

## COMMUNICATION FROM THE CHAIR

Honourable members, on Thursday, 23<sup>rd</sup> April, 2009 just as the House was about to resume the interrupted debate on the Motion for the approval by the House of the names of the Members nominated to serve on the House Business Committee, the Member for Kisumu Town West; the Honourable John Olago-Aluoch stood on a point of order claiming to raise an issue touching on the ability of this House to defend the Constitution. The Member noted that the Motion for approval of Members of the House Business Committee had been brought by the Honourable Vice-President as Leader of Government Business. He however sought to know from the Chair who under our Constitution is supposed to move the Motion.

Citing the definition of the “Leader of Government Business” in the Standing Orders, which at standing order 2 define the “Leader of Government Business” as “the Minister designated by the Government as the Leader of Government Business in the House” the Member posed the question “who is the Government in the context of the Kenyan situation?” Hon. Olago-Aluoch went on to argue that “Government” in the context of the Kenyan situation is defined by the Constitution and the National Accord and Reconciliation Act and that considering the functions of the Prime Minister as set out in the Constitution, the inference from the Constitution and the National Accord is that the Leader of Government Business and the chairperson of the House Business Committee is a constitutional affair. It was the argument of the Hon. Olago-Aluoch that the Leader of Government Business ought to be the Prime Minister and that it would be unconstitutional for any other person to be the Leader of Government Business or the chairperson of the House Business Committee. Hon. Olago-Aluoch therefore sought a Ruling from the Chair on these matters before the House could proceed.

The Chair took the view that the matters raised by Mr. Olago-Aluoch were weighty and decided to hear a few more contributions from Members before indicating the way to proceed.

Honourable Members, what followed was a barrage of learned and educated opinions by many Members canvassing various positions on the issues raised. In the process a number of Members also raised new issues which merit consideration and comment by the Chair. Some of the Members who gave opinion or raised issues include Honourables Mutula Kilonzo, James Orengo, Gitobu Imanyara, Dr. Machage, Kiraitu Murungi, Isaac Ruto, Uhuru Kenyatta, Charles Kilonzo, William Ruto, Walter Nyambati, William Ole Ntimama, Abdul Bahari, Prof. Saitoti, Chris Okemo, Peter Munya, Elizabeth Ongoro, Dr. Naomi Shaban, John mbadi, Prof. Ongeru, Ababu Namwamba, Prof. Anyang' Nyong'o, Bifwoli Wakoli, Farah Maalim and George Thuo. This list is not exhaustive.

Honourable Members, you will recall that at the end of all the contributions, I delivered a communication in which I among other things promised, without prejudice to the Ruling I undertook to deliver today, to seek direct audience with His Excellency the President and the Right Honourable Prime Minister with a view to bringing the matter of the constitution of the House Business Committee, its chairperson and the Leader of Government Business to a speedy and amicable conclusion. I also undertook to make known to this House, the results of that initiative. Indeed, I will do so in the course of this communication.

Honourable Members, before I get to the heart of this Ruling, let me remind you of what I said on Thursday, 23<sup>rd</sup> April, 2009. I said then and I repeat now that the office of the Speaker of the National Assembly is singularly ill-equipped to advise on or determine for the Executive arm of Government, and, for that matter, political parties, how they shall run their affairs. I further stated that the Speaker will limit himself to questions of constitutionality, statute and the Standing Orders, but only so far as these relate to the business and affairs of this House. I therefore want to make it very clear from the onset that subject to these qualifications, I do not intend to traverse territory that is outside the province of my office.

Honourable Members, I have distilled the following issues from the points of order and contributions made:

- a) What is the definition of the Government in the context of Standing Order No. 2?;
- b) Whether the Speaker having recognized or allowed the Vice- President to appear before the House as the Leader of Government Business, is estopped from entertaining any questions as to the legality or propriety of his incumbency as such;
- c) Whether the House has any role in the nomination or determination of the Leader of Government Business;
- d) Whether the Constitution as read with the National Accord and Reconciliation Act provides for who shall be the Leader of Government Business in this House;
- e) How any inconsistency between the National Accord and Reconciliation Act and the Constitution, or for that matter the Standing Orders, is to be resolved;
- f) What the Speaker is to do in the event that he receives two different letters from the same Government designating different persons as Leader of Government Business in the House;
- g) Whether the House can remove a Leader of Government Business and if so by what procedure;
- h) The procedure for nomination of the chairperson of the House Business Committee and whether the nominee of Government for chairperson is to be part of the list submitted to the House for approval or is additional to that list;

- i) Whether the House can proceed to approve the membership of the House Business Committee without regard to the question of who the Leader of Government Business or the chairperson of the Committee is;

Honourable Members, I seek your indulgence as the menu of issues for determination is very long. Allow me to pronounce myself as concisely as I can on each of these issues:

Honourable Members, the first and probably the most important issue is the question of who or what constitutes the “Government”, for the purposes of the designation of a Minister envisaged under Standing Order 2. This issue was canvassed at length and is at the core of the present impasse. Various documents were cited as providing the answer; including the Interpretation and General Provisions Act; Chapter 2 of the Laws of Kenya, the Constitution and the National Accord and Reconciliation Act. The simple question being asked is this: When the Standing Orders provide for designation of a Minister to be the Leader of Government Business in the House by the Government, who is envisaged to make that designation?

Honourable Members, the position of Leader of Government Business exists in virtually all Parliaments in the Commonwealth. There are however no hard and fast rules as to who shall hold that office. In some jurisdictions, the matter is expressly provided for in the Constitution, while in others it obtains by statute or the standing orders. The following few examples shall illustrate this point:

In the Republic of Ghana, the Leader of Government Business is not specifically provided for in the Constitution and the holder of that office need not be a Minister. In fact, as of today, the Leader of Government Business in the Parliament of Ghana is not a Minister. He is not a member of Cabinet and cannot lay a paper in the House on behalf of a Minister. In the Republic of Uganda, pursuant to Article 108A of the Constitution, the Prime Minister is designated as the Leader of Government Business in Parliament. In the United Republic of Tanzania, under the Constitution, the Prime Minister is appointed by the President and is the Leader of

Government Business in the National Assembly and has authority over the control, supervision and execution of the day-to-day functions and affairs of the Government. In the Republic of South Africa, the President appoints the Leader of Government Business in Parliament. In democracies with a longer history such as the United Kingdom, and India, the Leader of Government Business is designated by the Prime Minister who is the Head of Government. There is therefore no universal rule of general application in this matter.

Honourable Members, in Kenya, the office of the Leader of Government Business is recognized and defined only in the Standing Orders. The position as defined in the Standing Orders must be construed, not generally, but only in the context of the National Assembly. The holder is the Leader of the Business of the Government *only for the purposes of the House*. The expression “Leader of Government Business” is not, to my knowledge, to be found anywhere in the Constitution or in the National Accord and Reconciliation Act. The position is not established by or under any other statute. It follows that neither the Constitution, nor any statute has provision on the appointment of the Leader of Government Business *in the House*. In providing that the Leader of Government Business shall be the Minister designated by the Government, I find that, in terms of how the House functions, the Standing Orders mean no more than that the Leader of Government Business is to be the Minister designated by the Government. It is that organ that is entrusted with the running of the Executive arm of the Republic of Kenya. The office of Leader of Government Business in this House has been held by various persons since independence. At some times the office has been held by the Vice-President while at other times it has been held by a Minister. The one constant thread running through is that the decision about who shall be the Leader of Government Business has always been in the Executive.

Honourable Members, a number of Members suggested that as the Speaker had “recognized” the Vice-President acting as Leader of Government Business at some point, the Speaker was therefore estopped from entertaining any queries on the legality or propriety of the Vice-President’s incumbency as such. This is not so. The

role of the Speaker, as is well known, is to act as a neutral arbiter. The Speaker is not a protagonist in the arena that is the House. The Speaker does not raise points of order on his own motion. On 22<sup>nd</sup> April, 2009 the Speaker had before him a valid Motion. At this time the Speaker had received only one letter, from His Excellency the President, designating the Vice- President as the Leader of Government Business. When I called out the Leader of Government Business to move the Motion, I was acting on this basis. Indeed the Motion was properly moved, seconded and proposed. As we speak, we have before the House a valid Motion. The view that since the Speaker had not raised issue about the legality of a situation, he is prevented from adjudicating on it when it is raised by any Member, is not tenable. Similarly, the view that a Member cannot raise a point of order on the grounds that such a Member did not raise the point of order earlier is not correct. I rule that any Member can, at any time, raise a question on the constitutionality of any action or set of circumstances in this House and it is always open to the Chair to entertain and rule on the merits of such a question.

Honourable Members, on the question of whether the Constitution as read with the National Accord and Reconciliation Act provides for who shall be the Leader of Government Business in this House, I shall be brief. The office of Leader of Government Business, as I have said, is defined only by this House through the Standing Orders. You will recall that when, as recently as 10<sup>th</sup> December, 2008, just four months ago, the House considered the question of who should be the Leader of Government Business, the House made its decision quite clearly.

When the House passed the New Standing Orders on 10<sup>th</sup> December, 2008, the House was aware of the provisions of the Constitution and the National Accord and Reconciliation Act. It was also aware of the respective constitutional powers and functions of both His Excellency the President and the Right Honourable Prime Minister. Yet, this House, in its wisdom, the Members present here, resolved that the Leader of Government Business shall be a Minister designated by the Government. There is therefore clearly no room for inferring that either the President or the Prime Minister or the Vice-President or any other person is *ipso*

*facto* the Leader of Government Business. This is because the Standing Orders, which recognize and define this office, expressly provide for how the holder of the office is to be arrived at.

Honourable Members, I do not find that there is room for inference or implication on this question. I rule that the definition of Leader of Government Business at standing order no. 2 must be understood in its plain and ordinary meaning, namely that *any* Minister (and “Minister” is also defined at standing order No. 2 to mean the President, the Vice-President, the Prime Minister, a Deputy Prime Minister or other Minister, and includes the Attorney-General, an Assistant Minister, and any person who holds temporarily any such office) can be designated by the Government to be the Leader of Government Business in the House.

Honourable Members, the answer to the question whether this House has any role to play in the nomination or determination of the Leader of Government Business is by now apparent. This House has only a very limited role in the matter. The office of Leader of Government Business is recognized and defined in our Standing Orders but the onus of designating the incumbent is placed on the Government. The role of this House is therefore limited, through the Speaker, to receiving the name of the Minister designated by the Government and recognizing and facilitating that Minister to discharge his or her functions as the Leader of Government Business in this House.

Honourable Members, I find after careful consideration that it will not be necessary to answer in any detail the question of how any inconsistency between the National Accord and Reconciliation Act and the Constitution, is to be resolved. I make this finding because, in the present matter, that is probably a hypothetical question. I have not been able to find that there is any contradiction or inconsistency between the provisions of the Constitution and the National Accord and Reconciliation Act or the Standing Orders. This is because the Constitution itself anticipated this very question and answered it before it was asked. Section 3 of the Constitution makes it clear that if *any other law* is inconsistent with our Constitution, the Constitution

prevails and that other law shall to the extent of the inconsistency, be void. That is the general rule, with which we are all familiar. However, the same Constitution is quite clear at the same section 3 that this general rule does not apply to the National Accord and Reconciliation Act, which is an Act made by Parliament pursuant to section 15A (3) of the Constitution. The proviso to section 3 of the Constitution stipulates that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A (3).

Honourable Members, the Constitution has made it clear that the National Accord and Reconciliation Act is not any other law within the meaning of section 3 of the Constitution and questions of consistency with the Constitution cannot be raised in respect of any of its provisions. To remove all doubt about this position, the Constitution goes further at section 15A (5) to provide as follows:

*The Act made pursuant to subsection (3) immediately following the commencement of this section (i.e. the National Accord and Reconciliation Act) shall, while in force, be read as part of this Constitution.*

The dichotomy between the Constitution and the National Accord and Reconciliation Act is not real. The two are read as one. Indeed, we have only one Constitution of the Republic of Kenya.

With respect to the question whether the House can vary a designation of the Leader of Government Business made by the Government, the answer is in the negative. The appointment of the Leader of Government Business is the prerogative of the Executive. He or she stands in a similar position as does a Minister of Government, so that while the House might express its dissatisfaction in him or her and possibly even censure him or her, the ultimate decision whether to exit remains on the individual or the appointing authority.

Honourable Members, a number of contributions posed the question of what the Speaker should do in the event that he or she receives two different letters from

the same Government designating different persons as Leader of Government Business in the House. In ruling on this, let me first point out that the view that if the Speaker receives and possibly entertains one letter, he cannot entertain another is cannot be sustained. It cannot be sustained because the power to designate a Leader of Government Business is not spent and exhausted by being exercised once. It is possible, and quite in order for the Government to designate a different Leader of Government Business every other day and the Speaker is obliged to accept all such appointments if they are properly made. The Speaker must therefore satisfy himself or herself that any designation he receives has been properly made.

In considering the matter of the two letters of designation, we need to address one fundamental question that is at the root of the present controversy: Once it is agreed that the proper authority to designate the Leader of Government Business has always been, and under the New Standing Orders, remains the Executive, the question we must address is whether the changes made in the Constitution with the introduction in it of the provisions of the National Accord and Reconciliation Act have any bearing on how the Executive should make that decision. There are three possible answers to that question.

- One option is to take the view that nothing in our constitutional dispensation has changed; that decision making before and after the Coalition Government is the same; that the Executive shall make the designation the way it has always done and therefore that the Speaker should receive and accept a designation of the Leader of Government Business if it accords with the practice and the traditions of the House and should reject any representations that do not accord with that practice; Sections 23(Executive authority of Government of Kenya), 24 (constitution and abolition of offices for the Republic of Kenya) and 52 (Powers of President in Parliament) of the Constitution are of particular significance here.

- the second option is to take the view that under the Constitution as it now stands after the recent changes in it, the mechanisms for designation by the Executive arm have changed and it is for the Speaker to interpret and set out the new procedure by which the Executive arm shall designate the Leader of Government Business. In terms of this option, the Speaker would then accept only such designation as accords with the new procedure ; this option advocates the supremacy of the National Accord and Reconciliation Act over the rest of the Constitution;
- a third option is a hybrid view that recognizes that there is the established traditional procedure but also recognizes that the new constitutional arrangements may have affected that traditional procedure. In terms of this option the Speaker's hands would be tied as he would have to await resolution by the Executive itself of the question whether and if so how the traditional procedure has been affected. The Speaker would then be bound by any agreement that emanates from the Executive as to the choice of the Leader of Government Business in the House. This view advocates a purposive and holistic reading of the Constitution.

I am persuaded that it would be a grave abdication of my duty as your Speaker if I was to take the first or the second of these options. In my considered view, only the third option is in consonance with the Kenyan reality. That reality is that following the general elections held in 2007 our country went up in flames and tottered on the precipice of anarchy. More than one thousand innocent Kenyans lost their lives. Thousands fled their homes. Some of these are still displaced to this very moment. We could have perished. We were saved by the mercy of God through intervention by the international community. Standing out in this intervention is His Excellency Kofi Annan and the Panel of Eminent African Personalities to whom we are indebted. An accord was painstakingly negotiated as the country waited with bated breath. On 28<sup>th</sup> February, 2008 ululations rent the air, there was a collective sigh of relief. Agreement had been reached in the form of the Agreement on the Principles

of Partnership of the Coalition Government. This Agreement is now contained in our Constitution. Allow me to quote some words from it:

“Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

These words were uttered before the whole the nation; before the whole world! What do they mean? Do they mean anything? Did the signatories to them intend them to mean anything? These words are now read as part of our Constitution. When we in this House, unanimously voted to make them part of our Constitution, what did we intend? What was the mischief we intended to address? What ruling on the Speaker's part will address that mischief?

Honourable Members, the Speaker was also asked to rule on the procedure for the nomination of the chairperson of the House Business Committee and whether the nominee of Government for chairperson is part of the list (of at least fifteen and

not more than twenty-one Members) submitted to the House for approval or whether it is additional to that list.

Honourable Members, the procedure for nomination of the Chairperson of the Committee is to be found at standing order 158. It is clear from a reading of paragraphs (1), (6) and (7) of that standing order that the Chairperson is one of the members of the Committee in respect of whom the approval of the House is to be sought under standing order 158(1). Standing order 158(6) should be correctly construed. It does not say that any person that the Government nominates shall automatically be chairperson of the Committee. What it does say is that the person to be the chairperson shall be a Member who is nominated by the Government. It is imperative to note that the words used are “nominated” and not “appointed” by the Government. In my considered view, this means that the nomination by the Government does not automatically secure the appointment. The nominee is subject to the approval of the House.

Standing order 158 as read with standing order 162 opens two options to the Government: either to indicate, on the list tabled for approval, the person the Government has nominated to be the chairperson so that the House approves this when approving the list, or alternatively, if the Government does not do this, to have its nominee subjected to the election procedure under standing order 162 (1). In such an election, no person who is not a nominee of the Government is eligible to vie to be the chairperson.

Honourable Members, on the question of whether the House can proceed to approve the membership of the House Business Committee without regard to the question of who the Leader of Government Business or the chair of the Committee is, I rule in the affirmative. There is no “Siamese twin” relationship between these offices. There is no requirement in the Standing Orders or any other law that the Leader of Government Business be a member of the House Business Committee or its chairperson. It might be reasonable and it might be convenient, but it is not a legal requirement.

Honourable Members, before I make my final ruling, let me make good my promise to report to the House the results of my initiative to seek audience with His Excellency the President and the Right Honourable Prime Minister with a view to reaching a consensual and amicable settlement to the matter of the membership and chairperson of the House Business Committee as well as the Leader of Government Business. Before I do so, let me make it clear that the office of the President of the Republic of Kenya is a very high office and an institution deserving of every respect and courtesy. The President is the Head of State, Head of Government and Commander-in-Chief of the Armed Forces of the Republic of Kenya. The office of Speaker will at all times accord to this office the esteem and respect that is owed to it. I further note that the office of the Prime Minister as enacted in the Constitution has important constitutional functions and is an office deserving of every respect and courtesy. Again, the Speaker shall accord to this office the esteem and respect that is owed to it. The organs and institutions of the Republic must be accorded due respect and dignity. It is therefore the earnest hope of the Speaker that this ruling and any other ruling or action of the Speaker in the exercise of the Speaker's functions shall not be construed as derogating from that esteem or respect.

Honourable Members, I seek the indulgence of this House to report only that the initiative which I undertook, has not, so far, met with success.

Honourable Members, arising from all of the foregoing, in making my pronouncements on the matters in issue, I wish to invoke standing order no. 1 of our Standing Orders. That standing order stipulates that in all cases where matters are not expressly provided for by the Standing Orders or by other Orders of the House, procedural questions shall be decided by the Speaker. It further stipulates that in so doing, that the decisions the Speaker makes shall be based on the usages, forms, precedents, customs, procedures and traditions of the National Assembly of Kenya and other jurisdictions to the extent that these are applicable to Kenya. The Standing Orders clearly did not envisage nor provide for the current impasse.

I now rule as follows:

**Firstly**, that in the current state of our Constitution, the laws and the Standing Orders, the office of the Speaker of the National Assembly is not well-suited to determine and therefore declines to determine who the Leader of Government Business shall be, in a situation where the Speaker has received two letters, one from His Excellency the President and the other from the Right Prime Minister, each designating a different Minister as the Leader of Government Business. I am clear in my mind that the Constitution and the National Accord and Reconciliation Act contemplate only *one indivisible* Government of the Republic of Kenya and where the Speaker is faced with a situation eliciting uncertainty as to a designation made by the Government, such uncertainty is not for the Speaker to resolve. To endeavour to make a finding as to which of these letters is from the Government and which should be accepted is to miss the point with regard to the situation we are in.

Honourable Members, With profound respect, and much regret, I therefore rule that the Speaker will await the name of one Minister consensually designated by the Government as the Leader of Government Business. It is the expectation of this House that the designation will be made “*in good faith, through... consultation and willingness to compromise*” within reasonable time. In the interim, the Speaker shall do everything in his power to enable the business of this House to be transacted and to flow without hindrance. The Speaker’s role in this respect shall be limited to the facilitation of the Business of the House. During this interim period, those provisions of the Standing Orders that require specific action by the Leader of Government Business, such as standing order no. 36 (4) will remain suspended. I therefore direct that the Clerk shall publish and circulate the business of the House as approved by the House Business Committee.

Secondly, that, in the same vein, considering that the Speaker has also received the names of two different nominees of the Government for chairperson of the House Business Committee, no approval or election of a chairperson of the House Business Committee shall be proceeded with by the House. Instead, with much regret and much reluctance, I rule that the Speaker of the National Assembly, who under the Standing Orders is an *ex officio* member of the Committee, shall serve as the chairperson of the Committee until such time as the Speaker shall receive, the name of one Member consensually nominated by the Government for the position of chairperson of the House Business Committee.

Honourable Members, let me emphasize that this is a purely interim arrangement dictated by the current situation and the Speaker will be happy to give way to the chairperson, as soon as one is nominated. While serving as the chairperson of the House Business Committee, the Speaker shall have neither an original nor a casting vote. The Speaker has no interest in any particular matter. The Speaker has no business of his own to bring before the House.

In reaching this decision, Honourable Members, I have considered the procedures and traditions of a number of jurisdictions with similar circumstances as those of Kenya. In Germany which has useful lessons about coalition government the “Council of Elders” of the Bundestag, which is the equivalent of our House Business Committee, is under Rule 6 (1) of their Rules of Procedure, convened by the equivalent of our Speaker. Similarly, in India and New Zealand, both Commonwealth countries, the Business Committee (standing order 76) and the Business Advisory Committee (standing order 287) respectively, the equivalents of our House Business Committee are chaired by the Speaker.

Closer home, in Uganda, rule 128 of the Rules of Procedure of Parliament provides that the Speaker shall be the chairperson of the Business Committee and shall preside over sittings of the Committee, and in his or her absence, the Deputy Speaker shall preside. The same position obtains in Tanzania where, under rule 91 of the Rules of Procedure under the heading, and I quote in Kiswahili, the language in which the Rules are written-

*“Muundo na Majukumu ya Kamati ya Uongozi”*

*(1) Kutakuwa na Kamati ya Uongozi itakayokuwa na Wajumbe wafuatao-*

- a) Spika, ambaye atakuwa Mwenyekiti;
- b) Naibu Spika
- c) Kiongozi wa Shughuli za Serikali Bungeni au Mwakilishi wake;
- d) .....
- e) .....
- f) .....

*(2) Katibu wa Bunge atakuwa ndiye Katibu wa Kamati.*

*(3) Majukumu ya Kamati ya Uongozi yatakuwa ni kufikiria na kumshauri Spika kuhusu mambo yote yanayohusu shughuli za Bunge kwa jumla ikiwa ni pamoja na kuweka utaratibu utakorahisisha maendeleo ya shughuli za Bunge au za Kamati yake yoyote endapo itatokea haja ya kufanya hivyo.*

**Finally**, Hon. Members, the duties of the Speaker are primarily to ensure that the business of the House proceeds, I therefore rule that immediately following this ruling the House shall proceed with the Order on the Motion for the approval of the names of the members proposed to serve on the House Business Committee so that by tomorrow morning the House can commence

work on the legislative agenda set in the State Opening Address. We must unlock the business of the House.

Honourable Members, as I stated before this House on 23<sup>rd</sup> April, 2009, extraordinary situations call for extra-ordinary measures. I have taken these extraordinary measures in the firm belief that the extraordinary situation in which this House, and by extension, this country finds itself in, calls for them. In so doing, I have been guided by what I believe to be in the best interests of this House and our nation.

I urge all of us, Honourable Members, to resolve with one accord, in common bond united, that the important business entrusted to us by the people of Kenya shall not, shall never, be allowed to stall.

Thank you.

SIGNED

**Hon. Kenneth Marende, E.G.H., M.P.,**

**Speaker of the National Assembly**

**28<sup>th</sup> April, 2009.**