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TWELFTH PARLIAMENT - (FOURTH SESSION)
THE NATIONAL ASSEMBLY
COMMUNICATIONS FROM THE CHAIR

_____ (No. 35 of 2020) _____

**PROCEDURE FOR THE REVOCATION OF THE APPOINTMENT OF A
MEMBER OF THE PARLIAMENTARY SERVICE COMMISSION (PSC)**

Honourable Members, You will recall that during the afternoon sitting of the House on Tuesday, 2nd June, 2020, the Member for Rarieda (The Hon. (Dr.) Otiende Amollo) rose on a *Point of Order* seeking guidance of the Speaker on, among other things, the applicable constitutional provisions with regard to a Member of the Parliamentary Service Commission. The Hon. (Dr.) Amollo averred that the question of the procedure for removal from Office of a Member of the Parliamentary Service Commission (PSC) is one that touches on the Constitution, the Parliamentary Service Act 2019 and the Standing Orders and therefore requires clear demarcation. Specifically, the Member sought the guidance of the Speaker on whether the removal of a Member of Parliament, or the non-Member of Parliament from the Office of a Member of the Parliamentary Service Commission ought to be proceeded with in accordance with the provisions of Article 251 of the Constitution as read with Standing Order 230 or otherwise as provided for in section 10 of the Parliamentary Service Act, 2019. Several other Members spoke on the matter including the Leader of the Minority Party (the Hon. John Mbadi, EGH, MP), the Member for Ugenya (the Hon. David Ochieng, MP), nominated Members (the Hon. David Sankok, MP and the Hon. Dennitah Ghati), the Member for Mathare (the Hon. Tom Oluoch, MP) and the Member for Saku (the Hon. Ali Rasso, MP).

Hon. Members, while seeking direction on the matters at hand, the Hon. Dr. Otiende Amollo also alluded to an intention by his party to institute “changes in the composition of the Parliamentary Service Commission”. Out of abundance of caution, he sought the Speaker’s direction on the proper procedural management of the process. He stated, and I quote–

“...Hon. Speaker, I seek your guidance on the matter proactively to avoid contention and acrimony. I invite your guidance accordingly...”

Honourable Members, having listened to the deliberations on the matter, I have deduced the following two issues as requiring my guidance-

- (1) Whether the procedure employed in the appointment of a Member of Parliament to the Office of a Member of the Parliamentary Service Commission should mirror the procedure that would be applied in removing the person from office; and,**
- (2) Whether the removal of a Member of Parliament, or non-Member of Parliament from the Office of a Member of the Parliamentary Service Commission ought to be proceeded with in accordance with the provisions of Article 251 of the Constitution as read with Standing Order 230 or otherwise as provided for in section 10 of the Parliamentary Service Act, 2019.**

Honourable Members, before I embark on the issue of removal of a Member of the Parliamentary Service Commission, allow me to revisit the purpose the Commission serves and pose some questions, which are fundamental to this considered guidance.

For what reason was the Commission established and who does it serve?

Does it exist to take care of the interests of parties, or Members, staff and the public at large? I find that a clear background on this will help us all in discerning the Parliamentary Service Commission and its performance against the role that it is supposed to play.

Honourable Members, Allow me to take the House down the memory lane. The journey for the autonomy of the administration of the Legislature in Kenya began during in 2nd Parliament when, on 20th March, 1970 a motion for a resolution to give Parliament autonomy was introduced in the House by the late Hon. Jean Marie Seroney, then a Member of Parliament for Tinderet. However, autonomy was not to be realized until the Eighth Parliament. Some of you may recall that before 1999, the National Assembly was a Department under the Office of the President. At that time, the Office of the President determined Parliament's budget, staffing, remuneration, calendar as well as other parliamentary affairs. Members of staff were pooled from the mainstream civil service with all human resource matters being administered from the then Directorate of Personnel Management, or the "DPM" as it was then popularly known. The Eighth Parliament took a definite step aimed at attaining an autonomous and independent status for the National Assembly then. Indeed, the Deputy Leader of the Majority Party (the Hon. Jimmy Angwenyi, MP) and the Member for Igembe North (the Hon. Maoka Maore, MP) will remember that it took the passage of the Constitution of Kenya (Amendment)(No.3) Bill of 1999 to establish the Parliamentary Service Commission through the introduction of Sections 45A & 45B of the then Constitution. This was a great stride towards entrenching the independence of Parliament, which was followed by the introduction and enactment of the Parliamentary Service Act a year later on November 28, 2000. From the onset, the inaugural Commission was established, among other things, to –

- (i) provide such services and facilities as are necessary to ensure efficient and effective functioning of the Assembly;*
- (ii) direct and supervise the administration of the services and facilities provided by, and exercise budgetary control over, the Service;*
- (iii) determine the terms and conditions of service of persons holding or acting in the offices of the service;*

- (iv) from time to time as necessity arises, appoint an independent body to review and make recommendations on the salaries and allowances of the members of the Assembly;*
- (v) initiate, co-ordinate and harmonize policies and strategies relating to the development of the Service;*
- (vi) undertake, singly or jointly with other relevant authorities and organisations, such programmes as would promote the ideals of parliamentary democracy in Kenya; and,*
- (vii) to do such other things including review of parliamentary powers and privileges as may be necessary for the well-being of the members and staff of the National Assembly and to exercise such other functions as may be prescribed by or under an Act of Parliament.*

Honourable Members, It is worth noting that most of these roles were carried over in the current Constitution and mainly seek to cement the independence of the institution of Parliament from external control. In the present day, Article 127(6) of the Constitution provides for the responsibility of the Parliamentary Service Commission as—

- (a) providing services and facilities to ensure the efficient and effective functioning of Parliament;*
- (b) constituting offices in the parliamentary service, and appointing and supervising office holders;*
- (c) preparing annual estimates of expenditure of the parliamentary Service and submitting them to the National Assembly for approval, and exercising budgetary control over the service;*
- (d) undertaking, singly or jointly with other relevant organisations, programmes to promote the ideals of parliamentary democracy; and,*
- (e) performing other functions—*
 - (i) necessary for the well-being of the members and staff of Parliament; or*
 - (ii) prescribed by national legislation.*

Honourable Members, Comparatively, in the United Kingdom, the House of Commons Commission is responsible for the administration and services of the

House of Commons, including the maintenance of the Palace of Westminster and the rest of the Parliamentary Estate. Annually, the Commission presents to the House for its approval the Budget Estimates for the House of Commons' Administration, covering spending on the administration and services of the House for the financial year. The Commission is responsible for –

- (i) providing the non-executive governance of the House by Members, (but it does not manage day to day operations);*
- (ii) Setting the number and pay of House staff (in line with the civil service);*
- (iii) Appointing staff of the House (excluding the Clerk of the House of Commons, Serjeant-at-Arms, and Speaker's personal staff);*
- (iv) Preparing and laying before the House the Estimates for the House of Commons Service;*
- (v) Allocating functions to House departments; and*
- (vi) Reporting annually to the House on its actions and on financial estimates for the financial year.*

Honourable Members, it is therefore evident that the main purpose of a Parliamentary Service Commission is to ensure provision of services and facilities for Members of Parliament to enable them perform their duties. Put differently, a parliamentary service commission is designed as an **independent parliamentary corporate body to oversee administration and management of the institution of Parliament**. This independence is closely linked to the doctrine of separation of powers among the arms of government as a hallmark of democratic governance. Members of Parliament ought to be accorded all the necessary facilitation, free from control by external forces in the performance of their constitutional responsibilities. In support of these principles, Section III of the Commonwealth (Latimer House) Principles on the Three Branches of Government states in part-

"Independence of Parliamentarians-

- (a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.¹"*

¹ Derived from: *The Commonwealth (Latimer House) Principles on the Accountability of and Relationship Between the Three Branches of Governments*, Commonwealth Parliamentary Association, 2009 (page 42)

Hon. Members, With this background, allow me now to address the first issue of *whether the procedure employed in the appointment of a Member of Parliament to the Office of a Member of the Parliamentary Service Commission should mirror the procedure that would be applied in removing the person from office.*

To respond to this question, let us ask ourselves- ***How do Members of Parliament and the other two non-MPs get appointed to the Office of a Member of the Parliamentary Service Commission?*** You may recall that, the Special Motion for the appointment of the current members of the Parliamentary Service Commission who are Members of Parliament was considered and passed by the National Assembly on February 22, 2018. During that afternoon Sitting, the Member for Rarieda rose on a *Point of Order* seeking clarification on the term of office of the members of the Commission in view of the provisions of Article 250(6)(a) of the Constitution. For clarity, the provision states –

*"(6) A member of a commission, or the holder of an independent office—
(a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment;"*

In the ensuing deliberations, it was noted that the Parliamentary Service Commission, by design, is different from other Commissions. With regard to the term of office, it was noted that whereas Commissioners of other Commissions serve for a single term of six (6) years, the members of the Parliamentary Service Commission serve for the term of Parliament, which is five years. Similarly, whereas Article 250(1) of the Constitution provides that each commission shall consist of at least three (3) and not more than nine (9) members, the Parliamentary Service Commission consists (10) members. It was also observed that the appointment procedure for the Parliamentary Service Commission is primarily different from that of other constitutional Commissions. Notably, whereas the appointing authority in the case of the Parliamentary Service Commission is Parliament itself, Commissioners of the other Commissions are appointed by the President, with the approval of the National Assembly.

Hon. Members, Chapter Fifteen of the Constitution establishes ten Commissions and the two independent offices of the Auditor General and the Controller of Budget. Article 248(1) of the Constitution outlines the manner in which Chapter Fifteen is to apply. It provides, and I quote—

*248. (1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), **except to the extent that this Constitution provides otherwise.***

I lay emphasis to the phrase "**except to the extent that this Constitution provides otherwise**" as it is central to the questions at hand. The subsequent provisions in Chapter Fifteen outline general provisions that are to apply to Commissions and independent offices with regard to objects, authority and funding; composition, appointment and terms of office; removal from office; general functions and powers; incorporation; and reporting to the President and Parliament. These general provisions are to apply unless another specific provision of the Constitution provides otherwise with regard to a matter that they affect. The appointment and the removal from office of a Member of the Parliamentary Service Commission are matters that are, to a certain extent, removed from the general application of Chapter Fifteen of the Constitution. As the House will note, Article 127 of the Constitution is the substantive provision of the Constitution which governs the affairs of the Parliamentary Service Commission. The Article provides in part, and I quote—

"(1) There is established the Parliamentary Service Commission.

(2) The Commission consists of—

(a) the Speaker of the National Assembly, as chairperson;

(b) a vice-chairperson elected by the Commission from the members appointed under paragraph (c);

(c) seven members appointed by Parliament from among its members of whom—

(i) four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and

(ii) three shall be nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and

(iii) one man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.

(3) *The Clerk of the Senate shall be the Secretary to the Commission.*

(4) ***A member of the Commission shall vacate office—***

(a) if the person is a member of Parliament—

(i) at the end of the term of the House of which the person is a member; or

(ii) if the person ceases to be a member of Parliament; or

(b) if the person is an appointed member, on revocation of the person's appointment by Parliament.

*(5) Despite clause (4), when the term of a House of Parliament ends, a member of the Commission **appointed** under clause (2)(c) shall continue in office until a new member has been appointed in the member's place by the next House"*

Hon. Members, From a close reading of Article 127 of the Constitution you will observe that indeed the Parliamentary Service Commission is "***sui generis***" (Latin for "of its own kind") in a number of ways and departs from the general provisions of Chapter Fifteen of the Constitution in various specific aspects including the following—

- (1) First,** with regard to the membership of the Commission, the Parliamentary Service Commission comprises of ten (10) Members whereas the general composition of a constitutional commission is a minimum of three (3) Members and a maximum of nine (9) Members;
- (2) Second,** while the general rule on the process of appointment of all members of Commissions and holders of independent offices is by an advertisement, conduct of interviews, forwarding of recommendations for nomination and eventually appointment by the President with the approval of the National Assembly **alone**, the appointment of members of the Parliamentary Service Commission starts and ends in Parliament, with the appointment being made by the **two Houses**;
- (3) Third,** whereas Article 251 of the Constitution prescribes a standard single six-year term for Members of other Commissions and holders of Independent Offices and a general procedure for removal from office

that may be initiated by any person, Article 127 of the Constitution ties the term of office of a Member of the Parliamentary Service Commission to the term of Parliament unless either a person ceases to be a Member of Parliament or upon the revocation of their appointment by Parliament for both the member and non-member of parliament.

- (4) Fourth**, unlike other constitutional commissions, the membership of the Parliamentary Service Commission is largely drawn from Members of Parliament and indeed out of the ten Members of the Commission, eight are Members of the Parliament;
- (5) Fifth**, the Parliamentary Service Commission and the Commission on Revenue Allocation are the only constitutional commissions in which Political Parties largely nominate the membership;
- (6) Sixth**, whereas in the case of all other Commissions, members are not eligible for re-appointment upon serving for a term of six years, in the case of the Parliamentary Service Commission, once a term of a Member of Parliament ends, if the Member is re-elected, such a Member is still eligible for re-appointment to the Commission subject to a fresh process of re-appointment being undertaken by the Houses. This was the case in respect of the Member for Eldas Constituency, the Hon. Adan Keynan, MP, who is now serving his third consecutive term in the Commission;
- (7) Seventh**, Hon. Members, unlike other Commissions where the secretary is also the chief executive officer under Article 250(12) of the Constitution, in the case of the Parliamentary Service Commission, under Article 127(3) the authority of the Clerk of the Senate is limited to being the Secretary to the Commission; and,
- (8) Eighth**, whereas for all other constitutional commissions, Article 251 on the removal process applies to all members of a Commission and does not distinguish between a Member and a Chairperson, the Constitution provides specific procedures for the removal of the Speaker of the National Assembly who serves as the Chairperson of the Parliamentary Service Commission and the Chief Justice who is the Chairperson of the Judicial Service Commission at Articles 106(2)(c) and 168, respectively.

Hon. Members, the analysis of the differences I have just outlined leads to two inescapable conclusions. The first conclusion is that Article 127 of the Constitution governs the appointment of a person as a member of the Parliamentary Service Commission. The second conclusion is that Article 127 of the Constitution also governs the vacation from office of a person appointed to the Parliamentary Service Commission by Parliament. Save for the specific question that I have alluded to which was asked by the Member for Rarieda on February 22, 2018 regarding re-appointment of a Member to the PSC in a new House and which I comprehensively addressed, we have not had any other queries on the process of appointment of persons to the Parliamentary Service Commission. **The Houses have construed and settled on the interpretation that all Members of the Commission, save for the Chairperson, are appointed by the Houses of Parliament- and that has been the precedence even after enactment of the 2010 Constitution.** The process of how one gets into the Commission is therefore straightforward.

Hon. Members, The next step now is to draw a nexus between the appointment and the process of removal, that is, how a Member of PSC comes into office, and how he or she may be removed. A reading of the provisions of **Article 127(4)(b) of the Constitution reveals that, if the Member came to office by way of appointment, then his or her removal is arrived at by way of revocation of the appointment.**

What follows then is for me to answer the question, **What is revocation?** According to The Black's Law Dictionary (as edited by Bryan A. Garner) the term "revoke" is defined as the act of "rescinding a decision".² Further, according to section 482 of the ***Mason's Manual of Legislative Procedure***, (pg 319)-

"A Legislative Body can rescind an action previously taken, so long as no vested rights have arisen from the original action. The motion to rescind may be made at any subsequent meeting as long as no rights have intervened and is not limited to any specific or particular time during which the motion can be made."

²The Eighth Edition of Black's Law Dictionary, Edited by Bryan Garner

Hon. Members, as mentioned earlier, political parties nominate Members for appointment to the Commission by the House. It is left to the House to either accept to appoint the nominees, or reject a person proposed for appointment. The word “nominate” as used in the various provisions of the Constitution relating to constitutional commissions and independent offices is not among the terms defined under Article 260 of the Constitution.

The Black’s Law Dictionary defines the term “nominate” as the act of “proposing a person for election or appointment³”. **I am therefore inclined to agree with the Members who are of the opinion that the approach employed to appoint a person into a constitutional office ought to be mirrored as closely as possible in the method employed to remove the person from the office, implying revocation of appointment.**

Hon. Members, this now brings me to the second question, which is, *between the provisions of Article 251 of the Constitution (as read with Standing Order 230) and section 10 of the Parliamentary Service Act, 2019, which is the applicable provisions to be applied in the removal of a Member of Parliament, or a non-Member of Parliament from the Office of a Member of the Parliamentary Service Commission?*

Hon. Members, this is not the first time that the Speaker has been confronted with that question. Indeed, by way of a letter dated 20th June, 2018, the Minority Whip, the Hon. Junet Mohamed, MP sought my guidance on the process of the removal of a Member of Parliament appointed as a Commissioner to the Parliamentary Service Commission. For the benefit of the House, the substantive part of my brief response to the query was as follows-

"Pursuant to the provisions of Article 127(2) of the Constitution as read with section 51 of the Interpretation and General Provisions Act, Cap.2, the procedure for the removal of a Commissioner under Article 127(2)(c)(ii) of the Constitution is through a motion for removal of the Commissioner to the House for its consideration and passage in terms of Article 122 of the Constitution"

³The Eighth Edition of Black's Law Dictionary, Edited by Bryan Garner, (pp 3322-3323).

Hon. Members, There are two things to note with regard to the guidance I provided at the time to the Minority Whip. First, in referring to section 51 of the Interpretation and General Provisions Act (Cap. 2), I took cognizance of the **inherent power of the House to revoke the appointment** of a Member of the Parliamentary Service Commission as it is the only body mandated to appoint such a Commissioner in the first place. Secondly, and as Members are aware, no other specific provision outlining the procedure for the removal of a Commissioner of the Parliamentary Service Commission **was in place at the time.**

Consequent to that Guidance, this House passed the Parliamentary Service Act, 2019 outlining specific provisions on the procedure to be followed by the House to revoke the appointment of a Commissioner of the Parliamentary Service Commission.

Hon. Members, before I examine the procedure for removal of a Commissioner of the Parliamentary Service Commission as provided for in the Parliamentary Service Act, 2019 allow me to examine the provisions of Article 251 of the Constitution which provides for the procedure for removal of a member of a constitutional commission. Article 251 of the Constitution provides that a member of a commission (other than an *ex officio* member), or the holder of an independent office, may be removed from office only on grounds specified which includes serious violation of the Constitution and gross misconduct. A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified may present a petition to the National Assembly setting out the alleged facts constituting that ground. The National Assembly is then required to consider the petition and, if it is satisfied that it discloses a ground send the petition to the President. Subsequently, the President is mandated to constitute and establish a Tribunal to investigate the matter expeditiously, report on the facts and make a binding recommendation to the President.

Hon. Members, from the foregoing, it is indeed clear that an interpretation that Article 251 of the Constitution applies for removal of members of the Parliamentary Commission would not just be a departure from already

established procedures and practices by the two Houses but it would be an affront to the provisions of Article 127 of the Constitution for the following five reasons-

- (i)** The appointment of the Members of the Parliamentary Service Commission is by Parliament and not the President as is the case for all other constitutional commissions. To involve the President in the removal process would ignore this distinct feature and would be tantamount to conferring upon an office which was not part of the appointment process, with the power to get involved in the revocation;
- (ii)** This argument would fall flat against section 51 of the Interpretation and General Provisions Act which is an established rule of interpretation that a person having the power to make an appointment also has the power to remove from office;
- (iii)** It is also worth noting that Article 251 of the Constitution only provides for removal of Members of the Constitutional Commissions by the National Assembly to the exclusion of the Senate. The appointment of Members of the Parliamentary Service Commission as provided for in Article 127 of the Constitution is however by both Houses of Parliament. Consequently, to interpret that Article 251 of the Constitution applies in the removal process of Members of the Parliamentary Service Commission ignores two facts. First is that the seven Members of Parliament to the Commission are nominated by political parties from both Houses of Parliament. Secondly, the appointment of the Members of the Commission is done by both Houses of Parliament;
- (iv)** It is also worth noting that the Parliamentary Service Commission, unlike other commissions was established for the sole purpose of serving both Houses of Parliament through provision of services and facilities to Members of Parliament and staff. Article 251 of the Constitution, if applied, would also ignore the constitutional architecture of the Parliamentary Service Commission as envisaged in Article 127 of the Constitution by excluding one House in the removal process of commissioners; and,

- (v) The establishment of a Tribunal by the President consisting among other persons a person who holds or has held office as a judge of a superior court, who shall be the chairperson and at least two persons who are qualified to be appointed as High Court judges to investigate matters raised in a petition for removal also departs from Article 127(4) of the Constitution on the revocation of appointment of a Member of the Commission by Parliament. It therefore follows that if revocation of appointment of a Member of the Parliamentary Service Commission is by Parliament, then the body responsible for investigating if any grounds levelled against a Member have been disclosed can only be a body in Parliament, in this case being a Select Committee established for that purpose.

Hon. Members, in view of the foregoing, Article 251 of the Constitution does not apply in the removal of a Member of the Parliamentary Service Commission. It is therefore my view that the right procedure is one that contemplates revocation of appointment by Parliament but at the same time taking into account the need for clearly defined grounds for removal from office and the requirements of fair administrative action. This is the essence behind section 10 of the Parliamentary Service Act, 2019. Indeed, looking at the Report of the Departmental Committee on Justice and Legal Affairs on the Parliamentary Service Bill, 2018 now an Act of Parliament, the Committee observed as follows on the procedure for removal from office of a Member of the Parliamentary Service Commission on pages 35 to 39 -

"It is notable that the Commission is one of the constitutional commissions listed in Article 248 of the Constitution and it would appear from the face of it as if the provisions of Article 251 of the Constitution on the procedure for removal of member of a constitutional commission would apply. However, it is notable that Article 248(1) of the Constitution provides that the provisions of chapter fifteen including Article 251 of the Constitution apply, except to the extent the Constitution provides otherwise.

Article 127 of the Constitution is one exception of the application of the provisions of chapter fifteen in particular on the composition, mode of appointment and the removal process of the commissioners of the Parliamentary Service Commission among others. In this regard,

the procedure for removal of a commissioner as espoused in Article 251 of the Constitution does not apply to commissioners of the Parliamentary Service Commission. A close reading of Article 127 of the Constitution reveals that Article 127 does not provide for the procedure of removal of commissioner from the Parliamentary Service Commission save for it provides for the manner in which the office of a member of the Commission may become vacant. Therefore, there is need to anchor in law, a procedure for the removal of the Commissioners. As drafted, the clause suggests that the procedure under Article 251 should apply to the commissioners of the PSC contrary to the aforementioned advice by the Speaker and the provisions of Article 248(1) of the Constitution.”

Hon. Members, based on the observations, the Committee proceeded to propose an amendment which is currently section 10 of the Parliamentary Service Act, 2019. Section 10 of the Parliamentary Service Act, 2019 provides as follows with regard to the procedure for the removal of a Member of the Parliamentary Service Commission-

"10. (1) A Member of Parliament, supported by at least one-quarter of all the Members of the respective House, may propose a motion for the removal of a member of the Commission only for-

- (a) serious violation of the Constitution or of any other law including a contravention of Chapter Six;*
- (b) gross misconduct, whether in the performance of the member's functions or otherwise;*
- (c) physical or mental incapacity to perform the functions of office;*
- (d) incompetence; or*
- (e) bankruptcy.*

(2) If a motion presented under sub-section (1) is supported by at least one-third of the Members of the respective House—

- (a) the respective House shall appoint a select committee comprising of eleven of its Members to investigate the matter;*
- (b) the select committee shall within ten days report to the respective House whether it finds the allegations against the member of the Commission to be substantiated.*

(3) Where the select committee finds that—

(a) the allegations against the member of the Commission have not been substantiated, there shall be no further proceedings on the matter;

(b) the allegations against the Member of the Commission have been substantiated and the motion is supported by a majority of all the members of the respective House—

(i) the Speaker of that House shall inform the Speaker of the other House of the resolution within seven days; and,

(ii) the member of the Commission shall continue to perform the functions of the office pending the outcome of the proceedings under this section.

(4) The procedure prescribed in sub-sections (1), (2) and (3) shall apply with the necessary modifications to the consideration of the Motion for removal of a member of the Commission by the other House.

(5) If both Houses pass the motion in the same form, the member of the Commission shall stand removed.”

Hon. Members, The section outlines the steps that a Member of this House and the Senate may take to initiate and consider the removal of a Member of the Parliamentary Service Commission for specifically stated reasons. You will note that section 10 reasonably satisfies the requirements of Article 47 of our Constitution regarding fair administrative action as it replicates the character of Article 251 of the Constitution in terms of reasonableness and expeditiousness, due process and providing a forum for a fair hearing.

Hon. Members, One would however claim that section 10 of the Parliamentary Service Act, 2019, does not seem to prescribe any process which a member of the public may take to initiate removal of a Member of the Commission for any of the stated reasons. Indeed, this procedure is similar to the one for removal of a Cabinet Secretary. Article 152(6) of the Constitution provides that a Member of the National Assembly may propose a Motion for removal of a Cabinet Secretary. However, Article 152 of the Constitution, just like section 10 of the Parliamentary Service Act, 2019 does not provide for the procedure for removal of a Cabinet Secretary by instigation of any other person other than a Member of the National Assembly. Does this therefore imply that in the case of the Parliamentary Service

Commission just as is the case with a Cabinet Secretary no other person can initiate the process for removal of a Commissioner other than a Member of Parliament? Simply put, does section 10 of the Parliamentary Service Act, 2019 lock out or bar any other person other than a Member of Parliament from initiating the removal process of a Member of the Parliamentary Service Commission? It is my considered opinion that this is not the case. Certainly, any person may request or petition a Member of Parliament to propose the Motion under section 10 of the Parliamentary Service Act. Hence the section does not lock out other persons other than Members of Parliament from initiating the removal process.

Hon. Members, As it stands, therefore, a Member of Parliament may initiate the removal from office of a Member of the Parliamentary Service Commission through a motion in line with the provisions of Section 10 of the Parliamentary Service Act, 2019. Any person may also request or petition a Member of Parliament to propose the Motion under section 10 of the Parliamentary Service Act. **This therefore settles the question of which of the two provisions applies to the removal of a Member of the Parliamentary Service Commission.**

Hon. Members, let me now turn to a secondary issue that was tendered by the Member for Rarieda who, in my view while referring to **“abundance of caution”** invited me to make my considered guidance as comprehensive as possible, so as to **“avoid contention and acrimony”**. In doing so, I will remind the House on what parameters ought to be taken into consideration in employment of the process under Section 10 of the PSC Act, 2019. In giving this guidance, I must note that it is not the sole prerogative of a parliamentary party or coalition of parties which nominated a person for appointment to the Commission to initiate the revocation of the person’s appointment.

Hon. Members, Upon appointment by Parliament as a member of the PSC, a Member of Parliament ascribes to a constitutional office on which the Constitution places strict and weighty obligations. Apart from discharging its mandate under Article 127, Article 249 of the Constitution requires the Commission and each Member of the Commission by extension, to—

- (a) protect the sovereignty of the people;

- (b) secure the observance by all State organs of democratic values and principles; and
- (c) promote constitutionalism;
- (d) be subject only to this Constitution and the law; and
- (e) be independent and not subject to direction or control by any person or authority.

Indeed, the Courts have also ruled in a number of instances on the independence of constitutional commissions. In particular, inferring on *the High Court Case Miscellaneous Application No. 18 of 2017 (Edward Ouko versus the National Assembly)* to which I make reference to paragraphs 138, 140, 141, 150 and 151 of its determination, the Court did observe that-

- (1)** the independent Offices and Constitutional Commissions are people's watchdogs and to perform their roles effectively they must operate without improper influences, fear or favour⁴;
- (2)** proceedings seeking the removal of a member of constitutional office ought not to be taken lightly and unless such proceedings strictly adhere to the law, the independence of the holders of such offices would be compromised;
- (3)** constitutional institutions ought to be accorded their due respect and deference and to unjustifiably malign the institutions and the holders of the institutions can be explained on the basis of impunity;
- (4)** constitutional commissions and independent offices must operate in an environment devoid of subjection to direction or control by any person or authority;
- (5)** Article 249(2) expressly provides that the commissions and independent offices are subject only to the Constitution and the law; and,
- (6)** the Courts are constitutionally bound to protect the said constitutional commissioners and holders of independent offices from unlawful intimidation and harassment by any person or authority.

⁴See the Supreme Court Constitutional Application No. 2 of 2011 in Re: The Matter of the Interim Independent Electoral Commission.

It appears therefore that, the reading of the obligations of a Commissioner of the PSC are incompatible with any assertion that a Commissioner should be beholden to partisan interests in the execution of his or her duties.

This view is also supported by the Constitution in the manner it provides for the appointment and removal from office of the members of two other Commissions, that is, the Commission on Revenue Allocation and the Salaries and Remuneration Commission, as I will explain shortly.

Hon. Members, Article 215 of the Constitution establishes the Commission on Revenue Allocation and contains provisions on the nomination of certain persons for appointment as members of the Commission by parliamentary parties in the National Assembly and the Senate. Clause (2) of the said Article reads, and I quote—

(2) The Commission shall consist of the following persons appointed by the President—

- (a) a chairperson, who shall be nominated by the President and approved by the National Assembly;*
- (b) Two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly;*
- (c) five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate; and,*
- (d) the Principal Secretary in the Ministry responsible for finance.*

Similarly, Article 230 of the Constitution establishes the Salaries and Remuneration Commission and provides for the nomination of certain persons for appointment as members of the Commission by the Parliamentary Service Commission and the Senate. Clause 2 of the said Article reads, and I quote—

(2) The Salaries and Remuneration Commission consists of the following persons appointed by the President—

- (a) a chairperson;*
- (b) one person each nominated by the following bodies from among persons who are not members or employees of those bodies—*
 - (i) the Parliamentary Service Commission;*
 - (ii) the Public Service Commission;*

- (iii) *the Judicial Service Commission;*
- (iv) *the Teachers Service Commission;*
- (v) *the National Police Service Commission;*
- (vi) *the Defence Council; and*
- (vii) *the Senate, on behalf of the county governments;*
- (c)** *one person each nominated by—*
 - (i) *an umbrella body representing trade unions;*
 - (ii) *an umbrella body representing employers; and*
 - (iii) *a joint forum of professional bodies as provided by legislation;*
- (d)** *one person each nominated by—*
 - (i) *the Cabinet Secretary responsible for finance; and*
 - (ii) *the Attorney-General; and*
- (e)** *one person who has experience in the management of human resources in the public service, nominated by the Cabinet Secretary responsible for public service.*

Hon. Members, Though the Constitution reserves special rights to certain entities in the nomination of persons for appointment to the CRA and the SRC, it does not reserve equivalent rights to those entities with regard to the vacation from office of the nominees upon their appointment. Presently, any person may petition this House for the removal of any Member of the two Commissions under Article 251 of the Constitution which may lead to the formation of a Tribunal by the President. As such, it cannot be said that the vacation from office of a person nominated for appointment by a parliamentary party or a House of Parliament to the CRA or the SRC is either predicated on a whim or is the sole prerogative of the parliamentary party or the House of Parliament.

Hon. Members, Noting the participation of parliamentary parties, the mode of appointment of Members of Parliament to the PSC is not unique. Are the Members appointed to the PSC after being nominated by parliamentary parties beholden to the interests of the parties? In accordance with the provisions of Article 259 of the Constitution, I now have the unenviable task of applying specific provisions of the Constitution whilst construing the Constitution as a whole. In this regard, it appears that, upon appointment by Parliament as a member of the Parliamentary Service Commission, there exists no real or imagined hold on the Member by the parliamentary party which nominated him or her for appointment.

The Membership of the Commission cannot be equated to Membership to a Committee of Parliament from which a Member may be de-whipped under Standing Order 176. With these references, the House will agree that, **a Commissioner of Parliamentary Service Commission ought not be beholden to any partisan interests in the execution of his or her duties as doing so would be an affront to the Constitution.**

Hon. Members, Moving on, the question of the manner in which the process of removal may be initiated is inextricably linked to the form in which either the motion by a Member in the case of the Parliamentary Service Commission or the petition by a member of the public in the case of constitutional commissions and independent offices under Article 248 of the Constitution is proposed or submitted respectively. The inclusion of independent offices and commissions in our Constitution is linked to the desire for decentralization by the people of Kenya. They are vital to ensuring limited government and to play an important role in the pursuit of good governance and democracy in the country. It is for this reason that the constitution set high qualifications for appointment and specific grounds and thresholds for removal from such offices.

Hon. Members, Those of you who were in the House during the Eleventh Parliament may recall that on Thursday, October 22, 2015, I issued a Communication regarding the *“Processing of Special Motions on Removal of State Officers”*. In the *Communication*, I reiterated the high threshold set by the Constitution on the removal of state officers. The Communication observed that Articles 145, 150(2), 152(6) and 251(2)(a)&(b) of the Constitution require, as a ground for removal from office of the President, the Deputy President, Cabinet Secretary or member of a constitutional commission or independent office, a threshold of either gross violation of the Constitution or other laws or gross misconduct. Drawing from the decision of the High Court in the case of *Martin Nyaga Wambora & 30 Others vs the County Assembly of Embu & four Others (Embu Constitutional Petition Nos. 7 & 8 of 2014)*,⁵ for a matter to amount to

⁵See also *Nancy Baraza v Judicial Service Commission & 9 others (2012) e KLR 2013* and *Hon. Michael Dapianlong & 5 Others v Chief Joshua Chibi Dariye Supreme Court of Nigeria S.C 39 of 2009*. See also the *“Special Constitutional Structure of the Federal Impeachment Process”* Michael J. Gerhardt while reviewing the impeachment trial of the then US President Bill Clinton stated that *“by vesting the impeachable authority in the politically accountable authorities of the House and the Senate, the framers*

gross violation as a ground for removal from office, the following parameters ought to be satisfied-

- (a) the allegation must be **serious**, substantial and weighty;
- (b) there must be a nexus between the office holder and the alleged gross violations of the Constitution or any other written law.
- (c) the charges framed against and their particulars must disclose a gross violation of the Constitution or any other written law; and,
- (d) the charges as framed must state with **degree of precision** the provisions of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.

Hon. Members, As I did guide the House at the time, the question of determining what constitutes gross violation of the Constitution or gross misconduct is one that clings and hangs on the impeachable authority of the House and is exercisable in two instances under the Standing Orders:

Firstly, at the point of the approval of the Motion for impeachment or dismissal and secondly, at the point of investigations conducted by the relevant select committee. Therefore, as an initial guidance on the matter, it should be noted that the Constitution has placed certain thresholds for the removal of State Officers from office. In practising these provisions, Standing Order 47(3)(b) and (e) requires the Speaker to take into account constitutional and evidential requirements while determining the admissibility or otherwise of a Motion including all Special Motions brought under Part XIII of the Standing Orders, which relates to Special Motions. For that reason, and in the first instance, the Speaker is obliged to exercise his or her responsibilities under Standing Order 47(3) whenever such a motion is submitted for approval.

Hon. Members, Indeed, at the close of the 11th Parliament, the House amended the Standing Orders to entrench the thresholds established by the Court in Standing Order 230 on the procedure for the removal from office of a member of a Commission or the holder of an Independent Office. **The high threshold should not be viewed as a barrier to removal from office, but rather as a safeguard from any unjustified witch-hunt on members of**

of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of the officials well versed in pragmatic decision making”.

independent offices and constitutional commissions. As Members are aware, under the provisions of Article 75(3) of the Constitution, a person who has been dismissed or otherwise removed from office for misconduct in a state office is disqualified from holding any other state office.

Indeed, Members must also be cautious to note that removal processes are aimed at checking on the conduct and capacity of members of the constitutional commissions and hence should not be instigated where there are no defined grounds touching on the competence, capacity and integrity of a commissioner.

Further **Hon. Members**, allow me to refer to the *High Court Petition No. 518 of 2013* in the matter of the Independence of Constitutional Commissions and Independent Offices between the *Judicial Service Commission versus the Speaker of the National Assembly* where the court observed as follows in paragraph 204-

204. "In that light, removal can be said to be the ultimate sanction in the oversight process which is otherwise routine. The ultimate threat of the sanction of removal is in and of itself a tool for regulating the conduct of commissioners and independent office holders while in office. It is intended as the ultimate check on the competence, capacity and integrity of such commissioners and office holders. It is the oversight tool of last resort. The process of removal touches personally upon, and is concerned with, the conduct or capacity of individual members of a commission"

Hon. Members, may I also remind this House that, based on the precedents set in this House and our courts, any removal proceedings are bound to and must adhere to the provisions of the Constitution as entrenched in Article 47 and further extrapolated in the Fair Administrative Action Act No. 4 of 2015. As Members may be aware, removal proceedings of Members of Constitutional Commissions are quasi-judicial in nature. The Black's Law Dictionary defines the terms "**quasi-judicial process**" as "*a term applied to the action of bodies which are required to investigate or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions from them as a basis for their official action and to exercise discretion of judicial nature*⁶".

⁶The Ninth Edition of Black's Law Dictionary.

Hon. Members, the question that therefore arises, is what does the law require of any person exercising a quasi-judicial function? Such a person must adhere to the requirements of fair administrative action. Article 47 of the Constitution which entrenches the right to fair administrative action provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

It is also a fundamental right that any person that has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The courts have also been very specific and emphatic on the need for Parliament to adhere to the requirements of the Fair Administrative Action in conducting removal processes of members of constitutional commissions and independent offices. For instance, in the High Court Case *Miscellaneous Application No. 18 of 2017, (Edward Ouko versus the National Assembly* and others), a suit which the Member for Rarieda, Hon. Otiende Omollo is certainly familiar with having been the Advocate on record for the Applicant, the then Auditor-General Mr. Edward Ouko, the Court held, amongst others, and I quote paragraph 164-

164. "In the premises whereas I do not have any quarrel with the Respondents (National Assembly) powers to conduct the subject proceedings, such proceedings must comply with Article 47 of the Constitution and section 4 of the Fair Administrative Action Act. In other words the due process must be adhered to in the conduct of the said proceedings."

Hon. Members, it is noteworthy that the proceedings of one of the Committees of this House to remove the then Auditor-General were subsequently set aside for failure to adhere to the requirements of the Fair Administrative Action. Additionally, you may also recall *the High Court Petition No. 518 of 2013 in the matter of the Independence of Constitutional Commissions and Independent Offices between the Judicial Service Commission (JSC) versus the Speaker of the National Assembly*. The subject matter of the particular case was a Petition that had been filed in this House seeking the removal of six JSC Commissioners. In the Petition, the Court also held as follows in paragraphs 140 and 143, in a decision of a five-judge bench -

140. *“In addition to the requirement to act judiciously, a body exercising a quasi-judicial function must accord the parties a fair hearing.”*

143. *“The right to a hearing and fair administrative action is no longer just a rule of natural justice, but is now a constitutional principle which applies in equal measure to all proceedings, investigations and hearings whether judicial, quasi-judicial or administrative. Article 47 guarantees to everyone administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The right to fair hearing is guaranteed under Article 50.”*

Hon. Members, to this end, I am in effect expected to examine whether a Special Motion as presented contains and meets the threshold of the grounds envisaged under the relevant Articles of the Constitution and specifically whether the facts as stated in the Motion amount to alleged **gross violation** of the Constitution or **gross misconduct**. In doing so, I must, as a matter of jurisprudence, be guided by the interpretation precedent set by the courts of law. I am bound to admit any Motion which meets the minimum requirements set by the constitution, written law, the Standing Orders and the precedents of this House. I shall however not admit any whimsical attempt that does not meet the constitutional thresholds.

Hon. Members, finally as I conclude, I hasten to remind the House that I have consistently evaluated previous motions for the removal of Cabinet Secretaries and petitions for the removal of members of Commissions and holders of Independent offices without fear or favour. As Members will recall, during the 11th Parliament I did admit the first petition for the removal of the Members of the Judicial Service Commission in 2015 to be presented to the House. The House subsequently recommended that the President form a Tribunal in the matter. In the same vein, I did admit a Motion for the dismissal of the then Cabinet Secretary for Education, the Hon. (Prof.) Jacob Kaimenyi; the Petition for the removal of the Commissioners of the Ethics and Anti-Corruption Commission in 2015; and the Petition for the removal of the Chairperson of the Ethics and Anti-Corruption Commission in 2016, among others. During the said 11th Parliament, I also declined to admit the second Petition for the removal of the Commissioners of the Judicial Service Commission; and a Motion for the dismissal of the then

Cabinet Secretary for Planning and Devolution, Ms. Anne Waiguru, to name a few.

Hon. Members, In summary therefore, I guide as follows—

- (1) THAT,** the procedure for the removal of a member of the Parliamentary Service Commission is as provided for in section 10 of the Parliamentary Service Act, 2019 which is by a Motion proposed by Member of Parliament on any of the grounds specified;
- (2) THAT,** the motion for removal of a Member of the Parliamentary Service Commission can be filed in either House of Parliament. However, for good order, a Motion for removal of a Commissioner ought to start from the House that the Commissioner serves as a Member. Such sequence, would neatly sit with the provisions of Standing Order 257 regarding the process of acquiescence to a request for appearance of a Member of one House before the other House or before a Committee of other House;
- (3) THAT,** in addition to the process being initiated by a Member of Parliament, any other person may petition a Member of Parliament to initiate the process of removal of a Member of the Parliamentary Service Commission as envisaged under section 10 of the Parliamentary Service Act, 2019;
- (4) THAT,** initiating the revocation of the appointment of a Member of the Parliamentary Commission is not the sole prerogative of a parliamentary party or coalition of parties which nominated the member for appointment;
- (5) THAT,** for purposes of admissibility, a Notice of Motion for the revocation of the appointment of a member of the Parliamentary Service Commission must meet the thresholds set by the Courts, the Standing Orders and precedents of this House as to what constitutes gross violation of the Constitution or gross misconduct under the Constitution. This includes the requirement for the Notice of Motion to —
 - (a)** indicate the grounds which the member of the commission is in breach;

- (b) state with a degree of precision the provisions of the Constitution or any other written law that have been alleged to be violated, where the specified grounds relate to violation of the Constitution or any other law;; and,
 - (c) indicate the nexus between the member and the alleged grounds on which revocation or removal is sought.
- (6) **THAT**, the removal process under section 10 of the Parliamentary Service Act must also be guided by the provisions of Article 47 of the Constitution and the Fair Administrative Action Act No. 4 of 2015.

The House is thus accordingly guided.

I thank you!



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

Tuesday, June 16, 2020

