



REPUBLIC OF KENYA

ELEVENTH PARLIAMENT (SECOND SESSION) THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR:

SUPPLEMENTARY GUIDANCE ON MANDATE OF AUDIT COMMITTEES VIS-A-VIS DEPARTMENTAL COMMITTEES

Hon. Members,

As you may recall, on Tuesday, the 18th of March, 2014, Chairperson of the Departmental Committee on Energy, Communication and Information (The Hon. Jamleck Kamau) rose on a point of order, seeking the guidance of the Speaker on the issue of the mandate of the Departmental Committees as compared to that of Public Investments Committee in respect of state corporations.

The Leadership of the House, present in the House at the time, also spoke on the matter including the Leader of the Majority Party, the Deputy Leader of the Minority Party, the Chairpersons of several Committees, including the Departmental Committee on Administration & National Security, the Departmental Committee on Transport, Public Works and Housing, the Departmental Committee on Health, the Public Accounts Committee and Public Investments Committees. They also canvassed very important views to the clarifications sought by the Member for Kigumo. Other members who spoke include the Member for Rarieda (Eng. Gumbo) and the Member for Homa Bay Town (The Hon. Kaluma). Having listened to them, I have deduced the following three matters as requiring my determination-

- (i) The extent to which the Public Investments Committee and Departmental Committees should engage with state corporations in the execution of their respective mandates;**
- (ii) Whether the usage of the words “examination of” as compared to usage of the words “study, investigate and inquire into all matters” in Standing Orders**

206 and 216, respectively limit the work of the Public Investments Committee;

(iii) The interpretation of paragraph (8) of standing order 206 in comparison with paragraph (5)(a) and (e) of Standing Order 216.

Hon. Members, Allow me to begin by thanking the membership of this House for raising these very weighty matters. I have treated this as a rare opportunity to augment my communication of December 5, 2013 on a related subject. As stated in that communication, I will time and again, when called to do so by this House, offer supplementary guidance on these matters, on case by case basis, as any new information arise. Before I make my findings known, let me admit that, these issues have indeed exercised my mind severally. As I put my mind and agonised on the finest ruling to make, I have asked myself a number of questions, which I wish to share with you this afternoon. **Hon. Members,** I invite you individually to sincerely attempt to answer the following five questions-

1. What are the inherent reasons that have made these matters to keep recurring, more so in this 11th Parliament?
2. Is it that we have more committees than we ought to, or is it that our present committees tend to concentrate on similar matters that probably appear to be popular?
3. Is it possible, Hon. Members, that, by tending to focus on the familiar issues, committees may overlook other important matters falling within their mandates and lose the opportunity to be more innovative?
4. Is it optimal use of our time as a House, if more than one Committee were to investigate the same matter and report to the House, whether separately or jointly?
5. Who really gains when committees continually contend with overlap of mandates?

Hon. Members,

It is my view that, if we were to **boldly** answer these questions, we probably would not seek the guidance of anybody on the mandates of committees, let alone a ruling of the Speaker! If we were to be faithful to our Standing Orders and practices of this House, as indeed urged by the Hon. Kaluma on March 18th, 2013, I have no doubt that I would rarely be asked to provide guidance on such matters as the interpretation of words used in the Standing Orders. However, since I was asked to adjudicate, I will not fail to rise to this occasion. On my part, I will be very bold.

The First question relates to the extent to which the Public Investments Committee and Departmental Committees should engage with state corporations in the execution of their mandates.

Hon. Members, as I have ruled before, a state corporation, established under the provisions of the State Corporations Act (Cap. 446), or in deed established by a specific Act of Parliament, is not and cannot be construed to be a department of a Ministry, within the meaning of standing order 216. If that was to happen, then we would be assuming that there is not a difference, for instance, between the department of finance in the Ministry of Transport and a similar department at the Kenya Airports Authority. That would not auger well! As the organ that made the laws that separated such two institutions and described one as “body corporate”, then we should not shy away to treat them as such when it comes to applying Standing Orders 206 and 216. Why would one be comfortable to acknowledge that a public body is a state corporation when the usage of term favours the intention, but retreat to a different meaning when the term does not favour the intention? In my last communication, I mentioned the matter of audit of Ministries and state corporations under the Public Audit Act (No. 12 of 2003). If indeed state corporations were to be mistaken for departments, then it follows that they would be audited and reported together with Ministries. But that is not the case. Each is treated separately and distinctively. That is why I encourage all of us to apply our minds in the consideration of these matters and remain consistently faithful to the law and our own standing orders.

Hon. Members, Article 125 of the Constitution empowers any committee of a House of Parliament to summon any person for purposes of giving evidence or providing information. But that is not the end. Derek Lee, a former MP in the House of Commons of Canada in his book “The Power of Parliamentary Houses to send for Persons, Papers and Records” recognises that ***“a committee has no authority except that which the House has delegated”***. Invariably, the House exercises that delegation by way of standing orders and resolutions. It therefore does not mean that a witness to one committee should appear before every committee on the same matter! The Standing Orders are supposed to guide us on who is supposed to appear and give evidence in what committee.

Hon. Members, I guided on December 5, 2013, that, if the Public Accounts Committee was to engage a state corporation, then the principal witness would be the account officer of the parent Ministry. On the other hand, in executing their mandates under Standing Order 216, if a Cabinet Minister or a Principal Secretary is required to appear before a Departmental Committee, such committee should look into all matters falling within that Ministry and all its departments. In the course of inquiring into the matters, the committee is not stopped from

delving into matters of mandate, management, activities, administration, operations or estimates of the state corporations under that Ministry as provided under paragraph (5)(a) of standing order 216. However, the interpretation of that Standing Order limits the jurisdiction to the confines of “ministries and their departments”. It therefore follows that the carrying out of that mandate must be tied to the **context of that particular Ministry and its departments**.

Hon. Members, Let me now turn to the second question relating to the usage of the words “examination of” as compared to the words “investigate, inquire into all matters” and the word “study” as used in Standing Orders 206 and 216, respectively.

The oxford dictionary defines the word “**examine**” as follows: *“to look at, inspect, or scrutinize carefully or in detail; to investigate”*; On the other hand, the word “**investigate**” is defined as *“to **inquire into** a situation or problem thoroughly, in order to discover facts”*. The word “**study**” is defined as *“to apply the mind to the learning or understanding of a subject”*.

In Standing order 206 that provides for the mandate of the Public Investments Committee, the word “examination of” is used consistently in all paragraphs. According to the Oxford dictionary, the word can be used interchangeable with the word “investigate”, which also means *“to inquire into a situation or problem thoroughly, in order to discover facts”*. Without proceeding further with the usages of these words, it is worth noting that assigning meaning to words is not as crucial as determining their application. In this regard, it is no doubt that, by the application of the usage of these words in the Standing Orders, and the operation of the State Corporations Act and the Public Audit Act, the Public Investments Committee has limited mandate. Not only is the mandate limited to oversight of workings of public investments, but the exercise of that mandate is mainly limited to state corporations as corporate entities embodying public investments. Since the “**examination**” is a process of finding out and not a result, the mandate is further limited to the availability of a report, either by the Auditor-General, or other competent authority. Where a report is not available, the Committee can only report to the House after a special report by the Auditor-General is prepared.

On the other hand, the mandates of Departmental committees are indeed very wide. To no other group of committees has the House delegated the functions of “investigating, inquiring into all matters and even “studying”. However, Committees tend to concentrate on the traditional and seemingly populist matters and overlook others. If all committees chose to go for the lesser mandate, then who will do the wider business that the House has delegated? Who will study, assess or analyse the relative successes of Ministries and their departments? Who will study on policy objectives of ministries and report on their effectiveness? These are

very distinct and unfettered mandates given to Departmental Committees, but which have remained largely unattended to. This is where innovativeness comes in. In their book, titled "How Parliament Works" (6th Edition), Robert Rogers and Rhodri Walters aver that, and I quote *"whatever a committee does, its effectiveness depend above all on its members"*. Citing a report of the Liaison Committee of the House of Commons, the authors noted the following, and I quote-

"no pain, no gain: there is no easy route to success (in committee work). A determined and hard working committee, in which Members are prepared to devote substantial effort and put the interests of the citizen and the tax payer first, can be extraordinarily effective"

I have no doubt that there are Committees which, by the end of the term of this Parliament, would be rated by yourselves as having been *extraordinarily effective*.

Hon. Members, The last question relates to the interpretation of paragraph (8) of Standing Order 206 in comparison with paragraph (5)(a) and (e) of Standing Order 216. There appears to be no question as to which Committee should oversight which particular Ministry. However, this last item that I am asked to determine relates to which committee would oversight what aspect of parastatals under their respective Ministries.

Hon. Members, the plain reading of Standing Orders 206 and 216 indicate that-

- (i) It is would be out of order for the Public Investments Committee to examine policy matters such as those of mandates, management, administration or estimates of a Ministry, its department or a state corporation;
- (ii) It would also be out of order for the Public Investments Committee to examine matters that are not of **business or a commercial function** of a state corporation, such as the processes of appointing board members, hiring of the Chief Executives, the execution of regulatory functions of state corporations or the implementation of objectives of state corporations. These are matters falling within the mandates of Departmental Committees as they engage in the matters of Ministries and Departments under which the respective state corporation fall;
- (iii) It would be out of order for a Departmental Committee to attempt to inquire into matters of **business or a commercial function** of a state corporation, except the policies that inform such business or commercial undertakings. I put emphasis on the word **"policies"**. Such matters include investments made by state corporations, the

management of investments made by the national government in a state corporation and related matters. The Oxford business dictionary unexhaustively defines a business function of an enterprise to include the functions of sale, procurement or purchase of goods and services, trading in services, commodities, shares or futures, the granting or undertaking of loans, commercial liabilities, debts or commercial agreements. It therefore follows that the substantial function of oversight of these items of public investments, whether they are being managed in accordance with sound financial or business principals and prudent commercial practices, as made by the national government in any corporation is an **exclusive function** of the Public Investments Committee.

Hon. Members, As you may be aware, the Speaker has no jurisdiction over matters active before Committees, unless in exceptional circumstances where those matters are brought to the attention of the Speaker. In this regard, the Member for Rarieda, in canvassing his views, correctly observed that the subjects under the Departmental Committee on Energy, Communication and Information, in which he is a member, includes fossil fuels exploration, development, production, maintenance and regulation of energy, communication,, information and broadcasting amongst others he did not mention. The question that the member did not ask himself is- what is the connection between these subjects as contained in the Second Schedule of the Standing Orders and the provision of standing order 216(5). What should the committee do, for example with the mandate of fossil fuels exploration? We must interpret the limits in the context of the broad context of the mandate, management, activities, administration, operations or estimates of the particular Ministry dealing with that subject and its departments, its programmes and policy objectives. If in the course of an inquiry, a state corporation under the ministry becomes a subject, then, it follows that the inquiry is as wide to that extent. **But, such an inquiry would not go into the functions of sale, procurement or purchase of goods and services, trading in the services, commodities, shares or futures, the granting or undertaking of loans, commercial liabilities, debts or commercial agreements related to that subject in a state corporation,** unless **policies** made by Government in respect of those functions have not been adhered to. Again, I emphasis the use of the word "policies". This is because such are matters of business or a commercial function of such a corporation. This is the opportunity for interface that the Member for Homabay Town asked the Committees to seize as opposed to seeing it as a conflict. That, one committee with wide mandate, would limit itself to non business and commercial aspects, while the other would take over from there! However, if there was to be a report of the Auditor General touching on the said subject as alluded by the Member for Eldas, then it would be completely out of order for any other committee to

examine the audit matters since that mandate is exclusively vested on the Public Investments Committee. Where the report of the Auditor General or other report from a competent authority is not available on matters relating to business or commercial functions of a public investment, the calling of witnesses by the Public Investments Committee on such matter can only be for the purposes of occasioning a special report, for which the Auditor General will be asked to investigate and give a report from a professional view. Like I mentioned in my previous communication, that Committee may also be assisted by other organs such as the Inspectorate of State Corporations and the State Corporations Advisory Committee in addition to the Auditor General.

Hon. Members, As I uphold my previous communication of December 5, 2013, allow me to revisit the very last question that I posed at the beginning. Hon. Members, Who actually stands to gain when committees continually allege overlap of mandates? If the questions before me were those of the celebrated tussles between the Executive and the investigative committees, I would probably be very fervent to deliver such a ruling on the spot. This is because the Constitution, many statutes, traditions, practices, conventions and almost every authority that exists would expressly defend our position on who should offer oversight. But when that question is to determine which of the committees of the National Assembly should assist the House in the exercise of oversight roles, the only loser would be this House. We risk losing faith whenever these questions are subjected to the court of public opinion. Let us exercise the mandate of committees with temperance and sobriety. Those of you who may have visited other jurisdictions will know that these two values are held very high in committee work. Committees are not an end by themselves. They operate on delegated authority and as such their findings are not final. When all is done, the entire House eventually has the opportunity to consider the matters examined by a Committee. Sometimes, as you have done before, the House may even disagree with a Committee. As the Leader of the Majority Party rightly affirmed, a committee has no power to suspend or stop the execution of a function of the executive, or any other arm of Government. That is the exclusive mandate of the House sitting in the plenary.

Hon. Members, It is said that when you realise that you are heading in the wrong direction, it is wiser to retrace your steps, than to continue in the wrong direction. It is possible that mistakes have been made in the past. It is possible that the Public Investments Committee may have examined matters of day-to-day running of state corporations even when the Standing Orders prohibit. It is also possible that the Public Investments Committee would do a report to the House even when it is not accompanied by the Report of the Auditor-General or a special audit report or indeed any other report from a competent authority. It is also

possible that, a Departmental Committee would examine anything, including financial audits and business or commercial functions of state corporations, even where the Auditor-General has made a report on such matters. All that might have happened. The time for corrective action should start now, if it has not already started. Let us now look ahead boldly and remain faithful to the law of the land and our Standing Orders.

Finally, it is my sincere hope that, this communication, read together with the previous communication of December 5, 2013 settles these matters. I expect committees, individual members or indeed the management of the National Assembly to adhere to the two communications. Should there be need, I will not hesitate to offer further guidance in future.

I Thank You!

THE HON. JUSTIN B.N. MUTURI, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY

March 26, 2014