



REPUBLIC OF KENYA

ELEVENTH PARLIAMENT – FIFTH SESSION

NATIONAL ASSEMBLY

VOTES AND PROCEEDINGS

TUESDAY, MARCH 21, 2017

1. The House assembled at thirty minutes past Two O'clock
2. The Proceedings were opened with Prayer
3. **Presiding** – the Speaker
4. **COMMUNICATION FROM THE CHAIR**

The Speaker conveyed the following Communication –

Authority of the House on the Petition for Removal of the Auditor-General

“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 MwagamboMwagahah 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 of 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 Okioti (High Court Petition No. 62 of 2017; Okiya Omtatah Okioti 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 Mwangi *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 Kimini 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 Njoroge Baiya, MP; the Member for South Mugirango, the Hon. Manson Nyamweya, MP; the Member for Nambale, the Hon. John Sakwa Bunyasi, 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 onset 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 powers¹".

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—

(5)

- (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 this 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 aforesaid. 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 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 constitutional 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 for 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 it 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 and evaluated against the provisions of the Bill of Rights and the mandate of the Courts.

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. Infact 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 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 CourtOrder 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 MwagamboMwagonah 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 theConstitution 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 substantiveMotion 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 me⁴."

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 March 13th, 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

(e) 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 Articles 95(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,

5. **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

6. 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. I thank you".

5. **PETITION**

The petition by the by former employees of Chogoria Farmers' Co-operative Society Limited (In Liquidation) regarding non-payment of dues by the Society that was to be presented by the Member for Chuka/IgambaNg'ombe (Hon. Muthomi Njuki) was dropped due to his absence

6. **PAPERS LAID**

The following Papers were laid on the Table –

- (a) The Annual Report and Financial Statements of the University of Eldoret for the year ending 30th June, 2015;
- (b) The Reports of the Auditor-General on the Financial Statements in respect the following institutions for the year ended 30th June, 2016 and the certificates therein –
 - (i) Kenya Energy Sector Environment and Social Responsibility Programme Fund – Ministry of Energy and Petroleum;
 - (ii) Petroleum Training Levy Fund;
 - (iii) Muhoroni Constituency;
 - (iv) Kisumu West Constituency;
 - (v) KabondoKasipul Constituency;
 - (vi) Narok North Constituency;
 - (vii) Kenya National Bureau of Statistics; and
 - (viii) Anti-Counterfeit Agency.

(The Leader of the Majority Party)

- (c) The Report of the Budget and Appropriations Committee on the Message from the Senate on the Division of Revenue Bill, 2017

(Chairperson, Budget and Appropriations Committee)

- (d) Report of the Select Committee on National Government Constituencies Development Fund on the Vetting of Nominee for Appointment as the Chief Executive Officer of the National Government Constituencies Development Fund.

(Chairperson, Select Committee on National Government Constituencies Development Fund)

7. **NOTICES OF MOTION**

The following Notices were given –

- (i) THAT, this House adopts the Report of the Budget and Appropriations Committee on the Message from the Senate on the Division of Revenue Bill, 2017, laid on the Table of the House today, Tuesday, March 21, 2017; and,

(Chairperson, Budget and Appropriations Committee)

- (ii) THAT, this House adopts Report of the Select Committee on National Government Constituencies Development Fund on the Vetting of Nominee for Appointment as the Chief Executive Officer of the National Government Constituencies Development Fund.

(Chairperson, Select Committee on National Government Constituencies Development Fund)

8. **MOTION – REPORT OF THE COMMITTEE OF THE WHOLE HOUSE ON THE NATIONAL CORONERS SERVICE BILL (NATIONAL ASSEMBLY BILL NO. 46 OF 2016)**

Motion made and Question proposed –

THAT, this House do agree with the Report of the Committee of the whole House on its consideration of the National Coroners Service Bill (National Assembly Bill No. 46 of 2016)

(The Leader of the Majority Party)

Question put and agreed to;

Motion made and Question proposed –

THAT, the National Coroners Service Bill (National Assembly Bill No. 46 of 2016) be now read a Third Time

Question put and agreed to;

Bill read a Third Time and **passed**.

9. **MOTION – REPORT OF THE COMMITTEE OF THE WHOLE HOUSE ON THE MOVABLE PROPERTY SECURITY RIGHTS BILL (NATIONAL ASSEMBLY BILL NO. 50 OF 2016)**

Motion made and Question proposed –

THAT, this House do agree with the Report of the Committee of the whole House on its consideration of the Movable Property Security Rights Bill (National Assembly Bill No. 50 of 2016)

(The Leader of the Majority Party)

Question put and agreed to;

Motion made and Question proposed –

THAT, the Movable Property Security Rights Bill (National Assembly Bill No. 50 of 2016) be now read a Third Time

Question put and agreed to;

Bill read a Third Time and **passed**.

10. **MOTION - DEBATE ON THE PRESIDENT’S ADDRESS- (DAY 1)**

Motion made and Question proposed –

THAT, pursuant to the provisions of Standing Order 24(6), the thanks of this House be recorded for the exposition of public policy contained in the *Address of H.E. the President delivered in Parliament* on Wednesday, March 15, 2017 and further **notes** the following Reports submitted by the President in fulfillment of the provisions of Articles 132(1)(c) and 240(7) of the Constitution, laid on the Table of the House on Thursday, March 16, 2017-

- (a) Report on the Measures Taken and Progress Achieved in the Realization of National Values and Principles of Governance;
- (b) Report on the Progress made in fulfillment of the International Obligations of the Republic; and,
- (c) The Fourth Annual Report to Parliament on the State of National Security.

(The Leader of the Majority Party)

Debate arising;

(Change of Chair from the Speaker to the Fourth Chairperson)

And the time being thirty minutes past Six O’clock, the Fourth Chairperson interrupted the proceedings and adjourned the House without Question put pursuant to the Standing Orders.

11. **HOUSE ROSE** - at thirty minutes past Six O’clock

M E M O R A N D U M

The Speaker will take the Chair on
Wednesday, March 22, 2017 at 9.30 a.m.

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