REPUBLIC OF KENYA
TWELFTH PARLIAMENT- (THIRD SESSION)
THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

(No. 47 of 2019)

ON

THE CONSIDERATION OF CERTAIN CLAUSES OF THE FINANCE BILL, 2019

Honourable Members,

You will recall that yesterday, Wednesday 18th September 2019, the Finance Bill (National Assembly Bill No. 51 of 2019) was listed as Order No. 12 in the Order Paper of the afternoon sitting for consideration at Second Reading. Upon the Order being called out and before the motion for the Second Reading of the said Bill was made, the Hon. Murugara George Gitonga, MP, Member for Tharaka Constituency, rose on a Point of Order and sought the indulgence of the Chair not to allow the Bill to proceed for Second Reading. The Hon. Murugara asserted that Clauses 50 and 51 of the Bill which propose to amend the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 are unconstitutional to the extent that they contain provisions limiting the right to privacy guaranteed under Article 31 of the Constitution and by threatening to erode the settled principle of advocate-client confidentiality.

Honourable Members, That claim elicited interest from several other Members including the Leader of the Majority Party and Honourables Dr. Otiende Amollo, Jennifer Shamalla, John Mbadi, Kirima Nguchine, Chrisanthus Wamalwa, Mohamed Junet and Jude Njomo. Another matter that arose relates to the propriety of including proposed amendments to the Proceeds of Crime and Anti-Money Laundering Act, 2009 in the Finance Bill, 2019 and which some members felt were not incidental to the tax and other measures proposed in the Finance Bill.

Honourable Members, As you may recall, the Member for Kiambu Constituency introduced a separate dimension to the Point of Order. His concern was that if the House went ahead and debated the provisions of Clause 43 of the Finance Bill, 2019 relating to control of bank interest rates, any resolution of the House on the matter would sound a death knell to the proposals in the Banking (Amendment) Bill, 2019 currently under consideration by the House and which address the "ambiguity" issues of the capping of interest rates provision. The assertion by the Member for Kiambu Constituency was based on Standing Order No. 49(1), which provides that no Motion may be moved which is the same in substance as any Question which has been resolved either in affirmative or in negative, during the preceding six months in the same Session.

Honourable Members, From the Members' contributions, there are four questions arose which require the determination of the Speaker-

(i) What is the scope of a Finance Bill? Is the Finance Bill another form of a Statute Law (Miscellaneous) Amendment and can the Bill be used to introduce proposals which are not incidental to taxation or revenue raising measures?

(ii) Do clauses 50 and 51 of the Finance Bill, 2019 offend the Constitution?

(iii) Do clauses 50 and 51 of the Finance Bill, 2019 comply with the standard of disclosure set out in the Constitution?

(iv) How does the inclusion and subsequent consideration by the House of provisions proposing to amend the Banking Act under Clause 43 of the Finance Bill, 2019 affect the Banking (Amendment) Bill, 2019 currently before the House?

Honourable Members, You will recall following the issues raised, I provided preliminary guidance to the House by allowing the debate on the motion for Second Reading of the Bill to proceed and undertook to make a considered ruling on the matter today.

Honourable Members, At the outset, may I state that a Finance Bill has the nature and form similar to that of Bills commonly termed in parliamentary parlance as *"omnibus bills"*. Although there exists no precise definition of the expression "omnibus bill", Audrey O'Brien and Marc Bosc, in *House of Commons (Canada) Practice and Procedure, 2nd Edition*, describe an *omnibus* bill as *"one that seeks to amend, repeal or enact several Acts, and is characterized by the fact that it is made up of a number of related but separate initiatives"*. For all intent and purposes, a Finance Bill is usually intended to amend several, separate but related statutes on taxation and revenue raising.

Honourable Members, In terms of history, the practice and usage of *omnibus* Bills dates as far back as 1850 in the United States Congress when Senator Henry Clay introduced a series of resolutions to seek a compromise and avert a crisis between North and South over the issue of slavery. The Compromise of 1850 covered five separate legislative subjects in terms of enactment, amendment and repeal, including partial abolition of the slave trade, entry of the State of California into the Union, creation of two territorial governments and settlement of a boundary dispute between the States of Texas and New Mexico. The practice in Canada dates back to as early as 1888 and also exists in the United Kingdom, Australia and New Zealand, save for differing procedural requirements as to what such Bills may or may not contain.

Honourable Members, The procedural propriety of introducing *omnibus* bills is therefore an established practice, albeit exercised with caution. From the Canadian Parliament experience, *O'Brien and Bosc* had the following to say with regard to the propriety of omnibus Bills, and I quote-

> *"It appears to be entirely proper, in procedural terms, for a bill to amend, repeal or enact more than one Act, provided that the requisite notice is given, that it is accompanied by a royal recommendation (where necessary), and that it follows the form required."*

Honourable Members, It is an indisputable fact that Parliament of Kenya relies on the practices and precedents in the mentioned jurisdictions. Hence, it has become an established practice that bills of *omnibus* nature have been introduced and passed by Parliament and assented to by the President. **Indeed, Hon. Members,** Article 94(1) of the Constitution clearly states that *legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament*. Further, Article 109(1) provides that *Parliament shall exercise its legislative power* ***through Bills passed by Parliament*** *and assented to by the President*. It is worth noting that there exists no prescription as to the nature, limitation or form that Bills introduced in Parliament for passage ought to take. Guidance in this respect only exists in the Standing Orders. Of particular importance in this respect is Standing Order 114 providing for (the manner of) introduction of Bills, Standing Order 127 regarding public participation, and Standing Order 133(5)(6) regarding scope of amendments which may be permitted at Committee of the whole House. With regard to Standing Order 114, there are three parameters set out for scrutiny before a Bill is published. That is, whether the proposal—

(a) affects county governments;

(b) is a money Bill as outlined under Article 114 of the Constitution; or

(c)conforms to the Constitution and the law and the format and style of the House.

Honourable Members, With regard to "Bills emanating from the Executive" which have by tradition been introduced in the House by the Leader of the Majority or the Chairperson of the relevant Departmental Committee, this House had occasion, during the review of its Standing Orders at the close of the Eleventh Parliament, to introduce a new Standing Order 114A. This Standing Order empowers the Speaker to exempt legislative proposals originating from the Party forming the National Government from the detailed and rigorous pre-publication scrutiny on condition that the proposal is accompanied by a copy of the relevant Cabinet approval.

The Cabinet approval notwithstanding, any proposal so exempted is still interrogated by the Clerk in terms of its conformity to the Constitution and the law and the format and style of the House. The Finance Bill, 2019 is an example of such a proposal, having been introduced under the hand of the Chairperson of the Departmental Committee on Finance and National Planning.

Honourable Members, It is therefore clear that the House has in place proper mechanisms to assess the propriety of a legislative proposal both in form and substance. Questions relating to the scope of *omnibus* Bills and proposed amendments thereof at the Committee of the Whole house have arisen on few isolated cases in the Twelfth and preceding Parliaments. I will highlight two cases just to jog the memory of this House. First, as you may recall, on, 28th August 2018, the Member for Rarieda Constituency, Hon. Dr. Otiende Amollo, MP raised a Point of Order challenging the constitutionality of the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) in its entirety. In respect of this matter, I did guide the House, in part, that –

> *"There is nothing unconstitutional about this Bill. The term omnibus does not refer to minor or trivial amendments. In fact, you could be talking about making minor amendments to existing law. But you may just insert one word; where it talks of "10 per cent" and make it 50 percent. That could be monumental. So, it is not the volume of the text that should be the issue to be considered. On this, the courts must also allow Parliament to do its legislative work. Let them deal with the interpretation of the constitutionality or otherwise of Bills that have been passed by the House. We cannot be held hostage by courts saying: "We think this is an omnibus law or, there are too many amendment Bills".*
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> *"A Finance Bill, for instance, is an omnibus Bill. It amends several laws to deal with revenue-raising measures or even repeals in entirety certain taxation provisions in law. Some of them have such great import that if one was to say the issue of substantive vis-à-vis the text, the two would not go hand in hand.*

My view is that, since the issue of "omnibus law" is as old as the year 1850, the issue of "omnibus" is not one that offends the practice anywhere in the jurisdictions we compare ourselves with. We have traditions and customs. Our Constitution has not disallowed miscellaneous amendment Bills. I do not think whether we could say it is "un-procedural". My guide would be that we consider the Bills. Our requirement is under Article 10, among others; Articles 10(2)(a) and 118, which are on public participation. So, when a Bill is published, whether it contains proposals to amend two Acts of Parliament or 10 or 15, what our Constitution requires is that the public is involved. That is why we publicise those Bills. ...So, I think it is within the power of the House to legislate in terms of Articles 94 and 95. When we are legislating, we should not look over our shoulders save to consider what the letter and spirit of the Constitution and its substance are. ... There has never been a precedent that says: "Do not use miscellaneous amendment processes".

As you can clearly tell, the practice of *omnibus* Bills in our Parliament is established and this House has, with technical support of Officers of the House, devised innovative strategies of navigating the complexity of Omnibus Bills based on the experiences with different bills of this kind.

Honourable Members, in the Tenth Parliament, a question of similar import arose as to whether or not some amendments proposed on certain statutes in the Finance Bill, 2011 were within the scope and ambit of a Finance Bill. In addressing the question, my predecessor, Speaker Kenneth Marende observed as follows –

"Hon. Members, the practice that is emerging where amendments covering diverse subject matters are introduced to a Finance Bill is one that requires to be reconsidered. Some of the amendments that have been proposed to Finance Bill in recent times, and in the present case are over matters that rightfully fall within the mandates of Ministries other than that ministry responsible for Finance, and consequently the mandates of various Departmental Committees.

Introducing such amendments to a Finance Bill denies the relevant Ministries and Committee of the House, stakeholders, and the general public, the opportunity to reflect and deliberate on the proposed amendment."

Honourable Members, The question at hand that I have been invited to rule on closely mirrors the situation that my predecessor dealt with above. But, be that as it may, and as earlier stated, the *omnibus* nature of a Finance Bill ought to be taken into account when resolving any question of the scope and principal object of a Finance Bill. Erskine May Parliamentary Practice (24th Edition), an authority on parliamentary practice and procedure, provides as follows at page 780 –

"The scope of a Finance Bill is not limited to the imposition and alteration of taxes for the purpose of adjusting the revenue of a particular year. It is also not intended to be an annual Act in the same sense as an Appropriation Act, but normally includes many provisions of permanent character for the regulation of ***fiscal machinery*** *and other purposes."* **I put emphasis to use of the words "fiscal machinery".**

Honourable Members, The scope of a Finance Bill is not exclusively limited to imposition and alteration of taxation for the purpose of adjusting the revenue of a particular financial year but also **includes provisions of permanent character for the regulation of the fiscal machinery and other purposes.** With regard to the inclusion of amendments to the Proceeds of Crime and Anti-Money Laundering Act, 2009 under Clauses 50 and 51 of the Finance Bill, 2019, though not reflected in the Long Title of the Bill, a correlation can be made between the proposed amendments with regard to reporting of suspicious transactions as **a fiscal control on the loss of government revenue.** It is my considered view that as a House we should not be seen to curtail our legislative mandate. The legislation passed by this House is measured as against the Constitution and the issues of concern to the people that it resolves. With this in mind, form is a secondary consideration.

Honourable Members, Standing Order 47(3) places a particular obligation on the Speaker to exclude a motion from being debated or direct the amendment of a motion in an appropriate format where the motion either offends the Constitution, an Act of Parliament or the Standing Orders. Verbatim, the Standing Order provides, and I quote—

(3) If the Speaker is of the opinion that any proposed Motion –

(a) is one which infringes, or the debate on which is likely to infringe, any of these Standing Orders;

(b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;

.....

the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the relevant committee of the Assembly, pursuant to Article 114(2) of the Constitution.

Honourable Members, In parliamentary practice, a House of Parliament considers any Bill by way of a motion seeking agreement of the House either for the Bill to be read a Second Time, for amendments to the Bill to be considered and approved during the Committee of the Whole House, or for the Bill to be read a Third Time. In relation to the consideration of a Bill, the role of the Speaker under Standing Order 47(3) is two-fold. On the one hand, the Speaker is under an obligation to exclude any Bill or part of a Bill from consideration by the House where such a Bill or part of it patently violates the Constitution, any written law or the Standing Orders and the said violation is not curable through appropriate amendment or revision, prior to the consideration of the Bill. On the other hand, the Speaker is under a further obligation to ensure that any Bill under consideration by the House is insulated from any amendment or revision that may place it at odds with either a constitutional or statutory provision or violate the procedural prescriptions of the Standing Orders.

Standing Order 47(3) effectively excludes the participation of the House in the decision to be made by the Speaker and, as I have previously ruled, obliges the Speaker not to fold his or her arms and preside over deliberations that may lead to an unconstitutional and absurd result.

Honourable Members, Clauses 50 and 51 of the Finance Bill 2019 seek to amend the provisions of the Proceeds of Crime and Anti-Money Laundering Act 2009 to designate advocates, among other professionals, as reporting institutions of any suspicious transactions done by their clients. I understand the concern of the Hon. Murugara and all other lawyers in this House in trying to tie attorney-client confidentiality, the right to privacy and the right of access to information under Article 31 and 35 of the Constitution, respectively. However, as Members are aware, the Constitution is very clear on the rights and freedoms that may not be limited under any circumstances.

Honourable Members, Article 25 of the Constitution provides as follows, and I quote—

> *"Despite any provision in this Constitution, the following rights and fundamental freedoms shall not be limited—*
>
> *(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
>
> *(b) freedom from slavery or servitude;*
>
> *(c)the right to a fair trial; and*
>
> *(d) the right to an order of habeas corpus."*

A clear reading of Article 25 of the Constitution mandates this House to limit any other right or fundamental freedom subject **only to the protections outlined by the Constitution**. Up to that point, and without interrogating the merits of the proposals, the argument that clauses 50 and 51 of the Finance Bill, 2019 ought to be excluded from consideration by this House on account of limiting constitutional rights seems **NOT** to hold any water in my view.

Honourable Members, Article 24 of the Constitution prescribes the manner in which the rights and fundamental freedoms guaranteed by the Constitution may be limited. Clauses (1) and (2) of the Article are instructive insofar as they state, and I quote—

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

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

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

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

Honourable Members, Article 24(2) of the Constitution requires that any provision enacted or amended on or after 27th August 2010 to expressly stipulate the intention to limit a fundamental right or freedom and the nature and extent of the limitation for the provision to be valid. I am cognizant of the fact that the Proceeds of Crime and Anti-Money Laundering Act was enacted in 2009. To the extent that the Finance Bill, 2019 proposes amendments to sections of the Act with a discernible link to the limitation of rights guaranteed under the Constitution, the said amendments ought to comply with the requirements of Article 24(2) of the Constitution.

Clauses 50 and 51 of the Finance Bill are not accompanied by any additional provision **stating the intention to limit the right to privacy and the nature and extent of the limitation in relation to the new categories of professionals it seeks to designate as reporting institutions under the Proceeds of Crime and Anti-Money Laundering Act, 2009**. To this end, the two proposed provisions fail to comply with the standard of disclosure set out by the Constitution and therefore are procedurally defective. To this end, **Honourable Members,** given the clear provisions of Standing Order 47(3)(b) which imposes an obligation on me to satisfy myself with regard to certain procedural and constitutional standards, I am constrained to order that these two provisions be excluded from consideration by this House during the Second Reading of the Bill. **I hasten to add that this determination is only related to the procedural defects in the manner in which the proposed amendments have been presented**. Nothing stops the mover of the Bill or any other Member from proposing the amendments in the appropriate format in a separate Bill for the consideration of the House. At this stage, the question as to whether the two provisions would offend the Constitution if they were to comply with the standard of disclosure set in the Constitution and introduced as a separate Bill does not arise.

Honourable Members, Before I conclude, let me also allay the fears expressed by the Hon. Jude Njomo on the inclusion and subsequent consideration by the House of Clause 43 of the Finance Bill, 2019 which seeks to amend the Banking Act, and the manner in which it affects his Banking (Amendment) Bill, 2019. As I stated in my preliminary directions to the House yesterday, the House has not yet expressed itself on the said Bill sponsored by the Hon. Njomo, hence the provisions of Standing Order 49 on re-visiting a matter already decided by the House does not arise. But, for the benefit of the Member, the House and perhaps the general public and stakeholders who may be keenly tracking proceedings relating to that Bill, there are three likely scenarios that may result.

Honourable Members, First, if Clause 43 of the Finance Bill, 2019 is amended by this House to include provisions extracted from Hon. Njomo's Banking (Amendment) Bill, 2019 and the Finance Bill, 2019 is assented to by the President without any reservations, the object of the Member will have been realized, hence there would be no need to proceed with further consideration of his Bill.

Second, if the House negatives Clause 43 of the Finance Bill or an amendment to delete the said proposal is carried, the House would have resolved on the matter. This scenario will trigger the application of the provisions of Standing Order 49 and the matter may only be re-introduced after six months in accordance with that Standing Order. In the third scenario, the same fate as that in scenario two would arise in the event that this House passes the Finance Bill, 2019 with Clause 43 but the President expresses reservation to that Clause, and the House fails to muster the threshold required to override the President's reservations.

As to what the second and third scenarios would portend to the likely lapse of the 12 months that the Court, through a ruling made on 14th March 2019, granted the National Assembly to rectify the anomalies that were in that law, the matter is outside the purview of the Speaker at the moment.

I summary therefore, it is my finding-

1. **THAT**, clauses 50 and 51 of the Finance Bill, (National Assembly Bill No.51 of 2019) fail to comply with the standard of disclosure set out by the Constitution and therefore are procedurally defective and are hereby exclude from Second Reading. The Bill will proceed as if the two clauses were not part of it;

2. **THAT,** this determination is only related to the procedural defects in the manner in which the proposed amendments have been presented;

3. **THAT**, nothing stops the mover of the Bill or any other Member from proposing the amendments in the appropriate format in a separate Bill for the consideration of the House; and,

4. **THAT, with respect to** Clause 43 of the Finance Bill, 2019 which seeks to amend the Banking Act, the provisions of Standing Order 49 on re-visiting a matter already decided by the House does not arise at this stage as the House has not made a decision on the matter.

The House is accordingly guided.

I thank you.

THE HON. JUSTIN B.N. MUTURI, E.G.H, MP
SPEAKER OF THE NATIONAL ASSEMBLY
Thursday, September 19, 2019