REFERRAL OF COURT ORDER TO COMMITTEE ON PRIVILEGES

Wednesday, 6th July 2016

Honourable Members, yesterday (Tuesday, 5th July 2016), as you will recall, the Leader of Majority Party, Hon. Aden Duale sought directions from the Speaker on matters arising out of media reports of a court order reversing a matter of proceedings of the House. The court order stayed the decision of this House to suspend Hon. James Opiyo Wandayi for the remainder of the Session of the House in terms of Standing Order No. 111, pending the hearing and determination of the judicial review application filed by the honourable Member.

In light of the court order, the Leader of Majority Party sought clarification on some fundamental issues. For the avoidance of doubt, I want to confirm to the House that I have since received the said court order. Indeed, the Leader of the Majority Party this afternoon tabled the court order and the pleadings. The issues he sought clarification on were:-

i. What is the fate of the Standing Orders and in particular the disciplinary procedure set out in Standing Orders Nos. 107 to 112 of the National Assembly Standing Orders that are made pursuant to Articles 75(2)(a) and 124(1) of the Constitution?
ii. What is the fate of the power of the House to make Standing Orders and how far can the House provide for the orderly conduct of its proceedings and what is envisaged by the use of the words "orderly conduct"?
iii. What is the fate of the privileges conferred on this House by virtue of Article 117(2) of the Constitution and the National Assembly (Powers and Privileges) Cap. 6?

Some Members including Hon. Olago Aluoch, Hon. T.J. Kajwang' and Hon. Kimani Ichung'wah also debated on the issue and requested the Speaker to make a ruling on the same. Prior to the debate in the House, my office received correspondence from Hon. Peter Kaluma and Hon. Jakoyo Midiwo requesting the Speaker to pronounce himself on the matters relating to Standing Order No. 111.

Indeed, the question as to what is the import of the court order is one of great moment for this House. It raises fundamental issues touching on the principle of separation of powers as contemplated in our Constitution. As you are all aware, our Standing Orders are made pursuant to Article 124 of the Constitution. They are to govern the manner in which we conduct ourselves and our business as a House and in the committees

Therefore, can the court pronounce itself on the internal rules and procedures of the National Assembly without encroaching into the powers of Parliament to conduct its business? This is a weighty question which the court order issued by the High Court reversing the decision of this House now presents. Simply put, what is the Speaker required to do in light of the court order staying the decision of this House?

Honourable Members, as you are all aware, Article 107 of the Constitution provides that the role of the Speaker is to preside over or chair the proceedings of the House. The role of the Speaker is however not limited to presiding over the proceedings of the House but one which extends to ensuring that the House functions effectively and freely. Allow me to refer to *The Canadian Parliamentary Review*, "The Speakership: A New Zealand Perspective" which perhaps best illustrates the role of the Speaker. I quote:-

> *"That crucial separation of powers so fiercely fought over hundreds of years, remain today and establish, to my mind, the breadth and depth of the Speaker's role. The role is not just chairing or presiding over the House. It is, in full context about ensuring the House of Representatives is free and able to function effectively both as a Legislature and in the vital role of holding the Crown or Executive to account. This view of the Speaker's role guides my interpretation of Standing Orders and also my role as "Minister" responsible for the Parliamentary Service."*

The decision of the House, which the court order has now stayed, is one that was made by the Speaker in exercise of powers which have been bestowed on him by the Constitution and the Standing Orders. Indeed, the Speaker does not take part in any debate and does not vote on the decisions of the House.

Honourable Members, permit me now to refer to the words of Speaker Lenthall uttered in 1642 in the British House of Commons when King Charles went into the House in that year and demanded to know the whereabouts of a certain Member of Parliament who had opposed his proposal to raise taxes. In response, the Speaker Lenthall told the King, and I quote:-

"May it please your Majesty, I have neither eyes to see, nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here…"

In light of the foregoing and since the court order seeks to stay the decision made by this House, the Speaker's hands are therefore tied. His eyes cannot see and his tongue cannot speak. He is subject to the direction of this House.

Consequently, the Speaker has no option but to refer the matters raised by the Leader of the Majority Party and other Members back to this House for determination. However, as you are aware, the court order relates to the issue of disciplinary proceedings raised by the House of Parliament against its Member. That is a question of the privilege of the House in terms of Article 117(2) of the Constitution.

With this in mind, I direct that the matters raised, including the issues canvassed by the letters by Hon. Peter Kaluma and Hon. Jakoyo Midiwo, be taken up by the Committee on Privileges. That is the body mandated under the National Assembly and the Powers and Privileges Act, to consider and advise the House on matters of privilege. They should do so by Tuesday 19th July 2016. The Committee is also at liberty to relook at the events of 31st March 2016 for purposes of Article 75 of the Constitution and make such recommendations as may be appropriate, taking into account the rights of the Member. The Committee shall advise the House on the way forward as regards the court order and the issues raised by the Members, namely, Hon. Peter Kaluma and Hon. Jakoyo Midiwo as well as the court order.

I further direct that, in the meantime, pending the conclusion of the matter by the Committee on Privileges, the Member, Hon. James Opiyo Wandayi, is deemed a stranger and shall not be allowed within the precincts of Parliament except for purposes of attending the summons of the Committee of Privileges as and when required by the Committee.

The House and officers of the House are accordingly advised.

14. GUIDANCE ON PRESENTATION AND REPORTING OF PETITIONS IN THE HOUSE

Thursday, 28th July 2016

Honourable Members, this communication relates to a matter that has come up very frequently in the House, and which needs to be addressed. It is a matter of presentation and reporting of petitions in the House.

One of the core functions of legislators is to deliberate on and resolve issues of concern to the people, as envisaged in Article 95(2) of the Constitution. As you may be aware, our constitutional dispensation bestows to the people the right to petition public authorities, including Parliament and, indeed, this House, as contemplated under Article 37 of the Constitution in the Bill of Rights. For the case of petitions to Parliament, this provision is actualized through the Petitions to Parliament (Procedure) Act, 2012, read together with Part XXIII of our Standing Orders on petitions. Hon. Members, my office has noted the steep increase in the number of public petitions being presented to the House on various matters. Indeed, a reflection on the weekly reports to this House by various Departmental Committees regarding business pending before them reveals that an overwhelming bulk of that business constitutes considerations of petitions. As at Wednesday, 27th July 2016, the number of petitions that were before this House stood at 108.

Unfortunately, some of those petitions have been pending before the relevant committees of the House for far too long, with some dating back to 2013, oblivious of the 60 calendar days prescribed by Standing Order 227. This is partly because some committees have not been according them due attention. I wish to remind the House that the core reason for citizens opting to present their prayers to this House for intervention on various matters is informed by the failure by relevant authorities to address these concerns. The unprecedented increase in petitions to Parliament, and delays in consideration of the same by the relevant committees, invites the Speaker to guide this House on how best it may handle petitions, going forward. I therefore wish to guide the House on the matter.

For predictability and harmony in processing of petitions, I have designated certain days for presentation and reporting as follows:-

(i) Tuesdays and Wednesday afternoon Sittings shall be designated for presentation of petitions received; and,

(ii) Wednesday Morning and Thursday Afternoon Sittings shall be designated for Committees to report to the House on consideration of petitions referred to them.

I therefore direct that, pursuant to the provisions of Standing Order 225(1), a schedule of all petitions to be presented or reported to the House on a particular day be appended to the Order Paper of that day. As you may have noticed from the Order Papers from Tuesday, 26th July 2016, this requirement has already taken effect.

Honourable Members, upon tabling reports on petitions, chairpersons of the relevant committees shall be required to apprise the House on the contents of the said reports. For clarity, the brief by chairpersons shall be confined to the subject of the petition, the prayers sought by petitioners, summary of the views and evidence gathered and the findings or recommendations thereof.

Thereafter, Honourable Members interested in the petition may make brief comments on the report. Such comments by the chairperson shall be limited to a maximum of 10 minutes and the total time shall not exceed 30 minutes. This guidance is meant to breathe life into the provisions of Standing Order 226.

Honourable Members, to keep the petitioners' prayers in abeyance is against the Constitution and our own Standing Orders and tantamount to denying them justice. In this regard, committees that have not reported to the House on petitions referred to them within the requisite period of 60 days, and have not sought leave of the House to have that prescribed time extended for justifiable reasons, are in breach of the provisions of Standing Order 227.

I am also aware that most committees are unable to dispose of their business because they have elected to operate without delegating some business to sub-committees, yet the Standing Orders permit them to do so. For avoidance of doubt, Standing 183 provides that a select committee may establish such sub-committees as it may consider necessary for the proper discharge of its functions.

Chairpersons of committees are therefore encouraged to embrace the spirit of this provision and utilize the window for establishing sub-committees with a view to expediting transaction of business, particularly business with timelines.

I thank you.

15. CONSIDERATION OF STATUTORY INSTRUMENTS

Tuesday, 2nd August 2016

Honourable Members, whereas Article 94(1) of the Constitution vests the legislative authority of the Republic of Kenya in the National Parliament, Clauses (4) and (5) of the said Article allows Parliament to, through Acts of Parliament, delegate legislative powers to other persons or bodies to make provisions for those legislations to have the full force of the law in Kenya. The Statutory Instruments Act, 2013 requires such delegated provisions to be subjected, where applicable, to parliamentary approval. In fulfillment of the provisions of the said Act, persons and bodies exercising delegated powers continue to make and submit to this House various statutory instruments as required under Section 11 of the Statutory Instruments Act, 2013.

Upon submission to the House, the instruments are effectively committed to the Committee on Delegated Legislation for consideration in accordance with Sections 12 and 13 of the Statutory Instruments Act, 2013. The sequence of approval under the Act is, however, cast in the negative whereby Parliament is not required to approve the whole of the provisions, but is only required to disapprove or annul those provisions that it does not agree to.

Honourable Members, as at today, Tuesday, 2ndAugust, 2016, the following statutory instruments have been laid on the Table of this House, pursuant to Section 11 of the Act, and are yet to be concluded:-

1. Legal Notice No.197 of 2015 on the Mediation (Pilot Project) Rules, 2015 and the Explanatory Memorandum, laid on the Table of the House on Wednesday, 10th February, 2016;
2. Legal Notice No.225 of 2015 on Witness Protection Rules, 2015 and the Explanatory Memoranda, laid on the Table of the House on Wednesday, 10th February, 2016;
3. Legal Notice No.35 of 2016 on the Capital Markets (Licensing Requirements) (General Amendment) Regulations, 2016 and the Explanatory Memorandum, laid on the Table of the House on Tuesday, 12th April, 2016;
4. Legal Notice No.36 of 2016 on the Capital Markets (Securities) (Public Officers Listing and Disclosure) (Amendment) Regulations, 2016 and the Explanatory Memorandum, laid on the Table of the House on Thursday, 12th April, 2016;
5. Legal Notice No.37 of 2016 on the Capital Markets (Derivatives Markets) Regulations, 2015 and the Explanatory Memorandum, laid on the Table of the House on Tuesday, 12th April, 2016;

6. Legal Notice No.47 of 2016 on the Insolvency Regulations, 2016 and the Explanatory Memorandum, laid on the Table of the House on Thursday, 14th April, 2016;
7. Legal Notice No.62 of 2016 on the Traffic (Registration Plates) Rules, 2016 and the Explanatory Memorandum, laid on the Table of the House on Tuesday, 7th June, 2016;
8. Gazette Notice No.1420 of 2016 on the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 and the Explanatory Memorandum, laid on the Table of the House on Tuesday, 12th April, 2016; and,
9. Gazette Notice No.1421 of 2016 on the Guidelines on Prevention of Money Laundering and Terrorism Financing in Capital Markets, 2015 and the Explanatory Memorandum, laid on the Table of the House on Tuesday, 12th April, 2016.

Honourable Members, allow me to remind the House that upon committal of these statutory instruments, the Committee on Delegated Legislation is required under the Act to:-

a. scrutinize the statutory instruments for compliance with the matters specified under Section 13 of the Act together with such other requirements as may exist in the Interpretation and General Provisions Act (Cap. 2 of the Laws of Kenya) relating to subsidiary legislation;
b. confer with the regulation-making authority in the manner contemplated under Section 16 of the Act; and,
c. table a report in the House containing only a resolution that the statutory instrument or a part of it be revoked as contemplated under Section 15 of the Act.

Honourable Members, you may recall that Section 15 of the Statutory Instruments Act, 2013 was amended through the Statute Law (Miscellaneous Amendments) Act of 2015, which amendment introduced a timeline within which the National Assembly is required to consider any statutory instrument laid before it. For clarity, the new Section 15 of the Act provides as follows in Sub-section (2)–

> *"Where the Committee does not make the report referred to in Sub-section (1) within twenty eight days after the date of referral of the statutory instrument to the Committee under Section 12, or such other period as the House may, by resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in Section 13."*

Clearly, the 28 days contemplated in the above-mentioned provision in respect of the statutory instruments listed in this Communication have expired. Since the Committee has neither reported to this House a proposed annulment of any of the affected statutory instruments nor sought any extension of time for consideration of the said statutory instruments as contemplated in the Act, the House is deemed to have had no objection to those statutory instruments and the said statutory instruments have the full force of approval by the House.

In this regard, and in accordance with the provisions of the Statutory Instruments Act as read together with Standing Order 210, the Clerk is now required to convey these facts to the respective regulation-making authorities so that they are notified that the instruments have the force of law as no objections have been made by the National Assembly.

Honourable Members, I hasten to add that this guidance does not apply to specific subsidiary legislation where positive approval of the National Assembly or indeed, both Houses under the specific statutes is mandatory. Under such circumstances, the House would not be time-bound unless there is an express provision prescribing the period within which the National Assembly or both Houses ought to approve or reject such subsidiary legislation.

It is worth noting that in contrast to other Committees which have a wide range of mandate, the Committee on Delegated Legislation is solely charged with the responsibility of considering delegated legislation. It is in my view that limiting the mandate of this Committee to considering statutory instruments was guided by the principle and nature of urgency with which such instruments ought to be given parliamentary approval so as to enjoy the benefit of having the full force of the law.

This House ought not to abdicate this duty conferred on it by the Constitution by delaying consideration and approval of statutory instruments or allowing such instruments to automatically assume clearance by the House by operation of the law albeit without scrutiny as may be in the current case.

The Chairperson and Members of this Committee are, therefore, encouraged to embrace the spirit of Standing Order 183 by establishing sub-committees with a view to expediting consideration of statutory instruments within the specified timelines.

The House and officers of the House are accordingly guided.

Thank you.

16. CONSIDERED RULING ON AMENDMENT OF SPECIAL MOTION ON THE IEBC

Thursday, 25th August 2016

Honourable Members, as you may recall, yesterday, August 24th, 2016, in the afternoon sitting, during the debate on the consideration of the Report of the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission (IEBC), the Leader of the Majority Party, the Hon. Aden Duale, rose on a point of order seeking direction from the Hon. Deputy Speaker on matters arising out of the debate.

Specifically, he sought determination on whether the Special Motion and the Report could be amended noting the special circumstances that had resulted to the establishment of the Joint Select Committee. This was after the Member for Kisumu West, the Hon. Olago Aluoch successfully moved the House to amend the Motion to delete sub-section (7) of Paragraph 659 of the Report relating to the recommendation to restrict candidates seeking political offices from changing parties – an act commonly referred to as "party-hopping"

Honourable Members, before I visit the questions that were raised yesterday, may I bring to the attention of House three important facts regarding this Motion.

The three facts will inform my decision.

Firstly, at the time of giving notice, the Speaker designated this particular Motion as a Special Motion. By doing so, the Speaker elevated the Motion to the kind of Motions provided for under Standing Order No. 61, which require certain special considerations which are typically not accorded to ordinary Motions in terms of procedure, timelines and manner of admitting amendments. As a way of example, a Special Motion includes a Motion to approve borrowing by National Government, a Motion for impeachment of the President, a Motion for alteration of boundaries of a county or a Motion for extension of state of emergency, among others.

Secondly, even though it is not expressly indicated in the Order Paper, this particular Special Motion is also deemed to be a party-sponsored Motion having been jointly sponsored by the majority and the minority parties in this House. Indeed, the signatures of both the Leader of the Majority Party and the Leader of the Minority Party are appended to the Report. This should be a stark reminder to all of us of the agonizing, consensual and consultative journey that has culminated into the Report that is before us this afternoon. This also explains why this particular Motion is taking

precedence over other Motions for adoption of Reports. In addition, a Motion is framed in a manner that, if agreed to, will express the judgment or will of the House.

Thirdly, Honourable Members, you will agree with me that almost every resolution of the House requires implementation. Invariably, the implementing agencies for most House resolutions are offices outside Parliament. However, the implementing agency for most of the recommendations contained in the Report before us today is Parliament. That is not only a rare occurrence but also an opportunity for all of us to display selfless leadership. May I remind us that the implementation of this Report will be majorly actualized, not by necessarily passing the Special Motion, but by considering the two pieces of legislation annexed to the Report. In other words, while this Report accords the House an opportunity to discuss generally matters relating to IEBC and the conduct of the next general elections, the opportunity to make binding decisions and actualize those decisions is reserved in the passage of the two draft Bills. I put emphasis in the words "binding decisions". Indeed, except as expressly provided for in the Constitution or an Act of Parliament, decisions of the House can only have legal effect in the form of an Act of Parliament. It is only by legislating that the House could give its sufficient authority to its wishes.

Honourable Members, allow me now to re-visit the questions raised yesterday. You will recall that during the debate, several Members, including the Member for Budalangi, Hon. Ababu Namwamba, Nominated Member Hon. Sara Korere and the Member for Kisumu West, Hon. Olago Aluoch, spoke on recommendations contained in the Report. The Member for Budalangi spoke at length on the admissibility of Notices of Motion as provided for by Standing Order No. 47. Notably, it was observed that the Speaker has the leeway of directing the re-drafting of Notices of Motion if in the opinion of the Speaker, the Notice is inadmissible. For avoidance of doubt, Standing Order No. 47(3) states, and I quote:-

> *"(3) If the Speaker is of the opinion that any proposed Motion:-*
>
> *a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;*
>
> *b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;*
>
> *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 or that the Motion be referred to the relevant committee of the Assembly, pursuant to article 114(2) of the Constitution."*

Further, the Member for Budalangi and, indeed, several other Members postulated that some recommendations in the Report may be offensive to the general rule of law and, ultimately, the Constitution. Specifically, the recommendation barring candidates seeking political offices from changing parties was observed to be against the Bill of Rights as enshrined in the Constitution. The agreement with the report would, therefore, be an attempt to right an obvious wrong. For clarity, Article 36(1) and (2) of the Constitution state:-

> *"Freedom of association*
>
> *36. (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*
>
> *(2) A person shall not be compelled to join an association of any kind."*

Honourable Members, an amendment is moved upon the original Motion to modify the question in such a way as to increase its acceptability, build consensus or to present to the House a different proposition as an alternative to the original question. It is on this basis that I admitted the amendment by the Member for Kisumu West following consultations with the Mover and the seconder of the Motion, who were Members of the Select Committee. That therefore settles the first question.

Honourable Members, the main question at hand, therefore, was whether the Motion for adoption had been procedurally amended as proposed by the Member for Kisumu West, the Hon. Aluoch. In addressing the question, the Leader of the Majority Party, the Hon. Aden Duale, made reference to the Speaker's earlier direction that no amendments were to be moved by any Member to the Motion except the party leadership, that is, the Majority and Minority Leaders. The relevant Standing Orders therefore apply, and in this case, Standing Order No. 54 and 55.

Standing Order 54 relates to amendments to Motions. Paragraph (1) of the Standing Order states:

> *"(1) Unless otherwise provided in these Standing Orders, any amendment to a Motion which a Member wishes to propose in accordance with these Standing Orders may be moved and, if necessary seconded at any time after the question upon the Motion has been proposed and before it has been put."*

Further, Standing Order 55, relating to amendments to be in writing states:-

"(1) The proposer of an amendment to a Motion shall, before moving it, hand the proposed amendments in writing, signed by the proposer, to the Clerk at least two hours before the order is read.

(2) Despite paragraph (1), the Speaker may, in exceptional circumstances, allow a Member to move an amendment to a Motion before the Assembly at any time during consideration of that Motion."

From the foregoing, having addressed the question as to whether the right procedure was applied to admit the amendment by the Member for Kisumu West, allow me to address the next concerns. Should we admit more amendments? On this question, I will be guided by the decision of the Speaker of 5th July 2016 when the Motion to form the Select Committee was under consideration. On that day, the Speaker directed as follows and I wish to quote him:-

"I will overrule all of you and make this direction: That for the reasons given by the Member for South Mugirango, any amendments including those proposed by Hon. Ben Washiali will have to be agreed on by the two coalitions. That is the best way to carry this forward"

Honourable Members, I will, therefore, uphold that particular decision on any further amendment to this Motion and require any Member seeking to move amendments to obtain prior written approval of either the Leader of the Majority Party or the Leader of the Minority Party, in person, meaning that the responsibility to do that is not to be delegated.

Honourable Members, the next question is what does adopting the Report mean? Perhaps, the principal concern for all of us should be the relationship between the recommendations of the Report and the Bills that the Committee proposes. May I reiterate that Report in itself makes recommendations, but whose actualization lies in the passage of the two Bills.

It is therefore, in place of the House, to look into itself and decide whether to engage in the current processes or await the Bills which will undoubtedly go through all the stages, including Second Reading, and consideration of any amendments at Committee stage, in accordance with the Standing Orders.

Honourable Members, let us not overlook the fact that the Report and the two draft Bills are part of a very long process. As a matter of fact, we are just beginning step one of nine steps that will culminate in the actualization of the other crucial processes important to the next General Elections.

May I take the liberty to enumerate these steps as follows:-

1. The adoption of the Report of the Joint Select Committee, which we will be doing this afternoon.
2. The passage of the two Bills, (Election Offences Bill, 2016 and the Election Laws (Amendment) Bill, 2016) by the two Houses.
3. The assent of the two Bills by the President.
4. The appointment of the Selection Panel by the President in accordance with the provisions of the new law.
5. The nomination of new Independent Electoral and Boundaries Commission (IEBC) Commissioners by the Selection Committee.
6. The approval by the National Assembly of the new IEBC Commissioners.
7. The appointment of the new IEBC Commissioners by the President in accordance to the new law and the Constitution.
8. The assumption of office by the new Commissioners including taking of oath of office, and
9. The handing over by the current IEBC Commissioners to the new Commissioners and vacation of office.

Honourable Members, it is important for Members to note that, all these steps ought to be achieved on or before 30th September 2016. Of importance also is to note that this Report and its recommendations are a product of a process that captivated the mood of the nation. Given that the implementation of the recommendations of the Select Committee will greatly impact on the manner of holding of the next general elections, I call upon the leadership and the entire House to be gallant to rise to the occasion and offer leadership while treating this matter with the sensitivity it deserves.

I thank you.

17. IMPLEMENTATION OF NTSA (OPERATION OF MOTOR CYCLES) REGULATIONS, 2015

Thursday, 1st September 2016

Honourable Members, this Communication relates to a matter that was raised by the Member for Kiharu, Hon. Irungu Kang'ata, on the alleged implementation of regulations by the National Transport Safety Authority (NTSA).

As I indicated yesterday, there is various ways by which the regulation-making authorities may deal with regulations soon after they are gazetted and, more particularly, the requirement by the Statutory Instruments Act for the tabling of those regulations or any other regulations in the House within seven days.

I want to confirm that NTSA did not table before this House the NTSA (Operation of Motorcycle) Regulations, 2015, for ease of reference. The Cabinet Secretary for Transport and Infrastructure transmitted the gazetted NTSA (Operation of Motorcycle) Regulations, 2015 to the National Assembly for tabling as required under Section 11 (1) of the Statutory Instruments Act, 2013.

As usual, the Regulations were referred to the Select Committee on Delegated Legislation for scrutiny to see whether they conform to the Constitution and the enabling Act, pursuant to which they are made or any other laws of the country and the principles of good governance and rule of law.

The Select Committee on Delegated Legislation held a meeting on Friday 19th June 2015 to scrutinize the said Regulations through which the Committee approved the Regulations having observed that the Regulations are in accordance with the Constitution, the parent Act and other written laws of the country.

Pursuant thereto, there was no need for the Committee on Delegated Legislation to table a report. In keeping with our Standing Order No. 210(4) (a), those of you who have copies of the Standing Orders could be looking at them so that the Hon. Member for Kiharu may rest.

Standing Order No. 210(4) says as follows:–

"(4) If the Committee–

(a) resolves that the statutory instrument be acceded to; the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument."

Therefore, there is no need for tabling the Regulations. They can only be tabled here if the Committee does not accede to the statutory instrument, in which case the Committee may recommend to the House that the Assembly resolves that all or any part of the statutory instrument be annulled. The rest is provided under that Standing Order.

Therefore, the Member for Kiharu is advised that the Clerk of the National Assembly communicated to the Director-General of NTSA on 30th June 2015 that the Regulations conform to the requirements of the Constitution, the parent Act and all other relevant laws of the country.

Therefore, their implementation violates no known law, unless the Member for Kiharu has imagined some recent ones.

Indeed, hon. Members, it is fair to commend the Committee on Delegated Legislation. It shows that the Committee has been working. It is only that the methods of doing their work are not always by reports here.

18. CONSIDERATION OF THE ELECTION LAWS (AMENDMENT) BILL, 2016

Thursday, 1st September 2016

Honourable Members, you will recall that yesterday, Wednesday 30th August 2016 during the afternoon Sitting, during the Second Reading of the Election Laws (Amendment) Bill, 2016, the Member for Kisumu Town West, Hon. Olago Aluoch, rose on a Point of Order seeking direction from the Speaker on matters arising out of the debate. Specifically, he sought determination on whether the Members could propose amendments to the Bill in light of the Communication from the Speaker with regard to further amendments to the Report of the Joint Committee on matters relating to the Independent Electoral and Boundaries Commission (IEBC). The Member additionally sought direction from the Speaker on whether it would be proper for the House to continue debate on the Bill in its present form, which according to the Hon. Member, does not conform to the Resolution of the House on the Report of the Joint Committee on matters relating to the IEBC with regard to the recommendation to restrict candidates seeking political offices from changing parties – an act commonly referred to as "party-hopping". Hopping like grasshoppers.

Honourable Members, on the question of proposing amendments to the Bill, I am guided by the Communication issued on Thursday, 25th August 2016 on the consideration of the Report of the Joint Parliamentary Select Committee on matters relating to the IEBC. On that day, the Speaker did direct as follows and I quote:-

> *"May I reiterate that Report in itself makes recommendations, but whose actualisation lies in the passage of the two Bills. It is, therefore, in place of the House to look into itself and decide whether to engage in the current processes or await the Bills which will undoubtedly go through all the stages, including Second Reading, and consideration of any amendments at Committee stage, in accordance with the Standing Orders."*

From the foregoing, it is quite clear that any prescription on amendments in the Communication only applied to the consideration of the Report of the Joint Parliamentary Select Committee. Members of the House are, therefore, at liberty to propose amendments to and, indeed, to amend the Bill in the usual manner as provided for under the Standing Orders. Indeed, I dare say for clarity that members are even at liberty to propose amendments to the Constitution itself. That should settle that first issue.

Honourable Members, on the second issue on whether it is proper for the House to continue debate on the Bill, allow me to revisit the resolution of the House on the

Report of the Joint Parliamentary Select Committee on matters relating to the IEBC. You will recall that the Hon Olago Aluoch had successfully moved the House to resolve to delete sub-paragraph (7) of Paragraph 659 of the Report relating to the recommendation to "restrict candidates seeking political offices from changing parties" – an act commonly referred to as "party-hopping".

During the debate on the adoption of the Report and also in the Point of Order that is the subject of this Communication, the Hon. Member argued that the recommendation in the Report and Clauses 8, 9, 10, 11 and 12 of the Bill contravene the political rights of an individual by prescribing timelines that restrict the individual from either changing parties or standing as an independent candidate in contravention of Article 38 of the Constitution and the freedom of association.

Honourable Members, the Constitution and legislation passed by this House outline a clear framework for the enjoyment of political rights and the place and regulation of political parties in *our democracy respectively. Article 38 of the Constitution provides, and I quote—*

> *"(1) Every citizen is free to make political choices, which includes the right—*
>
> *(a) to form, or participate in forming, a political party;*
> *(b) to participate in the activities of, or recruit members for, a political party; or,*
> *(c) to campaign for a political party or course.*
>
> *(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*
>
> *(a) any elective public body or office established under this Constitution; or,*
> *(b) any office of any political party of which the citizen is a member.*
>
> *(3) Every adult citizen has the right, without unreasonable restrictions—*
>
> *(a) to be registered as a voter;*
> *(b) to vote by secret ballot in any election or referendum; and,*
> *(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office."*

A clear reading of Article 38 reveals that the political rights are not absolute, but are subject to reasonable restrictions, some of which are contained in the Constitution itself. The Constitution empowered Parliament to legislate on the regulation of the

enjoyment of political rights, including prescribing any reasonable restrictions. Indeed, Article 82(1) of the Constitution, in this regard, provides—

> *"(1) Parliament shall enact legislation to provide for—*
>
> *(a) the delimitation by the Independent Electoral and Boundaries Commission (IEBC) of electoral units for election of members of the National Assembly and county assemblies.*
>
> *(b) the nomination of candidates.*
>
> *(c) the continuous registration of citizens as voters.*
>
> *(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections and*
>
> *(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote."*

Honourable Members, as you may recall, the Tenth Parliament in line with the requirement under Article 82 of the Constitution passed the Elections Act, 2011 to regulate among others the procedure for the nomination of candidates by political parties. Indeed, the Act currently obliges political parties as well as persons intending to stand as independent candidates to submit various documentation to the IEBC within stipulated timelines. Generally, it regulates the activities of political parties and candidates in the period before an election.

The Act requires parties to-

a. Conduct primaries at least forty five days before the general election at section 13.
b. Submit their membership lists to the Commission at least forty five days to a general election provided for at section 28 and
c. Submit their nomination rules to the Commission at least 90 days before the general election at section 27.

Further, Honourable Members, the Constitution itself prescribes a timeline that "locks out" independent candidates from being members of a political party. Article 85(a) of the Constitution provides-

> *"Any person is eligible to stand as an independent candidate for election if the person –*

(a) is not a member of a registered political party and has not been a member for at least three months immediately before the date of the election."

Honourable Members, it is therefore evident that the timelines contained in the Election Laws (Amendment) Bill, 2016 are not new or unusual. The timelines and indeed the rest of the Bill constitute proposals placed before the House for consideration, adoption, amendment or rejection. I must note that in addition I have scrutinized the Bill and I do not find any provision that may be interpreted as violating the fundamental rights and freedoms afforded under the Constitution, including the freedom of association and political rights. This, as I have previously ruled, does not preclude any individual from seeking a determination of the constitutionality of the provisions of the Bill after its enactment in the High Court as the body mandated to interpret the Constitution and other laws under Article 165.

Please be guided accordingly.

19. AMENDMENTS WITH MONEY BILL EFFECT MUST CONFORM TO THE REQUIREMENTS OF ARTICLE 114

Wednesday, 12th October 2016

Before we proceed to the next Order, which is the Committee of the whole House on the Kenya Defence Forces (Amendment) Bill (National Assembly Bill No. 41 of 2015), I wish to offer the following guidance.

In mid-March this year, I received proposed amendments to the Kenya Defence Forces (Amendment) Bill by the Member for Homa Bay Town, Hon. Peter Kaluma. The said amendment seeks to propose a compulsory compensation to members of the Kenya Defence Forces who suffer any form of disability or their dependents on death while on duty, a lump sum of not less than Ksh20 million. In addition, the amendment also proposes a waiver of all fees or tuition charges in all public institutions of learning, up to college level, for the members' children.

Honourable Members, whilst I am conscious that the amendments mean well to our Defence Forces, it is the opinion of the Speaker that the said amendments have a money Bill effect in terms of Article 114 of the Constitution. As you may be aware, the Budget and Appropriations Committee ought to consult with the Cabinet Secretary for

the National Treasury before the House can proceed with the consideration of the amendments in Committee of the whole House.

Hon. Members, I am also reliably informed that such formal consultations have not been concluded.

In the circumstances, I order that the said amendments are not considered in the Committee of the whole House as the extent of their financial implication have not been determined nor has this House made any legislative provision to meet the consequent budgetary requirements of the amendments, should they be passed. I am also aware that the Member has a separate legislative proposal with a similar effect, which is under consideration by the relevant committees before publication into a Bill. This is, indeed, a preferred alternative as it will also allow room for the obligatory public participation and determination on the implication of the proposed legislation on the pension scheme for the Kenya Defence Forces.

The House and the Committee of the whole House are guided accordingly that the said amendments shall not be considered.

20. SUBJUDICE: IN THE MATTER OF VIOLATION OF LABOUR LAWS AND TAX EVASION BY BIDCO AFRICA LIMITED

Thursday, 27th October 2016

This is on consideration of the Petition by concerned citizens regarding continued violation of labour laws and tax evasion by Bidco Africa Limited.

Honourable Members, you will recall that on Tuesday, 25th October 2016 during the Afternoon sitting, the Member for Kiambu, Hon. Jude Njomo, presented a Public Petition on behalf of former and current employees of Bidco Africa Limited.

The Petitioners on whose behalf the Petition was presented prayed that the House-

a) Investigates and inquires into the allegations on the matters raised in the Petition;
b) Requires the Kenya Revenue Authority, pursuant to the powers bestowed upon it by law, to investigate the tax evasion practices espoused in the Petition and report to the National Assembly, the Petitioners and the public as a matter of urgency;
c) Requires the State labour and employment institutions to urgently address their concerns and take appropriate action; and,
d) Makes any other order or direction that it deems fit in the circumstances of the Petition.

Honourable Members, you will further recall that I committed the subject Petition to the Departmental Committee on Labour and Social Welfare to consider and report its findings to the House within 60 days in accordance with the Standing Order No. 227(2).

Since the committal of the Petition, I wish to bring to the attention of the House that I have received letters from two law firms, namely Ngatia and Company Associates Advocates and TripleOKLaw Advocates both dated 26th October 2016. The two law firms claim to act for Bidco Africa Limited which is the subject of the Petition. In their letters, it is contended that the issue of tax evasion for which the intervention of the House has been sought through the Petition is currently before court in two cases, namely, High Court Civil Appeal No.33 of 2016, the parties being the Commissioner of Customs Services vs Bidco Oil Refineries Limited filed on 29th January 2016 and High Court Petition No.217 of 2016, the parties being Okiya Omtatah Okoiti & Another vs Bidco Africa Limited and four others filed on 26th May 2016.

The letters urge the House not to consider the Petition in light of the pending proceedings and further note that Paragraph 11 of the Petition is misleading to the extent that it avers that the issues in respect of which the Petition is made are not pending before any court of law or any constitutional or legal body. Their averment is to the effect that the subject matter of the Petition, in so far as it relates to the issue of tax evasion, is *sub judice*.

Honourable Members, the *sub judice* rule is set out in Standing Order No.89, which provides-

> *"(1) Subject to paragraph (5), no Member shall refer to any particular matter which is sub judice or which, by the operation of any written law, is secret.*
>
> *(2) A matter shall be 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.*
>
> *(3) In determining whether a criminal or civil proceeding is active, the following shall apply-*
>
> *(a) criminal proceedings shall be deemed to be active when a charge has been made or a summons to appear has been issued;*
>
> *(b) criminal proceedings shall be deemed to have ceased to be active when they are concluded by verdict or sentence or discontinuance; (c) civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made until the proceedings are ended by judgment or discontinuance;*
>
> *(d) appellate proceedings, whether criminal or civil, shall be deemed to be active from the time when they are commenced by application for leave to appeal or by notice of appeal until the proceedings are ended by judgment or discontinuance.*
>
> *(4) A Member alleging that a matter is sub judice shall provide evidence to show that paragraphs (2) and (3) are applicable.*
>
> *(5) Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House to a Committee."*

The rule is 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. For the rule to apply, the matter alleged to be pending before the court or other legal body must be active and there must be a likelihood of prejudice to its

fair determination of the issue under consideration if the House or its Committee refers to it in debate.

I must note that the House voluntarily imposes the rule on itself subject to the discretion of the Chair and 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.

I note that the letter received from Ngatia and Company Advocates encloses the pleadings filed by Mr. Okiya Omtatah Okoiti in High Court Petition No. 217 of 2016. In the case by Mr. Omtatah, he seeks a number of declarations from the court against Bidco and other respondents including and I quote:-

> *"A declaration that, as at 31st December 2015 and as stated in the whistle-blower report, the 1st Respondent's total tax exposure on the unpaid duty (including Value Added Tax) was Kshs4,394,779,047.00."*

The above declaration sought from the court is similar to the one sought in the Petition seeking the intervention of the House. The discussion of the issues relating to tax evasion by the subject of the Petition may, indeed, in my view, prejudice the fair determination of the cases.

Honourable Members, you will also note that the Standing Order No. 223(g) requires a Petitioner to indicate whether issues in respect of which the Petition is made are pending before any court of law or other constitutional or legal body. The object of this Standing Order is to provide the House with information it may use to determine whether consideration of a Petition and the resolution of issues arising from it may prejudice their fair determination by a court or other constitutional or legal body concurrently dealing with the same matter.

This, therefore, begs the question why the Petitioners wilfully averred that there were no pending proceedings in court over the subject matter of the Petition relating to the issue of evasion of taxes. This may only lead to the inference that the disclosure of that fact would have adversely affected the cause of the Petitioners.

Honourable Members, in addition to the foregoing, I note that Bidco Africa Limited is a privately owned company. I have previously pronounced myself on the extent to which the House may interrogate the affairs of individuals and private companies. It is not to say that the jurisdiction of this House may be ousted by that existence alone. I trust that the matters being prayed for here in this Petition, especially with regard to labour violations are perfectly within the remits of this House. In my view, I trust that the Departmental Committee on Labour and Social Welfare would take the

pronouncements that I have made in the past relating to individuals and private companies as well as the fact that, that does not oust their jurisdiction. In addressing this matter, the Committee is directed that in its consideration of the Petition, matters touching on issue to do with taxes payable by the subject of the Petition must be avoided pending the final determination of that matter in Civil Appeal No. 33 of 2016 and High Court Petition No. 217 of 2016 since any resolution of the House relating to the issue of that would still require that the matter may end up being taken up by other relevant agents of Government, which might still end up going to the same civil jurisdiction of the High Court and other courts superior to it.

I, therefore, rule that the Petition will continue to be considered by the Departmental Committee on Labour and Social Welfare to the extent only of the matters relating to violation of labour laws.

The Committee is accordingly guided.

21. WITHDRAWAL OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL

Tuesday, 22nd November 2016

Honourable Members, the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bill No. 58 of 2015) was published on 18th September 2015 to effect minor amendments that do not warrant the publication of a separate Bill. The Bill, which is sponsored by the Leader of the Majority Party, contained amendments to the following Acts:

a. The Industrial Training (Cap. 237);
b. The National Hospital Insurance Fund Act No. 9 of 1998;
c. The Copyright Act No. 12 of 2001;
d. The Kenya Institute of Curriculum Development Act No. 4 of 2013; and
e. The Kenya Law Reform Commission Act No. 19 of 2013.

You may recall that while moving Second Reading of the Bill on 5th October 2016, the Leader of the Majority Party formally withdrew amendments to the Industrial Training Act (Cap. 237) and the National Hospital Insurance Fund (NHIF) Act No. 9 of 1998. The Bill was, therefore, considered and concluded at Second Reading without the two statutes.

Honourable Members, I wish to inform the House that I have received a letter from the Leader of the Majority Party, requesting to withdraw proposed amendments to the Kenya Law Reform Commission Act No. 19 of 2013. This implies that the Bill now contains amendments to only two statutes, which negates its original omnibus intention. In this regard, I direct that the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bill No. 58 of 2015) be withdrawn from the House forthwith.

Nevertheless, the Leader of the Majority Party is at liberty to re-introduce the proposed amendments to the remaining two statutes, being the Copyright Act No. 12 of 2001 and the Kenya Institute of Curriculum Development Act No. 4 of 2013, by way of subsequent omnibus Bills or separate legislations.

The House is accordingly informed.

I thank you.

22. APPLICATION OF STANDING ORDER 176 ON DISCHARGES OF MEMBERS FROM COMMITTEES

Wednesday, 30th November 2016

Honourable Members, this Communication is on the application of Standing Order No. 176 on discharges of members from Committees. Honourable Members, on Thursday, 27th October, 2016 during the afternoon sitting, the Leader of the Majority Party, Hon. Aden Duale, MP, rose on a point of order seeking direction from the Speaker on the de-whipping of Members from Committees by parliamentary parties pursuant to Standing Order No. 176.

Specifically, he sought a determination of the question as to whether political parties can invoke the provisions of Standing Order No. 176 against certain Members despite the provisions of the Constitution; in particular Article 47 on the right to fair administrative action; Article 50 on the right to fair hearing, and Article 236 (b) on the protection of public officers.

Additionally, the Leader of the Majority Party sought guidance whether the House has a role in the process of the discharge of a Member from a Committee to which it considered and approved his or her appointment. He also sought guidance on whether our current practice of actualizing the provisions of Standing Order No. 176 would be unconstitutional to the extent that, in some cases, the discharges are necessitated by matters external to the proceedings or business of the House. He also contended that even if that particular Standing Order did not exist, political parties would still have the liberty and lawful avenues to punish or instill discipline on their members within the confines of internal party mechanisms and the Political Parties Act.

From the issues canvassed by Leader of the Majority Party, the following issues arouse for thoughtful consideration:

1. Whether and to what extent Standing Order No. 176 may be used as a mechanism for enforcing party discipline for breaches outside the proceedings of the House or its Committees;
2. Whether the provisions of Standing Order No. 176 is to be applied against Members of the House by instigation of or order of persons other than Members of the House;
3. Whether Standing Order No. 176 adequately protects the rights of Members in the performance of their functions in the House. Related to this is the question

of whether in the practice of Standing Order No. 176 without instituting a formal fair hearing forum within a political party setting in the confines of the precincts of the Parliament, we have been exposing Members to some form of injustice and unfair prejudice.

Honourable Members, you will recall that in reserving the concerns of the Leader of the Majority Party for a considered ruling, I did mention that the Procedure and House Rules Committee has been actively dealing with the issue of the review of Standing Order No.176 in light of formal concerns raised by Members and various suggestions for amendment of the Standing Orders. Undeniably, this matter has caused disquiet in the House and specifically the leadership for a long time.

Indeed, the Member for Lunga Lunga, Hon. Khatib Mwashetani had earlier in the Session raised matters along the same lines. The concerns raised with regard to the application of Standing Order No.176 and the interventions sought have been threefold:

a) The need for the affected Member to be notified before discharge;
b) The need to subject the aforementioned notification to a forum of Members of the parliamentary party in the House; and
c) The need for the affected Member to be afforded a practical and fair hearing within the parliamentary party set-up by his or her parliamentary party.

Honourable Members, you may also recall that this is not the first time that Parliament is being faced with the issue of discharge from committee membership. Indeed, as I indicated in a Communication on 14th April 2016, the Tenth Parliament was severally confronted by a similar issue. Notably, the Departmental Committee on Justice and Legal Affairs, then chaired by Hon. Ababu Namwamba, MP, remained moribund for more than one year as one of the coalition partners attempted to de-whip its Members from the Committee. The then Speaker, Hon. Marende, noted that he could not effect the discharge as the Standing Orders were silent on the matter.

The then Standing Order No. 176 provided that, and I quote: *"A vacant position occasioned by the resignation, removal, or appointment of a Member to the Government shall be filled within seven days after the National Assembly next meets."*

The ensuing disagreements saw the mandate of the Committee being taken over by the Constitutional Implementation Oversight Committee, then chaired by Hon. Abdikadir Mohamed. I am sure the matter is very fresh to Members who served in the House then. To demonstrate the active debate that ensued, the Hansard records shows that on 27th October 2011, the then Leader of Government Business who was also the Vice-President and Minister for Home Affairs was taken to task by the then nominated

Member, the Hon. Shebesh to explain why he had not effected the removal of certain Members from the Departmental Committee on Justice and Legal Affairs following her party's decision. In the debate, the then Member for Chepalungu, the Hon. Isaac Ruto contended that since the Standing Orders did not define what comprised the removal process, or who was to commence or effect the removal, the Leader of Government Business had no authority to remove any Member from a Committee.

Honourable Members, in the subsequent review of the Standing Orders, records indicate that the House was unanimous in passing the new provision giving parties powers to remove individual Members in Committees and replace them as in other multi-party jurisdictions. The Deputy Leader of the Minority Party, Hon. Midiwo, may recall the push for change of the rules to empower parties to discharge their Members from Committees which he fervently spearheaded together with the then Member for Gichugu, Hon. Martha Karua.

Honourable Members, in parliamentary practice, party discipline is integral in the management of parliamentary party affairs and whips play an important role. For votes on key issues, it is imperative for the Majority Party and the Minority Party to maximize the turnout of their Members. As such, the whips try to ensure that every Member from their party turns out to vote. The duties of whips include keeping Members and peers informed of forthcoming parliamentary business, maintaining the party's voting strength by ensuring Members attend important debates and support their party in parliamentary divisions, passing on to the party leadership the opinions of Members and ensuring party discipline. Party discipline is a mechanism, political parties use to keep their Members functioning as a cohesive group rather than as an informal collection of individuals. It encourages party loyalty among Members who may be tempted to act individually.

The question that arises with regard to the current concerns raised by the House is: To what extent and in what manner can a parliamentary party enforce party discipline by dewhipping Members from committees of the House?

Honourable Members, in the Third Edition of *Parliamentary Practice in New Zealand*, David McGee writes that permanent changes in replacing Members on select committees may be made by the House itself but, more commonly, they are made by the Business Committee. However, while the Business Committee formally appoints Members to committees, it is normally concerned with the party proportions rather than the individual Members proposed to serve on each committee, which is regarded as a matter for each party to determine according to its internal arrangements. Until 1972, replacing Members on select committees could only be effected by the House on a Motion with notice. The practice in New Zealand has since changed and making changes to committees is a largely administrative matter dealt with off the Floor of the

House and formally effected by the Business Committee without question. The only instance where the Business Committee exercises its own judgment on a proposal, is where a party proposes to vary its proportions to a committee by replacing its Member with a Member of another party.

In our context, the mandate of considering these proportions and proposing appointments is vested in the Committee on Selection. Honourable Members, in the House of Commons of the UK, the general rule is that a Member has to be notified before appointment to or discharged from a committee. Indeed, in the UK Standing Order No.121 states as follows and I quote:

> *"Any member intending to propose that certain members be members of a select committee, or be discharged from a select committee, shall give notice of the name of the member whom he intends so to propose and shall endeavour to ascertain previously whether each such member will give his attendance on the committee, and shall endeavour to give notice to any member whom he proposes to be discharged from the committee."*

The key words to be emphasized here are "shall endeavour to give notice to any Member whom he proposes to be discharged from the committees." Obviously, this implies that for discharges, the rule of natural justice and fair hearing needs to apply in the discharge process.

Honourable Members, that brings us to the next question, which is*: What is a notice*? In a ruling made by the United States of America (USA) Supreme Court on 24th April 1950 in the case of Mullane versus Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) the court held that notice must be *"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"*.

It will be also noted that in the United Kingdom, both the Labour Party and the Conservative Party have a code of conduct that requires Members to behave in a way that is consistent with the policies of their party, to have a good voting record and not to bring the party into disrepute. Indeed, in the Sixth Edition of *How Parliament Works*, Robert Rogers and Rhodri Walters write that a Back-Bencher's cardinal sin is to abstain or worse vote against his or her party without giving any warning. Notwithstanding the fact that the code for both the Labour and the Conservative parties contain a conscience clause, which recognizes a right of dissent on matters of deeply held personal conviction,

Members who vote against their party position are usually perceived as having committed a serious breach of party discipline. In a study of the House of Commons,

when asked to rank "acts of disloyalty" in order of seriousness, both party leaders and Back-Benchers rated cross-voting as the most serious violation of party discipline. In addition to being either excluded by party associates or refused party funds or organizational support in election campaigns, parties have other mechanisms to punish Members that they deem to be errant. These include refusal for promotion to Cabinet; denial of decent office accommodation and adequate staff; being overlooked as members of certain prestigious parliamentary committees; denial of opportunities to be part of travelling parliamentary delegations; denial of opportunity to ask a question during prime time such as Question Period; or refusal of party assistance in performing services for constituents and discharge from party caucuses.

Likewise, in the German Bundestag, parliamentary groups play a key role in placing members to serve in committees as they appoint committee members, and may also remove individual members and replace them at will with another of its members. In the United States Congress, the Senate, by a resolution, appoints chairs and members to serve in standing committees and to fill vacancies thereon. However, while the Senate Rules are fairly clear regarding how nominations are to be approved as stated above, they do not address how nomination of senators to committees by parties is to be made. In practice, each party vests this authority to their parliamentary group meeting, popularly referred to as "conference". The Republican Party has the Committee on Committees comprising of the party leader and senators that nominates members to committees, who are then approved by the Republican Conference. The Democratic Party on the other hand has the Democratic Steering and Outreach Committee comprising the Democratic Party Leader in the House, the Democratic Whips and most senior Democrats, who make nominations to committees before they are approved by the Democratic Conference – which comprises all Democrats in the Senate. Nominations and replacements made by these panels are rarely challenged on the Floor because it is in the parties' forum where decisions are made.

Honourable Members, in our case, the law relating to internal party disciplinary measures has since been radically changed by the Constitution and the enactment and amendment of our electoral laws. Article 47 of the Constitution, Sub- Article 1, provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, Committees are established pursuant to Article 124 of the Constitution for the orderly conduct of the proceedings of the House. Consequently, membership to a committee forms part of the endeavour to ensure the orderly conduct of the proceedings of the House.

In my opinion and as is the practice in comparative jurisdictions, for a parliamentary party to de-whip its members, the reason for the action must necessarily relate to an act or omission by the members that relates to the business of the House. This is particularly as espoused in my preceding examples of the United Kingdom Labour and

Conservative parties' codes of conduct that require members to behave in a way that is consistent with the policies of their parties, to have a good voting record and not to bring the party into disrepute in the House.

The decision to deny a member the right to actively participate in committees without a right to fair administrative action and for reasons unrelated to the business of the House would, in my opinion, offend the letter and the spirit of Articles 74 and 124 of the Constitution.

Hon. Members, though the decision to de-whip a member from a committee is one to be made internally by a parliamentary party, the current Standing Order No.176 neither incorporates the need for the decision of the party to be based on any grounds nor does it provide for a procedure affording the affected member a right to be heard. When compared against the extensive provisions under the Political Parties Act with regard to the discipline of members by parties that sponsored them to the House, the inadequacy of the Standing Order, which parliamentary parties would use to discipline their members within the House, becomes apparent. You will agree that this clear disparity calls for an urgent review of the text of that Standing Order.

Honourable Members, the issue of enforcing party discipline within the House through discharge of members from Committees is indeed a serious issue that requires conscious consideration by all. I am aware that the Procedure and House Rules Committee, which I chair, is considering the matter at length. Since I will be expected to preside in the House during the debate on the matter at hand, I request to excuse myself from the Committee until the end of that process. In the meantime, I request the Members of the Committee to ensure that the report on the consideration of these concerns is tabled soonest possible to allow the House to substantively consider the recommendations arrived at and deal with this recurring concern.

In the meantime, until this House addresses the question of the appropriate process for the discharge of members from committees, including putting in place formal mechanisms for notification and eventual removal of members from committees, I will not admit any further requests for the discharge of any member from a committee unless the whip of the party proposing the action demonstrates the following:

1. That, the parliamentary party has given the affected member notice of his or her intended discharge. The notice referred to here has the meaning ascribed to it by the USA Supreme Court Ruling quoted in this communication.
2. That, the parliamentary party has afforded the affected member a prior right to be heard on the issue. In this regard, it is not for the Speaker to dictate who will constitute neither the panel nor its procedure but it suffices to say that some form of a hearing must have taken place.

Honourable Members, for avoidance of doubt, this communication is not intended to amend the current Standing Order No.176 but to supplement the matters not provided for, which is requiring parties to comply with the constitutional standards of notification and fair hearing. In this regard, the decision of a party to discharge a member from a committee, having accorded him or her formal hearing, is final and ought not to be challenged or subjected to a vote in the House.

23. PARTICIPATION OF ASPIRANTS OF ELECTIVE POSTS IN HARAMBEE

Thursday, 1st December 2016

Honourable Members, my office has of late received a number of inquiries from Honourable Members relating to their participation in public collections and Harambee, and the requirements of the law in relation to such participation. These inquiries are presumably precipitated by the impending next general elections that are almost upon us, and the recent passage by the House of the Election Laws (Amendment) Bill, 2016 and the Election Offences Act. Therefore, I would like to offer the following guidance in addressing the concerns.

Honourable Members, as you are all aware, Chapter Six of the Constitution outlines the principles of leadership and integrity that all state and public officers must observe in the service of the people. With regard to conduct, Article 75(1) of the Constitution provides as follows:-

> *"A State officer shall behave, whether in public and official life, in private life, or*
>
> *in association with other persons, in a manner that avoids—*
>
> *(a) any conflict between personal interests and public or official duties;*
>
> *(b) compromising any public or official interest in favour of a personal interest; or*
>
> *(c) demeaning the office the officer holds."*

Honourable Members, as you may recall, this House subsequently passed the Leadership and Integrity Act 2012 (No.19 of 2012), which implements Chapter Six of the Constitution. When I say "this House" I mean the 10th Parliament. In addition to the above prescription, the Elections Act, 2011 (No.24 of 2011) limits the period within which, and the purpose for which persons intending to stand for election may participate in public collections. Section 26 of the said Act provides as follows:

> *"(1) A person who directly or indirectly participates in any manner in any public fundraising or Harambee within eight months preceding a general election or during an election period, in any other case, shall be disqualified from contesting in the election held during that election year or election period.*

(2) Subsection (1) shall not apply to a fundraising for a person who is contesting an election under this Act or to a fundraising for a political party."

To clarify this, it means that you can call a few of your friends to contribute for your campaigns or for your parties but you may not go to help others to do the same. Section 2 of the Act defines Harambee to mean public collection of monies or other property in aid or support of a course or project. Therefore, I wish to give guidance on the inquiries made by Members intending to vie for elective positions in the forthcoming general elections; that, as the law stands, their participation in public collections is restricted to eight months before a general election. The only exempted collection that they may participate in is one intended to raise funds for their re-election or for funding the activities of a political party.

Noting that pursuant to Article 101(1) of the Constitution, the date of the next general election is 8th August 2017, a quick calculation reveals that the eight months period contemplated in the Elections Act, 2011 begins to run as from 7th of December 2016. As your Speaker, I take liberty to remind us to take cognizance of the position of the law as it regards this matter. I trust that you will be guided accordingly even as you discharge your noble public duties and attend to the needs of your constituents.

24. PROCEDURE OF RECOMMITTING CLAUSES OF A BILL

Thursday, December 22, 2016

Honourable Members, before we resume business on Order No. 8, I wish to address one issue, out of the many issues that were raised in the House on Tuesday this week during the morning sitting. That issue relates to the question of procedure for *re-committal* of clauses of a Bill as raised by the Member for Laikipia East, the Hon. Anthony Kimaru and partly also sought by the Member for Ruaraka, the Hon. Tom Joseph Kajwang', MP.

Honourable Members, the Member for Laikipia East was of the view that a motion to recommit a clause ought to be moved in the Committee of the Whole House as opposed to the plenary after the Bill is reported. May I draw your attention to the provisions of Standing Order 136(3), which reads as follows and I quote:-

> *(3) A Member who desires to delete or amend any provision contained in a Bill, or to introduce a new provision in the Bill under paragraph (2) may propose any amendment to add, at the end of a Motion under paragraph (1), the words "subject to the re-committal of the Bill (in respect of some specified part or of some proposed new clause or new schedule) to a Committee of the whole House," and if that Motion is agreed to with such an amendment, the Bill shall stand so re-committed and the House shall either forthwith or upon a day named by the House Business Committee in consultation with the Member in charge of the Bill dissolve itself into a Committee to consider the matters so re-committed.*

Honourable Members, the reading of that provision of the Standing Order is clear that the *recomittal* process commences upon resumption of the House and after the question for the motion for agreement with the report of the Committee of the Whole House is proposed. That is exactly what the Leader of the Majority did during the morning sitting. Indeed, the Committee of the Whole House on Thursday, 1st December 2016 considered the said Bill but the motion on the agreement with the report of the Committee of the whole House was not made. It is however a matter of good practice, but NOT mandatory, that the intention to recommit a clause is notified to the Chairperson of the Committee of the Whole House. This therefore settles that question of procedure.

FIFTH SESSION (2017)

Speakers' Considered Rulings and Guidelines (2017)

1. Election of members to the Fourth East African Legislative Assembly (January 24, 2017)
2. Business that lapsed at the end of the Fourth Session (January 24, 2017)
3. Withdrawal of sections of proposed amendments to the Statute Law (Miscellaneous Amendments) Bill, 2016 and the Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2016 (February 09, 2017)
4. Request for Re-committal of a Clause in the Privatization (Amendment) Bill, 2016 (February 14, 2017)
5. Submission of election related regulations by the IEBC (March 2, 2017)
6. Authority of the House on the Petition for Removal of the Auditor-General (March 21, 2017)

1. ELECTION OF MEMBERS TO THE FOURTH EAST AFRICAN LEGISLATIVE ASSEMBLY

24th January 2017

I wish to convey the following communication relating to election of Members to serve during the 4th term of the East African Legislative Assembly.

Honourable Members, pursuant to the provisions of section 3 of the East African Legislative Assembly Elections Act 2011, I have received a notification from the Clerk of the East African Legislative Assembly (EALA) regarding the expiry of the term of the current 3rd East African Legislative Assembly which will come to an end on the 4th day of June 2017. The notification requests that the Parliament of Kenya causes the election of Members to represent the Country in the Assembly.

Honourable Members, the East African Legislative Assembly is established under Article 9 of the Treaty for the Establishment of the East African Community(EAC) as one of the key organs and institutions of the Community. Articles 50 and 51 of the EAC Treaty provides for Election of Members of the Assembly and the Tenure of Office of Elected Members respectively. Specifically, Article 51(1) provides that an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years. The current Assembly was elected in 2012. Additionally, section 4(1) and (2) of the East African Legislative Assembly Elections Act, 2011 provides that the election of Members to the Assembly shall be conducted in accordance with the rules of procedure of the Legislatures of the Partner States. The Act also requires that the elections ought to be conducted within ninety (90) days before the expiry of the date of the outgoing Assembly. The effective date in this case is March 04, 2017.

Honourable Members, it is my view that the current Elections Rules which were adopted by the National Assembly in April 2012 and published in the Kenya Gazette through Legal Notice No. 31 of 11th May, 2012, require a review to conform to the bicameral nature of our Parliament. In this regard, a team of officers of the Houses of Parliament has been constituted to propose amendments of the existing Rules for election of Members of the Assembly, taking into account the bicameral nature of our Parliament and the relative political party majorities. The text of the proposed amendments will be submitted to the two Houses of Parliament for consideration, soonest. The Rules, once adopted by Parliament will thereafter inform the next course of action including the process of nomination of candidates and election procedure. In view of the foregoing, the Leadership of the Political Parties in the House are notified of the process and advised to await direction from the Houses on the rules to be

applied upon adoption. I thank you.

2. BUSINESS THAT LAPSED AT THE END OF THE FOURTH SESSION

25th January 2017

Honourable Members, this communication relates to pieces of legislation and other business that lapsed upon the conclusion of the Fourth Session, yesterday 23rd January, 2017. Standing Order 141(2)(b) states that, "a Bill that has been published, read a first time or in respect of which the Second Reading has not been concluded at the end of two consecutive Sessions of Parliament shall lapse at the end of the Second Session and may be republished in the same or different form in accordance with Standing Order 114."

In this regard, Honourable Members, the following Bills have since lapsed-

(i) The Two-Third Gender Rule Laws (Amendment) Bill, 2015;
(ii) The Election Laws (Amendment)(No. 2) Bill, 2015;
(iii) The Parliamentary Service Bill, 2015;
(iv) The Constitution of Kenya (Amendment)(No. 3) Bill , 2015;
(v) The Constitution of Kenya (Amendment)(No. 5) Bill, 2015;
(vi) The Constitution of Kenya (Amendment) (No. 6) Bill, 2015;
(vii) The Military Veterans Bill, 2013;
(viii) The Kenya Uwezo Fund Bill, 2015; and
(ix) The International Crimes (Repeal) Bill, 2015.

Honourable Members, it is imperative to note that in accordance with our Standing Orders, the aforementioned Bills may be re-published, whether by the Members who had earlier sponsored them or by any other Member or Committee for consideration by the House. Similarly, all notices of motion that had been given in the previous Session have also lapsed. This includes notices of motion relating to adoption of Reports of Committees as well as individual Members' motions which are ordinarily considered on Wednesday mornings. Committee Chairpersons and individual Members who wish to resubmit the motions are free to do so following the usual procedure. The House is accordingly guided.

I thank you

3. WITHDRAWAL OF SECTIONS OF PROPOSED AMENDMENTS TO THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2016 AND THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL, 2016

9th February 2017

Honourable Members, the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 45 of 2016) and the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bill No. 48 of 2016) were published on November 11, 2016 as *Kenya Gazette Supplements* No. 185 and 188 respectively. The Bills were aimed at effecting minor amendments, which do not warrant the publication of separate Bills, to various legislations. The Bills were sponsored by the Leader of the Majority Party.

Honourable Members, I wish to inform the House that I have since received a letter from the Leader of the Majority Party, requesting to **withdraw** proposed amendments contained in the two Bills as follows:

1. **The Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 45 of 2016)**
   - Proposed amendments to: -

   (i) TheSexualOffencesAct,2006;
   (ii) The Proceeds of Crime and Anti-Money Laundering Act, 2009;
   (iii) The Treaty-Making and Ratification Act, 2012; and
   (iv) The Independent Policing Oversight Authority (IPOA) Act, 2011.

2. **The Statute Law (Miscellaneous Amendments) (No.2) Bill (National Assembly Bill No. 48 of 2016) -**
   - Proposed amendments to the Copyright Act, 2001

In this regard, Honourable Members, the consideration of the two Bills at *Committee of the House* for the Statute Law (Miscellaneous Amendments) Bill, 2016 and at *Second Reading* for the Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2016 will proceed as though the withdrawn sections were not part of the Bills as published. The House is accordingly guided.

I thank you

4. REQUEST FOR RE-COMMITTAL OF A CLAUSE IN THE PRIVATIZATION (AMENDMENT) BILL, 2016

14th February 2017

Honourable Members, on Thursday, February 09, 2017, the House considered the Privatization (Amendment) Bill, 2016 (National Assembly Bill No. 27 of 2016) in Committee of the Whole House. The Bill is therefore due for Third Reading in accordance with our procedures. However, I have since received a request, in the form of a motion from the Leader of the Majority Party, for the House to rescind its decision on the agreement with the report of the Committee of the Whole House on the consideration of the Privatization (Amendment) Bill, 2016.

Honourable Members, the essence of the request is that as currently carried, the law requires the approval of "...the relevant committee of Parliament..." in the appointment of the members of the Privatization Commission. This poses two technicalities. First, approval for appointments is by practice the jurisdiction of the House and not a committee of the House. Secondly, though the law had been passed prior to the bicameral legislature where Parliament and the National Assembly referred to one and the same thing, the meaning of Parliament in the current scenario presupposes both Houses. It would therefore be prudent to clearly state the intention of the law as envisioned by its drafters in 2005.

Consequently, Honourable Members, pursuant to the provisions of Standing Order 49(2)(a), I have allowed the Leader of the Majority Party to move the motion for rescission and re-committal of the clause as indicated in the Supplementary Order Paper.

Thank you

5. SUBMISSION OF ELECTION RELATED REGULATIONS BY THE IEBC

2nd March 2017

Honourable Members, as you may have just heard, the Independent Electoral and Boundaries Commission (IEBC) has submitted the final drafts of five sets of election-related regulations. I am aware that the Committee on Delegated Legislation has had several formal engagements with the IEBC between 13th February and 22nd February 2017 to consider earlier drafts of the regulations. The IEBC has therefore done its part by providing the final draft regulations for tabling and ultimate consideration by the House, through the Committee on Delegated Legislation, within the timelines specified in Section 109(3) of the Elections Act.

Honourable Members, I urge the Committee to expeditiously consider the regulations to allow the IEBC to publish the final regulations within stipulated timelines. The Committee is also reminded that pursuant to Section 18 of the Statutory Instruments Act, a desire to annul a statutory instrument requires the approval of the House, and would need to be fast-tracked to ensure adherence to the statutory deadlines. Once the Committee has considered the regulations, it is expected that a comprehensive brief will be given to the House on the content of the final regulations, given the importance of this matter.

I thank you

6. AUTHORITY OF THE HOUSE ON THE PETITION FOR REMOVAL OF THE AUDITOR-GENERAL

March 21, 2017

Honourable Members, you may recall that on Tuesday, 14th March, 2017, the Chairman of the Departmental Committee on Finance, Planning and Trade, Hon Benjamin Langat, MP, Ainamoi Constituency, rose on a point of order under Standing Orders 83 and 86 and informed the House of matters that had arisen during the Committee's consideration of a petition by one Mr. Emmanuel Mwagambo Mwagonah for the removal of Mr. Edward Ouko as the Auditor General of the Republic. It will be recalled that I committed the Petition to the Committee on 16th February 2017 for their consideration as required under Standing Order 230(4). In accordance with the provisions of Standing Order 230 (4) the Committee had fourteen days (14) within which to conclude consideration of the petition and submit a Report to the House containing its findings and recommendation(s).

Honourable Members, the Chairman did inform the House that the Committee commenced its sittings on 21st February 2017 and had since heard representations from a number of persons including, the following-

(a) Mr. Emmanuel Mwagambo, the Petitioner;
(b) Mr. Edward Ouko, the Auditor-General;
(c) The Clerk of the National Assembly;
(d) The Chief of Staff and Head of Public Service;
(e) The National Integrity Alliance;
(f) The Institute of Certified Public Secretaries of Kenya;
(g) A Mr. Benjamin Ndolo;
(h) The Ethics and Anti-Corruption Commission; and,
(i) The Director of Public Prosecutions.

Honourable Members, the Chairman further reminded the House that, upon realizing that the matter was quite weighty and required additional time to examine, the House, by a resolution made on 1st March 2017 granted the Committee a further twenty-one (21) days with effect from 2nd March 2017 within which to conclude the hearing of the grounds of the Petition.

Honourable Members, the Chairperson also informed the House that, on 13th March 2017, the High Court issued conservatory orders restraining the Committee from further proceeding with the petition pending the hearing and determination of a case filed by one Mr. Okiya Omtatah Okoiti *(High Court Petition No. 62 of 2017; Okiya*

Omtatah Okoiti v National Assembly of Kenya & 3 Others), which case I will refer to as *the Omtatah Case* for the remainder of this Communication. Mr. Omtatah had contended amongst others that the matters raised in the petition had been addressed by the competent offices mandated in law to investigate the matter and therefore by considering the petition, the National Assembly will be usurping the powers of these agencies. The House was informed that the conservatory order was issued by Justice E. Chacha Mwita *restraining the Committee from further proceeding with the Petition and the National Assembly from acting on any recommendation made by the Committee pending the hearing and determination of the case*. The Court also stated that the *Omtatah Case* will be coming for hearing on 10th of April, 2017.

Honourable Members, the Chairperson further informed the House that, on 14th March 2017, Justice George Odunga granted similar conservatory orders in a second case filed by Mr. Edward Ouko himself *(Judicial Review Application No. 108 of 2017; Edward Ouko v National Assembly of Kenya & Others)* and has been fixed for hearing on 15th May 2017. In this regard, on 14th March 2017, upon deliberation of these developments, the Committee resolved to suspend all scheduled meetings relating to the petition as ordered by the Courts and sought the guidance of the Speaker and/or the House. The Committee also resolved to request for directions and guidance from the Speaker on various other issues, which I will set out shortly.

Honourable Members, you will also recall that, this matter did attract a lot of reasoned concern in the House. Various Members spoke on it, seeking guidance from the Speaker. Amongst those who spoke was the Member for Kisumu Town West, the Hon. John Olago Aluoch, MP; the Member for Kiminini and Minority Party Deputy Whip, the Hon. Chris Wamalwa, MP; the Member for Kikuyu, the Hon. Kimani Ichungwa, MP; the Member for Ainabkoi, the Hon. Samuel Chepkong'a, MP; the Member for Githunguri, the Hon. Njoroge Baiya, MP; the Member for South Mugirango, the Hon. Manson Nyamweya, MP; the Member for Nambale, the Hon. John SakwaBunyasi, MP; the Member for Mbita, the Hon. Millie Odhiambo-Mabona, MP; the Member for Kiambu, the Hon. Jude Njomo, MP, and the Leader of the Majority Party , the Hon. Aden Duale, MP, amongst others.

Honourable Members, having carefully examined the Chairperson's submission and the additional matters raised by other Members, I have isolated the following six (6) issues as requiring my guidance-

1. Whether the High Court has power to impede the National Assembly from considering a petition submitted under Article 251 of the Constitution for the removal of a member of a constitutional commission or holder of an independent office;

2. Whether the High Court has powers to suspend the Standing Orders of the National Assembly or set aside the decision of the Speaker of the National Assembly made on 16th February 2017 committing the petition to the Departmental Committee on Finance, Planning and Trade and requiring the Committee to consider the petition within specified timelines;

3. Whether the High Court has powers to stop Parliament from exercising the freedom of speech and debate in Parliament provided for in Article 117 of the Constitution;

4. Whether the High Court has powers to impede the National Assembly and its Committees from exercising oversight over State Organs as provided for under Article 95(5) of the Constitution;

5. Whether the present orders issued by the High Court were lawfully made and issued in good faith as contemplated in Article 160(5) of the Constitution?

6. What actions may the National Assembly take with regard to the decisions of the High Court in light of the provision of Article 1(2) of the Constitution on the sovereign power of the people for which people exercise through their democratically elected representatives and Article 94(4) which obligates Parliament to *'protect this Constitution and promote the democratic governance of the Republic.'*

Honourable Members, as I address these questions, allow me clarify from the on set that as your Speaker, I will dwell mainly on the privileges of the House and its Committees as granted by the Constitution and as interpreted in other applicable jurisdictions. Indeed, whereas the Constitution may have granted jurisdiction to the judiciary in certain matters, it does not mean that the jurisdiction should be invoked and judicial powers exercised in every matter brought before the Courts **without regard to the exemptions contemplated by the Constitution.** In making this communication, I will also be guided by Articles 259(1) and 94(4) of the Constitution which provides as follows -

Art. 259(1):

This Constitution shall 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.***

Art. 94(4). Parliament shall ***protect*** *this Constitution and promote the democratic governance of the Republic.*

Honourable Members, having laid that background, I will now proceed to consider each of the issues raised in the House sequentially in a more detailed manner.

1. Whether the High Court has powers to stop the National Assembly from considering the petition

Honourable Members, I am aware that the Order issued by the High Court in the *Omtatah Case*, on 13th March 2017, read in pertinent part, as follows;

4. THAT in the meantime conservatory orders are hereby granted restraining the Committee of the National Assembly seized of the Petition against the 1st Interested Party herein (Edward Ouko) from further proceeding with that Petition pending the hearing and determination of this Petition.

5. THAT for avoidance of doubt the Respondents should not act on any recommendation made by the responsible Committee of Parliament, namely: the Finance, Planning and Trade Committee of the National Assembly, until the Court determines the Petition before it.

Whereas the Court apparently set *the Omtatah Case* for hearing on 10th April 2017, nobody knows whether the hearing will indeed proceed on that day and what other orders the Court may issue then. As such, I will see the Court Order for what it is, not what it purports to be. Whereas the Court Order purports to be a 'meantime conservatory order', its effect, on the face of it, is to impede the National Assembly from discharging its mandate by considering the Petition until such a time that the Court may issue further orders. The Court Order therefore seeks to stop the National Assembly from considering the Petition submitted by Emmanuel Mwagambo Mwagonah for the removal of the Auditor General as contemplated under Article 251 of the Constitution.

Honourable Members, in examining the question of whether the High Court has powers to stop the National Assembly from considering the petition there are two related issues that need to be examined. These are what is the place of the doctrine of separation of powers and what is the right of a Petitioner as espoused in the Constitution? Permit me to examine each of the questions as follows-

Firstly, on the issue of what is the place of the doctrine of separation of powers, as you are aware the doctrine requires that the three principal institutions of the State-the Legislature, the Executive and the Judiciary-should be divided in persons and functions

in order to safeguard liberties and guard against the excesses of the other. Clarifying on the democratic principles underpinning this doctrine, *Montesquieu,* in 1748, states as follows:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers[1]".

Honourable Members, in our case in Kenya, the doctrine of separation of powers can be deduced from the provisions of Article 1(3) of the Constitution, which provides as follows,

Art. 1(3): Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions, in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;
(b) the national executive and the executive structures in the county governments; and
(c) the Judiciary and independent tribunals.

A further reading of the more specific provisions of the Constitution will show that Legislative Authority, at the national level is delegated to Parliament under Article 94(1) while Judicial Authority is delegated to the courts and tribunals as established under Article 159(1).

Honourable Members, in a Presidential System of Government like the one obtaining in Kenya, a strict interpretation of the meaning of the doctrine of separation of powers is necessary for the preservation of democracy and the rule of law. Such an interpretation leads to the inevitable conclusion that none of the three Arms of the Government of Kenya may exercise power conferred on the other, nor should any person be a member of more than one of the arms. Indeed, separation of powers is meant to establish a system of checks and balances between the branches of government.

Honourable Members, my predecessor to this Office, the Hon. Kenneth Marende, had this to say on the doctrine, in a Ruling to the House made on November 27, 2008 (*Ruling on Judicial Review: In the Matter of the Electoral Commission of Kenya (ECK)Chairman Versus the Attorney-General),* and I quote-

> *"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".

Honourable Members, coming back to the present circumstances which we find ourselves dragged into, I have to look at what arm of government should make the determination in the removal of the Auditor-General as contemplated in Article 251 of the Constitution, which I may reproduce and quote as follows-

Removal from office -

Art .251 (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—

(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
(c) physical or mental incapacity to perform the functions of office;
(d) incompetence; or
(e) bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.

(4) On receiving a petition under clause (3), the President—

(a) may suspend the member or office holder pending the outcome of the complaint; and

(b) shall appoint a tribunal in accordance with clause (5).

Honourable Members, it is important to appreciate from the outset that in the sequence of events contemplated under Article 251, the National Assembly is indeed not the trial chamber of the petition. The obligation bestowed on the House **is merely to ascertain whether the petition discloses a ground for removal ...** after which the Petition is transmitted to His Excellency the President for the appointment of a tribunal which will act as a trial chamber. In fact the obligation on the House can be discharged by a direct vote of the House if the House so wishes to encompass such a procedure. An examination of the foregoing provisions will show that at the time of the service of the Court Orders, the National Assembly was considering the petition as required under Article 251(3) of the Constitution afore-stated. The petition was received by the National Assembly on 14th February, 2017. The Petition was reviewed and it was ascertained that it complied with the relevant provisions of the Constitution, the Petitions to Parliament (Procedure) Act, No. 22 of 2012) and Standing Order 230 (Petitions for Removal of a member of a Constitutional Commission).

Honourable Members, having been satisfied that the Petition met the requirements of the relevant provisions of the Constitution, the Petitions to Parliament(Procedure) Act and Standing Order 230 on 16 February 2017, I committed the Petition to the Departmental Committee on Finance, Planning and Trade for investigation and reporting to the House. It is important to note that once advised by the Clerk that a Petition meets the requirements of the relevant provisions of the law and is worth investigation, the Speaker is **obligated** to convey it to the House and refer it to relevant Committee. The law does not require the Speaker to seek the views of courts, any aggrieved party or indeed the Petitioner in determining whether or not a Petition should be admitted for consideration. Doing so would in fact amount to investigating the grounds of the Petition, which is the exclusive function of the relevant Committee and the House. This is clear from a plain reading of the Constitution, the Petitions to Parliament (Procedure) Act and our Standing Orders.

Honourable Members, moving on, upon conveying the Petition, the Committee subsequently sought, and was granted an extension of the period within which they should have submitted the Report to the National Assembly by 21 days with effect from 2nd March, 2017. Thus according to the said House Resolution, the Committee is required to submit its report in the House on or before Thursday, 23rd March, 2017. The concern now is a determination whether it was proper or allowable for the High Court to issue a conservatory order stopping the consideration of the petition by the Committee until the *Omtatah Case* is heard and determined.

As the conservatory orders were in fact issued by the Court on its own motion, without application of the parties, it is not clear what mischief the Court sought to address by issuing the Orders at the time it so did. Indeed, at the time of the issuance of the

Order, the Committee had not even finished its investigations into the petition as required by Standing Order 230(4). The *Omtatah Case* and the Court Order are pre-emptive of the fact that the Committee may as well have reached a conclusion that the petition did not disclose a ground for removal of the Auditor General as contemplated in Article 251(3) of the Constitution. The Committee would have then tabled a report to the House seeking approval of their findings. Needless to say, the House may agree or disagree with the Committee. In the event the House finds that that the petition does disclose a ground for removal of the Auditor-General under Article 251(3) of the Constitution, then the petition shall be forwarded to **the President.**

Honourable Members, allow me to re-emphasize that as seen in Article 251 of the Constitution which I need not restate, it is clear that it is **only** the National Assembly that has the mandate to consider the substance of the Petition in the first instance. This, simply put involves an examination of whether the Petition has merit or not. In the second instance, the other body that ought to consider the substance of such a Petition is the tribunal contemplated under paragraph (4)(b). It may also be valid to argue that, indeed, the actual *quasi-judicial* trial on matters of this nature would vest in the tribunal, if the matter was to escalate to such level. It is therefore not also clear what the court order seeks to achieve. Indeed the House would expect that the Court order is not an attempt to remove the hat of the National Assembly and put it on the Judiciary as doing so would be a clear violation of the provisions of Article 251 of the Constitution which confers jurisdiction only on the National Assembly to consider a the petition for removal of the Auditor-General in terms of substance.

Indeed Honourable Members, as you are all aware, the Speaker ordinarily receives Petitions seeking to remove Members of constitutional Commissions and holders of Independent Offices. As a matter of fact, this House has in the past deliberated on several Petitions for removal of Members of constitutionals commissions and holders of independent offices. You would recall several of them including the two separate Petitions for removal of Members of the Independent Electoral and Boundaries Commission, the Petition for removal of Members of the Judicial Service Commission, the Petition for removal of Members of the National Police Service Commission, the separate Petitions for Removal of Chairperson and Members of the Ethics and Anti-Corruption Commission, the Petition for removal of the Attorney General, Motions for Removal of specific Cabinet Secretaries, amongst others. In many of these instances, the House pronounced itself through reports submitted by Committees of this House. In some cases, including the one in the case of the petition for the Removal of the Chairperson of the Gender and Equality Commission and the first petition for the Removal of the Members of the IEBC, the House, agreed with the Committee that the respective petitions did not disclose a ground for removal of the said state officers from respective offices. It is important to note that in all these Petitions, the Courts did not restrain the National Assembly from considering the matters. Indeed, this House has

also adjudicated on previous Petitions seeking the removal of other persons from office, including one on the removal of the Auditor-General which was not admitted for failure to meet the requirements of the Constitution, the Petitions to Parliament (Procedure) Act and our Standing Orders.

Honourable Members, in view of the foregoing, it is therefore my view that if the Courts are to be said to have jurisdiction in this matter, it then must be after the determination by the National Assembly of the question whether there was indeed a ground for removal of the Auditor General under Article 251(3) of the Constitution. Accordingly, Hon Members it is my view that any attempt by the High Court to pre-empt or stop the Committee or the National Assembly from taking actions to enable it to be 'satisfied' under Article 251(3) of the Constitution on whether the petition discloses a ground for removal of the Auditor-General is **premature** at this stage of the process. Indeed, such interference flies in the face of the principle that the process of removal of state officers from office through legislative intervention, in what other jurisdictions call **impeachment**, vests entirely with the legislature as an ultimate check on the other arms of government and oversight of state organs.

Honourable Members, moving on to the second question, which relates to the right of a Petitioner to Petition Parliament, as you are all aware Article 119 of the Constitution clearly espouses the right of a Petitioner to petition Parliament and it provides that every person has a right to petition Parliament to consider any matter within its authority. This is a right which in my view the Speaker and certainly the House cannot curtail or limit. The Petition before the Departmental Committee on Finance, Planning and Trade seeking to remove the Auditor-General was certainly submitted to Parliament in furtherance of clear provisions of the Constitution, the Fair Administrative Action Act and the Standing Orders. Moreover, under the provision of Article 47 of the Constitution, and the Fair Administrative Action law, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedural. The Speaker and the office of the Clerk, when processing such petitions is conscious of these provisions and the need to balance both the right of both the Petitioner and the state officer(s) being claimed to be removed from office. As such, the Court Order which in effect seeks to impede the National Assembly from considering the petition is therefore a clear violation and blatant abrogation of the right of the Petitioner to Petition the National Assembly.

2. Whether the High Court has powers to suspend the National Assembly Standing Orders and set aside the internal decisions of the Speaker and the House

Honourable Members, it has been claimed that the Court Order has disregarded the powers of the National Assembly and its Speaker to issue directions and deadlines to Committees of the House. A question was also posed *on whether who between the*

National Assembly and the High Court should be directing the internal procedures of the House.

The powers of the Speaker to preside in the proceedings of the House are set out in Article 107(1)(a) of the Constitution which provides that the Speaker of the House shall preside at any sitting of a House of Parliament. To 'preside' means to be in a position of authority in a meeting or gathering and this authority must surely include powers to issue lawful directions to Committees and Members of the House. To this extent, I am of the view that no person or body has authority to 'Preside in Parliament' except the respective Speaker of the House, or a Member of the House lawfully authorized to stand in for the Speaker. It must also not be forgotten that the Committees of the House and the Standing Orders have their anchorage in Article 124(1) of the Constitution, which provides as follows-

> ***Art. 124.*** *(1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.*

Honourable Members, the doctrine of separation of powers and parliamentary practices in leading world democracies require that Parliament be left to be the sole arbiter of its own internal proceedings. Indeed, on the subject of "Powers of Courts with Reference to Legislative Procedure", *Masons Manual of Legislative Procedure*, which is widely applied in the legislative Houses of the United States of America in section 71 (page 59) that, and I quote-

> Sec.71:
>
> **Courts cannot interfere with Rule-Making Powers of Legislative Bodies**
>
> *"The courts will not disturb a ruling on a parliamentary question made by a legislative body having authority to make rules for its governance and acting within the scope of its powers."*[2]

Honourable Members, further, in the United States, the United States Supreme Court has had many occasions to consider the extent to which the United States Courts may call into question internal proceedings in either Houses of Congress. In the landmark case of *Marshall Field & Co. Versus Clark, 143 U.S. 649 (1892*), the relevant brief facts were as follows-

> *While engrossing the McKinley Tariff Bill, a clause known as section 30, relating to a rebate of taxes on tobacco, which was shown by the journals of both the House of Representatives and the Senate to have been regularly passed by both Houses of Congress,* ***was omitted****, and that the engrossed Act, as attested by*

the Vice-President and the Speaker of the House, as approved by the President and as deposited with the Secretary of State, was not the Act which passed the two Houses of Congress. There was contention that the Act was therefore not a statute of the United States in accordance with the provisions of the Constitution.

The Court held that federal courts will generally not allow challenges to statutes on the grounds that the versions passed by the House and Senate differed from each other. The Court held that the judiciary must treat the attestations of "the two houses, through their presiding officers" as "conclusive evidence that a bill was passed by Congress."

The Court also held that a Bill signed by the leaders of the House and Senate establishes that Congress passed the text included therein "according to the forms of the Constitution," and it ***"should be deemed complete and unimpeachable." The Court held that the Judiciary should not delve into the internal proceedings of the legislative chambers to the validity of their claims.*** *Appellants had argued that the constitutional clause providing that "each house shall keep a journal of its proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Supreme Court rejected that interpretation of the Journals Clause, holding that the Constitution left it to Congress to determine how a Bill is to be authenticated as having passed. The Court finally stated that-*

"the respect due to coequal and independent departments" demands that the courts accept as passed all bills authenticated in the manner provided by Congress."

Honourable Members, let me now turn to the issue of the **sub-judice rule**, which was alluded to by the Member for Kiambu, the Hon. Jude Njomo, MP. The sub-judice rule, which is provided or under Standing Order 89 is a tenet adopted by most legislatures in the Commonwealth and intended to espouse the rule of law and the rights to a fair trial. The rule generally provides that where an issue is awaiting determination by the Courts, the issue should not be discussed in the House through a Motion, debate or question in a manner that may prejudice the decision to be made in Court. You will also notice that the *sub-judice* rule is not absolute. It is limited under paragraph (5) of the said Standing Order so as not to hinder the constitutional rights of Parliament to discuss any matter before it.

Having said that Honourable Members, it is thus apparent that the Courts have no mandate and it is indeed unconstitutional for the High Court to disregard the express provisions of Article 107 and Article 124 of the Constitution and substitute themselves for the Speaker of the House and the Standing Orders to discharge the functions of

'presiding officers of Parliament' or act as 'regulators of the orderly conduct of Parliamentary proceedings'. **Honourable Members allow me to reiterate that the right of the Legislature to determine its own rules of procedure also exist in the Judiciary.** Indeed the Judiciary, through the Chief Justice makes several rules that guide certain proceedings in Courts. In this regard, the Legislature may not purport to question the manner in which Courts perform certain matters filed before them under those rules. It is this fundamental concept that should also guide the Judiciary and refrain from interfering with internal procedures of the National Assembly which find their basis in clear provisions of the Constitution. Indeed, it is my view that, for the principle of separation of powers to flourish and stem possible abuse of authority, the three arms of government should discharge their respective mandates based on comity and reciprocity as a virtue itself and self-restraint.

3. Whether the High Court has powers to stop Parliament from exercising the freedom of speech and debate in Parliament provided for in Article 117 of the Constitution.

Honourable Members, in my attempt to address this question, I will begin by setting out the provisions of Article 117 of the Constitution, and which reads as follows;

> ***Art. 117. Powers, privileges and immunities***
>
> *(1) There shall be freedom of speech and debate in Parliament.*
>
> *(2) Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.*

Honourable Members, it should not be lost that the underlying the constitutional doctrine of parliamentary privilege is the recognition that these privileges are **indispensable** for the conduct of the Legislature' business and that an efficient and effective Parliament must enjoy a certain autonomy from **control** by the Executive and the Judiciary. The basic concept underpinning 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 say in Parliament will later be held against them in court or other adverse proceedings. In the commonwealth of the United Kingdom, Lord Neuberger, Master of the Rolls, reports that freedom of speech and debate in Parliament is *"an absolute privilege and is of the highest constitutional importance. Any attempts by the courts to contravene Parliamentary privilege would be unconstitutional. No court order could conceivably restrict or prohibit Parliamentary debate or proceedings."*[3]

Honourable Members, in the present matter, I am, of course, aware that in Kenya the prevalent constitutional law principle is constitutional democracy and not necessarily that of parliamentary supremacy as practiced in the United Kingdom. But so long as Article 117 is part of our Constitution and that the Article protects freedom of speech and debate in the Houses of Parliament, I am of the view that the court order stopping a Committee of the House and the House itself from debating or taking decisions on matters lawfully and constitutionally before the House, is an unconstitutional affront by the Judiciary on the constitutional privileges accorded by the Constitution to Parliament. The Courts cannot therefore purport to exercise quasi-judicial supervision over proceedings in Parliament without respecting the clear provisions of Article 117 of the Constitution.

Additionally, Honourable Members, under Article 19(5) of the Constitution, the rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

This therefore shows that that the import of the Article 117 can only be fully understood if restated.

Honourable Members, in my view, it is clear from the holistic exposition of the Constitution that, Article 117(1) which confers ***freedom of speech and debate*** to Parliament is clearly one of the **limitations** to the Bill of Rights contemplated by the Constitution. Consequently, a person moving the High Court under Article 165(3) of the Constitution, on the basis of a denial, violation, infringement or threat on a right or fundamental freedom in the Bill of Rights has to take cognizance of the **privilege and protection** accorded to parliamentary proceedings by Article 117 of the Constitution. It is with this spirit that Article 165(3) (c) confers jurisdiction on the High Court to hear an appeal **from a decision of a tribunal appointed under this Constitution** to consider the removal of a person from office, other than a tribunal appointed under Article 144. It is my humble view in respect of matters for removal from office, the framers of the Constitution must have contemplated involvement of the High Court at the tail end of the process and not at the beginning or in the course of the parliamentary proceeding as this may be obtrusive to the removal process.

Honorable Members, although Article 165 (6) of the Constitution further gives the High Court supervisory jurisdiction over the subordinate courts and over any person,

body or authority exercising a judicial or quasi-judicial function, Parliament retains the responsibility under Article 160(1) to legislate on the procedure and manner in which the High Court shall exercise this power without offending the spirit of Articles 19(5) (c), 117 and 165 (3) (c) of the Constitution. Indeed, Article 160 of the Constitution that guarantees judicial independence provides as follows-

> *Art.165 (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution* ***and the law*** *and shall not be subject to the control or direction of any person or authority.*

Honourable Members, the responsibility is therefore squarely placed on Parliament to consider making the necessary amendments to the law including the Civil Procedure Act and other laws so as to provide for the procedural exercise of the powers conferred on the Courts within the limits contemplated by the Constitution, especially as regards the doctrine of separation of powers.

4. Whether the High Court has powers to impede the National Assembly from exercising oversight over State Organs as provided for under Article 95(5) of the Constitution

Honourable Members, in addressing this question, I will be guided by the provisions of Article 95(5) of the Constitution, which provides as follows-

> *Art.95(5). The National Assembly—*
>
> *(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and*
> *(b) exercises oversight of State organs.*

Honourable Members, it is very important to note that the Constitution bestows this important mandate of reviewing the conduct of the President, Deputy President and other state officers and exercising oversight over all state organs on the National Assembly and **not** on any other state organ or arm of government. The other arms of government should therefore refrain from encroaching on this important mandate of Parliament.

Honourable Members, more importantly, the House must appreciate that it is dealing with perhaps its utmost and foremost servant. The Auditor-General is indeed arguably the foremost servant of the Legislature. In fact in jurisdictions like the United States of America, the office of the Auditor General is an office which resides in the legislature. Under Article 229 of our Constitution, the Auditor General is approved by this House before appointment to office. His job description is entirely to audit on all public entities funded from public funds and make a report to Parliament on whether public

funds have been expended lawfully and in an effective way. Under Article 229(8), Parliament has an obligation to consider debate and take appropriate action on the report of the Auditor General. The Auditor General therefore is constitutionally bestowed with the greatest amount of interaction with the House in the performance of its oversight role. That is why it is important in this communication to separate the matter of his removal from office from the other parliamentary obligations that subsist to his office and are not in any way subject to the court orders.

Further, as you are aware the Office of the Auditor-General and Parliament have had a mutual working relationship and in the past where the Office of the Auditor-General has raised queries relating to the financial audit of other accounting officers, Courts have also not restrained the National Assembly from considering such matters. The relationship between the Auditor-General and the House must therefore be not only cordial but of utmost integrity especially where questions of integrity are raised.

Honourable Members, in the present situation, I am of the view that the Court Order has not impeded the National Assembly from exercising oversight under Article 95(5) of the Constitution for the reason that the Court Order in question is limited in **scope and application** in that it only seeks to stop the Committee from taking actions for the removal of the Auditor-General from office under Article 251 of the Constitution and is also limited to the particular Petition submitted by Mr. Emmanuel Mwagambo Mwagonah is concerned. In this regard, the Court Order is specific to the proceedings relating to removal from office of the Auditor General under Article 251 of the Constitution. The National Assembly and its Committees are therefore free to execute their **ordinary** oversight mandates in relation to the Office of the Auditor-General as contemplated in the Constitution and the law.

5. Whether the High Court Order was lawfully issued in good faith as contemplated under Article 160(5) of the Constitution.

Honourable Members, I wish to draw your attention that Article 160(5) of the Constitution provides as follows;

> *Art.160(5). A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.*

In the same vein, Standing Order 87(1) of the National Assembly Standing Orders provides that-

> ***Contents of speeches***
>
> *87. (1) Neither the personal conduct of the President, nor the conduct of the Speaker or of any judge, nor the judicial conduct of any other person*

performing judicial functions, nor any conduct of the Head of State or Government or the representative in Kenya of any friendly country or the conduct of the holder of an office whose removal from such office is dependent upon a decision of the House shall be referred to adversely, except upon a specific substantive Motion of which at least three days' notice has been given.

Honourable Members, in light of the provisions of the Constitution that I have cited and our own Standing Orders, I refrain from making any comment on whether the Court Order was issued lawfully and in good faith. I believe that the judicial arm has put in place adequate and effective mechanisms to deal with any allegations of impropriety on the part of any judge or judicial officer. As contended by some Members, it is also valid to hold that even the Courts are not free of error.

6. What actions may the National Assembly take with regard to the decision of the High Court?

Honourable Members, in answering the question as to what actions ***the National Assembly may take if it is in disagreement with the decision of the High Court*** permit me to quote the words of Speaker William Lenthall of the House of Commons to King Charles when, on 4th of January 1642, he entered the House of Commons to arrest five Members of Parliament for high treason. At the time, the Five Members had already fled the precincts of the House of Commons, and possibly run to safety far from Westminster. Speaker Lenthall did not divulge any information regarding their whereabouts, instead he replied to the King's questions of their whereabouts as follows and I quote:

"May it please your majesty, I have neither eyes to see nor tongue to speak in this place but as this house is pleased to direct me whose servant I am here; and humbly beg your majesty's pardon that I cannot give any other answer than this is to what your majesty is pleased to demand of me[4]*"*

Honourable Members, in the present matter I have endeavored to offer guidance on the issues raised. It is clear that the House needs to take urgent actions to protect the Constitution of Kenya and the mandate of the National Assembly in light of the issues raised in this communication. However, just like Speaker William Lenthall, having guided the House at length, I wish to state that, ***I have neither eyes to see nor tongue to direct this House what steps to take or not to take on this matter*** save to give the following summary-

(a) **THAT**, I have since instructed our Advocates on record to appeal against the court's decision to injunct the House as this is the avenue available in law to express disagreement with judicial findings and also to give the Court an opportunity to hierarchically express itself on the question of separation of

powers with finality. I am informed that a Notice of Appeal in respect of this matter, petition No 62 of 2017, was filed in the High Court on 17th March 2017 and in the Court of Appeal on 20th March 2017;

(b) **THAT**, in respecting the Court Orders, the Departmental Committee on Finance Planning and Trade continues with its suspension of the investigation of the specific grounds alleged by Mr. Emmanuel Mwagonah in his Petition to the National Assembly seeking removal of Mr. Edward Ouko from office of the Auditor General. However, the Committee is hereby required to submit a Progress Report to the House, within seven (7) days from tomorrow, detailing the matters of the Petition as at the 13th March 2017 for consideration by the House in accordance with the Standing Orders;

(c) **THAT**, the calculation of time granted to the Committee by the House in respect of the investigation on the grounds claimed in the Petition will also stand suspended from the 13th day of March, 2017;

(d) **THAT,** the Court Order does not in any way amount to a blanket restraining order against the National Assembly and ALL its committees on any other matters outside the specific Petition. Indeed, the House and its Committees are at liberty to engage the Auditor-General in any other matter before the Committees in exercise of their respective mandates as espoused in the Articles95(2), (4), (5)(b) and 125 of the Constitution and the Standing Orders including lawfully holding him to account for matters related to the office; and,

(e) **THAT,** the House contemplates the introduction of necessary legislation under Article 160(1) of the Constitution to provide for the manner in which the High Court shall exercise its supervisory jurisdiction over quasi-judicial matters pending before the Legislature with respect to the provisions of Article 117 of the Constitution.

The House is accordingly advised.

APPENDIX I:

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 & 7th Parliaments
7	Kausai Francis Xavier ole Kaparo	Jan 26, 1993	Jan 15, 2008	National Assembly	7th, 8th & 9th Parliaments
8	Kenneth O. 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.*