

NATIONAL ASSEMBLY

OFFICIAL REPORT

Tuesday, 15th January, 2008

Tenth Parliament - First Session - First Day

*(Tenth Parliament established by proclamation
Legal Notice No.1 of 7.1.2008)*

*The National Assembly met at 2.30 p.m. at
Parliament Buildings on Tuesday, 15th January,
2008, it being the first day of the first
meeting of this National Assembly.*

ARRIVAL OF HIS EXCELLENCY THE PRESIDENT

*(The Clerk announced the arrival of His Excellency the
President, the Hon. Emilio Mwai Kibaki, MP)*

*(His Excellency the President, the
Hon. Emilio Mwai Kibaki, MP took
his seat in the Chair of State)*

*(The proceedings were opened with a prayer
read by the Deputy Clerk/Director,
Legislative and Committees Services,
(Mr. P.C. Omollo)*

PAPER LAID

The following Paper was laid on the Table:-

List of hon. Members of the House.

ELECTION OF THE SPEAKER

The Clerk of the National Assembly (Mr. Ndindiri): Your Excellency, hon. Members; pursuant to the provisions of Standing Order No.3, I have laid on the Table the list of the names of the Members of the Tenth Parliament. The list does not contain names of hon. Members of three constituencies; that is, Kamukunji, Kilgoris and Wajir North, who are yet to be elected and 12 Nominated Members who have not yet been gazetted.

Nevertheless, Section 56(2) of the Constitution of Kenya provides for the National Assembly business to proceed, notwithstanding such vacancies. Section 56(2) reads as follows:-

"Subject to this Constitution, the National Assembly may act notwithstanding a

vacancy in its membership (including a vacancy not filled when the Assembly first meets after a general election), and the presence or participation of a person not entitled to be present at or to participate in the proceedings of the Assembly shall not invalidate those proceedings."

An incumbent Speaker ceases to hold office when the National Assembly first meets after dissolution of Parliament.

Section 37(3) of the Constitution of Kenya says: "No business shall be transacted in the National Assembly (other than election of the Speaker) at any time when the office is vacant---

"The Speaker shall be elected by members of the National Assembly in accordance with the Standing Orders from among persons who are members of the National Assembly or are qualified to be elected as such members."

Acting under the powers conferred to me by Standing Order No.4(3), I, Samuel Ndindiri, on 7th January, 2008, invited interested persons and subsequently issued nomination papers for the election of Speaker on the first meeting of this National Assembly.

The completed nomination forms were to be returned to me by 2.30 p.m. on Friday, 11th January, 2008. At the deadline of the return of the forms, five candidates submitted their completed forms. They had fulfilled the requirements and were consequently validly nominated.

In alphabetical order, the candidates are:-

1. Kausai Francis Xavier ole Kaparo
2. Kihoro Wanyiri
3. Marende Kenneth
4. Ndile Kalembe
5. Ms. Njoki Ndung'u

Pursuant to the provisions of Standing Order No.44, I have accordingly prepared ballot papers in which I have entered the names of the five candidates for today's election. The procedure for the election of the Speaker is provided for in Section 37 of the Constitution, and National Assembly Standing Orders No.3 and 4 respectively.

It is as follows:-

1. At the commencement of each ballot, the ballot box shall empty and unlocked, be displayed to the House, which we are going to do. This is for transparency purposes. It shall then be locked and placed in full view of the House for the duration of the election.
2. Each hon. Member will receive one ballot paper at a time. The hon. Member will collect one ballot paper at the Table and proceed to cast the ballot.
3. Any hon. Member who wishes to vote shall mark his or her ballot paper by placing an "X" in the space provided for, opposite the name of the candidate he or she wishes to vote for.
4. Before the conclusion of a ballot, an hon. Member who has marked his paper in error may, by returning it to the Clerk, obtain another in its place. The first one shall be cancelled and destroyed.
5. When all the hon. Members present have voted, the Parliamentary staff will unlock the box, examine and count the ballot papers and papers not marked in accordance with the Standing Orders, that is by placing an "X" in the correct space, will be rejected. I hope we will not get to that point. Thereafter, I will announce the results of the vote count.
6. If in the first ballot, no candidate is supported by two-thirds of all the hon. Members of the House, that is

148 hon. Members, a further ballot will be taken. If again, during the second ballot, no candidate is supported by two-thirds of all the hon. Members, the two candidates who will have the highest and second highest number of votes cast respectively will qualify for election in a third ballot. The candidate with the highest number of votes in the third ballot shall be declared elected as Speaker.

Hon. Members will now be called in alphabetical order to come to the Table each to collect one ballot paper and proceed to vote. I need to mention this because this Parliament is a leader to show the country how a secret ballot is conducted.

Voting is by secret. We have arranged for the voting mark point that is in the general elections, where you go and mark your X. We have arranged the voting point to be next to the dispatch box. There are two dispatch boxes on the Table. Therefore, those who will be on this voting side; that is our voting booth. After that, the hon. Member will proceed to the ballot box and slot in the ballot paper. So, it will be that secret. We will call upon all hon. Members to vote on either side as may be convenient. So, if you are on this side and it is convenient for you to come to this side, pick the ballot paper, vote and then cast. If you are on the other side, the same goes.

For convenience, we will start with His Excellency the President, who will be given a ballot paper and he will also proceed to cast his ballot where the ballot box is. So, we are now ready to start. I wish hon. Members a smooth and successful election process.

Thank you, very much.

The Member of Parliament for Ugenya (Mr. Orengo): Mr. Clerk, you have just said that voting will be by secret ballot. I have gone through my version of the Standing Orders of 2002 and I do not see anywhere it says that voting shall be by secret ballot.

The second issue, which I will revisit, is where it says that voting will be in alphabetical order. Or is someone being preferred to come first before others? We are here as hon. Members of the National Assembly.

(Applause)

The Clerk of the National Assembly (Mr. Ndindiri): I take that to be a point of order. As you know, I have no authority to reply to points of order because I am not elected by this House!

(Applause)

However, the Standing Orders talk about a ballot paper and each hon. Member collecting a ballot paper from the Clerk-at-the-Table. That is what the Standing Orders say. That, consequently, means that once an hon. Member has the ballot paper and for the convenience of the House, he proceeds to vote.

However, this is an example to the nation, as I said. The voting should be secret and each Member should vote in secret. That is how we have done it in the past. Members have not shown each other how they have voted. I have not witnessed it in the past. Therefore, as I said, we are ready to start and I direct that His Excellency the President be given a ballot paper after which he will cast it. After that, the Clerk-at-the-Table will read the names in alphabetical order.

*(His Excellency the President
proceeded to vote)*

(Applause)

(Mr. Ababu Namwamba was asked to vote but declined and instead gave his

chance to Mr. Raila)

The Clerk of the National Assembly (Mr. Ndindiri): I have noticed that hon. Raila has been given a chance by hon. Ababu Namwamba. If there is no objection, he can cast his ballot.

(Applause)

(Mr. Dick Wathika stood up in his place)

Hon. Members: Sit down!

(Voting resumed)

An hon. Member: Why are they displaying the ballot papers? Is this really secret ballot?

*(Several hon. Members stood up
in their places)*

The Clerk of the National Assembly (Mr. Ndindiri): May I appeal to all hon. Members to sit down? As I said in my introductory remarks, this voting is by secret ballot and, therefore, it makes it invalid if a Member votes and displays it to the rest of the House. We do not have a choice because it is through secret ballot under the provisions of the Standing Orders and the Constitution.

The Member of Parliament for Eldoret North (Mr. Samoei): Mr. Clerk, you have no authority to change the Standing Orders. You cannot revise the Standing Orders of the National Assembly because you do not have such powers.

An hon. Member: Completely!

The Member of Parliament for Eldoret North (Mr. Samoei): The Standing Orders are very clear that hon. Members shall be given ballot papers. Can you show us where it says "secret ballot"?

The Member of Parliament for Tigania West (Dr. Mwiria): Mr. Clerk, I do not mean to object. However, I am wondering about these hon. Members of Parliament who have been arguing for secret ballot and fought against queue voting and who want leadership--- Do you want us to give examples that even the people who elected us do not believe in?

An hon. Member: May I appeal to hon. Ruto! Please, for God's sake, let us follow this list and vote. We do not want a showdown here. It is as simple as that!

The Clerk of the National Assembly (Mr. Ndindiri): That appeal is very valid. Let us not make it political. This is a process of electing the Speaker, who would be serving all the Members assembled here. When there is a ballot box---

We are showing you a ballot box which has no other papers, the insinuation is that it is secret! You can see the Members going. I will leave it to the Members but, in our view here, and in our interpretation, it should be a secret ballot. Under the Standing Order:-

"The Clerk shall prepare, at least, one hour before the meeting of the House, ballot papers upon which shall be shown the names of the candidates validly nominated under Paragraph (3) of this Standing Order, and shall issue not more than one such paper to each Member who comes to the Table to obtain it".

Coming to the Table does not include all Members. It is one on their own. If you wish to display it, there is no specific mention of a ballot paper. But as I said, this House is the Leader in the nation to show the country how voting is done. Voting is by secret ballot, as we did it in the last

election.

The Member of Parliament for Mukurweini (Mr. Kabando wa Kabando): Bw. Clerk, we have information on the authority of some Members on that side that they have been intimidated and threatened with violence. They have been intimidated. As hon. Members, you cannot advocate democracy and bring street-wise behaviour in this House. They have been intimidated. Some of them are my classmates from college and they have been intimidated by hon. Ruto with violence!

The Member of Parliament for Mvita (Mr. Balala): These Members are used to stealing votes and bribing. That is why they are not ashamed of secret ballot.

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): Bw. Clerk, I think this House knows that we have voted in many ways. We usually vote by division where people go to the lobbies to vote. That is not a secret ballot. You cannot say by insinuation that it is by secret ballot in the Standing Order. The Standing Order has to be very specific so that people are left in no doubt whatsoever what to do. In the event that it is not specific, then, indeed, any form of voting that is allowed in this House, which is usually by division, can be resorted to.

But, Mr. Clerk, Sir, I think, it would be out of the ordinary to coerce Members with your interpretation of the Standing Order, when you, yourself, has said that you have no authority whatsoever to interpret the Standing Orders.

The Clerk of the National Assembly (Mr. Ndindiri): I will leave that to hon. Members. But let me remind the House that when there is a vote on a specific issue, we ask Members to go to the lobby rooms to vote. That is an open matter. We want your constituents to know how you voted on a particular issue. That is why it is open. Legislation is not secret. But election in any form, in order not to be accused of any matter---

That is why we have a ballot paper. In any other voting in this House, we do not have a ballot paper. But let us proceed and continue to vote.

The Member of Parliament for Tinderet (Mr. Kosgey): As we proceed, we are surprised. It is also in the interest of my constituents to know how I voted for the Speaker.

The Minister for Energy (Mr. Murungi): Mr. Clerk, Sir, I am surprised, that Members who have participated in voting in this House for many, many years before, are here misleading Kenyans that we can vote in this House in any other manner other than through a secret ballot.

Bwana Clerk, Sir, this House is guided by the Constitution, the Standing Orders and the traditions of this House. Bw. Clerk, although the Standing Orders may not specifically mention the words "secret ballot", it is obvious from the history and traditions in this House, that we have always voted through a secret ballot. We are appealing to hon. Members to follow the traditions of this House today.

Bw. Clerk, I think it is immoral and irresponsible for us to change the traditions of this House on the basis of expediency. So, I appeal to hon. Members that we proceed to vote the way we have always done.

Asanteni sana.

The Member of Parliament for Narok North (Mr. ole Ntimama): Mr. Clerk!

The Clerk of the National Assembly (Mr. Ndindiri): May we, please, proceed with the voting!

The Minister for East African Community (Dr. Machage): Mr. Clerk, mine was an appeal---

The Member of Parliament for Narok North (Mr. ole Ntimama): I was the first on the Floor. You came later just now when I am standing here!

Mr. Clerk, please proceed. The right of the people to show whether it is secret or not secret is the voter. Leave him alone!

The Minister for East African Community (Dr. Machage): Mine is an appeal to hon. Members of this House. We Members, both sides, maybe, are the cause of the turmoil in this country.

We are showing this House a lot of irresponsibility. We are showing that some Members in this House condone the killings that are going on in this country. We are showing that we do not care about the destiny of this country.

Mr. Clerk, surely, if we really want to have a fair election, which some members [**The Minister for East African Community**] have cried for always, let us have a secret ballot. A truly secret ballot. Let every Member express his or her desire in the exercise of choosing the Speaker of the House. Then, even God will bless this voting.

The Clerk of the National Assembly (Mr. Ndindiri): Please, let us continue!

The Member of Parliament for Ikolomani (Dr. Khalwale): Mr. Clerk, with due respect. Members, with due respect, those of you who are new, my name is Dr. Khalwale. I am begging Members that the point raised by hon. Ruto, that the Clerk was changing the Standing Orders of the House is fair that it be addressed, so that the heat does not continue.

Mr. Clerk, the Standing Orders provide that in cases where the Orders are not expressly clear, the decisions made---

(Loud consultations)

My mind is clear! Can you relax? Share with me and then you can dismiss me. The decisions made in such cases shall be based on usages, forms, precedents, customs, procedures and traditions of the National Assembly of Kenya and other jurisdictions to the extent that it is applicable to Kenya. So, because we have had to elect a Speaker in Kenya nine times before, a custom has been set. A tradition has been set. Ladies and gentlemen, hon. Members, let us elect the way we have elected those nine times, so that we can get a Speaker and we have order.

The Member of Parliament for Mbooni (Mr. M. Kilonzo): Mr. Clerk, please, allow me! My name is Mutula Kilonzo. I would like to make a little contribution. I would like to remind this House that on 27th December last year, all of us, as a matter of fact, went to the ballot box.

All of us, please, hear me out. All of us had agents. In fact, each one of us had two agents. In fact, when you went to vote, you did not even show your agent how you voted, leave alone a stranger.

I want to mention something else, Mr. Clerk. Allow me to make this point because it is important for the country.

In fact, after I go there and vote, I should come out empty-handed, other than after putting it inside there. This is the country's tradition, going back to the Lancaster House Conference, and practised over the last 45 years. I would like to say, without fear of contradiction, that the fact that the Standing Orders say that one person will be given one ballot paper, means that the person who knows how he has voted is one. My concluding remark is simple: The man we are going to elect here must be impartial and he must not know who voted for him or who did not vote for him. By displaying and showing to your so-called "buddy", you are, in fact, violating the very principle of impartiality that this country is seeking in the office of the Speaker.

Hon. Members: We have heard!

The Member of Parliament for Mbooni (Mr. M. Kilonzo):

I know you have heard, but I want to tell you again that the fact that you are given one ballot paper means that you should vote on your own. We do not have agents here, unless you want us to appoint agents. Thank you, Mr. Clerk.

The Clerk of the National Assembly (Mr. Ndindiri): I hope the hon. Members will

confine themselves to secret ballot and voting secretly. Let us proceed and vote. I will ask for the names to be called out.

The Minister for Defence (Mr. M.Y. Haji): Mr. Clerk, Sir---
(*Loud consultations*)

You have said enough and we are going to say our bit whether you want it or not! You will listen to us! We are hon. Members like you!

Mr. Clerk, Sir, anybody who will show his ballot to a group of people, his vote should be invalidated and recorded.

The Member of Parliament for Laikipia East (Mr. Kiunjuri): Mr. Clerk, Sir, in any particular election conducted anywhere in the world, the returning officer [**The Member of Parliament for Laikipia East**] has the final word. We do not have any use for a returning officer if he will not make a ruling. Secondly, we would like to have strict interpretation of the phrase "secret ballot".

(*Hon. Members proceeded to vote one by one*)

The Minister for Energy (Mr. Murungi): I would like to bring to the attention of the Clerk that hon. George Khaniri is recording the names of the people who are voting and they are showing him the ballot papers. Is that proper, Mr. Clerk? As our returning officer, we want a ruling from you.

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk, Sir, I want to make a very special appeal. Basically, we are setting here a very dangerous precedent. I want to appeal that we bring our emotions down and do what is right before man and God. If it is secret ballot, this election of Mr. Speaker is already flawed *ab initio*. It is important to recognise that.

Therefore, it compromises the neutrality of the Chair. Can you imagine a Speaker who will be divided between this House? If there are mistakes that have been made, we should not compound the same mistakes through this House because this is the supreme legislative organ. In terms of the doctrine of separation of powers, there is nothing more supreme than this House. If we start the Tenth Parliament on the wrong footing, I fear we are setting this country on the wrong footing.

The Member of Parliament for Lagdera (Mr. Maalim): I want to appeal to all of us, including hon. Musyoka. I think this House has had a tradition. I was an hon. Member from the 1992 to the 1997 Parliament. It was a very divided Parliament and the intention of the hon. Members was known through, basically, the kind of spectre we had here. There has been a claim that you have emasculated and stolen the verdict of the Kenyan people. We are not saying that now. It will be very sad for you to try and emasculate again the wishes of elected Members of Parliament who are representatives of their constituents. You have to learn to win and lose. If you feel that you are going to lose this election, you had better live with that feeling also. It is not a good feeling, but that is the essence of democracy. Shall we proceed on with this?

You cannot change the rules and you cannot force an hon. Member to do what you want him to do. Voting by secret ballot is there in the Constitution, but it is not clearly specified in our Standing Orders. The Speaker has the prerogative to give a ruling on anything that is not clearly spelt out and specified in the Standing Orders. The Clerk does not have that power. Let us not turn this thing into---

This is the only institution right now in the country which has the respect and the hope of the Kenyan people, because all other institutions have problems right now. We want to unite this country. Can you allow this process to continue without us wasting a lot of time on acrimony?

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk has already pronounced himself on the all-important matter of secret balloting. Therefore, he is the returning officer. I think we are duty-bound to follow the ruling of the Clerk. Therefore, I want to suggest that the Clerks here note the names of any voter who is showing the way he or she has voted. It is very important.

Hon. Members: On a point of order!

The Member of Parliament for Narok North (Mr. ole Ntimama): Why do you want the Clerk to respond to points of order? He has already said that he cannot. Let us proceed and vote. If somebody wants to show anybody their own vote, the word "secret" is not in the Standing Orders. We must not force our way like you forced the other day.

The Member of Parliament for Ugenya (Mr. Orengo): Mr. Clerk, Sir, if you may allow me, you have been put to account. Just cite any provision in the Constitution. The election of the Speaker is in accordance with the Constitution and the Standing Orders. Running from Section 37 of the Constitution, you will find the provisions in relation to the election of the Speaker and the Deputy Speaker. Could you tell us which sections carry those provisions that you are trying to relate to the House?

Secondly, can you state specifically where the Standing Orders state that voting should be by secret ballot? If it is by precedent, can you bring a ruling by the Speaker from Humphrey Slade up to Mr. Kaparo, whom we are voting for, where he has ruled that the election of the Speaker should be by way of a secret ballot? If it is by way of usage, then we should follow the House of Commons and the House of Representatives. In any case, the Speaker of the House of Representatives in the United States is an acknowledged political leader; his stand is known! He is either a Democrat or Republican.

If we are talking about our traditions, there was a time when this Parliament, for 20 years, imported something which was never in the law. When you were taking the Oath of Allegiance, you mentioned the name of the President. That was a usage that was not in accordance with the law. I am glad that, when some of you were more clear-headed in the Seventh Parliament, you refused to take an oath which was not in accordance with the law. So, to cut a long story short, just tell us under which provisions, otherwise, let us finish this job! Some people want to go back to other things. We are very busy people. If you are not busy and you are used to sleeping, or drinking tea when people are working, then you are not part of this House!

The Minister for Justice and Constitutional Affairs (Ms. Karua): Mr. Clerk, as the Presiding Officer, you made a ruling. The Constitution only talks of Members before they are sworn-in; participating in the election of Mr. Speaker. The election itself is spelt out in the Standing Orders as read out by you. Dr. Khalwale, Member of Parliament elect for Ikolomani, who is not a lawyer, but who is doing better than lawyers today, read out from the Standing Orders that this Parliament follows the Standing Orders, traditions, usage *et cetera*. This is the tenth election of a Speaker. It has always been by secret ballot. By what method can we start changing it now, especially at a time when we know some bearing the title "honourable" are planning murder and have executed murder and mayhem?

(Applause)

It means that people are going to be intimidated, threatened and their properties are going to be burnt. Mr. Clerk, take responsibility as the Returning Officer. In that Ballot Box, are ballots that have been shown publicly. We are calling upon you to invalidate what has gone on now. Let us begin afresh! Take responsibility for this election the way the law mandates you. Period!

(Applause)

The Member of Parliament for Kisumu Town West (Mr. Olago): Mr. Clerk, I see a deliberate move by hon. Members on the other side of the House to stop the election. We must proceed as we have been doing and we have been doing it so orderly.

Thank you.

The Member of Parliament for Isiolo North (Dr. Kuti): Mr. Clerk, all of us who are seated before you are hon. Members elect. None of us is, so far, an hon. Member officially sworn-in. You are now acting as the in charge, and you are the Returning Officer.

It is your responsibility to see to it that this election is free and fair. "Free" means that the hon. Member votes out of his will, and not out of intimidation shown by a paper and a register being marked, so that you prove that you have voted the way a block wants. This is not block-voting; it is single-Member voting. Therefore, ensure that this is a single-Member voting and is not block-voting.

The Clerk of the National Assembly (Mr. Ndindiri): Indeed, that was my belief from the beginning; that it would be a process where each hon. Member would be voting on their own and placing the vote in the Ballot Box. However, that aspect of showing how you have voted has confounded me, and I wish to ask for your view. Do we continue this way or do we consult? Do we adjourn to consult?

Hon. Members: No!

Hon. Members: Yes! Let us start afresh!

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk, as it is, we are not sworn-in as hon. Members. We are eagerly waiting to be sworn-in. However, we cannot participate in a flawed process in the presence of the international media and the whole world. If I can quote the supremacy of this House, let us be honourable enough! If there is need to adjourn for a while to consult, I am ready for it.

Hon. Members: No!

The Vice-President and Minister for Home Affairs (Mr. Musyoka): If not, the proceedings should adjourn all together!

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): Mr. Clerk, Mr. Musyoka says that he cannot participate in a flawed process. He has just accepted being a Vice-President and Minister for Home Affairs in a flawed process. What contradiction is that?

(Laughter)

He knows the process was flawed but he accepted to be sworn-in as the Vice-President and Minister for Home Affairs. Please, stop being involved in contradictions! During the Referendum, you left this House because you said that the debate was a flawed process! What is this ping-pong game he is playing with us? Be clear in your mind exactly when you participate in flawed things and when you do not participate in them.

The Clerk of the National Assembly (Mr. Ndindiri): May we please confine ourselves to this election and not to the past election. Let us not accuse each other as we stand here. Let us deal with this issue as it is. However, as I said, the position and the traditions of this House, all over the years, is for the ballot to be secret and not to be shown. It has never happened. This is the very first time.

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk, I thank you for re-affirming that ruling. We take it that, with the authority given to you under the Constitution and the Standing Orders of this House, you have made your ruling. It behooves hon. Members to abide by that ruling.

Therefore, from now on, on the Government side, we are suggesting that any vote that is shown will then be treated as invalid, because this is important. We should proceed with the exercise!

The Minister for Transport (Mr. Mwakwere): Mr. Clerk, I have a very simple appeal here, and maybe a brief explanation will assist you in making a decision. We were all elected hon. Members of our own constituencies.

Not everybody in our constituencies voted for us. There are people who did not vote for us, but we are supposed to serve them equally, impartially and to treat them as our constituents without any favour. That is why we had a secret ballot.

We do not know who voted for us but we know we won. It is important that, for the Speaker to be impartial, he should not know that X or Y did not vote for him. I am pleased that a tradition has already been established during the past Sessions of Parliament. We have been voting by secret ballot, and the rationale is that you have somebody who presides over Parliament without knowing who voted for him or her, and that person treats everybody equally and impartially. That is why the business of the House has gone on very well.

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): Mr. Clerk, the fact is that the parties have already publicly acknowledged who their candidates are. What is this hypocrisy about a secret ballot? They went to Naivasha campaigning for Mr. Kaparo. We are campaigning for our candidate; so, why are we hypocritical about being secret? We know what the stand of Mr. Musyoka is. He has said publicly that he supports Mr. Kaparo. So, this myth about a secret ballot is hypocritical!

The Member of Parliament for Laikipia East (Mr. Kiunjuri): Mr. Clerk, I would like to remind you that, in every game, the players cannot be allowed to become referees. Therefore, there must be a referee in any game.

Secondly, it is known all over the world, in all democracies, that there must be a Presiding Officer or a Returning Officer. That is the only person who holds the power to make a ruling. In any case, you are the only person who can make a ruling on this issue.

You must be guided by rules which you have read out to us right now. They are very clear and there is no way you can abdicate that responsibility of making a ruling.

The Member of Parliament for South Mugirango (Mr. Omingo): The worries of one side concern each one of us. I do not think it is fair to dictate upon other hon. Members on what to do and what not to do.

Mr. Clerk, you have read the Standing Order which says whether it is secret or not. Suppose somebody does not want to write. Today I forgot to carry my spectacles, I can request another hon. Member to mark the ballot paper for me. They are fearing because they paid. They do not want to lose because they like rigging.

(Applause)

The Member of Parliament for Gachoka (Rev. Musyimi): Mr. Clerk, Sir---

Hon. Members: Pray! Pray!

The Clerk of the National Assembly (Mr. Ndindiri): Could he be allowed to make his comments, please?

The Member of Parliament for Gachoka (Rev. Musyimi): The last thing we want to bring to this House is blasphemy. Prayer is a private matter. We are here as hon. Members of Parliament and it is in that capacity I stand here.

(Applause)

May I wonder loudly; if a ballot paper is shown only to one side of the House, does that not in itself undermine the very---

Hon. Members: No! No!

The Member of Parliament for Gachoka (Rev. Musyimi): Mr. Clerk, Sir, if a ballot paper is going to be shown--- Which is a mistake in the first instance, it should be done to both sides. Can I say that I am not sure myself, as we sit here today, we have ballot papers in that box that have already been displayed in this House. A fraudulent act has been committed, how do we proceed from now? These are weighty matters. The decision of this House has enormous implications for this country and for all of us. If we cannot conduct ourselves the way we ought today, how are we going to conduct ourselves in the next five years? So, already there are deep questions with regard to this ballot.

The Minister for Education (Prof. Ongeru): Mr. Clerk, Sir, I came here with tremendous hope and respect. I have been voted from a community which has been heavily traumatised. Heavily butchered!

Heavily ostracised because they voted by secret ballot in a particular pattern. They are now being victimised! I am not here to apportion blame at this stage. However, in order to be able to vote with a free conscience, for a Speaker who presides over issues that we intend to lay on this Table of high magnitude, it is important that protection of voting is safeguarded. There are people who may wish to vote in a particular direction. We should let them do so.

I do not want to feel that I am under duress to vote in this House when I fully know that the people that I represent are, day by day, hour by hour, second, by second being butchered because they voted in a particular pattern.

Mr. Clerk, Sir, I want us to vote through secret ballot so that other hon. Members who want to vote through their conscience do so. Please, Mr. Clerk, rule that way!

The Minister of State for Administration and National Security (Prof. Saitoti): Mr. Clerk, Sir, this is a very sad moment. For all the many years some of us have been in this Parliament, when it comes to voting for the Speaker, the guiding principle has been that every hon. Member of Parliament vote with his or her conscience. We vote for somebody who we believe shall conduct the business of this House without fear or favour. That is why the tradition has always been that the election of the Speaker be conducted in a manner completely different from the other issues.

Whenever we decide on an issue, a Motion or a Bill, then there are divisions. Therefore, it is seen clearly.

Mr. Clerk, Sir, here we have the risk of having to vote a Speaker who will only be holding only to one side or one people.

Mr. Clerk, Sir, you pronounced very clearly that, according to the Standing Orders, a ballot paper will be given to every hon. Member of Parliament to decide to vote for the person that one's conscience tell them to do.

I want to take you back to 1988 when we used to have *mlolongo*--- The basis for the elimination of *mlolongo* was that Kenyans felt that they were not being allowed to exercise their conscience. We all today, for pertinent reasons, want to switch the clock backwards! I do not think we should do that! We cannot do that! We will do the one thing. In fact, if we do this one, it will mean that, whenever we have a General Election, even for we hon. Members, whoever wants to vote for us will have then to come and show others the way they have voted. That will undermine democracy. Parliament must defend democracy and freedom of individuals.

So, Mr. Clerk, Sir, stand by what you said. The voting must be by secret ballot. You are the Returning Officer now. Not these other hon. Members!

Before I sit, it very much follows the common tradition. Could you give us an example of any Parliament in the Commonwealth where hon. Members vote and show their ballots to the others? It does not exist anywhere and we want to set a precedent here which is primitive! We cannot allow that!

The Member of Parliament for Narok North (Mr. ole Ntimama): Mr. Clerk, Sir, you are being intimidated! You should follow the book! If the book does not say "secret" do not be forced to say "secret"! It does not say so! You are being intimidated by these people because they want to have their way! It is my business to show my friend who I have voted for. What does it matter? It is my business! Even if you want to see it yourself, I can show it to you! So, proceed!

The Clerk of the National Assembly (Mr. Ndindiri): May I ask the Attorney-General to give us his legal interpretation as well to help the House?

The Attorney-General (Mr. Wako): Thank you, Mr. Clerk, Sir. Indeed, we are discussing weighty issues. Therefore, the decision you make is very important, particularly as it relates to the Speaker. The Speaker, when elected, has to be fair to all hon. Members of the House.

Mr. Clerk, Sir, I read and heard you out and very clearly on what the Standing Orders are and what Section 37 of the Constitution states. In those Standing Orders, it may very well be that there were no words "secret ballot". But let me take you to Section 20 of the National Assembly Powers and Privileges Act, which contains the proviso which was ably read by my in-law, Dr. Khalwale. In part it states:-

"Except in so far as express provision is made in those provisions for the determination of that question be determined in accordance---"

Here, there is no express provision made on the issue "secret", although one can imply, from reading the entire meaning of the Standing Order that, that is what may have been meant.

The Section further states:-

"---be determined in accordance with the usage and practice of the Commons House of Parliament of the United Kingdom."

Mr. Clerk, Sir, my dear learned friend, Mr. Orengo then asked that we quote any book, including Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*. Here, in the 23rd Edition, at page 280, the practice there, which we can import here, where there is no express---

In other words, to fill in the gap, the practice there clearly is that the election will in future be by secret ballot. Here I am quoting at page 280, 23rd Edition of Erskine May's, *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* under a paragraph headed, "Election of A Speaker By the Commons". So, it does appear that, at least, as far as the House of Commons practice is concerned now, the election is by secret ballot. Therefore, we can import the implication that an hon. Member comes here, gets a vote, marks and proceeds to vote. One can imply that it is marked by secret ballot.

Mr. Clerk, Sir, I support you in your ruling. I do not know whether it is too late to change where hon. Members should mark the ballot paper. Maybe, they should go behind there to mark the ballot papers then come back and vote. But I support what you declared.

(Applause)

The Clerk of the National Assembly (Mr. Ndindiri): Let us now hear Mr. Orengo, so that we can proceed!

The Member of Parliament for Ugenya (Mr. Orengo): Mr. Clerk, Sir, I respect what the Attorney-General has said. The only problem with him is that on any single issue, even on the Constitution of Kenya and the way of altering the Constitution, he has more than five opinions on

any single issue!

Hon. Members: Do not personalise issues!

The Member of Parliament for Ugenya (Mr. Orengo): Mr. Clerk, Sir, secondly, his reading of the National Assembly Powers and Privileges Act is totally irrelevant. The National Assembly Powers and Privileges Act has nothing to do with the election of the Speaker. It relates to the powers and privileges of the National Assembly. The election of the Speaker is provided for under the Constitution.

The Standing Orders are made in accordance with the provisions of the Constitution. It is a superior law because it flows from the Constitution unlike the National Assembly Powers and Privileges Act. Under the National Assembly Powers and Privileges Act, for example, one of the provisions of Section Five says that while you are a sitting hon. Member of Parliament, when you travel from your home to the House, you cannot be arrested on a civil debt or trespass. It deals with a totally different subject. The Attorney-General should know that. Mr. Clerk, Sir, on the question of Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, what the Attorney-General is reading is a proposal in the House of Commons. He read it quite clearly that, "in future the House of Commons will vote by way of secret ballot." Therefore, the traditions that we have had, flowing from the traditions in England - and he should listen very carefully - were in accordance with the law in England prior to the changes that were made in regard to the House of Commons.

I want to offer a solution. We are not afraid of losing the election. But I stand to be corrected. Let us proceed and vote. Whichever way you say we vote, we are going to win. So, let us not waste time! Let us finish this exercise!

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk, Sir, the hon. Member-elect for Ugenya Constituency, Mr. Orengo knows how much I truly respect him. This is separate from the personalised attacks that we have had from my friend, Prof. Anyang'-Nyong'o. But be that as it may---

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): On a point of order, Mr. Clerk, Sir.

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Clerk, Sir, I want to move on!

Now that the learned Attorney-General has quoted from Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, and that was the express request from Mr. Orengo, I want to move that having made your ruling, that we invalidate those ballot papers and start the process all over again!

The Clerk of the National Assembly (Mr. Ndindiri): Indeed, I was going to followup the proposal by Mr. Orengo that we continue, presumably not showing how hon. Members have voted.

May we then, as a consensus, invalidate those ballot papers and start all over again. That is the neatest way to do it!

May I ask that His Excellency the President--- We need to remove the ballot papers first before we give His Excellency the President a ballot paper. Could we do this quickly? The ballot papers are not for the view of everybody. They are for the Clerks-at-the-Table so that they are destroyed. Tell us when you are through, so that we can go back to voting.

(Hon. Members withdrew the ballot papers and forwarded them to the Clerks-at-the-Table)

May I ask the clerks to bring the spoilt ballot papers to this point? May I also request all hon. Members to, please, sit down, so that we start this process all over again? We need to finish this on time! Our intention is for the ballot box to be nearer the voting point and once a Member votes, he or she quickly puts it in the ballot box. But is it physically possible? No! It is too far!

Let us hear from Mr. Omingo!

The Member of Parliament for South Mugirango (Mr. Omingo): Mr. Clerk, some of us are not that tall. We cannot reach the ballot box.

The Clerk of the National Assembly (Mr. Ndindiri): I do realise that it is not possible for the short Members to reach the box. The alternative is to return it where it was before. The other alternative is to bring another ballot box. I think it is now practical. May I then ask Members to sit down! For Members who are not tall enough there are members of staff who can assist. May I start with His Excellency the President, then we shall go in the alphabetical order.

*(Hon. Members proceeded to
vote one by one)*

The Minister for Defence (Mr. M.Y. Haji): On a point of order, Mr. Clerk. You [The Minister for Defence]

said that voting would be secret. Are you seeing what Mr. Ojode is doing? He is looking at the voting pattern all the time. Somebody should stand there!

The Clerk of the National Assembly (Mr. Ndindiri): We had an agreement from both sides of the House that voting would be secret. I believe that is what is happening now. I hope we will maintain that.

An hon. Member: Mr. Clerk, I propose that this and that clerk can go there so that the hon. Member voting can pass the other way. This is because Mr. Khaniri and Mr. Ojode are looking at the hon. Members voting directly.

The Clerk of the National Assembly (Mr. Ndindiri): We trust their honesty. I will keep an eye. If they stand and look at any hon. Member voting, we will invalidate that vote!

Thank you.

(Applause)

No that is a secret ballot!

Hon. Members: It is invalid.

The Minister for Information and Communications (Mr. Poghismo): Mr. Clerk, I would like to draw to your attention the fact that two Members of Parliament are standing up and keenly watch as other hon. Members mark their ballot papers. The two of them are here, hon. Khaniri and hon. Joshua Ojode.

The Clerk of the National Assembly (Mr. Ndindiri): We did agree that this is a secret ballot. I believe that is what we are doing. May I ask Mr. Gichohi to move closer so that those hon. Members do not look at the ballot paper?

The Minister for Information and Communications (Mr. Poghismo): Mr. Clerk, could we please vote from one central place?

The Clerk of the National Assembly (Mr. Ndindiri): I will request hon. Members to go to the central point and vote from there. It is easier that way. We will all be more confident when that is done. Let us continue!

(Hon. Members proceeded to

vote one by one)

*(Mr. Mwachima displayed his
ballot paper to Members)*

Hon. Members: No! no!

The Clerk of the National Assembly (Mr. Ndindiri): That is an invalid vote because he has shown it!

An hon. Member: Mr. Clerk, would you invalidate this vote?

The Clerk of the National Assembly (Mr. Ndindiri): I think now that you have shown how you have voted--- It is in the Box now. Let us proceed!

An hon. Member: Mr. Clerk, you had invalidated that vote. We know the vote is right over there and we can see it. We demand that vote to be removed from there!

Mr. Clerk, this is a shameful conduct. You have made a ruling. Mr. Clerk! Invalidate that vote! Do we start again?

The Clerk of the National Assembly (Mr. Ndindiri): I do agree. But it is a difficult position. The vote is in the Box now. It is very difficult to identify. I have given him the benefit of the doubt. But indeed, I had declared it an invalid vote. We are not going to have that kind of thing again.

An hon. Member: Mr. Clerk, we agree we continue. But we request for only one thing: If there is any other person, his vote should be invalid. We need somebody there, so that we can get them as fast as possible.

The Clerk of the National Assembly (Mr. Ndindiri): We would enforce it. I would ask the Serjeant-at-Arms staff to prevent that ballot paper from going into the box. He will open the box and pour all the ballot papers on the Table as we all look. Make sure you do not drop any!

*(Several hon. Members stood
up in their places)*

Hon. Members, if you want to see it clearly, you should sit down. I assure you there will be no rigging here.

(Laughter)

The clerks will begin the counting. The five clerks will each be keeping a count for an individual candidate before we do the total.

*(The Clerk unlocked the ballot box
and the clerks proceeded
to count the votes)*

May I now ask Mr. Omollo to bring forward the results!

The Clerk announced the results of the first ballot as follows:-

NAMES	VOTES	
Kausai Francis Xavier ole Kaparo	99	Kihoro Wanyiri 0
Marende Kenneth	104	

Ndile Kalembe	2
Ms. Njoki Ndung'u	0
Spoiled ballot papers	2

Hon. Members, the total number of votes cast is 2,007!

Hon. Members: No! 207!

The Clerk of the National Assembly (Mr. Ndindiri): Sorry! I am becoming anxious about numbers!

As I explained to hon. Members, in the first ballot, the winner has to get two-thirds majority. Since in this vote, none of the candidates received the majority, which is 148, we will have to go to the second ballot. The third ballot will be for two contestants. We will have to go for the second round, so that the winner attains 148 votes. May I, again, request that we start the process. The winner of the first round is Mr. Marende with a total of 104 votes, followed by Mr. ole Kaparo with 99 votes. We will have to go back to a repeat of the votes in the second round.

Hon. Members, we are about to start voting. May I request hon. Members to be seated, so that we can start the process and save on time. We will start with His Excellency the President.

*(Hon. Members proceeded to
vote one by one)*

Hon. Members, I would like to alert the Assembly that we are past the 6.30 p.m. time detailed by the Standing Orders. As hon. Members realise, this is a special session not governed strictly by the Standing Orders, being an informal assembly to elect the Speaker and Deputy Speaker. Therefore, we will continue until we complete this exercise. You have to be patient. It is going to be long.

*(The Clerk unlocked the ballot
box and the clerks proceeded
to count the votes)*

The Clerk of the National Assembly announced the results of the second ballot as follows:-

NAMES	VOTES
Kausai Francis Xavier ole Kaparo	102
Kihoro Wanyiri	1
Ndile Kalembe	0
Marende Kenneth	104
Ms. Ndung'u Njoki	0
	The total number of votes cast is 207

Since we have not attained the two-thirds majority for any candidate, we have to go on to the third vote which requires a simple majority.

I should add that it would be a vote for two candidates only. These are Kausai Francis Xavier ole Kaparo and Marende Kenneth. Those are the only two candidates that you decide on. Since we are not going to give you another ballot paper with the two names only, when you vote you must be conscious of this. We are deciding on the two.

Thank you very much.

*(Hon. Members proceeded to
vote one by one)*

The third ballot is now concluded and I will call upon the Deputy Clerk to open the ballot box for the votes to be counted as we have done in the past.

(The Deputy Clerk/Director, Legislative and Committee Services unlocked the ballot box and the clerks proceeded to count the votes)

Please, allow the officers to count the votes! We will give you the figures!

(Several hon. Members stood up in their places)

May I ask hon. Members to sit down, otherwise, the process will take too long. We are supervising the officers so that there is no mistake. Let me request the hon. Members to sit down, please. I am being requested if we could have two hon. Members from either side, and I concur with that. Can we, please, do that and leave the officers to do the counting? May I have the two hon. Members from either side, and then the rest may sit down.

I will have Mr. Ojode and Mr. Omingo from the Opposition side and Mr. Muthama and Ms. Mbarire from the Government side. These will be the agents for their sides. All the others may sit down. May I, please, ask hon. Members to sit down and then we can have the agents? Otherwise, we may not complete the exercise. If the hon. Members do not sit down, we will never conclude this process. We have your agents from both sides. Can they be allowed to do the work on your behalf? Otherwise, the officers are counting the votes and we will make a final decision on the papers.

The Clerk announced the results of the third and final ballot as follows:-

NAME	VOTES
Kausai Francis Xavier ole Kaparo	101
Marende Kenneth	105

(The Clerk accordingly declared hon. Marende Kenneth elected Speaker of the National Assembly and directed the Serjeant-at-Arms to search for the said Marende and bring him to the Chamber)

(Applause)

(On arrival of hon. Kenneth Marende in the Chamber, he was escorted to the Chair by the Vice-President, Mr. Musyoka and Mr. Mudavadi)

(On arrival at the Chair, the Clerk thereupon administered the Oath of

*Allegiance to the Speaker-elect,
hon. Kenneth Marende)*

*(The Speaker, hon. Kenneth Marende, then
took the Chair, and the Mace, which
had been covered, was now uncovered)*

(Applause)

COMMUNICATION FROM THE CHAIR

SUBMISSION OF MR. SPEAKER TO THE WILL OF THE HOUSE

Mr. Speaker: Hon. Members, allow me from the outset of this acceptance speech to sincerely thank you all for having elected me the Speaker of the Tenth Parliament. I am humbled and deeply touched by the confidence that you have actively demonstrated in me. This will no doubt go down in the annals of the history of this country and this House as the most hotly contested election of the Speaker. I would, therefore, wish to salute my very worthy and valiant opponents for having fought well and lost honourably.

(Applause)

Mr. Speaker, under duty to be sensitive to and address the aspirations and expectations of our people. We must be pragmatic and learn from our past as Winston Churchill asserted: "The further we look back in the past, the further we see ahead in the future". But we must avoid the temptation to live in history because we must live today, tomorrow and in future.

Nevertheless, as your Speaker, I want to humbly submit myself to the collective will of the Members and institutional dictates of the House. I promise to be first and foremost, the defender of hon. Members' right to speak their minds freely in this House because they are the full spokesmen of the people of Kenya. I will carry out my duties both in the House and in the larger Kenyan society with decorum, dignity, honesty, diligence and fortitude that will project and propel the image of Parliament to every corner of our beloved country so that our people may hold this House in high esteem. This is their House and during my tenure as Speaker, I will make sure that Parliament remains alert to the needs of the people of Kenya. We must take Parliament to the people who elected it, no matter what it costs to do so.

Your Excellency and distinguished honourable colleagues, no Parliament worth its name can operate and transact business that comes before it if hon. Members do not respect their own rules of debate which are designed and passed by themselves. Such is the importance of Parliament that it is the only branch of Government that makes its own rules regarding how it wants to discharge its mandate. On the other hand, hon. Members' acceptance and respect for their own rules cannot be meaningful if the Chair who is charged with the heavy responsibility of applying and interpreting House rules is partial, or biased. I want to assure this House that I will be a very dynamic, effective, efficient, proactive, competent, steadfast and honest Speaker. Do not look at my lips, pry open my heart!

(Applause)

It is my earnest belief that in my time and the life of the Tenth Parliament, we shall witness progressive reform, that this House will make it a priority to amend our Standing Orders so as to be in step and consonance with other modern Parliamentary jurisdictions. That we will move to electronic voting so that we avoid the kind of debacles that hon. Members have witnessed this afternoon. We will quickly entrench live coverage of the proceedings of the House.

(Applause)

Significantly, this House will endeavour to grant Kenyans a new Constitutional order at the earliest.

As your Speaker, I promise to preside over the proceedings of the House by applying the Standing Orders in a fair, but firm manner. I will be observing one basic principle of debate; this is a principal tenet of democracy which is that while the minority must have their say, the majority must have their way. That does not mean that the majority are always right, neither does it mean that the majority shall be exempted from some rules of debate because they have to get their way or that the minority will have an excuse to say things that are best left unsaid in this House. What compels me to say all this is what I have previously observed above that you are the only institution that enjoys the privilege of being allowed, in the Constitution, to determine the methods you want to use to run your own affairs. In any civilised society, you cannot be allowed to make your own rules and fail to respect them. In short, we must respect our Standing Orders. If we do not do that then we can as well forget about gaining any respect from our society. I hope both sides of the House are listening and, indeed, that the whole country is listening.

Finally, I appeal to hon. Members to take our Standing Orders seriously because without that, no meaningful debate can take place in Parliament. It may be necessary to inform the new hon. Members that we have a very competent, non-partisan team of officers who are always keen to assist hon. Members on procedural issues. These members of staff are headed by our able Clerk of the National Assembly.

With those many remarks, I wish all hon. Members a prosperous and successful political career in the Tenth Parliament. God bless Kenya!

(Applause)

ELECTION OF THE DEPUTY SPEAKER

The Clerk explained that the procedure for the election of the Deputy Speaker was the same as that for the election of the Speaker. He also announced he had issued and received back nomination papers for the Office of Deputy Speaker from hon. Gitobu Imanyara and hon. Maalim Farah. He requested that His Excellency the President be issued with a ballot paper so that the voting could move and thereafter the exercise continue under the guidance of Mr. Speaker.

(The Clerk unlocked the ballot box and displayed it to the hon. Members)

(The ballot papers were issued to each hon. Member as their names were called by the Clerk in

alphabetical order)

*(Hon. Members proceeded to
vote one by one)*

*(The Clerk unlocked the ballot
box and clerks proceeded
to count the votes).*

The Speaker announced the results of the first ballot as follows:-

NAME	VOTES
Farah Maalim	110
Gitobu Imanyara	94
Spoiled ballot paper	1

You will notice that the number of votes has gone down because the hon. Member for Emuhaya is now your Speaker. So, going by the Standing Orders, Standing Order No.8 provides that the voting for the Deputy Speaker shall be conducted in the same manner as that of the Speaker.

We are enjoined to go to the second round of voting because none of the candidates achieved a two-thirds majority. Two-thirds would have been 148 votes. So, we will have to go for a second round of voting.

The Member of Parliament for Central Imenti (Mr. Imanyara): On a point of order, Mr. Speaker, Sir. Let me first take this opportunity to congratulate you on being elected as the Speaker.

Secondly, in the spirit of a true democrat and in recognition of the fact that my good friend has a comfortable lead, I wish to concede defeat and congratulate him, and request that my name be removed from further balloting.

(Applause)

Mr. Speaker: Order, Members! The result of that withdrawal by hon. Imanyara Gitobu is that there will be no second round of voting. Consequently, there will be no third voting either. So, we will take it that the results of the only round of voting which had taken place determine this election. I, therefore, declare hon. Maalim Farah the winner and Deputy Speaker of the Tenth Parliament.

Hon. Maalim Farah should now come forward and take his oath.

(Applause)

*(Hon. Maalim Farah was escorted
to the Chair by Messrs. Imanyara
and Fredrick Otieno Outa)*

*(The Speaker accordingly declared the
hon. Farah Maalim elected Deputy Speaker
of the National Assembly and*

*administered the oath
to him accordingly)*

Mr. Speaker: Congratulations!

The Clerk of the National Assembly (Mr. Ndindiri): Mr. Speaker, Sir, Order No. 5 is Administration of Oath. That is the Administration of Oath to all Members of this House, starting off with His Excellency the President.

The Member of Parliament for Ugenya (Mr. Orengo): Mr. Speaker, Sir, on a point of order.

Mr. Speaker: Yes, hon. Orengo!

POINT OF ORDER

VALIDITY OF OATH OF ALLEGIANCE

The Member of Parliament for Ugenya (Mr. Orengo): I am seeking your directions on this matter because, according to Section 1 and 1(A) of the Constitution, Kenya is a Republic. Section 1(A) says that Kenya is a multi-party democratic state. That means that the sovereignty of this nation is in the Republic. It is not on any individual. It is not in any office.

Mr. Speaker, Sir, if you look at the arrangement of the Constitution, Chapter one which declares the Republic of Kenya, it has nothing to do with the Executive. The provisions relating to the Executive are found in Chapter Two of the Constitution. Therefore, if you look at the Oath of Allegiance, it undermines the Constitution of Kenya by suggesting that the sovereignty of the Republic of Kenya is in the President of the Republic of Kenya.

In fact, if you go by the arrangements of the Constitution as I have shown you, the first Chapter of the Constitution declares Kenya to be a Republic. Then the second Chapter deals with the Executive.

The Oath of Allegiance is in this form which undermines the theory of the Constitution and the arrangement of the Constitution as it appears. The Oath of Allegiance says: "I do swear that I will be faithful and bear true allegiance to the President and the Republic of Kenya." That, in itself, undermines the Constitution itself. That is because the authority of the Republic of Kenya, the sovereignty of the Republic of Kenya is in the people of Kenya.

There is no way that the Republic can come after the President. It should be the other way round. That is because if you look at our courts, there were discussions of Section 1 and Section 1(a) in many decisions last year, where they were saying that these words in the Constitution are not there for cosmetic reasons. They mean something.

Once the Constitution says we are a Republic, then it means the sovereignty of the Republic of Kenya is in the people of Kenya. That, therefore, means that if we have to swear allegiance, we have to swear allegiance to the Republic. In England, you can swear allegiance to the monarch because sovereignty is in the monarchy. But I stand guided because I remember when I was challenging the Speaker on Erskine May, what he read before you is a one line footnote from Erskine May. It is not in the body of the text. But I will challenge him again. Where in the world is there a Republic where people swear allegiance to the President rather to the Republic? I seek your guidance on that matter. It is part of the duty of your office that, if there is any statute or any matter that undermines the Constitution, you cannot close your eyes to it. That is why I am grateful to the Attorney-General when this matter arose in 1992, in respect of having the name of the former President in the oath, he readily acceded and we did not have any debate about it. I am also appealing to the other side that, if you believe that Kenya is a Republic, then we should swear

allegiance to the Republic. But if you think that Kenya is a monarchy, then we can have the oath the way it is and that would make sense.

My second point is also on the issue of the oath that we are about to take. If the oath is in the form it is in the Promissory Oaths Act and you have to swear allegiance to the President, then this House is being put in a very difficult position because there is contestation as to who is the President of the Republic of Kenya. I know that the hon. Member for Othaya is sitting on the seat of the Head of State, which is on the right hand of the Speaker. But so long as there is contestation on the seat of the Presidency, that is a matter which this House must resolve expeditiously. It cannot wait. It is the tradition of all Parliaments, particularly in the tradition of the Commonwealth, that Parliaments do consider themselves to be courts. There are matters which, if you look at the Powers and Privileges Act, sometimes we almost sit as a court. We summon people to come before us. Therefore, I want to put this very boldly that, in the eyes of the people of Kenya, the President of the Republic of Kenya is Raila Amollo Odinga. In the eyes of the Electoral Commission-- In the words of the Chairman of that Commission, he does not know who the President of the Republic of Kenya is. So, it is a matter which, Mr. Speaker, Sir, you cannot close your eyes to, particularly if you want us to swear allegiance to the President. Do I swear allegiance to hon. Raila Odinga or do I swear allegiance to hon. Mwai Kibaki? As far as I am concerned, I was there at the tallying. Hon. Mwai Kibaki lost elections by nearly half a million votes. I know on the other side--

An hon. Member: On a point of order, Mr. Speaker, Sir.

The Member of Parliament for Ugenya (Mr. Orengo): I am on a point of order! You have got to learn your rules again. I am just about to finish my point of order.

Mr. Speaker: The Member is on a point of order. Let him finish. You can have your time.

The Member of Parliament for Ugenya (Mr. Orengo): I do not know why he is feeling so edgy and he is an old Member of this House. What I am trying to say is a grave constitutional matter.

Mr. Speaker, Sir, you will take into account the fact that, in Uganda, when there is contestation as to who is the President and, for example, there is an election petition, it has to be resolved within 30 days. In the United States, that is the position. But here, and that is why we cannot go to those courts, they would take their time.

I remember representing the hon. Member for Othaya in an election petition which went to the Court of Appeal. Most of you did not know what was happening on the other side. I was his lawyer in the Court of Appeal. It was decided--

An hon. Member: What is your point of order?

The Member of Parliament for Ugenya (Mr. Orengo): My point of order is this: Do not be edgy about it. The point of order is that we need a clear ruling from you that, in so far as there is contestation as to who is the President of the Republic of Kenya, the hon. Mwai Kibaki should sit like any other ordinary Member of Parliament-- Where hon. Kalonzo is sitting!

Mr. Speaker, Sir, you should go by the verdict of the people and decide on the basis of evidence that is available that the President of the people is hon. Raila Odinga. That needs to be said and understood by the whole nation.

Thank you, Mr. Speaker, Sir.

The Minister for Justice and Constitutional Affairs (Ms. Karua): I thank you, Mr. Speaker, Sir. I want to now publicly congratulate you. I had my own misgivings, but you acquainted yourself in your acceptance speech, and we do, indeed, look forward to working with you.

This Session was summoned by His Excellency the President. I am happy to note that in your acceptance speech, you referred to respect for institutions. I want to underline here the fact

that the Presidency is an institution, just like Parliament is. The Presidency is duly constituted upon His Excellency the President having been declared the winner by the Electoral Commission of Kenya and having been subsequently sworn in. We are here so that you administer oath to us. Some of the hon. Members here, it is public knowledge that they are facing petitions, but they are here because they were declared winners. Until a competent court declares otherwise, they are Members of Parliament entitled to the same respect just as any of us. Let us be fair and avoid theatrics. This is the same for the Office of the President and for the Presidency.

If, indeed, there is a petition, and I have not heard of any yet, but the time is still there for a petition to be filed, until a court of law rules otherwise, His Excellency the Hon. Mwai Kibaki is the duly elected President of the Republic of Kenya. This institution constitutes one arm of the Government.

Allow me to bore you by repeating that the three arms of the Government are the Executive, which is headed by the President; the Judiciary, which is independent and thid not win. We all left satisfied. I will not go into that. The notes of that evening will speak for themselves and we can make other pronouncements before people, but before God, we know what transpired. I will not enter into the realm of adjudicating upon election disputes.

I am not a court of law. We cannot believe in our own elections and queue here to be sworn in, while we want to be the accuser and the judge in respect of the election of His Excellency the President. We either believe in institutions or we do not. We cannot have our cake and eat it.

Mr. Speaker, Sir, we also said that we should go with tradition. So, what is the tradition the world over? It is that election disputes are taken to courts of law. Parliament never decides on election disputes. So, I take it that here we are addressing the gallery.

Finally, we are here to be sworn in, so that we serve Kenyans in this House. If there are Standing Orders that we do not like, if we think that the Oath of Allegiance is defective, it is within our powers once we are sworn in as hon. Members to change the law; the Constitution, if we like, and the Standing Orders, but we cannot, through a point of order, change even the Oath of Allegiance as it is.

Very finally, we are actually strangers. The Session is informal and the House is not duly constituted until we are sworn in. Only the Speaker has been sworn in. The rest of us are actually strangers. I beg that you proceed to swear us in, so that we do become duly constituted as a House, and then we can utilise this institution to guide the country and to make all the objections that will be legitimately made here. I rest my case.

The Member of Parliament for Mbooni (Mr. M. Kilonzo): Mr. Speaker, Sir, I thank you and also wish to join my colleagues in congratulating you on your worthy election. You are fit and able and I have no doubt that you will lead this House to greater heights.

I wonder and I want to pause whether my learned friend, hon. Orengo, is in order to mislead the House. He is misleading the House because he is reading the Constitution selectively. I do not think it is right to merely read Sections 1 and 1(A) and ignore the rest of the Constitution. Therefore, allow me to point out why I believe he is out of order and then you can make a ruling. One of the very important sections of our Constitution is Section 4. You will notice that it is emphatic and clear. It says:-

"There shall be a President of Kenya, who shall be the Head of State and Commander-in-Chief of the armed forces of the Republic".

You will notice that, that is not conditional upon either an election petition or for that matter on what hon. Kivuitu may do or not or what a court of law may do. It states that there shall be a President of Kenya who shall be the Head of State and Commander-in-Chief of the armed forces of the Republic of Kenya. Therefore, it is in order, in my view, and I stand to be corrected, but only by you, to swear allegiance to the Head of State, who is also the Commander-in-Chief of

the armed forces.

Similarly, if you allow me, and to my amazement hon. Orengo is ignoring Section 23 of the Constitution.

Allow me to read it because it is very brief. It says:-

"The executive authority of the Government of Kenya shall vest in the President and subject to this Constitution, may be exercised by him either directly or through officers subordinate to him".

Mr. Speaker, Sir, as I speak to this honourable House, His Excellency President Kibaki has already been sworn in and as far as I know, there is absolutely nothing anywhere in our judicial system challenging that swearing in or the vote. That brings me to Section 10. That is why I have said that hon. Orengo should not mislead the House by reading the Constitution selectively. Section 10 is very clear. In fact, you will see the note on the side which says:-

"Determination of question as to validity of Presidential election".

That is the side note and under constitutional law, it is binding. A man like hon. Raila, whom I respect very much should take account of that phrase, namely, determination of questions as to the validity of Presidential elections. When you look at Section 10, you will see that you have no role whatsoever, as a Speaker. This House has no role whatsoever, in determining the question of the validity of the election of a President.

(Applause)

That validity is spelt on under Section 10. Unfortunately, having elected you, I take privilege of knowing of your enormous experience in the field of election petitions. I have done them with you left, right and centre. This says as follows:-

"Subject to this section, Section 44 shall apply

to the hearing and determination of a question whether a person has been validly elected as President as it applies to the hearing and determination of a question whether a person has been validly elected as a Member of the National Assembly".

Mr. Speaker, Sir, therefore, that refers you by direct extension to Section 44. Again, hon. Orengo, a man with whom I sat in the same class, has already admitted on the Floor of this House that he has represented President Kibaki in an election petition. Therefore, he knows about election petitions. He is referring to your ruling, but as to why he is leaving it out, then you should decide whether he is in order. I do not think he is!

Mr. Speaker, Sir, Section 44 of the Constitution states that the High Court, not Parliament, a foreign mission or a church, shall have jurisdiction to hear and determine any question whether:-

(a) a person has been validly elected as an hon. Member of the National Assembly;

or

(b) the seat in the National Assembly of an hon. Member thereof has become vacant.

It is embarrassing to ask a sitting President, who has been declared elected by the Electoral Commission of Kenya (ECK) and been sworn in this manner, to come and sit where Mr. Musyoka is sitting. He is sitting at the right place and that is where he belongs. That is where he will sit until Mr. Raila, or any other voter in the country, invokes the provisions of Section 44 that Mr. Orengo knows about very well. We will then meet in that court and determine what has happened.

(Applause)

Mr. Speaker, Sir, therefore, I am, with complete humility pleading this time with an officer of the Court itself. I wish to move that you rule that Mr. Orenge is completely out of order. Moreover, my learned friend is challenging the Oath. It is an Oath prescribed by this Chamber. The only way to amend an Act of Parliament, unless I have forgotten my law, is to come to this Chamber after we have been sworn in, and seek the amendment of that oath, so that the next time one of us - if it is Mr. Raila or Mr. Musyoka, because, thank God, as you can see, Mr. Kibaki is serving his last term - sits in that Chair we can swear allegiance to him fully knowing that he is the Chief Executive of this country. I see nothing wrong with that.

May God bless you.

The Member of Parliament for Mbita (Mr. Kajwang): On a point of order, Mr. Speaker, Sir. May I congratulate you once again for being elected the Speaker of the Tenth Parliament.

A fine point and a short one is that I want to thank Ms. Karua for reminding us that there are three branches of the Government, and that this is one of them. We always say that this is the sovereign and supreme organ in the governance of this country, as we know that the Executive is another branch and so is the Judiciary.

However, let me just ask this question, because that is how that Oath is framed. If you ask an hon. Member to swear allegiance to the Executive, what does that mean? Does that mean that this House cannot now check the Executive? Actually our job, as Back-benchers, is to check the ng. It should be amended to suit the Constitution, so that we take an oath that befits the dignity of this House.

*(Several hon. Members stood up
in their places)*

I am on a point of order, Mr. Speaker, Sir, to say that we cannot take an oath that is defective and unconstitutional! That is my point!

(Applause)

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Speaker, Sir, please allow this stranger to congratulate you for a very well fought election battle and the very fact that you have submitted yourself to the will of the House.

This nation is at a crossroad, because if we were to continue prevaricating over this matter of the manner of the swearing in--- First of all, I heard you say loud and clear that though this House is supreme, in accordance with the traditions of this wonderful country which we love so much to the extent that we can sacrifice as much as we have done, including the sacrifice our own people continue to make, then it behooves all of us to respect those traditions. The tradition is exactly what you have gone through. I heard you loud and clear in your acceptance speech. You referred to the institution of the President. You did not contest it, and you even went ahead and swore allegiance. Therefore, it will be grossly unfair where our Chief Executive, in this case Mr. Speaker himself, swears allegiance in accordance with the traditions of this country and then the rest of us refuse to comply.

I, therefore, want to urge as part of the healing process, that we, of necessity, have to go through as a country--- I heard my learned friend from Ugenya talk about contestation. Indeed, that is what it is; contestation! It is not the first time that elections have been contested. I think it is also important to recognise that even as we look forward to dialogueing over this matter, we cannot hold the destiny of this country at ransom by refusing to do what we should actually do, and that is to swear. Then once we are not strangers before you, then we will be able to deal with those issues. In fact, that argument by Mr. Orenge is very attractive, namely swearing allegiance to the Republic

in accordance with the things that we will have to carry out.

Mr. Speaker, Sir, in your own acceptance speech, you also correctly pointed out the need for all of us, as the Tenth Parliament, to give this country the kind of Constitution it obviously deserves. I think that in that totality of consideration we shall then be able to look at even the Oath of Allegiance and do whatever else. Since the majority of us---

I am sorry that 80 per cent of this House is new. But there are those of us who have lived through these traditions. I want to humbly suggest that you proceed---

An hon. Member: Make progress!

The Vice-President and Minister for Home Affairs (Mr. Musyoka): Mr. Speaker, Sir, proceed to make progress. Thereafter, when we are properly before this House, we will be able to look at all these matters. But I do not think I will lose my sleep tonight because I have sworn allegiance to His Excellency the President. That is a valued tradition, which can also change as we look at the new constitutional order that we have been talking about.

Thank you.

Mr. Speaker: I want us to come to a close on this matter. However, I will take two more from the Government side and two more from---

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): The Government side!

Mr. Speaker: The Government and Government! Either side!

The Member of Parliament for Kisumu Rural (Prof. Anyang'-Nyong'o): Mr. Speaker, Sir, let me also take this opportunity to congratulate you for being elected Speaker of the Tenth Parliament, a job you well deserve.

I am going to make a very short point, having appreciated the arguments of the lawyers which are usually made without reference to much politics.

Mr. Musyoka has said that we should respect traditions. The anxiety on this side is that His Excellency, the former President, has not been very good at respecting traditions.

(Applause)

We had a tradition in this House since 1997 of appointing members according to 1997 Inter-Parties Parliamentary Group (IPPG) agreement, which was a tradition. But rather than respect traditions, the President went to law rather than tradition. So, the argument that we should respect tradition has rarely been observed by the other side, let alone the Presidency. So, it is very difficult for the other side to argue that we should respect tradition and on that basis make a decision today.

Swearing-in is a very important event. It is like being baptised. If you are an Anglican and you are baptised according to the Roman Catholic procedures, your baptism may not actually be valid. Since we are going to swear allegiance as hon. Members of Parliament, I want to admit that, that swearing-in must be properly done. So, the point raised by Mr. James Orengo is extremely important. We would like to get a clear ruling from the Chair or the Attorney-General, given the valid point that hon. Orengo has raised.

Mr. Speaker, Sir, is it really valid for us to swear-in on a wrong premise or wait until that is clarified, so that we are properly baptised and not according to the catechism of procedures of a church we do not belong to?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Speaker, Sir, may I also congratulate you and your deputy for the victory that you have secured convincingly on the Floor of this House. I have no doubt that you will discharge your duties and responsibilities in accordance with the Standing Orders, the Constitution and the firm and categorical speech that you have given

us here.

Mr. Speaker, Sir, I want to join my learned friends; Ms. Karua and Mr. M. Kilonzo in what they have said. I want to point out that what Mr. Orengo has advanced here has no basis, validity or foundation either in law or fact.

If there is anybody that is empowered in this country to determine the constitutionality of any law, including our Standing Orders, which find foundation in the Constitution, it is only a court of law. Nobody else! We cannot come here and pretend that we can deal with issues of interpretation and determination of the constitutionality of any law. Section 3 of the Constitution is very clear. As a lawyer, I know it.

Mr. Speaker, Sir, under the law of Estoppel, you yourself and the Deputy Speaker are in fact estopped in law in impugning the validity of the oath you have just taken yourself after election. The oath that you have taken to determine the matters and affairs of this House without fear or favour with firm foundation in law. Mr. Orengo can then not turn round and urge you to say that the oath that has given you authority to sit where you are sitting is unconstitutional or defective.

Mr. Speaker, Sir, I want to urge you, with a lot of humility, that once the Chair is stopped for ruling any other way other than the oath that the Chair has taken to sit where it is sitting is valid.

Secondly, Mr. Orengo's point of order is only aimed at procrastinating and wasting the time of this Parliament. We need to move on with business.

Thank you.

(Applause)

Mr. Speaker: I had said we would take two more from that side and two more from this side. We have already taken one from this side. We will take one more; Mr. Ababu Namwamba and another from the other side; Mr. Murungi. After that, I would want to hear the Attorney-General.

Mr. Namwamba, please, proceed!

The Member of Parliament for Budalangi (Mr. Ababu): Mr. Speaker, Sir, let me also join the other hon. Members in congratulating you and your Deputy Speaker on your election to guide the proceedings of this House.

Mr. Speaker, Sir, I have a point of order which I shall come to after raising a couple of preliminary issues. First, I do not believe that you are estopped from exercising the authority of your office and you are not estopped in any way from taking judicial notice of certain things that are obvious to the ordinary Kenyans and Members of this House. One of those things that you must take the judicial notice of is the uncertainty with the Electoral Commission of Kenya (ECK) as to who exactly is the President of this country.

Mr. Speaker, Sir, we have an unprecedented situation where the Chairman of the ECK himself is on record for declaring that he has absolutely no idea who is the President of this Republic.

Mr. Speaker, Sir, we have it on record where at least five members of the ECK have gone public to declare their uncertainty about the resolve that purported to place the hon. Member for Othaya Constituency, Mr. Mwai Kibaki in the presidency. Therefore, I believe that extra ordinary times call for extra ordinary measures.

We have never been in a situation where the constitutional order of this country has been usurped and adulterated in the manner that we have witnessed in the recent past. These are extra ordinary times and they call for extra ordinary measures; traditions or no traditions.

(Applause)

Mr. Speaker, Sir, I also want to tell the hon. Member for Gichugu Constituency that, the fact that the hon. Member of Parliament for Othaya Constituency usurped the constitutional authority to convene this House does not in any way invalidate our coming here to correct that usurpation!

(Applause)

Mr. Speaker, Sir, it is not correct for the hon. Member for Gichugu Constituency to equate the uncertainty over the presidency to uncertainty over the election of any hon. Member of the House. We know that the ECK has not raised any question or any doubt on the election of the 207 hon. Members seated in this Chamber right now, while we know clearly that the Commission has raised serious doubts and weighty issues on the validity of the election and swearing in of the hon. Member of Parliament for Othaya; Mr. Mwai Kibaki as President of this country.

Mr. Speaker, Sir, there is absolutely no reason why the hon. Member of Parliament for Othaya Constituency, should be sworn-in ahead of me if indeed we are supposed to be sworn-in according to the alphabetical order of our names.

Mr. Speaker, Sir, because the very election of the hon. Member of Parliament for Othaya Constituency as the President of this country is in serious doubt, he must be sworn-in as the hon. Member for Othaya Constituency which is number 66 on this list. We are not going to close our eyes to obvious issues. Therefore, I urge you to exercise the full authority of your office and take judicial notice of the obvious that we are not going to deal with political and electoral fraudsters masquerading and exercising illegally the Executive authority of this nation.

Thank you.

The Member of Parliament for Muhoroni (Prof. Olweny): On a point of order, Mr. Speaker, Sir. Behind you there is someone who is improperly dressed! She is standing there.

Mr. Speaker: Mr. Murungi, please, proceed!

The Minister for Energy (Mr. Murungi): Mr. Speaker, Sir, let me also join colleagues from both sides of the House in

congratulating you upon your election as the Speaker of the Tenth Parliament. We appreciate the remarks you made in your acceptance speech. You said that you are going to support the institutions of this country, the Standing Orders and that you are going to enforce them firmly.

With all due respect to all my learned friends who have spoken before me, I would like to point out that, in fact, the debate which you are being encouraged to make a ruling on is irrelevant and has nothing to do with the matters before this House.

Mr. Speaker, Sir, the point of order raised by Mr. Orenge touches on alleged irregularities in the election of the President. We are not being called upon today to swear in the hon. Member for Othaya Constituency as the President of Kenya. That one has already been done.

(Applause)

We are being called upon to swear hon. Mwai Kibaki as the hon. Member of Parliament for Othaya Constituency.

Mr. Speaker, Sir, I have listened to a lot of complaints, read the newspapers and watched television. But there is no single Kenyan who has come up to say there were any irregularities in the election of hon. Mwai Kibaki as the hon. Member of Parliament for Othaya Constituency. I

stand to be corrected by any of my colleagues on the other side.

Mr. Speaker, Sir, since the election of hon. Mwai Kibaki as the hon. Member for Othaya Constituency has not been challenged and is not in question, he has got to be sworn in like any other hon. Member of this House today. Mr. Speaker, Sir, you, yourself, is sitting in the Chair to exercise legislative power. According to Section 30 of our Constitution, and permit me to read, it says:-

"The legislative power of the Republic shall vest in the Parliament of Kenya which shall consist of the President and the National Assembly."

Therefore, Parliament, by the very definition, means the National Assembly and the President. You cannot exercise legislative power without either of this. You cannot have the National Assembly exercising legislative power without the President. So, you would be dis-empowering yourself and undermining your own authority and the authority of this House if you do not recognise the institution of the Presidency.

Mr. Speaker, Sir, in law, we talk about the law as it is and the law as it ought to be. What Mr. Orengo was talking about is the law as it ought to be. We are here to follow the law as it is. The law requires us to take the oath in its prescribed form. That requires us to pledge our allegiance to the institution of the Presidency.

Mr. Orengo was with me in this Parliament in 1994 when the then hon. Member for Githunguri Constituency, Mr. Gatabaki, refused to swear allegiance to the former President. The hon. Member was summoned by the Speaker and he was told he would lose his seat unless he swore the oath as prescribed. He had to do it. So, any hon. Member who does not take the oath as prescribed risks losing his seat.

Mr. Speaker, Sir, I rest my case!

Mr. Speaker: Hon. Members, I ruled earlier on, on the number of hon. Members we are going to hear from either side. I ruled that we would conclude with the comments of the Attorney-General, whereafter we should proceed to the next step.

The Attorney-General (Mr. Wako): Thank you, Mr. Speaker, Sir. I associate myself with all hon. Members who have congratulated you on your election as Speaker. Having followed your career very - closely in high school, as a professional, as a State Counsel in the Attorney-General's chambers, as a practising senior advocate from Mombasa, as a member of the Disciplinary Committee of the Law Society of Kenya, as an hon. Member of this House and the active role that you have played particularly in guiding this House on the various legislations that have come before this House, I have no doubt in my mind that the collective wisdom of this House in electing you as Speaker is well founded. Your own speech, in accepting the election, testifies to that. I can only take from the Bar - and you are a lawyer - and I am titular head of the legal profession in this country, I take pride in you sitting there. I know that you will make a success of that seat. All of us here are bound to work very closely with you, to ensure and make your task, which in itself is onerous, slightly easier by following the Standing Orders of Parliament.

Mr. Speaker, Sir, my learned friend, Mr. Orengo, has raised a very important issue about the Oath. When he began, he correctly stated that the oath that was being sworn by hon. Members at that time mentioned the name of the President at that time. Therefore, it gave the impression that when one was swearing the loyalty, the loyalty was to that person who happened to be an occupant of that seat of the presidency. That is why, way back in 1992, I readily agreed, that because of that confusion and question: Are you swearing authority to that office or are you swearing to the person? Because the name was there, I readily agreed, as he has rightly stated, that we should delete that name.

Mr. Speaker, Sir, since that happened, of course, we have had a number of Parliaments.

Nobody has raised an issue on that. Obviously, we have to, all the time, progressively improve on what we are doing. But the fact of the matter is that, since that time, in fact, most of us in this House have sworn to that particular phraseology; "to the President and the Republic of Kenya."

Mr. Speaker, Sir, when we talk about the President, we are not talking about hon. Emilio Mwai Kibaki. We are talking about the Office of the President. The Office of the President occupies a unique position in our Constitution. Part of the problem, I think, which is giving rise to the confusion is the fact that, we have to make a distinction between the Head of State as Head of State and the Head of Government. That distinction is very clear, even under our Constitution. Part of Section 4, of the Constitution, which we quoted earlier, clearly states:-

"The President of Kenya, who shall be Head of State."

Section 23 says that the Executive authority of the Republic will be vested in the President. It is being vested in the President, not as Head of State, but as Head of Government. Under our Constitution, the two offices are fused together - the Head of State and the Head of Government.

The sovereignty is vested in the people. The sovereignty and the ultimate body in England is Parliament which is sovereign and can make any laws. They do not even have a Constitution, but the Members of Parliament there swear loyalty to Her Majesty the Queen. But her official title is the Head of State. That is why they swear their loyalty to Her Majesty the Queen because she is Head of State. In our Constitution, you will find many places where the President is acting as Head of State and not as Head of Government. When he assents to Bills, for example, he is not assenting to the Bills because of Executive authority. This is because the powers of Executive authority are there clearly set out from Section 23 onwards of the Constitution in that Chapter.

When he is assenting to the Bills, he assents to them as Head of State, not as Head of Government. My colleague has mentioned about the definition of Parliament. It is the National Assembly plus the President. It is not plus the President as head of Government. It is the President as Head of State.

Mr. Speaker, Sir, the President did not summon this Parliament in exercise of his authority under Section 58 of the Constitution as Head of Government. He has summoned Parliament as Head of State. That is why we are here. If you bear in mind those distinctions, then it becomes obvious to me that when you are swearing this oath of office to the President, it is to the President as Head of State. My colleagues have said enough to me about what you are saying about the doubt expressed by the Chairman of the Electoral Commission of Kenya (ECK) and the Commissioners. Somebody has even said that you should take "judicial notice." Judicial notice is taken by the courts and not by Parliament. Consequently, all those matters on which you have been asked to take judicial notice of, are best canvassed in an election court, challenging the validity of the election of the President. That is why he can stand up and say that the courts should take judicial notice that the Chairman of ECK said this and that. Even the Chairman of the Electoral Commission could be called in and be asked what he meant. Those are matters of the court.

Mr. Speaker, Sir, I want to state that the oath that we have today does not prejudice any person here. In fact, it is an oath that must be taken by any person. We all belong to this Republic and State. The Head of State is a symbol of unity of the entire country. We should distinguish him from the Head of Government of a party which has Members of Parliament here.

As Head of State, he is the symbol of unity in this country. That is set out in the Constitution. In addition to what I have said, you will find that even for Her Majesty the Queen, there is what we call the prerogative of mercy *etcetera*. All through, the President exercises this prerogative as Head of State.

To the extent that we have used this oath which we amended and removed the offending words from the original oath and that we have used it for a third or fourth time, that we continue to

do so. But after that, if you want to improve on it, we can do so. Another issue that you have to take into account is the pragmatism of the whole thing; even assuming that it is wrong, who is going to do the amendment unless you hon. Members are sworn in? First of all, you must be sworn in as Members of Parliament, form committees and then you can come and bring amendments to the oath that you are going to take.

If you are going to say that we wait until it is amended, who is going to do it and you are not yet sworn in? You have no capacity or *locus standi* to carry out that amendment to what is already there. So, the way forward - I would like to urge this - is that, in as much as they may have a point, that point can be taken up after everybody has been sworn in and Parliament has formally sat, committees have been formed then we can have a re-look at the Standing Orders, the description of the oaths that one must subscribe to and even to go further, the constitutional amendment. All those things can only happen when you have been sworn in properly. It cannot happen before you have been sworn in. This is the message I really want to give to my colleagues.

CONSIDERED RULING

FORM/CONTENT OF OATH AND ORDER
OF SWEARING-IN CEREMONY ARE
VALID AND PROPER

Mr. Speaker: Hon. Members, indeed, matters that have been canvassed beginning with the point of order by Mr. Orengo and supplemented by other points of order raised by hon. Members are very weighty, in as much as they pertain to matters that are constitutional and interpretation thereof.

In summary, three issues turned out for determination. I will not put them in any particular order, except as I conceived them. First, is the order of swearing in. The second issue is the form of the oath. The third issue is if the hon. Members can swear to the President which is part of the content of the oath. Indeed, as I intimated in my acceptance speech, we are under duty as Parliament to **[Mr. Speaker]**

comply with the Constitution, our own Standing Orders and any other laws as may be in place.

Indeed, this afternoon, going by our Standing Orders, hon. Members are assembled here for two main purposes: First, to elect the Speaker and the Deputy Speaker, which you have done, and to be sworn in. Under Standing Order No.3, there is provision for the form and conduct of the swearing-in ceremony. Allow me to read out Standing Order No.3, which provides as follows:-

"On the assembly of a new House - *as, indeed, we are a new House* - pursuant to the President's Proclamation, the list of names of Members of the House shall be laid on the Table by the Clerk and the House shall thereafter proceed to the election of a Speaker. Immediately following the election, the Clerk shall administer the oath--"

So, that provision deals with the first issue, pertaining to the order of swearing in. Standing Order No.3 is categorical that the swearing-in shall be pursuant to the list of the names of Members of the House as laid on the Table by the Clerk. It is clear; it speaks for itself. The Clerk laid a list on the Table. It does not have to be in an alphabetical order. The Standing Order does not say so. We raised no objection to that list. We followed the list and, indeed, allowed the Member for Othaya to vote first, and the Member for Langata to vote second.

Hon. Members, it is also significant to note that previous Parliaments - I was privileged to be a Member of the Ninth Parliament - took the order of the oath in that manner. So, that should

bring to rest the matter of the order of the Oath, because nothing will turn on it if you go by precedence and the clear provisions of Standing Order No.3.

With regard to the form of the oath, yes, this is a weighty matter, but I have weighed it carefully. There are a number of issues which have been ably canvassed by Mr. Orengo. The first contention to the effect that Kenya is a sovereign Republic as provided in Section 1 of our Constitution is for granted. Yes, Kenya is a sovereign Republic. Sovereignty, therefore, by constitutional interpretation vests in the people of Kenya. There is no doubt that, that is correct.

I have also considered a contention which was ably articulated by Mr. Mutula Kilonzo with respect to the legislative authority of Parliament which, again, by express provision is not in doubt. Under Section 30 of our Constitution, it is clear that the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly, but that is as much as one can say and comment on the constitutional provisions. Perhaps, some of the matters that have been canvassed with respect as to whether or not, in fact, there is inconsistency between the Oath and the provisions of the Constitution, are matters that this House should flag and be prepared to deal with.

Hon. Members, it is worth of note that the form of the Oath which is to be taken by hon. Members tonight is provided for in an Act of Parliament, namely, the Promissory Oaths Act, which is Chapter 100 of the Laws of Kenya. You will bear with me hon. Members. Note that the commencement date for that Act was 19th August, 1958. This House has, therefore, lived with that piece of statute all those years. Among other things, in Section 2, the Act provides as follows:-

"Subject to this Act, every person who is appointed to or to act in or assume the functions of any of the offices designated in the first column of the First Schedule shall, before entering upon the functions of that office, take before the person designated in relation thereto in the second

column of that schedule, the oaths specified in relation thereto in the Third Column thereof".

Among persons covered in the First Schedule are the following:

- (i) The Speaker of the National Assembly and,
- (ii) every Member of the National Assembly.

Hon. Members, therefore, by the provisions of this Act, Members of the National Assembly and the Speaker are bound to take an oath in the form that is provided in the Act. The form of the Oath is in the Second Schedule, which finds its anchoring in Section 3 of the Act. Section 3 of the Act provides as follows:-

"The oath specified in the Third Column of the First Schedule shall be taken in the forms, respectively, set forth in the Second Schedule."

So, by the wording of Section 3, the form of that oath and the taking thereof is mandatory.

(Applause)

Hon. Members, it is worthy of note - and I think it was in some of the submissions that were made by hon. Members from both sides of the House - that, indeed, the Oath that has been taken by hon. Members during the swearing-in ceremony has been taken in this form since 1993. It, therefore, means that it was also taken in this form in 1998; it was taken in this form in the year 2003. The only exception brought to question in 1993 was that the name of the President was removed from the Oath. What was left was the institution of the Presidency.

In a nutshell, therefore, this is an Act of Parliament that provides this form of Oath, and if it be inconsistent with the Constitution, then it should never have seen the light of the day. So, it will be the duty of this House, if it finds any contradiction whatsoever, within the provisions of the Statute and the Constitution to take the necessary action to ensure that the Act is amended or repealed or

whatever else the House may deem appropriate to do.

(Applause)

Hon. Members, the Chair is under duty now to interpret the law as it is. My interpretation is that the form of this Oath has been validly enacted, provided for by the Statute, has been administered previously and we have no reason not to administer it tonight in the form it is.

The third issue which I am under duty to deal with is whether or not, I should proceed to swear in hon. Members tonight. In my interpretation of the Standing Orders, I do not find anything that would operate as a stopper or in any other manner whatsoever to restrain the Chair from swearing in hon. Members. It is important that you note that according to the Standing Orders, the swearing in ceremony tonight is to swear in hon. Members and not the President. That is expressly provided for under Standing Order No.5. Note the side note, which says, "Swearing in of Members." It is my privilege and honour to swear in the hon. Member for Othaya like any other hon. Members from other constituencies.

Hon. Members, that is the ruling of the Chair!

(Loud consultations)

Order, hon. Members! We will now proceed with the swearing-in ceremony. From the ruling that I have delivered a little while ago, the list laid on the Table by the Clerk of the National Assembly begins with the name of Mr. Kibaki Mwai who is to be sworn in as the hon. Member for Othaya.

(Applause)

ADMINISTRATION OF OATH

The Oath of Allegiance was administered to the following Members:-

His Excellency Hon. Kibaki Mwai.

Mr. Speaker: Hon. Members, going by the practice that we have applied since this afternoon, the next person to be sworn in is Mr. Odinga Amolo Raila, the hon. Member for Langata.

(The swearing-in resumed)

Odinga Raila Amolo

*(Several hon. Members stood up
in their places)*

(Applause)

The Member of Parliament for Budalangi (Mr. Ababu): Mimi, Ababu Namwamba, naapa ya kwamba nitakuwa mwaminifu kwa "Rais Amolo Raila Odinga" na kumtumikia kwa moyo wangu wote na pia Jamhuri ya Kenya na kuhifadhi---

(Loud consultations)

Mr. Speaker: Order! There is a point of order, *mheshimiwa!* You have to wait.

The Minister for Energy (Mr. Murungi): On a point of order, Mr. Speaker, Sir. The oath is in a prescribed form. Is the oath being taken by Mr. Namwamba in the prescribed form or a

different oath?

*(Several hon. Members stood up
in their places)*

Mr. Speaker: Just wait! I have to make a ruling. Indeed, Mr. Murungi, you are right. If the hon. Member listened to the ruling I made--- This oath is in the form prescribed in Chapter 100 of the Laws of Kenya. So, you will have to take the oath in the form in which it is prescribed.

*(Ababu Namwamba Tawfig Pius was
ordered to take the Oath again)*

The Member of Parliament for Budalangi (Mr. Ababu Namwamba): Mimi, Ababu Namwamba, naapa ya kwamba nitakuwa mwaminifu kwa Jamhuri ya Kenya na kuitumikia kwa moyo wangu wote na kwamba nitahifadhi, nitailinda na kuitetea Katiba ya Kenya kwa mujibu wa sheria iliyowekwa.

Ewe mwenyezi Mungu nisaidie.

The Minister for Justice and Constitutional Affairs (Ms. Karua): On a point of order, Mr. Speaker, Sir. You have read the law and said the oath must be taken as prescribed. You are under duty to protect the dignity of this House and its Members. One, either going by your ruling, has to take the oath as prescribed or decline! Nobody is taking oath under duress! Protect us from this ignominy.

Mr. Speaker: Thank you, Ms. Karua! Mr. Ababu Namwamba, I am not sure that I followed the manner in which you swore because you must swear in the prescribed form. Can you confirm that you swore in the prescribed form? With assistance from the Clerks-at-the-Table, I will request the hon. Member to take the oath once more.

Please, take the oath once again; take it in the form in which it is and do not make any speeches. Just take the oath as it is. No addresses!

*(Mr. Ababu Namwamba took the
prescribed form of the Oath)*

Ababu Namwamba Tawfig Pius
Abdikadir Mohammed Hussein
Abdirahman Hassan Ali
Abuchiaba Abu Mohamed
Ahmed Shakeel Ahmed Shabbir
Akulo Bulimo Evans
Ali Bahari Abdul
Ali Hussein Mohamed
Ali Mohamed Mohamud
Aluoch Olago John
Anyang' Nyong'o Peter
Anyanga Omondi Edick Peter
Anyango Ochieng' Pollyins
Baiya Njoroge Peter
Balala Najib Mohamed
Baya S.K. Francis
Bett Franklin
Bifwoli Wakoli Sylvester
Chanzu Kifuma Yusuf

Chepchumba Peris
Chepkitony Kipkosgei Lucas
Cheruyoit Kipkemoi Zakayo
Dache Pesa John
Duale Aden Bare
Ethuro Ekwee David
Farah Maalim
Gaichuhie Ributhi Nelson
Ganya Chachu Francis
Gesami Ondicho James
Gitau Njuguna Peter
Githae Njeru Robinson
Githunguri Munga Stanley
Godhana Gaddae Dhadho
Gumbo O. Nicholas
Gumo Omulo Frederick
Gunda Fondo Benedict
Haji Mohamed Yussuf
Imanyara Gitobu
Jeffah Kingi Amason
Jirongo Shakhalaga Khwa
Joho Ali Hassan
Kabando wa Kabando
Kajembe Seif Ramadhan
Kaino Kipchumba Boaz
Kajwang' Otieno Gerald
Kaloki Kyalo Philip
Kamama Abongotum Asman
Kamar Jepkoech Margaret
Kamau Irungu Jamleck
Kamau Maina James
Kambi Kazungu Samuel
Kapondi Chesebe Fred
Kariuki Ngata John
Kariuki Wanjiru Margaret
Karua Wangari Martha
Kathuri Mureithi Emilio
Kenneth Peter
Kenyatta Uhuru
Keter Cheruiyot Charles
Keya Manyala Atanas
Keynan Adan Wehliye
Khalwale Boni
Khang'ati Alfred
Khaniri Munyasa George
Kigen Kipkorir Luka
Kiilu L.N. Peter
Kilemi Valerian Mwiria
Kilimo Jebii Linah
Kilonzo Kiema Julius

Kilonzo Mutavi Charles
Kilonzo Mutula
Kimunya Muhinga Amos
Kinyanjui Maiyani Lee
Kioni Ngayu Jeremiah
Kipkiror C. William
Kiptanui Kiplagat Jackson
Kiuna Joseph Ng'ang'a
Kiunjuri Mwangi Festus
Kivuti Maxwell Lenny
Koech Kibet David
Koli Nanok Josephat
Kones Kiprono Kipkalya
Kones Kipyegon Julius
Kosgey Jemng'etich Sally
Kosgey Kiprono Henry
Kuti Abdi Mohamed
Kutuny Serem Joshua
Laboso Chepkemoi Lorna
Lagat Kiptarbei Elijah
Lankas ole Nkoidila
Lekuton Joseph
Lesrima Saimanga Simeon
Lessonet K. Moses
Letimalo Lakalei Raphael
Litole Mwotiny Wilson
Linturi Mithika Franklin
Lugano Lilechi Charles
M'Mithiaru Ntoitha
Machage Gisuka Wilfred
Magara Omingo James
Magerer J. Langat Kiprono
Magwanga Oyugi Joseph
Maina Mwangi Ephraim
Mathenge Murugi Esther
Mbai Itwiku Benson
Mbarire Mutitu Cecily
Mbau Peter Elias
Mbiuki Kareke M. Japhet
Metito Katoo Judah
Michuki Njoroge John
Midiwo Jakoyo Washington
Mututho Njenga Michael John
Mohamed Elmi Ibrahim
Mohamed Mahamud Maalim
Monda Onsare Robert
Mudavadi Musalia Wycliffe
Mugo Wambui Beth

Mung'aro Gideon Maitha
Mungatana Buya Danson
Munya Gatirau Peter
Munyaka Kioko Victor
Munyes Kiyonga John
Muoki Mulatya Isaac
Muoki Mutua Daniel
Mureithi Kihara Erastus
Murgor Recha Julius
Muriithi Ndiritu
Murungi Kiraitu
Musila David
Musyimi Mutava
Musyoka Kalonzo Stephen
Muthama Nduya Johnson
Mwadeghu Ludindi Thomas
Mwahima Masudi Mwalimu
Mwaita Komen Silas Sammy
Mwakulegwa Mwazo Danson
Mwakwere Ali Chirau
Mwangi C. Muturi Barnabas
Mwangi Wathika Dickson
Mwatela Calist Andrew
Mwathi Mungai Peter
Mwau Harun John
Mwaura Kiburi Njuguna David
Mwiru Mhuri Muthengi Alex
Ndambuki Musyoka Gideon
Ndeti Wavinya
Ng'ang'a Nguyai Lewis
Ngilu Kaluki Charity
Ng'ongo Mbadi John
Ngugi Mwaniki David
Nkaiserry Kasaine Joseph
Ntimama ole Ronkorua William
Nuh Nassir Abdi
Nyamai Mutisya Charles
Nyammo Thombe Francis
Nyongesa Otuoma Paul
Obure Mogere Christopher
Odhiambo Bwire Alfred
Oginga Oburu
Ogindo Otieno Martin
Ojaamong Odeke Sospeters
Ojode Orwa Joshua
Okemo Chrysanthus
Olweny Ayiecho Patrick
Omagwa Onyancha Joel

Ombui Mariosi Wilfred
Omollo Ojwang Cyprian
Ongeri Kegengo Samson
Ongoro Elizabeth
Onyacha Charles
Onyonka Momoima Richard
Oparanya Ambetsa Wycliffe

*(Mr. Orengo omitted parts of
the Oath of Allegiance)*

*(Several hon. Members stood
up in their places)*

The Minister for Justice and Constitutional Affairs (Ms. Karua): On a point of order, Mr. Speaker, Sir. I beg your indulgence to draw your attention that the hon. Member now taking the Oath did not follow the prescribed form; he should swear allegiance to both the President and the country.

Mr. Speaker: Yes, that is a valid point of order. Mr. Orengo, please, comply with the ruling that I made earlier.

*(Mr. Orengo took the prescribed
form of the Oath)*

Orengo James Aggrey
Osebe Nyambati Enock Walter
Otieno Anyango Dalamas
Outa Otieno Patrick
Poghisio Losuron samuel
Rai Gonzi Samuel
Rege Kwanya G. James
Ruteere Muriuki Silas
Ruto Samoei K. William
Rutto Kiprono Isaac
Saitoti George
Sambili Jepkemoi Hellen
Sambu B.A. Wekesa
Sasura Tarry Hussein
Shaban Namsi Naomi
Shitanda Soita Peter
Simiyu Eseli David
Sugow Aden Ahmed
Thuo George
Too Kimutai David
Twaha Fahim Yasin
Waibara Kungu Clement
Wamalwa Ludovic Eugene
Wambugu Muchiri Clement

Warugongo Nemesys
Washiali Jomo Benjamin
Wekesa Mahalang'ang'a Noah
Were Aoko David
Were Melitus
Wetangula Masika Moses
Yinda Ochieng' Edwin
Zonga Mbwana Omar
Wako S. Amos (Attorney-General)

Mr. Speaker: Order, hon. Members! We have now come to the end of the business of the day which entailed the swearing in ceremony of hon. Members of the 10th Parliament. I thank all hon. Members for their patience in enduring the long, but necessary sitting.

DEPARTURE OF HIS EXCELLENCY THE PRESIDENT

Mr. Speaker: Hon. Members, His Excellency the President may now leave at his pleasure.

*(Hon. Members rose in their places while
His Excellency the President
left the Chamber)*

ADJOURNMENT

Mr. Speaker: Hon. Members, it is now time for the interruption of business. The House, therefore, stands adjourned *sine die*.

The House rose at 1.17 a.m.