

COMMUNICATION FROM THE CHAIR ON CONSTITUTIONALITY OF NOMINATION OF CERTAIN CONSTITUTIONAL OFFICE HOLDERS

Honourable Members, on Tuesday 1st February 2011, the member for Imenti Central rose on a point of order to seek the assurance, guidance and direction of the Chair on what members of the National Assembly should do where incidents of gross violation of the Constitution occur instigated by either members of this House, the executive or the judiciary. Honourable Imanyara drew the attention of the Speaker to the provisions of Article 3(1) of the Constitution enjoining every person to respect, uphold and defend the Constitution.

Mr. Imanyara further drew the attention of the Chair to, and tabled a statement attributed to the Judicial Service Commission, among other things “expressing grave concern and misgivings about the nomination of the Chief Justice made by the President” and calling for a re-think of the matter putting the country first that would entail a withdrawal of the nominations and a fresh start. Mr. Imanyara went on to cite the Judicial Service Commission as having held the view that in order to give the process of appointing judicial officers legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Judicial Service Commission must play an integral role in the process as contemplated in Article 172 as read with Article 166(1) and section 24 of the Sixth Schedule to the Constitution.

The Honourable Imanyara also cited and tabled a statement by the Commission for the Implementation of the Constitution which stated, *inter alia*, that the process of appointment of the Chief Justice should commence with recommendations by the Judicial Service Commission to the President who in turn should consult the Prime Minister after which the President should forward the name of the nominee to the National Assembly for approval before final appointment by the President. It was the further position of that Commission that the role of the Judicial Service Commission should be respected and the

Judicial Service Commission should be allowed to undertake the function reserved to it by the Constitution.

Mr. Imanyara claimed to be aware that the Right Honourable Prime Minister had written to the Speaker and he tabled a copy of the said letter in which the Prime Minister disassociated himself from the nomination process. In the member's view, there was a clear attempt to undermine the Constitution creating a dangerous trend which to his mind would lead back to the old days defeating the essence of the long crusade for a new Constitution in this Republic. Mr. Imanyara concluded by seeking the directions and guidance of the Chair on how the House should proceed bearing in mind the provisions of standing order no. 47 which empowers the Speaker to direct that any proposed Motion that is contrary to the Constitution without expressly proposing appropriate amendment of the Constitution to be inadmissible.

What followed were a number of interventions by seventeen members rising on substantive points of order and providing various perspectives on the matter of the nomination of certain constitutional office holders by His Excellency, the President. Honourable members, I permitted considerable ventilation on this matter and I am glad that I did because deep and profound reflections on the nature, character, letter and spirit of our Constitution were proffered. From these submissions, which are too numerous and varied to be cited and attributed individually, I have filtered the following issues-

1. Whether or not the Speaker is competent to make a pronouncement or determination on the matter of the constitutionality of the nominations and their propriety for transmission to and disposal by this House or whether conversely, this would be a matter for other constitutional organs and in particular, the Judiciary;
2. Is Parliament properly seized of the matter of the nominations;

3. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this;
4. Do the provisions of the Constitution require the involvement of the Judicial Service Commission in the nomination process and going hand in hand, if the Constitution dictates that the process be participatory, competitive and transparent;
5. Were there consultations between the President and the Prime Minister as contemplated by section 29(2) of the Sixth Schedule to the Constitution; tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally there is the further point of what was intended by the drafters of the Constitution in providing for consultation as they did;
6. What is the import of making the consultations subject to the National Accord and Reconciliation Act ;
7. Is a serving member of the judiciary constitutionally eligible to be nominated and appointed as Chief Justice;
8. Do the nominations meet the constitutional requirements of regional balance and gender parity;
9. Do the questions raised on the nomination of office-holders amount to a dispute within the meaning of the Political Parties Act;
10. And finally, whether or not the correct approach to the questions raised on the propriety of the nominations can be resolved by a vote in this House to approve or disapprove the nominees?

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

Honourable Members, I wish to begin by pronouncing myself on the matter of the jurisdiction of the Speaker to determine the questions raised as the answer to this question

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

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

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

should adjourn or otherwise suspend its business and seek the directions of another body or organ before it can proceed.

Honourable Members, I think that it is time to debunk and demystify, for all time, the question of the interpretation of the Constitution. It is not the intention of our Constitution and indeed the Constitution does itself make it clear in various Articles including Article 10(1) and Article 20(4), among others, that the interpretation of the Constitution is not the exclusive property or preserve of any particular organ, person or authority. Article 10(1) in particular, binds every State organ, State officer, public officer and all persons to the national values and principles of governance when they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions. It is clear that the interpretation of the Constitution is as much the mandate and obligation, in their respective capacities, of a forestry officer, a labour officer, a magistrate, the Board of a public school, a police officer, the Director of Public Prosecutions or the President of the Republic. Each of these is bound to administratively interpret and apply the Constitution in their actions and functions. To do so, they must interrogate and understand what the Constitution means and how it applies to any particular situation in which they find themselves.

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

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

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

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

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

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

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

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

Honourable Members, from the foregoing synthesis, the question whether or not this House is properly seized of the matter of the nominees for the purpose of enabling the Speaker to make the determinations he has been called upon to do becomes central and key to this matter. The question at hand is as follows: When a nominating authority sends the names of nominees to the Speaker, what is the legitimate role of the Speaker in respect of the correspondence transmitting the names? Is the correspondence addressed to the Speaker as Speaker or as a conduit to the House? What role does the Speaker have in regard to that correspondence before it goes to the House in plenary or to a committee of the House? Is the Speaker permitted to process the correspondence and form a judgment and make a determination as to whether or not it should get to the House? Is it permissible for the Speaker, administratively in his Chambers, to determine for example that the nominees do not qualify for appointment and that therefore the relevant statute or the Constitution has been contravened and decline to transmit the correspondence to the House or its committees?

Honourable Members, these questions are relevant because in the present case the Speaker received a letter from the Office of His Excellency, the President, on 31st January, 2011, averring that he was forwarding the names of nominees in accordance

with the Constitution for processing by the House. At the point at which the Honourable Imanyara sought the guidance of the Chair, the letter had neither been tabled before the House nor been received by a committee of the House. Subsequent to the receipt of the letter from the Office of the President, the Speaker did also receive on 1st February, 2011 a letter from the Right Honourable Prime Minister making certain representations as to the validity and constitutionality of the earlier correspondence received. Two important questions arise: firstly, whether the Speaker could rule that nominations were unconstitutional before the House had formally become aware of the nominations and secondly whether it would be proper for the House to deal with the correspondence of the Prime Minister before the preceding correspondence from the Office of the President, to which it related, had been formally brought to the attention of the House.

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

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

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

Honourable Members, as I have indicated the issues I have set out as requiring determination entail both matters of law as well as matters of fact. I acknowledge and appreciate the learned interventions made in the House in support or opposition of an array of propositions. The importance of questions posed and the critical ramifications that they have to the overall implementation of the New Constitution are such that a more collegiate and participatory process is required not only as a matter of natural justice and sound conduct of public affairs but also as a requirement of the Constitution. As your Speaker I do not feel that the points of order raised and the forum at which they were raised afforded me adequate opportunity to make a summary determination, without a full hearing, either that the Constitution was contravened or that it was complied with. If I were a judge sitting on the bench in a court of law, I would rule that the matter proceeds to hearing and that the objections raised be heard and determined at that stage.

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

I do recognize, of course, that the point has been made that the matters complained of, being unconstitutional, they do not merit even transmittal to the committee. With respect, in the present case, I disagree. The role of a committee in the vetting process is to consider all aspects of the proposed nominations, including compliance with the Constitution and all relevant, enabling and incidental laws. In answer to the question I have previously posed, I do find, and I therefore so rule, that in conformity and consonance with the precedents and practice developed and embraced by this House, the proper role of the Speaker when he receives nominations, and particularly those made pursuant to the provisions of the Constitution, is that, the minimum he will do, as a mandatory first step, is to convey these to the relevant organs of the House. It is also the role of the Speaker to see to it that the committees of the House do consider any forwarded nominations, observing constitutional requirements as to public participation and due process and report to the House their findings both as to the constitutionality and other propriety of the nominations as well as their recommendations for action by the House. If this is not done, I am of the considered opinion that the legislature shall not meet the requirements of the Constitution.

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

exercise, the relevant parliamentary committees, as they are obligated to, having delved into the matter, there will be a Motion or proposed Motion as presumed by standing order no. 47 that the House shall deal with.

Honourable Members, from my pronouncements above, it should become apparent that all the other issues raised requiring determinations of fact or law have not crystallized because of my finding that from a constitutional, legal and procedural point of view, a summary and preliminary determination of the matter is neither possible nor desirable. I therefore rule that as at where we are it is not appropriate, and I accordingly decline to make a determination as to whether or not the nominations transmitted to my office by the Office of His Excellency, the President, were or were not constitutionally arrived nor whether there was or was not consultation within the meaning of the Constitution, nor whether or not ethnic diversity and gender equality were observed. It follows, that I accordingly withhold any determination or comment on the veracity and weight to be accorded to the letter received from the Right Honourable Prime Minister. I further direct that the two letters be forwarded to the departmental committees on Justice and Legal Affairs and Finance, Planning and Trade according to their respective mandates for disposal as provided for in the Standing Orders and the law. Given the urgency of the matter and the constitutional deadlines, I direct that the committees shall carry out the requisite inquiries and table their Reports in the House on or before Thursday, 10th February 2011. This is particularly important because, as Members shall recall, the House is in special sittings convened to discharge this business.

As Honourable Members are aware, a committee of the House collects evidence and makes findings to help the House arrive at an informed decision. A committee does not of itself finally determine a matter for the House. Additionally, it must be noted that questions of constitutionality and observance of the law are not matters to be determined only by the vote of either the committee or indeed of the House. To this end, without pre-empting the findings of any of the committees of the House or any action of the House, it

is important that the House remains alive to the Speaker's mandate, when timeously obligated to, to give the guidance and directions sought by Mr. Imanyara. Needless to say, the window remains open, and it is to be hoped, that developments may occur that make this important nomination process uncontested on the basis either of constitutionality or otherwise and thereby render such guidance and directions unnecessary.

Honourable Members, permit me to make a few concluding observations on this matter. I wish to echo the observations of Mr. Abdikadir Mohamed, member for Mandera Central who called for the cultivation of a culture of constitutionalism without which culture the Constitution becomes a mere paper. Constitutionalism can be broadly defined as the bundle of ideas, attitudes and patterns of societal behaviour which shows a subscription by that society to, and a belief by it, in the principle that all authority of Government derives from and is limited by the Constitution and exists to advance the common good and welfare of that society. I want to plead with all of us, the leadership and the people of this country, that we all imbibe from the fountains of constitutionalism so that it becomes part of our life and our adherence to the Constitution ceases to be laboured, legalistic and minimalist.

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

that the Honourable Mohamed Abdikadir has described as a “zero-sum” game. A process in which I must not only win but you must lose.

Honourable Members, few countries have had the opportunity of a second chance as we have. Events around the world in recent days are testimony to how situations that may have been easily avoided or acted upon while there was opportunity can rapidly deteriorate and become unmanageable. To my mind, it will be a pity and a severe indictment of our collective leadership if in time to come, history shall record of our country in general and of our leadership in particular that we learnt nothing from history.

Thank you.

Hon. Kenneth Marende, M.P.

Speaker of the National Assembly.

Thursday 3rd February 2011.