



REPUBLIC OF KENYA
ELEVENTH PARLIAMENT- (THIRD SESSION)
THE NATIONAL ASSEMBLY
COMMUNICATIONS FROM THE CHAIR

**ON WHETHER A BILL TO AMEND THE CONSTITUTION MAY BE
AMENDED BY THE HOUSE**

Honourable Members,

You may recall that on Wednesday, August 4, 2015 during the morning sitting, the Member for Ainabkoi, the Hon. Samuel Chepkong'a while contributing to the Second Reading of the Constitution of Kenya (Amendment) Bill, National Assembly Bill No 1 of 2015, sought guidance of the Speaker on whether the House can amend a Bill seeking to amend the Constitution. During the same sitting, the Leader of the Majority Party also sought guidance of the Speaker on whether that particular Bill will require the approval of the people of Kenya by way of a referendum as contemplated under Articles 255 and 256(5)(a).

Honourable Members, You are aware that the said Bill which is proposed by the Member for Ugenya, the Hon. David Ochieng' is proposing to amend Articles 101(1), 136(2)(a), 177(1)(a) and 180(1) of the Constitution of Kenya relating to the date of the general elections for Members of Parliament, the President, members of County Assemblies and Governors. From the onset, it is clear that to me that the scope of some of the matters submitted for guidance, particularly on the issue of referendum is beyond matters of procedure and traditions of this House and has implication beyond Parliament. In this regard, even as I make my determination known to the House, I am conscious that my findings are limited to one of my cardinal roles of facilitating the transaction of business in the National Assembly.

Let me start with the first question of whether **a Bill to amend the constitution can be amended in the House.** To begin with, **Hon. Members,** I wish to restate to the House the provisions of Article 256 of the Constitution relating to amendment of the Constitution through parliamentary initiative which is the option preferred by the Member for Ugenya in his Bill, state and I quote—

(1) A Bill to amend this Constitution—

- (a) may be introduced in either House of Parliament;***
- (b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;***
- (c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and***
- (d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third readings, by not less than two-thirds of all the members of that House.***

(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—

- (a) the Bill, for assent and publication; and***
- (b) a certificate that the Bill has been passed by Parliament in accordance with this Article.***

(4) Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

Honourable Members, It must be noted from the foregoing that the Constitution sets out a distinct procedure for the consideration and passage of Bills to amend the Constitution different from that prescribed for ordinary legislation. First, and with regard to amendments through parliamentary initiative, such a Bill is not to address any other matter apart from consequential amendments to legislation arising from it. Secondly, the Bill cannot be read for a Second time until at least ninety days have lapsed since its First Reading to allow for public discussion of its contents. Thirdly, the Bill requires passage by not less than two-thirds majority in both Houses of Parliament at both its Second and Third Readings. Lastly the Bill is to be assented into law within thirty days of its passage. This process deliberately excludes additional processes such as concurrence between the two Speakers on whether the Bill concerns Counties use of mediation committees to harmonize differing views between the Houses and reservations by the President to the content of a Bill.

Honourable Members, From the foregoing, nothing would have been easier for the framers of our Constitution than expressly importing into, or at the very least referencing the amendment procedure applicable to ordinary legislation under Articles 109 to 123 of the Constitution into the framework provided under Article 256. Articles 3 and 10 of the Constitution and Standing Order 47(3) oblige the Speaker to respect, uphold and defend the Constitution. I am guided by this particular duty in my considered opinion that the provisions of Article 256 of the Constitution are worded deliberately. **Indeed,** as was well noted by the Hon. Member for Ainabkoi, the Hon. Chepkong'a the former Constitution of Kenya imposed explicit limits on the nature of interventions that the House could make with regard to the content of a Bill to amend the Constitution. Section 47 (4) of the former Constitution provided that, and I quote—

When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly.

The only change that could be made to a Bill to amend the Constitution at that time was corrections to references to time and dates and such change could be made only upon the certification of the necessity for the change by the Speaker.

Honourable Members, you will agree with me that it would be imprudent for the Speaker, or indeed this House, to assume that the exclusion of the above limits from the current Constitution is interpreted as allowing room for amendment to a Bill proposing to amend it. The custom and tradition of our democracy has been to restrict amendments to the Constitution. I see no reason to depart from this practice as the Speaker cannot rely on allegory or allusion in guiding this House.

Indeed, Members will note that the Preamble to the Constitution highlights that the people of Kenya adopted, enacted and gave the Constitution to themselves and to future generations. The sanctity of the Constitution as a social contract between the people of Kenya and not a document belonging to the Houses of Parliament, nor any other organ for that matter, is to be jealously safeguarded at every turn and any process of its amendment is delicate and can only be undertaken with reference to a definite procedure that deviates from the ordinary . While Parliament has been given the power to amend the Constitution, we should be mindful that the Constitution belongs to the people of this Republic and treating the process of its amendment to be akin to an ordinary legislation subverts the collective will of the People. In this regard, it is expected that any person intending to amend the Constitution must be very clear and precise on what he or she is intending to alter, but not to change mind while in the process. It is my strong view that any proposal to amend the Constitution should be preceded by

meaningful and adequate consultations before such Bill is published, a principle that is embodied in the Article 256(2) of the Constitution. Bearing in mind that the legislative power is originally derived and consequently vested in the people, we ought to obtain the confidence of our fellow citizens even as we endeavor to amend the Constitution. The process of making or amending the Constitution therefore cannot be without consultations, precision and guarded restraint. Indeed, James Madison, the fourth president of the United States of America (1809-1817) who is considered as the "Father of the American Constitution" once wrote , and I quote-

" that the American Constitution was not, like fabled goddess of wisdom, the offspring of single brain. It ought to be regarded as the work of many heads and many hands"

Honourable Members, one of the fundamental questions that would arise if the Speaker was to allow amendments to a Bill proposing to amend the Constitution is whether such a Bill would be subjected to mediation processes in terms of Article 113 of the Constitution as read with Standing Order 149. A close reading of Article 256(1)(d) of the Constitution reveals unequivocally that a Bill to amend the Constitution would not as I had earlier stated be subjected to mediation, as it is a process prescribed for ordinary legislation. Articles 111 and 112 of the Constitution further extrapolates this by providing that only special and ordinary Bills may be subjected to mediation processes. A Bill to amend the Constitution is clearly NOT one of the Bills under Article 111 or 112 of the Constitution which invites the application of mediation processes. Further, as I had stated earlier the Constitution is a document belonging to the people of Kenya and not to the Houses of Parliament . In this regard therefore, if mediation processes were to apply to Bills seeking to amend the Constitution, this would negate the very essence to which the Constitution was made. Article 113(4) of the Constitution as read with Standing Order 149(6) provides that if a mediation Committee fails to agree on version of the Bill to be presented to both Houses for approval, the Bill will be deemed to have been defeated and negated. A Bill to amend the Constitution may be termed as one that forms part of the engine which seeks to propel the aspirations of Kenyans as a people. Consequently, the drafters of the Constitution could not have intended to dilute or hamper any avenue or channel for Kenyans to do so by subjecting a Bill to amend the Constitution to mediation processes which have the potential of ending in a *cul de sac* where the mediation Committee fails to agree on a version of the Bill.

Honourable Members, Consciously aware that the House looks to the Speaker to decide any procedural question that arises in the House, I am therefore of the opinion that a plain reading of Article 256 of the Constitution clearly reveals that while the Constitution does not expressly disallow amendments to a Bill proposing

to amend any of its Articles, it deliberately **discouraged** such amendments, unless there is anything extraordinary in the proposed Bill that would require application of the extraordinary measures . In this regard, I am constrained **NOT** to allow any amendment to the Bill proposed by the Member for Ugenya or indeed any of the other four Bills proposing to amend the Constitution. This now settles the first question.

Honourable Members, On the second question of **whether the Bill proposed by the Member for Ugenya should be subjected to a referendum**, several weighty matters were canvassed. In particular, there has been debate , on whether the Bill has the effect of extending the term of office of the President in terms of Article 255(1)(f) of the Constitution an argument that has been advanced in this House, in the previous House and elsewhere. The determination of whether this particular Bill should be subjected to a referendum is tied to first establishing what exactly the term of office of the President is. In my gracious attempt to do this, allow me to refer to Article 142(1) of the Constitution which provides that and I quote “ the President shall hold office for a term beginning on the date on which the President was sworn in, and ending when the person next elected President in accordance with Article 136(2) is sworn in”. It should not escape our minds that the current President was sworn in on the 9th of April, 2013. A reading of this provision does not therefore expressly state what is the term of office of the President. Further, a reading of the interpretation clause of the Constitution under Article 260 does not also answer the fundamental question of **what is really the term of office of the President** as that explanation is not included in the definitions. However, a quick perusal of the Constitution and in particular Articles 136(2)(a),146(4)(a) and 177(1)(a) and (4) is perhaps the closest one would get in determining or rather construing what is the term of office of the President. Article 136(2)(a) provides that an election of the President shall be held on the same day as a general election of the Members of Parliament, being the second Tuesday in August of every fifth year. This provision seems to suggest that the term of office of the President is five years. Further, Article 146(4)(a) provides that if the Deputy President assumes office where there is a vacancy in the office of the President, such person shall be deemed to have served for a full term as a President if at the date which the person assumed office, more than two and half years remain before the date of the next regular scheduled election. Reference to the period of two and half years, which connotes a full half of a term of five years seems to solidify the provisions of Article 136 that the term of office of the President is indeed five years. Article 177(1)(a) and (4) 180(1) as read together with Article 136 also indicate that the term of office of the President is five years as it provides that the term of a county assembly is five years. Indeed, the members of county assemblies are elected on the same day as a general election of the Members of Parliament, being the second Tuesday in August of every fifth year the same day which, as already discussed, the President is also elected.

Hon. Members, Consequently, having looked at the Constitution, the Bill by Hon. David Ochieng' which seeks to change the election date to provide that general elections shall be held on the 3rd Monday of December in the FIFTH YEAR may NOT be said as being one that has the effect of extending the term of office of the President since, under the provisions of the Bill, those elections would still be held WITHIN THE FIFTH YEAR.

Honourable Members, I now wish to draw the attention of the House to provisions of Article 256(5) of the Constitution, which provides as follows-

(5) If a Bill to amend this Constitution proposes an amendment relating to a matter specified in Article 255 (1)—

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published.

I note in that regard, that the question of whether or not the Bill proposed by the Member for Ugenya should be subjected to a referendum is that of construing and interpreting the Constitution. Indeed, any attempt by the Speaker to make such a determination would be in blatant violation of the Constitution which pursuant to Article 165(3)(d) gives the High Court the jurisdiction to hear any question respecting the interpretation of the Constitution . As such the Speaker can neither purport to wear the hat of the judge nor hide behind the mask that blurs the principle of separation of powers between the Legislature and the Judiciary. Needless to say that the interpretation of the Constitution cannot be said to be a procedural matter for determination by the Speaker. Further,, I wish to quote the authority derived from a commonly quoted publication titled *The Fifth Edition of the House of Representatives Practice of the Commonwealth of Australia* on the subject of interpretation of the Constitution, that-

“the Speakers have generally taken the view that, with exception of determining questions of procedure relating to business in the House, the obligation to interpret the Constitution does not rest with the Chair and that the only body fully entitled to do so is the High Court. Not even the House has the power finally to interpret the terms of the Constitution”.

Hon. Members, I have no intention of deviating from this longstanding Commonwealth practice which in our case, and as stated earlier is espoused in Article 165 of the Constitution. It is also important to state that, in the process of amending the Constitution by Parliamentary Initiative, the responsibility of the Speakers ends when they jointly present the Bill to the President for assent together with a ***certificate that the Bill has been passed by Parliament in accordance with Article 256.*** Indeed, the particular duty of determining that question of whether or not the Bill proposed by the Member for Ugenya should be subjected to a referendum is vested in other competent authorities including the President under Article 256(5)(a) of the Constitution.

In summary therefore, on the two questions, it is my finding -

(i) THAT, I will not allow any amendment to the Bill proposed by the Member for Ugenya or indeed any of the other four published Bills proposing to amend the Constitution; and,

(ii) THAT, the determination as to whether a Bill proposing to amend the Constitution requires the approval by a referendum in terms of Articles 255 and 256 of the Constitution is outside the purview of the Speaker.

The House is therefore guided accordingly.

I Thank you!

THE HON. JUSTIN B.N. MUTURI, E.G.H, MP
SPEAKER OF THE NATIONAL ASSEMBLY

August 20, 2015