

# NATIONAL ASSEMBLY

## OFFICIAL REPORT

Thursday, 10th February, 2011

The House met at 2.30 p.m.

*[Mr. Speaker in the Chair]*

### PRAYERS

**Mr. Speaker:** Order, hon. Members! There is supposed to be a Communication at this point, but I am not certain as to whether or not our visitors are already in the gallery. I am told they are not yet there. We have a delegation visiting from the Republic of Botswana and it appears they have not arrived as yet. We will recognize them as and when they are in the House.

### POINT OF ORDER

#### EXTENSION OF DEADLINES FOR COMMITTEES TO SUBMIT REPORTS

**Mr. Okemo:** Mr. Speaker, Sir, I rise to seek your indulgence with regard to the matter that was brought before the Departmental Committee on Finance, Planning and Trade on the nomination process and the nominee whose name was presented before us.

I would like to request that you grant us an extension of time up to Tuesday, next week. We have heard from a number of witnesses and so we have gathered a lot of evidence. We are now in the process of writing the Report. We believe that in order to serve the best interest of this country, we need to do a good job. In order to do that, we want to take advantage of the weekend. We want to retreat to go and do a thorough job so that we Table our Report on Tuesday.

**Mr. Namwamba:** Mr. Speaker, Sir, I rise on the same matter of nominations to four constitutional offices. You referred the matter to the Departmental Committee on Finance, Planning and Trade and the Departmental Committee on Justice and Legal Affairs.

The Departmental Committee on Justice and Legal Affairs has had occasion to start prosecuting this matter from the time you referred it to us. We have endeavoured to fulfil the mandate of the Committee and execute that task which the Committee appreciates fully as a matter of critical national importance.

Mr. Speaker, Sir, we have worked round the clock. Yesterday, the Committee sat the whole day without a single break. We worked from 9.00 a.m. to about 8.00 p.m. in an attempt to beat today's deadline. The Committee appreciates the urgency of this matter. It understands the eagerness of this House, the Chair, and the nation at large to receive this Report. However, the Committee also believes that, that urgency notwithstanding, the

Chair, this House and the nation at large deserve to get a good Report; in fact, the best possible Report that could ever come out of this Committee.

Mr. Speaker, Sir, it is for that reason that the Committee pleads with the Chair for the indulgence of this House to be granted a few additional days to consider the huge volume of evidence that has been profiled before the Committee. There is evidence in the form of documents and some of them are voluminous. There is also evidence in the form of oral presentations and submissions received from various sources. We plead that the Committee be granted opportunity to table its Report in this honourable House on Tuesday, next week.

**Mr. Speaker:** Hon. Members, I have heard the presentations, if not, pleas, by the two Chairmen of the respective Departmental Committees on behalf of the larger membership of those Committees. Whereas I appreciate the public interest in this matter and the anxiety to hear what the findings of the two Committees are, I am satisfied that the Committees have made out a case for extension of time on the ground that contrary to the expectations, they have been overwhelmed by the number of witnesses who have turned up prepared to make submissions and give evidence before them. Indeed, a number of documents have also been tendered before the Committees.

Therefore, it is necessary that we accord these Committees more time, at least, until Tuesday next week at 2.30 p.m. Please, the two of you, hon. Okemo and hon. Namwamba, note that this matter still remains very urgent and that the whole country is holding its breath as to the outcome of the work of the two Committees. You should try and expedite your inquiry, investigations and recommendations as you will make.

In the meantime, on behalf of the membership of the House, I want to thank your two Committees for the commitment that you have demonstrated towards this assignment. I am aware that you have had to sit late into the night and that, perhaps, contrary to what some sections of Kenyans would have wanted to believe, you work much longer hours than just the four hours Kenyans believe you sit in this House. In fact, I am reliably informed that those journalists who were covering your proceedings yesterday tired at some point and left you to continue working.

## QUESTION BY PRIVATE NOTICE

### LOSS OF REVENUE DUE TO “PRICE WARS” AMONG MOBILE TELEPHONE COMPANIES

**Mr. C. Kilonzo:** Mr. Speaker, Sir, I beg to ask the Minister for Information and Communications the following Question by Private Notice.

(a) Could the Minister indicate the amount of taxes paid by the four major mobile companies/operators over the last five years and state how much money in taxes the Government is losing due to the current “price wars”?

(b) What action is the Government taking to protect the 750,000 local shareholders and erosion of the value of Government shareholding in Safaricom Limited from the imminent decline due to the “price wars”?

(c) What measures is the Minister taking to ensure that Safaricom does not outsource activities such as customer care, IT and network management, which will result in over 1,500 Kenyans being retrenched?

**The Assistant Minister for Information and Communications** (Mr. Khaniri):  
Mr. Speaker, Sir, I rise not to answer this Question, but to seek your advice and ruling.

This Question was forwarded to my Ministry the day before yesterday. As we attempted to get appropriate answers to the Question, we realized that it was touching on matters of taxes. We are all aware that matters pertaining to taxes and revenue are handled by the Kenya Revenue Authority (KRA) which is a parastatal under the Ministry of Finance and not my Ministry.

Mr. Speaker, Sir, part (b) of the Question touches on the shareholding and investments of a company. I believe that my Ministry is not competent enough to tackle this Question. I suggest that this Question should be tackled by the Minister for Finance. There are some aspects in the Question that my Ministry could be able to respond to, for example, the issue of price wars between the service provider companies and part (c) of the Question.

We thought that instead of answering the Question halfway or bits of it, you either rule that this Question be redirected to the Office of the Prime Minister because it has issues that cut across two Ministries, that is, my Ministry and the Office of the Deputy Prime Minister and Ministry of Finance.

Mr. Speaker, Sir, I seek your guidance.

**Mr. Speaker:** What is it, hon. Member for Yatta?

**Mr. C. Kilonzo:** Mr. Speaker, Sir, I am surprised that this Question was forwarded to the Ministry of Information and Communications. I had requested for this Question to be sent to the Office of the Deputy Prime Minister and Ministry of Finance for very obvious reasons. One of the reasons is the issue of price wars. There is a difference of opinion between the Permanent Secretary and the Minister himself.

The shareholders are of the opinion that they can never get justice from the Ministry of Information and Communications. It is for that reason that I thought it necessary that this Question be taken to a Ministry which is not controversial as far as the issue of price wars is concerned. I still insist that the Question be taken to the Office of the Deputy Prime Minister and Ministry of Finance or the Prime Minister's Office.

**The Assistant Minister for Information and Communications** (Mr. Khaniri):  
Mr. Speaker, Sir, I want to vehemently deny the allegations that have been made by the hon. Member that there is some squabbling between the Minister for Information and Communications and the Permanent Secretary. I have clearly stated the reasons why I think my Ministry is not competent enough to answer this Question. For the hon. Member to allege that there are some squabbles in my Ministry is misleading and so he must be made to withdraw and apologize.

**Mr. Speaker:** Order, hon. Member for Yatta! Please, relax! You are actually imputing improper motive on the part of the Minister as against his Permanent Secretary. So, if you are able to substantiate that matter, yes, then it can rest. If you are not, I am afraid you will have to withdraw and apologize.

**Mr. C. Kilonzo:** Mr. Speaker, Sir, what I said is the difference of opinion in as far as price wars are concerned. I have personally----

**Mr. Speaker:** Order! Order! Order! Resume your seat! We do not want to spill out this matter unnecessarily. You did not say that there was squabbling between the Minister and this Permanent Secretary. You did not say that?

**Mr. C. Kilonzo:** No, Mr. Speaker, Sir.

**Mr. Speaker:** Mr. Assistant Minister, you have raised a false alarm. So, let us leave it there; let it rest where it is.

Order, hon. Members! Taking into account the sentiments expressed by the Assistant Minister and the complement by the hon. Member for Yatta, I will direct that this Question be sent to the Office of the Prime Minister so that the Prime Minister will answer it or delegate it to whichever Ministry he will consider appropriate to answer it. I say so because it is the constitutional responsibility of the Office of the Prime Minister to supervise and co-ordinate Ministries. So, it is the right place for this Question to go.

*(Question deferred)*

## ORAL ANSWERS TO QUESTIONS

*Question No.639*

### ORIGINAL ACREAGE OF KARI LAND

**Mr. Mwathi** asked the Minister for Lands:-

(a) whether he could state the original total acreage of LR 164/4/R, belonging to the Kenya Agricultural Research Institute (KARI) Potato Research Centre at Tigoni and indicate the acreage of land currently available for research work;

(b) whether he could provide the names of the beneficiaries, if any, of the land that was sub-divided; and,

(c) what steps will he take to ensure that all the illegally acquired land belonging to the centre is returned for the benefit of the potato growers and all other stakeholders who benefit from potato research.

**The Assistant Minister for Lands (Mr. Rai):** Mr. Speaker, Sir, I beg to reply.

(a) The original total acreage of LR 164/4/R, belonging to the Kenya Agricultural Research Institute (KARI) in Tigoni was 228 acres. About 163 acres were excised leaving a balance of 65 acres.

(b) The beneficiaries of the sub-divided land are as follows:-

LR NO.	IR NO.	AREA	1 <sup>ST</sup> GRANTEE	CURRENT OWNER
14703	74788	29.86 Ac	Dedan Njuguna Gichuru P.O. Box 14195, Nairobi	Dedan Njuguna Gichuru
14918	50119	4.98 Ac	Rebeca Njeri Karanja P.O. Box 109, Kikuyu	Philip Njuguna Gichuki P.O. Box 56173, Nairobi
14919	50120	19.92 Ac	Rebeca Njeri Karanja P.O.	Rebeca Njeri Karanja

			Box 109, Kikuyu	
15410	56298	57.07 Ac	Julius Gikonyo Kiano P.O. Box 40125, Nairobi	Riangi Estate Ltd P.O. Box 56173, Nairobi
22008/1	70551	50.50 Ac	Renege Project Ltd P.O. Box 74400, Nairobi	Subdivided to 13 plots

The following are the resultant sub-plots of LR. No. 22008/1. The first beneficiary was Peter Gikura and Lawrence Waweru Chege, John Gathara, Irene Wanjiru, Jerioth Wangui, Thomas Kariuki, Susan Wangui, Wilfred Waweru, Edward Kariuki Muchai, Cones Machinery (K) Ltd, David Kamunya Runo and Michael Mwaura Kamau; Geoffrey Kuria Muriuki and Elias Mwangi Kabutu; Simon Kuria Kanyingi and lastly, David Kamau.

(c) A restriction has been placed on all titles pending repossession of the said land and reverting to its original user.

Thank you, Mr. Speaker, Sir.

**Mr. Mwathi:** Mr. Speaker, Sir, I want to thank the Assistant Minister, first of all, for putting a restriction and being able to bring the answer to my Question in the way I would have liked it to be but granted that I have since seen a Kenya Gazette after asking the Question, which was published on 26<sup>th</sup> of November, 2010. How long are you going to take so that these titles revert to the rightful owner, who is KARI?

**Mr. Rai:** Mr. Speaker, Sir, I want to inform the hon. Member that, yes, it has taken some time, but with this current position now, we are actually giving 45 days when he will actually get a Kenya Gazette Notice telling him that the land has now reverted back to its original usage.

Thank you, Mr. Speaker, Sir.

**Dr. Khalwale:** Thank you, Mr. Speaker, Sir. I want to congratulate the Ministry for the good work they are doing in addressing the issue of grabbed public land. However, at this point, Kenyans must know that this Question raises a fundamental issue on the sanctity of a title deed. To the extent that I have looked at the list of the titles that he has given and one of the people affected is a former honorable Member of this House. I have documents here showing that this honorable Member who has lost the property got that property from another honorable Member of the House who is here now. This hon. Member who is here now got it from another businessman, and that businessman got it from another one; and that one got it from the former honorable Julius Gikonyo Kiano. Hon. Julius Gikonyo Kiano was allocated this land in 1973. So, five people have changed title deeds up to the one whose property is now being taken away. Given that this particular property that I am trying to interrogate was not one of those properties that were identified under the Ndung'u Commission on unjustifiably acquired land, how far is this Assistant Minister going to go? Is he going to sweep all title deeds or has he a particular limit, because even in the Ndung'u Commission, they put a limit of up to 1992? But here is an Assistant Minister who is now revoking a title of a land that was allocated in 1973!

**Mr. Speaker:** Very well. Mr. Assistant Minister?

**Mr. Rai:** Mr. Speaker, Sir, the history of land is well known in this country. The reason why I have said it will take us about 45 days is because we want actually to direct our efforts to the Kenya Anti-Corruption Commission (KACC) so that they can take up this matter. They will, up to a certain extent, advise who is actually supposed to go to court and who is supposed to do what so that, at least, the land reverts back to the public. That is my main concern. But in view of the history which has been given out, I think the KACC will be in a position to advise all those persons affected as to what they are supposed to do.

**Dr. Khalwale:** On a point of order, Mr. Speaker, Sir. I am sorry I took long to build my question, and which he has not answered. My question was, how far back is he going to go? I want to table the agreement between hon. Kuria Kanyingi and hon. Cyrus Jirongo here which shows that Julius Gikonyo Kiano was given this land in 1973 by the late His Excellency President Kenyatta!

*(Dr. Khalwale laid the documents on the Table)*

**Mr. Speaker:** Very well, your point is made!

Proceed, Mr. Assistant Minister!

**Mr. Rai:** Mr. Speaker, Sir, the issue of the agreement to me would be immaterial because my concern is that whoever feels aggrieved by the action that my Ministry is going to take has a duty to go to court. That is my position.

*(Applause)*

**Mr. Baiya:** Mr. Speaker, Sir, the case of KARI land which had been set aside for public interest of research----. I can confirm that for the greater Kiambu zone, it is from this research that seeds are meant to be developed and which should be utilized by farmers, but as a result of this allocation to personal interest, there is even no adequate land for any further research to be carried out. Can the Ministry confirm that it is going to revert these parcels of lands to public interest at whatever cost? These private interests must pave way for the greater public interest.

*(Applause)*

**Mr. Rai:** Mr. Speaker, Sir, I have made my position very clear; a decision has already been made. We are actually communicating with the KACC, so that, at least, the land reverts back to its original use.

**Mr. C. Kilonzo:** On a point of order, Speaker, Sir. It is only fair that I bring to the attention of the Chair that yesterday when this Question was deferred, the Minister for Lands did not declare his interest in this matter. He had only informed you that they had agreed with the Assistant Minister to come and answer.

Mr. Speaker, Sir, I say so, because the Minister for Lands was the lawyer for Courier Green. His advice to them is contrary to what the Assistant Minister has said here. So, is he in order, first to mislead the Chair on the reason why he was not able to answer the Question yesterday? Is he in order not to declare his interest in the matter?

Thirdly, is he in order to declare that the sanctity of title deeds means nothing and that the Government can walk in, take your title deed and ask you to go to court?

**Mr. Speaker:** Order! The first two are valid points of order. The last one, I am afraid is not.

**Mr. C. Kilonzo:** I stand guided, Mr. Speaker, Sir.

**Mr. Rai:** Mr. Speaker, Sir, the Minister was right yesterday when he said the answer was with me and I came late when the Question had already been asked. It is true that it was me who had the answer to this Question. That is why I answered this particular Question.

**Mr. Mureithi:** Mr. Speaker, Sir, it is really a tragedy today because we have been told some people acquired the Potatoe Research Station (PRS). I want to declare that I used to work in the Ministry of Agriculture. The PRS was the only research station that did research on potatoes diseases. The current shortage of potatoes is because we have no research station that is screening and releasing good potatoes. How long will it take for them to repossess this land, so that consumers do not continue facing a problem in terms of the availability of potatoes because of lack of land to research and produce good potatoes?

**Mr. Rai:** Mr. Speaker, Sir, I have already answered that question. I said give me 45 days from today and we will get the results. We will actually get this land back to the Kenya Agricultural Research Institute (KARI).

**Mr. Mwachii:** Mr. Speaker, Sir, you can see the interest the Question has generated. I would want the Assistant Minister to tell us, in black and white, these factors you are considering in revoking title deeds that have changed hands, probably, three, four, five or six times?

**Mr. Rai:** Mr. Speaker, Sir, since the powers are not bestowed on the Minister, as I said, we have actually communicated with the KACC. They will advise the parties which way to go. One of the remedies is to go to court. However, on this particular matter, I have actually indicated to the House that within 45 days, the land will revert back to its original use.

**Mr. Mwangi:** On a point of order, Mr. Speaker, Sir. You heard the Assistant Minister say he needs 25 days and yet, he will consult the KACC. Is he in order to mislead the House that he has the ability to get the land back and yet he is seeking advice from the KACC?

**Mr. Rai:** Mr. Speaker, Sir, I said within 45 days that land will revert back to its original use. My colleague was not act actually in the House when I said I need 45 days. I want to correct him; it is 45 days and not 25 days. That is enough time for us.

This matter has taken some time. In fact, I think the hon. Member had indicated that it has actually taken about one and half years. With the new constitutional dispensation, we have actually communicated with the KACC and within 45 days, the result will be seen.

**Mr. Mututho:** On a point of order, Mr. Speaker, Sir. Is the Assistant Minister in order to criminalise each and every transaction entailed in that land, notwithstanding the fact that they have been adequate informed that several people purchased that particular land?

**Mr. Speaker:** Order! What do you mean by “criminalise”.

**Mr. Mututho:** Mr. Speaker, Sir, by invoking the KACC, it shows that all these transactions are subject to criminal investigation by the KACC under Dr. Lumumba.

**Mr. Speaker:** Mr. Assistant Minister, you may respond to that as best as you can.

**Mr. Rai:** Mr. Speaker, Sir, the land was initially public. How it went into private people's hands is an issue for the KACC to investigate in order to clear up the matter. I do not see why we are talking about criminalization of this matter. We are actually trying to save the situation so that the land reverts back to its original use.

*(Applause)*

**Dr. Khalwale:** On a point of order, Mr. Speaker, Sir. I rise on a point of order to insist that the Assistant Minister should declare his interest because I have here a copy of the Kenya Gazette Notice. It shows several title deeds. One of the title deeds is the one in the question that I raised. The others, while he was the lawyer for Mr. Kuria Kanyingi, he advised him to surrender them voluntarily, which he did. But this one, the same Assistant Minister told him not to surrender it. After he was appointed the Assistant Minister for Lands, he then revoked the title deed. So, could he declare his interest?

*(Dr. Khalwale laid the document on the Table)*

**Mr. Speaker:** Mr. Assistant Minister, could declare your interest in this matter? I think it is an easy matter to deal with.

**Mr. Rai:** Mr. Speaker, Sir, if any argument was prepared, it was not by hon. Samuel Gonzi Rai, as Assistant Minister for Lands. Maybe, it is another Minister for Lands, but not the one answering this particular question.

*(Applause)*

**Mr. Speaker:** Order! Order! I think the Assistant Minister has done very well.

*(Applause)*

Next Question, Member for Maragua!

*Question No. 649*

ILLEGAL ACQUISITION OF  
PARCELS OF LAND IN SABA SABA

**Mr. Mbau** asked the Minister for Lands:-

(a) whether he is aware that land parcel Nos. Loc.17/Sabasaba/1378 and Loc.17/ Sabasaba/1379, which were registered under Trust Land Board upto 6/04/09, have been illegally acquired and registered in the names of individuals,



(b) whether he could state the identities of the individuals, their physical location and how they were able to transfer the land to their names, and,

(c) whether he could consider reverting the parcels of land to public use.

**The Assistant Minister for Lands (Mr. Rai):** Mr. Speaker, Sir, I beg to reply.

(a) I am aware that land parcel No. Loc.17/ Sabasaba/1378 and Loc.17/Sabasaba/1379, which were registered under Trust Land Board up to 6/04/09 have been illegally acquired and registered in the names of individuals on diverse dates.

(b) The said parcels are registered in the names of: Dennis Kimeru Gachoka - Parcel No. Loc.17/Sabasaba/1378, Moses Mwangi Ndungu - Parcel No. Loc.17/Sabasaba/1379. The transfers to the aforementioned individuals were fraudulently done as no transfer documents were executed in their favour.

(c) A restriction was placed against the title deed prohibiting any dealings in anticipation of reverting the land back to public use.

**Mr. Mbau:** Mr. Speaker, Sir, I want to thank the Assistant Minister for, at least, conceding that public land was passed on to private individuals. I also want to thank him for appearing to have taken some precaution to ensure that the same is reverted back to the public. In his answer, he has said that some individuals who still possess that land – which is not theirs - are transferring it to innocent third parties. Could he confirm to me how long he will take to ensure that the transfer is cancelled once and for all? That is because the culprits can transfer it to third parties.

**Mr. Rai:** Mr. Speaker, Sir, my communication with the Kenya Anti-Corruption Commission (KACC) on this particular matter is--- I believe that within six days, we will finalise this matter and the land will be reverted back to its original use.

**Eng. Maina:** Mr. Speaker, Sir, land grabbing has been rampant in this country. He has said that he has referred that matter to the KACC. Is he aware that presently, in his Ministry, that practice is still going on? For example, today, there is a heightened push to divide the former colonial villages and dish out the plots to various individuals. What is he doing to ensure that, that practice for which he is taking people to KACC, does not continue in his Ministry? That is because that practice is continuing in his Ministry.

**Mr. Rai:** Mr. Speaker, Sir, that is a totally different Question and if my attention is drawn to it, I will revisit the issue and see the way forward.

**Mr. Olago:** Mr. Speaker, Sir, the history of Trust Land in our country is very sad. Before Kenya was colonized by Britain, no land was ever registered. When Kenya was colonized, land was registered as Trust Land and the whole concept of Trust Land was for the Government to look after the land in trust for the people. But even after Independence, the Government has misused that trust by evicting people on whose behalf it is holding the land without compensation. So, my question is this: Why did the Ministry invoke the Trust Lands Act to evict people of Kanoo, Kajulu and Nyakwari in Kisumu without compensation?

**Mr. Rai:** Mr. Speaker, Sir, I invite my colleague to put up a Question and I will go through my documents in the Ministry and then give him an appropriate answer.

**Mr. Mbau:** Mr. Speaker, Sir, finally, I want to inform the Assistant Minister that he has given the identities of the people who are involved. Some of them are councilors.

Those are councilors who have grabbed land belonging to the county. They are supposed to safeguard the interests of the public. They are councilors Moses Mwangi Ndungu and Dennis Kimeru Gachoka.

*(Applause)*

In view of the new Constitution, especially Chapter Six which requires that public leaders should lead by setting a good example of integrity, what is the Assistant Minister going to do to ensure that such persons who are entrusted with public leadership and are the ones who are depriving the public of what belongs to them are punished in the right manner?

**Mr. Speaker:** Mr. Mbau, do you have a basis to say that those councilors whom you have named grabbed that land?

**Mr. Mbau:** Mr. Speaker, Sir, the Assistant Minister was able to identify the persons who have possessed that land. Before then, I could not stand and say that the land is possessed by councilors. But now, the names are those of the councilors.

**Mr. Speaker:** Mr. Rai, is that so?

**Mr. Rai:** Mr. Speaker, Sir, as to whether they are councilors or not--- I believe they are just Kenyans because, in my records, they are known as Denis Kimeru Gachoka and Moses Mwangi Ndungu. Since I do not come from that particular area, it might be difficult for me to say whether they are councilors or not. But be that as it may, with the new Constitution, I believe that once we start putting the necessary laws into place, something will happen to all those people who have grabbed public utility land.

*Question No.569*

MEASURES TO RECTIFY SKEWED LENDING  
RATES BY BANKS

**Mr. Kombo** asked the Deputy Prime Minister and Minister for Finance:-

(a) whether he is aware that commercial banks are taking deposits at less than 2% and lending at over 12 per cent;

(b) whether he is further aware the practice is discouraging both depositors and borrowers and hence hampering economic development and, if so, what measures the Government will take to ensure that the above situation is rectified; and,

(c) whether he could also explain why efforts by the Central Bank of Kenya (CBK) to persuade commercial banks to reduce their lending rates has not been successful.

**The Assistant Minister, Office of the Deputy Prime Minister and Ministry of Local Government** (Mr. Nguyai): Mr. Speaker, Sir, I had answered the whole of this Question yesterday and it is pretty lengthy. The only thing is that he did not have a written copy of the answer. I wonder whether you would want me to answer the whole lengthy Question again for the sake of the House.

**Mr. Speaker:** Order! You do not need to repeat the full answer! Mr. Kombo, ask a supplementary question!

**Mr. Kombo:** Mr. Speaker, Sir, of course, I was surprised that the Office of the Deputy Prime Minister and Ministry of Local Government is answering on behalf of the Deputy Prime Minister and Minister for Finance. Is he on his way there?

*(Loud consultations)*

That was on a light note! In his answer which I have now read through, I am glad that he has recognized that the spread is very large. But he talks about cheap deposits that come into the banks. He does not tell us where those cheap deposits are. For the economic growth that he has talked about to be spurred even further, small entrepreneurs are needed. With this large spread, how will he encourage small entrepreneurs to borrow from the banks so that the economy can grow? Do you want to say the rich can borrow but the poor cannot?

**Mr. Nguyai:** Mr. Speaker, Sir, as you may realize, in fact, I have to delegate one of the Ministry of Finance Questions because I had very many today. I am not here as the Minister for Finance as yet, but I can see that there are signs---

**Mr. Speaker:** Order, Mr. Nguyai! You are answering as a Minister. You need not dwell on side shows!

**Mr. Nguyai:** Mr. Speaker, Sir, it was also on a light note. Normally, the spread of interest rates depends on the duration of time that the deposits or savings are made. If you look at what I would not necessarily call cheap deposits---. I mean deposits that come in on a day and go out in probably less than three months. Obviously, they are more expensive to the bank and they would not attract a higher interest rate. If you look at the ones that have a wider spread, you can find that the ones that are over three months, the margin between the savings and the deposits reduce to something like only 4 per cent. So, what we are trying to do in order to ensure that we are able to encourage more and more people to save and access banking facilities at a cheaper rate is to try and encourage banks to become much more efficient in delivering services and, as such, they will reduce the costs of banking services and then provide better interests.

**Mr. Mungatana:** Mr. Speaker, Sir, I wanted to bring to the attention of the Assistant Minister that the real question here is why is it that the cost of money is so expensive when you are dealing with individuals? I would like to lay on the Table the survey on bank charges and lending rates that was carried out by the Central Bank of Kenya. I just want the Assistant Minister to tell us in terms of reducing the cost of loans to individuals, what is the difficulty the Government is facing in standardizing those costs? If you look at this, there is a tabulation there on interest that is incurred on a loan of Kshs50,000 by various banks. Some of those banks will charge you facility fee, processing fees, early repayment fees, registration fees, valuation fees, insurance fees, appraisal fees, legal fees and all those fees that end up making the loan even more expensive than the interest itself. What is the Government doing to standardize and reduce the costs that affect an individual who comes to borrow money?

**Mr. Speaker:** Order! Member for Garsen, you know it is Question Time. Leave it where you are, because you have already asked the question. You have asked the Assistant Minister what they are doing to standardize the borrowing and lending rates.

**Mr. Mungatana:** Yes, and going with that---

**Mr. Speaker:** No, you cannot go with that. You have asked a question, so let the Assistant Minister answer.

**Mr. Nguyai:** Mr. Speaker, Sir, one of the reasons why small loans are more expensive than others is because of the risk factors that we have when it comes to assessing the small loans. What we have tried to do so far is to get shared information by creating information systems through the credit reference bureau. I think it will be very difficult as of now to assess the ability of certain individuals on how they can access loans. However, I think with time we should come up with good legislation that allows us to share information on this issue.

**Mr. Bahari:** Mr. Speaker, Sir, this is a very fundamental Question because you must have seen at the end of every year the banks announce supernormal profits in a very weak economy like Kenya. This Ministry, surprisingly, is excited with this answer by saying that there is tremendous growth realized. However, they fail to realize that what is happening in the industry is stifling growth. We are not realizing even half of the potential. Could the Assistant Minister now tell us what percentage of the loans have turned out to be bad debts to prove the fact that the risks are high?

**Mr. Nguyai:** Mr. Speaker, Sir, yes, banks have been making a tremendous amount of profits as, probably, other businesses in this country. I might be quick to first point out that the big amounts of profits are realized from the well-performing loans that are normally borrowed by large corporations that do business with these banks. I do not have the specific tabulation of what percentage of loans are not performing. However, I can easily say that a majority of the non-performing loans come from individuals. The mechanism that we need to put in place is how we can fairly assess individuals and reduce the risk.

**Mr. Bahari:** On a point of order, Mr. Speaker, Sir. This Question is very key to Kenyans. You heard the Assistant Minister say, in the first instance that because of the risks involved, that is why the interest rate for loans is very high and now he does not even have the figure. Would I be in order to request that this Question be deferred, so that he can actually substantiate that issue of non-performing loans?

**Mr. Speaker:** Order, Member for Isiolo South! The Assistant Minister did assert that he did not anticipate that a question would be raised on proportionality of bad debts in percentages. I think he is entitled to that. What you can do is follow up on the matter with him because he says he is able to furnish you with facts and figures. He has that information.

**Mr. Kombo:** Mr. Speaker, Sir, in view of the fact that persuading the banks has not yielded any results; the banks seem to have ignored the Central Bank of Kenya (CBK) completely. So that we do not bring back the Donde Bill, that is the *in duplum* rule, what is he planning to do? He should set the ceilings through the CBK and ensure the penalties for not keeping up the ceilings are very high for the commercial banks to do what the CBK is saying.

**Mr. Nguyai:** Mr. Speaker, Sir, the new dispensation, in effect, will bring a better business environment and more efficient services. This will bring down the cost of doing business. We must realize that we are in a free market economy. We are trying to adopt the most competitive and efficient ways of doing business. As such, it is the new monetary policies and laws contained in the Constitution that will make this a better country.

*Question No.620*

PROVISION OF VEHICLES FOR  
SUPERVISION OF PROJECTS

**Mr. Kigen** asked the Deputy Prime Minister and Minister for Finance:-

(a) what he is doing to ensure that District Education Officers (DEOs) are equipped with vehicles for use in their monitoring and supervision of projects funded under the Economic Stimulus Package;

(b) what modalities are in place to ensure close supervision of projects under the Economic Stimulus package in view of the Kshs8 billion allocated to the Ministry; and,

(c) whether he could confirm that the Ministry of Education requested for Kshs416 million in the 2010/2011 Financial Year for the purchase of 114 vehicles for supervision and monitoring of projects and, if so, whether he could consider allocating funds in the next Supplementary Budget.

**The Assistant Minister, Office of the Deputy Prime Minister and Ministry of Local Government (Mr. Nguyai):** Mr. Speaker, Sir, I beg to reply.

(a) The Ministry of Finance allocated Kshs20 million to the Ministry of Education to enable the officers to monitor projects under the Economic Stimulus Programme (ESP) that is Centres of Excellence and Primary Schools. An additional Kshs47 million was released to the Ministry of Education for ESP training.

(b) The Ministry of Education and Ministry of Public Works have undertaken the following measures to ensure quality of construction and timely completion of the projects:

1. All schools must have valid procedurally appointed District Infrastructure Committees (DICs) and School Infrastructure Committees (SICs) for supervising and monitoring the projects.
2. The Ministry of Public Works through the District Works Officer also supervises the projects.
3. The Ministry of Education has carried out capacity building programmes to DICs and SICs on their roles and responsibilities in supervising and monitoring these projects.
4. The Ministry has recruited consultants to supervise the construction of projects to ensure quality.
5. We also have School Management Committees and Boards of Governors that are making payments to contractors based on certificates issued by professional consultants.
6. In the meantime, the Ministry is obtaining updated reports on the progress and challenges of the projects through the District Education Officers.
7. Any complaints from the stakeholders on the projects are addressed immediately by sending a fact-finding mission to the ground.

8. The Ministry of Finance is also on the final stage of the completion of the ESP website that will have a Geographical Information System (GIS). The system and field visits will be used to monitor progress of the projects at various stages of implementation. The general public will be able to access the websites and see the status of the ESP.

(c) Yes, I confirm that the Ministry of Education requested for Kshs416 million for the purchase of 114 vehicles in the financial year 2010/2011. In reply, the Ministry was informed that due to resource constraints, Treasury was not able to provide additional funds.

As the Ministries are now preparing their 2011/2012 budget, I would request that the Ministry of Education prioritize their budget and consider the purchase of vehicles within their ceiling.

**Mr. Kigen:** Mr. Speaker, Sir, you did hear the Assistant Minister say that they set aside Kshs20 million to be used to assist in the monitoring of the progress of these projects on the ground. The client is the District Education Officer (DEO) on behalf of the Ministry of Education. The fact is that the DEO is not able to physically inspect these projects on the ground. Why would the Deputy Prime Minister and Minister for Finance find it difficult to ensure that Kshs8 billion is properly supervised by allocating Kshs416 million?

**Mr. Nguyai:** Mr. Speaker, Sir, we allocated Kshs20 million to supervise the effective monitoring of ESP projects through the Ministry of Education. Just as I had explained, we were unable to provide any additional funding but we have requested the Ministry of Education, through this House, to ensure that they make that requisition and it will be considered in due time.

**Mr. Mututho:** Thank you, Mr. Speaker, Sir. You heard the Assistant Minister say that they have allocated Kshs20 million for transport. That translates to Kshs390,000 per county or approximately Kshs100,000 per constituency. What type of transport would that be?

**Mr. Nguyai:** Mr. Speaker, Sir, you will realize that this is for the Projects Monitoring and Evaluation. It is not a daily expense. It is for *ad hoc* visits, when need arises, to ensure that supervision is done.

**Mr. Koech:** Mr. Speaker, Sir, the ESP projects have been well received by the people of Kenya and especially by parents. I would like to ask the Assistant Minister; what plans does he have, since they are very good at cutting the Ministry's budgets, to ensure that there will be enough money to equip and staff those schools, so that the public can benefit from the same?

**Mr. Nguyai:** Mr. Speaker, Sir, we are working in close consultations with the Ministry of Education to ensure that the ESP projects are not white elephants, but instead, become successful. We are now looking at the full requirements of particular centers to be put in place. Once we see the requirements, we will see what budgetary provisions we will make.

**Mr. Kigen:** Mr. Assistant Minister, what will you do to ensure that the unfinished ESP projects are completed by the end of the next financial year?

**Mr. Nguyai:** Thank you, Mr. Speaker, Sir. As I had said before, we are consulting with all Ministries that have been implementing the ESP projects to see what additional requirements are needed so that they become successful and fruitful.

*Question No.693*

SAVINGS FROM NEW TRANSPORT POLICY

**Mr. Langat** asked the Deputy Prime Minister and Minister for Finance:-

(a) how much money the Government has saved as a result of the austerity measures on the cost of transport for public officers outlined by the Minister in his 2009/2010 Budget Speech, and whether he could provide a per-Ministry transport cost comparison for 2008/2009 and 2009/2010;

(b) how many motor vehicles were sold, how much was realized and how the funds were utilized; and,

(c) whether he could state the number of non-fuel guzzler vehicles purchased and the cost.

**The Minister for Transport** (Mr. Kimunya): Mr. Speaker, Sir, I beg to reply.

(a) The Government saved Kshs846,355,639 in the Financial Year 2009/2010 as a result of the implementation of austerity measures on the cost of transport. I, hereby, table a detailed breakdown showing the transport comparison per Ministry for the Financial Years 2008/2009 and 2009/2010, which will be contained in the Government Accounts books once they are released.

(b) As at 31<sup>st</sup> December, 2010, a total of 1,491 of the surrendered vehicles had been sold. That sale realized Kshs338,244,955 and that amount has already been paid to the Exchequer.

(c) A total of 150 non-fuel guzzlers have been purchased at a total cost of Kshs566,950,000.

**Mr. Langat:** Thank you, Mr. Speaker, Sir. I have looked at the table that the Minister has laid on the Table. However, it seems as if the Minister is comparing the estimates of the two financial years. That should not be the case. It was a major pronouncement by the Deputy Prime Minister and Minister for Finance. I am sure that there must have been some workings to show what the Government was targeting to save. Could he tell us whether there was a target amount aimed at being saved and whether the amount that was saved was within that target amount?

**Mr. Kimunya:** Mr. Speaker, Sir, indeed, the target amount was Kshs1.2 billion and Kshs.846,355,639 has already been realized. The difference between the target and what was realized is the escalation of costs due to the increase in fuel prices. The extra vehicles were purchased for the ESP projects and security operations. That had a trickle effect such that the savings went to Kshs850 million, which is still a major saving.

**Mr. Ochieng:** Mr. Speaker, Sir, if I got the Minister right, he has indicated that they sold those vehicles at a cost of Kshs338,244,955. They bought the fresh fuel guzzlers at Kshs566 million. Could he tell us if there was any logic in recovering those vehicles from different Government Departments?

**Mr. Kimunya:** Mr. Speaker, Sir, the Kshs338,244,955 is what was realized from the vehicles that were sold. There are still more vehicles to be sold. In fact, hon. Members

may have noted that in the media, this week, there were adverts for tenders for some of the vehicles that are yet to be sold.

**Mr. Ochieng:** On a point of order, Mr. Speaker, Sir!

**Mr. Kimunya:** Mr. Speaker, Sir, could I finish?

**Mr. Speaker:** Order! Member for Nyakach, allow the hon. Minister to finish.

**Mr. Kimunya:** Mr. Speaker, Sir, we are talking about what has been realized to date. We are not talking about the cost of the vehicles that will be sold. This is the amount that has been realized from the sale of the vehicles. There are still more vehicles to be sold. The new vehicles were purchased at a cost of Kshs500 million compared to what would have been spent on higher capacity vehicles which, at the very least, would have cost double that amount. So, there was realization of costs in terms of buying the Passats and saving on the Mercedes Benzes. The operational cost of the Passats is far much lower than the higher capacity vehicles which are, certainly, much more expensive, as hon. Members who have them may have realized by now.

**Mr. Njuguna:** Thank you Mr. Speaker, Sir. I thank the Minister for the answer that he has given. However, could he also indicate to this House the number of the unsold vehicles and specify why they have not been bought by Kenyans?

**Mr. Kimunya:** Mr. Speaker, Sir, the number can be provided, subsequently. However, the reason for the slow off-take of the vehicles is that previously, they were being sold on auction basis. The Government had, obviously, some reserve prices and did not want to throw them away, depending on the prices determined by the auction. The vehicles whose bids had not matched the reserve prices were retained to ensure that the Kenyan public gets maximum value from the disposal of those vehicles.

A second batch has now been tendered and the process will continue until all the vehicles have been disposed off without losing value to the Kenyan taxpayer, who had paid for them in the first instance.

**Mr. Mwathi:** Thank you, Mr. Speaker, Sir. Since we are aware that the policy of the Government is to have 1,800 cc engine capacity saloons; what you are calling the non-fuel guzzlers. How did you arrive at the decision to buy Passats and yet, vehicles within that range are very many? What did you consider in purchasing Passats only?

**Mr. Kimunya:** Mr. Speaker, Sir, I believe that Question was responded to in this very House last year and the Minister tabled all the details of the whole tender process that arrived at the decision on the Passats. It is purely a matter of a combination of the cost of the vehicles, the maintenance cost and who was available to supply all those vehicles at the time they were required. All that went through a competitive process by the Treasury with all the major vehicle suppliers. The information is already in this House.

**Mr. Langat:** Mr. Speaker, Sir, looking at the cost of the Passats and the amount that has been recovered from the sale of the fuel guzzlers, they are almost similar. It is very possible that the cost of replacing the Passats plus the initial costs will exceed the savings. Could the Minister confirm whether there were actual computations to determine the long-term benefits of this decision?

**Mr. Kimunya:** Mr. Speaker, Sir, indeed, the computations have been going on since 2006 when a transport taskforce was put in place to look at the Government transport. It identified the number of vehicles that were required, the number of vehicles the Government had and what it needed to go forward. The purchase of vehicles with less



than 1800 cc was informed by the work of the taskforce. As Members are aware and this was included in the Budget Speech and in answers this week, the Government intends to work on leasing mechanisms, so that the upfront cost of purchasing vehicles does not need to be a burden on the Exchequer. The Government can disburse the utilization of the vehicle as the vehicle is being utilized, so that we do not end up with a situation of buying vehicles and then not being sure how to dispose them off and not getting value for money. All this has been informed by proper studies and is backed by statistics. This information can be shared, as indeed, Mr. Speaker directed that the information on the leasing be shared. We will be happy to share some of these research findings with the hon. Member on what informed the purchase of these vehicles.

*Question No.655*

SUPPLY OF ELECTRICITY TO  
KYAMATU/VOO LOCATIONS

**Mr. Speaker:** Member for Mutito! He is not here. The Question is dropped.

*(Question dropped)*

Hon. Members, the balance of the Questions on the Order Paper beginning from Question No.674 to Question No.700 will be deferred to Tuesday afternoon, at 2.30 p.m., because of the nature of business that is still on the Order Paper.

*Question No.674*

DISBURSEMENT OF FUNDS BY YEDF  
IN THARAKA CONSTITUENCY

*(Question deferred)*

*Question No.683*

FILING OF CASES BY NMC EMPLOYEES

*(Question deferred)*

*Question No.688*

PROMOTION OF WESTERN CIRCUIT  
AS TOURISM DESTINATION

*(Question deferred)*

*Question No.700*

LIST OF QUALITY-FOUR-STREAMED NATIONAL AND  
PROVINCIAL SCHOOLS IN 47 COUNTIES

*(Question deferred)*

**COMMUNICATIONS FROM THE CHAIR**

Hon. Members, before we move to the next Order, I have two communications to make. First, as follows:-

PRESENCE OF MEMBERS FROM BOTSWANA IN SPEAKER'S ROW

Hon. Members, I wish to introduce to you a delegation from the Parliament of Botswana, who is seated at the Speaker's Gallery. The delegation comprises the following hon. Members:-

Hon. Vincent T. Seretse, MP, Leader of the delegation

Hon. Gilson Saleshando, MP

Hon. Mephato R. Reatile, MP.

The delegation is accompanied by Ms. Nkabo Kefhilwe, Committee Clerk. The team is in the country to learn and share with their counterparts at the Parliamentary Service Commission and the CFC Committees on the terms and conditions for Members of Parliament and the running of the Constituencies Development Fund. They will be with us between today and tomorrow. Let me, on behalf of myself and that of the hon. Members of this House welcome them to Kenya. May I request that we all accord them the support they require.

HIGH COURT RULING ON CONSTITUTIONALITY  
OF NOMINATION OF JUDICIAL/FINANCE  
OFFICERS BY THE PRESIDENT

The second Communication is as follows:- On Tuesday, 8<sup>th</sup> February, 2011, the Member for Kisumu Town West, hon. John Olago Aluoch, rose on a point of order to seek the direction and guidance of the Chair on what he described as an issue galvanizing the attention, not just of the House, but also of the country. Mr. Olago sought to know how the twin doctrines of *sub-judice* and injunction apply to the proceedings in Committees of the House dealing with the nominations to Judicial and Finance Offices by His Excellency the President. Mr. Olago drew the attention of the Chair to and tabled a ruling of the High Court delivered by hon. Justice Musinga on 3<sup>rd</sup> February, 2011, in Nairobi High Court Petition No.16 of 2011, Centre for Rights Education and Awareness and Others versus the Attorney-General. He similarly tabled an order extracted on 7<sup>th</sup> February, 2011, from that ruling and a letter addressed to the Deputy Registrar of the High Court in Nairobi by the counsel for the respondent. In the letter, the Counsel requests the Deputy Registrar to place the matter before the Judge for directions on a hearing date for the petition and suggests 9<sup>th</sup> February, 2011, if that date is convenient to the court.

It was the assertion of Mr. Olago that arising from the documents tabled, he had established that the High Court Petition No.16 of 2011, was active. Mr. Olago claimed that at the time the Speaker delivered his ruling on 3<sup>rd</sup> February, 2011, referring the matter of certain constitutional nominations to the Committees of the House, his attention had not been drawn to the ruling of the High Court on the same matter and that the Speaker's attention now having been drawn to it, it was appropriate that the Speaker determines whether or not it will be proper for the Committees to proceed to consider nominations to those offices in view of the orders of the court.

The Chair allowed a number of interventions on the point of order raised by Mr. Olago. Hon. James Orenge, Minister for Lands and the Member for Imenti Central, Mr. Gitobu Imanyara, urged the Speaker to find that the matter was *sub-judice* while hon. M. Kilonzo, Minister for Justice, National Cohesion and Constitutional Affairs and hon. Amos Kimunya, Minister for Transport, were of the opposite view. The Minister of State for National Heritage and Culture, hon. ole Ntimama, also spoke to the matter. He was concerned at the manner in which the relevant Committees were going about their work, decrying certain statements from Members of those Committees indicating the pursuit of an ethnic and/or partisan agenda.

Hon. Members, as I was undertaking to make a ruling on the point of order raised by hon. Olago, hon. George Nyamweya rose on another point of order seeking guidance on whether it was in order for a Member of a Committee to raise in the House an issue which he could raise in the Committee and thereby leaving other Members of the Committee unable to respond or deal with it. I also undertook to give directions on this.

Hon. Members, aside from the point of order raised by Mr. Nyamweya, the issues I have to determine are two, namely: (a) whether the matter of consideration of the nominees for the positions of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget is *sub judice* and whether, therefore, the House should suspend all action on it until it is finally determined by the court; and (b) what effect, if any, the ruling of the court and its orders have on the proceedings of this House and its relevant Committees in consideration of the matter of the nominees.

As hon. Olago pointed out in canvassing his point of order, the Chair has previously, more so on 27<sup>th</sup> November, 2008, ruled on a matter which was almost identical to the present one. On that occasion, the same hon. Member sought a ruling as to whether or not conservatory orders issued by the High Court in Judicial Review Petition No.689 of 2008 – Samuel Kivuitu and 22 others versus the Hon. Attorney-General – amounted to a derogation of the constitutional principle of separation of powers by the Judiciary.

Hon. Members, in that case, the High Court had, on 11<sup>th</sup> November, 2008, issued an order restraining the Government of Kenya from taking or commencing any Executive or Legislative Action or process to disband or abolish the defunct Electoral Commission of Kenya and or remove its members from office, pending the hearing and determination of the application. Mr. Olago, in fact, asserted that the ruling of the High Court contravened Section 30 of the Constitution and amounted to a subjugation of Parliament by the Judiciary.

Looking at the point of order raised on that occasion and the arguments made and my ruling then, I have been struck at how amazingly identical the issues are. On that occasion, as on this occasion, my ruling identified the issues for determination as the

applicability of the rule on *sub judice* as well as the effect of a purported injunction on Parliament. I have read with some amusement, if not disbelief. Hon. Members may wish to re-visit the HANSARD of the time and read the arguments made in support or opposition of the various positions advanced. The arguments are virtually the same as those made here on Tuesday, 8<sup>th</sup> February, 2010, with one major difference---

*(Laughter)*

Order, hon. Members! Those at the Bar may want to walk in.

*(The hon. Members who were standing at the Bar walked into the Chamber)*

Hon. Members, the arguments are virtually the same as those made here on Tuesday, 8<sup>th</sup> February, 2011, but with one major difference: Some hon. Members have advanced completely opposite arguments on the issue on this occasion from the positions they took in November, 2008. Of course, an hon. Member or, indeed, any other person has the right to change their minds, and it may very well be that three years is a long time.

*(Laughter)*

I must caution that the conduct of Parliamentary business requires respect for the procedure, traditions, practice and precedents established by the House. The Chair represents the institutional memory of the House to ensure that this is so. The Chair, therefore, does not enjoy the luxury of changing positions and departing from practice and precedents unless the circumstances can be shown to be distinctly the same.

Hon. Members, the subject of the rule of *sub judice* in the context of the business of the National Assembly is one upon which the Speaker has ruled severally in recent times and is now firmly established in this House. It does not appear to me that the matter merits a lengthy discussion on this occasion because all the precedents are available to both Members of this House and to the country at large.

The rule of *sub judice* is one which the House has imposed on itself, and which is espoused in Standing Order No.80(1). The essence of this rule is that, subject to the Speaker's discretion to allow reference to any matter before the House or a Committee of the House, it is not permitted for an hon. Member to refer to a matter which is the subject of active criminal or civil proceedings if discussion of such a matter is likely to prejudice its fair determination.

Hon. Members, Standing Order No.80(4) makes it clear that the onus of showing that a matter is *sub judice* lies on the hon. Member alleging so. Such an hon. Member is required to produce evidence that Paragraphs 2 and 3 of Standing Order No.80 are applicable.

On the matter of *sub judice* in the present case, therefore, the role of the Chair is to determine: (a) whether or not there are active court proceedings; (b) whether or not there is likelihood of prejudice to their fair determination; and (c) whether or not the answer to (a) and (b) is in the affirmative. The Speaker will nonetheless exercise his

discretion in favour of allowing references to those matters. If the answer to (a) and (b) is in the negative, it will be necessary for the Speaker to exercise his discretion.

Hon. Members, Standing Order No.80(3)(c) provides *inter alia*; that civil proceedings shall be deemed to be active when arrangements for hearing such as setting down a case for trial have been made and until the proceedings are ended by judgement or discontinuance. In order to show that this provision is applicable, hon. Olago, as I indicated earlier, tabled a letter addressed to the Deputy Registrar of the High Court by Counsel for the respondent, requesting the Registrar to place the matter before the Judge for directions on a hearing date for the petition and suggests the 9<sup>th</sup> of February, 2011, if that date was convenient to the court.

Hon. Members, a request for a hearing date is clearly not the same thing as setting down of a hearing date. It follows that as at when Mr. Olago sought to rely on the *sub judice* rule, a hearing date had not been set down. This requirement is important as it ensures that the House does not suspend business without proof that the matter will proceed on a known future date. For this reason, Mr. Olago did not establish that the proceedings were active.

I, therefore, find and rule that on this score, the matter is not *sub judice* within the meaning of Standing Order No.80(3)(c).

Hon. Members, as I have previously ruled, the *sub judice* rule is not one to be invoked lightly. A claim of a likelihood of prejudice of the fair determination of a matter is similarly not to be invoked without circumspection. I have ruled before and I reiterate that gagging this House and preventing it from discharging its constitutional mandate requires tangible reasons to be advanced. The danger of prejudice to the due administration of justice must be clearly shown.

Speaker Snedden of the Australian House of Representatives held similar views when in 1976 he stated as thus: "There is the long line of authority from the courts which indicates that the courts and judges of the courts do not regard themselves as such delicate flowers, and they are likely to be prejudiced in their decisions by a debate that goes on in the House."

Hon. Members, even if it had been shown – which it was not – that the proceedings were active within the meaning of our rules, I am not prepared to find that in the present circumstances, there was or there is, a likelihood that the debate in this House would prejudice the fair determination of the matter.

The ruling of the High Court was in fact rendered---

Hon. Members, I will pause for a moment and let the hon. Members at the Bar walk in.

*(The hon. Members who were standing  
at the Bar walked into the Chamber)*

Hon. Members, the ruling of the High Court was, in fact, rendered after a fairly robust debate in this House in which all the questions which the court was determining had been argued. Additionally, I have perused the ruling of the court and the order extracted therefrom and found that I agree with Mr. M. Kilonzo that there is finality to the declaration of the unconstitutionality of the nominations. That leaves very little in respect of which the court, or the parties, can be prejudiced by the actions of this House.

Hon. Members, maybe you will want to look at that ruling; the prayers before the ruling was made were for conservatory orders. The ruling delivered by the judge actually went on and declared conclusively that the nominations were unconstitutional. I want you to read that and you will find that there is meaning in what I am saying.

Having found that the matter is not *sub judice* it is almost an academic exercise to consider how I will have exercised my discretion, whether or not to allow reference to the matter in the House and in the Committees, if the matter had qualified as being *sub judice*. However, I do think that it will aid the House to know that in a matter such as this, a matter that has occupied newspaper headlines and editorials, extensive television coverage and topical discussions in the streets and places of refreshments, it would be very odd, indeed, and hardly in keeping with our Constitution if some rule in our Standing Orders could be construed as making the National Assembly the only place where the matter could not be discussed.

(Applause)

Nor could a rule in our Standing Orders be construed as preventing the National Assembly from proceeding with an approval process ordained by the Constitution. It is my position that where, as in the present case, the public interest is for an open and detailed discussion of a matter, the Speaker will invoke Standing Order No.80, paragraph 5 to overrule any objections founded on the *sub judice* rule.

Hon. Members, on the matter of the effect of the orders of the High Court on this House and the Committees, I, again, find that I addressed this matter adequately on 27<sup>th</sup> November, 2008, and again just last week on 3<sup>rd</sup> February, 2011.

Article 1 of the Constitution provides that all sovereign power belongs to the people of Kenya, and shall be exercised only in accordance with the Constitution. It further provides that the people may exercise their sovereign power either directly or through their democratically elected representative. Chapter 3 of the former Constitution which is preserved by the new Constitution is still in force, and it enacts Parliament. Section 30 of the Constitution stipulates that the legislative power of the Republic vests in the Parliament of Kenya. Section 46 of the Constitution provides for the exercise of legislative power of Parliament. Section 56 of the Constitution provides that the National Assembly may make Standing Orders regulating its procedures, while Section 57 allows for the provision of powers, privileges and immunities of the Assembly, and its Committees and Members. Section 12 of the National Assembly Powers and Privileges Act, Chapter 6 of the Laws of Kenya, states as follows:-

“Immunities from legal proceedings – No civil or criminal proceedings shall be instituted against any Member for words spoken before or written in a report to the Assembly or Committee or by reason of any matter or thing brought to him therein by petition, Bill, resolution, Motion or otherwise”.

Hon. Members, that is significant; go and acquaint yourselves with that provision in the Powers and Privileges Act, Chapter 6 of the Laws of Kenya. I have just read it out.

Section 12 of the National Assembly Powers and Privileges Act, states as follows:-

“No proceedings or decision of the Assembly or the Committee of privileges acting in accordance with this Act shall be questioned in any court”.

Section 29 of the same Act, in fact, removes from the jurisdiction of the courts the acts of the Speaker and officers of the Assembly by providing as follows:-

“Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders”.

Chapter 10 of the Constitution establishes the Judiciary and provides in Article 159 that the judicial authority is derived from the people and vests in and shall be exercised by the courts or tribunals established by or under this Constitution. The Article requires the judicial authority to be exercised in a manner that promotes and protects the purpose and principles of the Constitution. These provisions emphasize the constitutional basis for the principle of separation of powers that is a prerequisite for a functioning democracy. The operation of the principle, as I have had occasion to hold, both separates and blends the powers so that each branch serves as a check and balance on the powers of the other. It ensures the protection of the rule of law, and secures the fundamental rights of the individual. Each branch of Government must exercise its powers in a fine balancing act to ensure that it properly and effectively carries out its functions while at the same time it does not infringe on the powers and responsibilities of the other branches of Government. Thus, this House is the Assembly of the people. It represents their will. It enacts laws and deliberates on and resolves issues of concern to the people. The Judiciary can review the constitutionality of legislation or other actions taken by the National Assembly, if challenged and can, indeed, declare a law, or other action taken by the House, to be unconstitutional and to be annulled.

Hon. Members, in my understanding, which I have stated severally before from this Chair, what the Judiciary cannot do under our Constitution is to stop or prevent the National Assembly from undertaking its Constitutional mandate.

*(Applause)*

Hon. Members, neither can the Judiciary compel any action to be undertaken by Parliament. The principal ensures that Parliament, as the representatives of the people, is not prevented from giving voice to the will of the people. An attack on this principal is an attack on the sovereignty of the people. In my estimation, it is a grave attack on the Constitution.

Hon. Members, no one outside Parliament, not the Executive and not the Judiciary, tells Parliament in a compulsive manner what to do or not to do, when to do it and how to do it.

Hon. Members, this is not new jurisprudence. Our courts are themselves aware of the respective spheres of operation of Parliament and the Judiciary as evidenced by a number of decisions of the superior courts of this country, which I have had the opportunity to read. The courts have recognized that next only to the privilege and immunity of free speech within the House, the most important privilege of the House is the right of the House to regulate its own procedure, free from intervention by the Executive or the courts.

The courts recognize that this privilege of the House can visit no harm on their authority or on the administration of justice, because the courts retain the residual

constitutional and judicial authority to declare any act or omission of any person to be unconstitutional.

Hon. Members, I will allow those at the Bar to walk in.

*(The hon. Members who were standing  
at the Bar walked into the Chamber)*

Hon. Members, for the reasons I have advanced the orders of the High Court, or any other court, in whatever form they may be worded must be construed to have been made with the intention to abide by the Constitution and will be so interpreted by the Speaker for the purposes of this House. That is the essence of the oath of office of the Speaker. I, therefore, rule, in answer to hon. Olago, that the orders of the court made in Nairobi High Court Petition No.16 of 2011, Center for Rights, Education and Awareness and others versus the Attorney-General, on 7<sup>th</sup> February 2011 were not addressed to this House, and were not intended to, and have no effect on the exercise by this House of any of its constitutional functions. The orders have no effect on the work of this House or its Committees, and the same will proceed as I have previously directed.

*(Applause)*

Hon. Members, it must however, be noted that it is a binding decision of the court, and unless varied by the court or by an appellate court it may have a bearing on the outcome of the processes undertaken.

*(Applause)*

Hon. Members, Mr. Olago thought that it was an omission on the part of the Chair not to consider the effect of the ruling of the court after delivering his ruling. It was not. In fact, it was a celebration of the doctrine of separation of powers that both the High Court's ruling and that of the Speaker were made on the same day, and within hours or minutes of each other without either the Judge of the High Court or the Speaker finding any need to wait and see what the other will rule.

Hon. Members, this is as it should be. The two institutions are distinct and separate and have separate constitutional mandates. None is beholden to the other.

The final matter which I must address is the point of order raised by Mr. Nyamweya. In answer to Mr. Nyamweya, I wish to advise that it is courteous and good practice, which the Chair will encourage, that any matters arising in Committees be raised, handled and disposed of in the Committees. In fact, to this end, Standing Order No.78 prevents reference in the House to the substance of matters in Committees. Committees are, however, agents of the House. A Member does not lose the right of audience in the House if he or she has a matter which can properly be addressed in the House. I note that in the present case, the guidance sought by Mr. Olago was a matter applying to more than one Committee, and occasioning anxiety in the broader membership of the House. I am, therefore, prepared to find that the action of Mr. Olago was in order, but hasten to add that it should not be seen to create a precedent.

Thank you!



*(Applause)*

Next Order!

**Mr. Speaker:** Are there any Statements due for delivery today?

**Mr. G. Nyamweya:** On a point of order, Mr. Speaker, Sir.

**Mr. Speaker:** Order, Mr. Nyamweya!

Are there any Statements for delivery?

Mr. Minister for Transport you may proceed! How long is the Statement?

**The Minister for Transport** (Mr. Kimunya): Mr. Speaker, Sir, this is the Order for Leader of Government Business.

**Mr. Speaker:** Yes, please, proceed!

## MINISTERIAL STATEMENT

### PARLIAMENTARY BUSINESS FOR THE WEEK

**The Minister for Transport** (Mr. Kimunya): Mr. Speaker, Sir, pursuant to provisions of Standing Order 36(4) I take this opportunity to make the following Statement with regard to the business for the week commencing the 15<sup>th</sup> of February 2011.

Mr. Speaker, Sir, the House is expected to deliberate on the Motion on adoption of the Report of the Departmental Committee on Justice and Legal Affairs on the nomination of the Chief Justice, Attorney-General and the Director of Public Prosecutions, and the Motion on the adoption of the Report of the Departmental Committee on Finance, Planning and Trade on the nomination of the Controller of Budget.

Mr. Speaker, Sir, may I take this opportunity to congratulate you on your ruling which now facilitates these Committees to present these Reports.

Also the House Business Committee (HBC) did ballot for consideration:-

(i) a Motion by Mr. Eugene Wamalwa to the Ministry of Agriculture;

(ii) a Motion by Mr. Affey to the Ministry of State for Immigration and Registration of Persons.

The HBC will convene on Tuesday the 15<sup>th</sup> of February 2011 to consider business for the rest of the week.

Thank you.

**Mr. Speaker:** Are there requests for Statements?

Hon. Members, next will be Order No.8 and in respect thereof, I have received a request from the Committee on Justice and Legal Affairs that they have not quite been able to find time away from the business of nominations to input into this Bill.

So, their report is not ready and they have pleaded that we give them until Tuesday next week. I find that request reasonable and, therefore, defer Order No.8 to Tuesday afternoon.

## COMMITTEE OF THE WHOLE HOUSE

### THE VETTING OF JUDGES AND MAGISTRATES BILL

*(Order deferred)*

### BILL

*Second Reading*

### THE JUDICIAL SERVICE BILL

*(The Minister for Justice, National Cohesion  
and Constitutional Affairs on 9.2.2011)*

*(Resumption of Debate interrupted on 9.2.2011)*

**The Minister for Justice, National Cohesion and Constitutional Affairs** (Mr. M. Kilonzo): Mr. Speaker, Sir, at the conclusion of business yesterday, I was in the process of moving this particular Bill, and I was at that time quoting from an extremely old but very relevant decision of the court. It is a decision of 1798 in the case of Buller versus J. Tedlock and it was quoting on justice. It enables me at this point, therefore, to move directly to the Bill and make a presentation to this hon. House as to the purpose of this Bill.

Mr. Speaker, Sir, this Bill is a continuation of what Kenyans began in August last year.

*(Loud consultations)*

Mr. Speaker, Sir, could you kindly protect me? The Bill I am moving is so important that I would like---

**Mr. Speaker:** Order, hon. Members! Note that it is at this point that we now deal with substantive business of the House. This is legislation which will affect you, your constituents, this nation and indeed, the international community. I think you are all under obligation to contribute to this business. If nothing else, just listen and applaud where you should.

**The Minister for Justice, National Cohesion and Constitutional Affairs** (Mr. M. Kilonzo): Mr. Speaker, Sir, I wish they could do so every time. This Bill is a continuation of what Kenyans began in August last year. The people of Kenya have for a long time cried out for a fair, efficient and expeditious judicial system. In a sense, a lot of Kenyans recall with nostalgia the Judiciary that was provided for in the Independence Constitution. Unknown to a lot of Kenyans, that Independence Constitution, as my learned friend hon. Orengo continues to remind us, had established a truly independent Judicial Service Commission. In fact, the procedure for appointment and removal of Judges was as good as any that I have come across. But as hon. Orengo has also

reminded us, within six months of Independence, that very quality provision was removed.

*[Mr. Speaker left the Chair]*

*[Mr. Deputy Speaker took the Chair]*

Mr. Deputy Speaker, Sir, following the numerous amendments to the Independence Constitution the security on the independence of the various constitutional offices, including those in the Judiciary was irredeemably watered down. Holders of such offices were subordinated to the pleasure of the Executive. The constitutional safeguards necessary for maintaining fair administration, neutrality of public institutions, accountability of Government and the protection of rights in general, were systematically removed. The result of the said actions is that the Judicial Service Commission was no longer regarded as fully independent. The net effect of which was that the Judiciary was now seen as vulnerable to Government pressures. The Judiciary was no longer credible. Certainly it had lost its glory as the fountain of justice.

Mr. Deputy Speaker, Sir, I recall, for example, in the 1980s when you and I were practicing law, the Law Society demanding that it be represented in the Judicial Service Commission. It took 30 years. It is only in the course of the end of last year that the Law Society found its way to the Judicial Service Commission. Granted this state of affairs, serious allegations were made and have been made against the Judiciary, including an allegation of sloth, inefficiency, incompetence and a long standing allegation of corruption. Besides it was fairly evident that people had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear. Similar sentiments had been expressed by a committee established by the Judiciary itself, known as the Kwach Committee and another report by the Commonwealth Judicial Panel of experts. Little wonder that one of the objections of the review process was to examine the existing constitutional commissions, to examine constitutions and offices and make recommendations for improvement and for the new bodies "to facilitate constitutional governance and the respect for human rights and gender equity". That was the former Section 17(III) of the retired CKRC Act. One such commission was the Judicial Service Commission which would among other things, advise the President on appointing Judges.

Mr. Deputy Speaker, Sir, the people of Kenya have expressed a desire to restructure the administration of the Judiciary. They have expressed a desire to entrench the independence of the Judiciary in the Constitution. I am talking about Article 160 of the Constitution. They have demanded to ensure that there is no interference in the Judiciary by the Executive and by the politicians and to ensure that cases are determined expeditiously. Article 156(2) (d) (e) of the Constitution is the command of that.

The Kenyan people have demanded that judges be qualified for their jobs. That court procedures be simplified. That would be found in Article 159(2) (d) of our Constitution. The people of Kenya have spoken and spoken loudly that all people be treated fairly and equally before the courts and access to court is improved by increasing the number of judges, magistrates and decentralizing the court system. Only yesterday, a number of MPs including the Minister of State for Development of Northern Kenya and

other Arid Lands stated that they do not even have courts. Indeed, this is in line with the Constitution.

Mr. Deputy Speaker, Sir, this Bill seeks to operationalize the above desire. It further proposes to entrench the constitutional principles set out in Chapter 10 of the Constitution. In addition, the Bill seeks to entrench the principles that have been internationally recognized in the Bangalore Principles of Judicial Conduct. I am quite proud and happy this afternoon to table the commentary on the Bangalore Principles of Judicial Conduct of September 2007. Luckily, those principles, unknown to the country have in fact, been informed by the principles already recognized by our own countries including Kenya. When you look at that particular document you will find that the Kenyan Code published in 1999 has been expressly recognized in part “H” of this particular document. The position of these Bangalore Principles is recognition that the global world is a small world, and therefore, anyone should respect the principles of the management of the Judiciary.

Mr. Deputy Speaker, Sir, on the Bill that I am tabling this afternoon, I speak with confidence because we have consulted the Attorney-General and the Commission on Implementation of the Constitution. I have consulted as widely as one person can do so. Again allow me to table the advisory that the Commission on Implementation of the Constitution has issued, and you will find the comments are acceptable to the Ministry as they are formulated. So, therefore the Bill, among other things outlines clear objects and principles for the Judicial Service Commission and the Judiciary. You will find that in Clause 3. It is significant of an independent Judicial Service Commission. You will find that in Clause 3(a). With the functions of recommending to the President persons for appointment of judges, reviewing and making recommendations on terms and conditions of service for judges, magistrates and other judicial officers, appointments and discipline, as well as removal of registrars, this is in line with Article 172(1) (c) of the Constitution.

*[Mr. Deputy Speaker left the Chair]*

*[The Temporary Deputy Speaker  
(Dr. Laboso) took the Chair]*

So, therefore, the Bill also enjoins the Judiciary and the Judicial Service Commission (JSC) to promote gender equity in the administration of justice. You will find that in Clause 3 (j) and (k). Similarly, it facilitates accessibility of judicial services to all Kenyans. You will find that in Clause 3(1) of the Bill. So, the areas of the country that are not enjoying judicial services will be required to be given those services.

Madam Temporary Deputy Speaker, the Bill seeks to promote and sustain fair procedures in its functioning. That is in Clause 3(g) of the Bill. It also seeks support to sustain judicial processes that are committed to the protection of people’s human rights. You will find that in Clause 3(f).

In addition, Madam Temporary Deputy Speaker, the Bill further seeks to raise standards of judicial service. If you look at Clause 4, in this regard, the Commission and the Judiciary must now apply modern technology in their operations and further ensure a non-partisan and a non-political approach in their orientation and operation. The Commission in the Judiciary will also be required to prepare and implement programmes

for educating and training judges, magistrates and paralegal staff in addition to advising the Government on improving efficiency in the administration of justice and access to it.

Madam Temporary Deputy Speaker, another significant highlight of this Bill is that it prescribes the procedure for appointment and removal of judges as well as discipline of other judicial officers. This is, again, required by Article 172 of our Constitution and you will find it in Clause 30.

In fact, Madam Temporary Deputy Speaker, can you allow me to say how proud I feel as a Kenyan to be able to speak to my country and to say without fear that, for the first time in the history of the Judiciary in this country, we are offering a mechanism such as the transparent and competitive process of applicants so that if you take your daughter or son to a law school, you will know that they are qualified to be able to apply to become a judge; and that when a vacancy occurs, it will be advertised and they can apply. I feel very proud of this and I am happy to say that the Cabinet has approved this and so has my Ministry, the Commission on the Implementation of the Constitution (CIC) and the Attorney-General.

So, therefore, Madam Temporary Deputy Speaker, I would want Clauses 30 and 33 to be fertilized by the very healthy and brilliant minds in this House so that if there are any adjustments that you think we can make, we can do so. They also provide for disciplining of other judicial officers.

Madam Temporary Deputy Speaker, for the first time in the history of our nation, any person seeking consideration for appointment as a judge must be ready to subject themselves to a transparent recruitment process following the publication of vacancies in the prescribed manner. The applicant will further be subjected to background investigation and vetting to ensure that only persons of integrity are selected for appointment as judges.

Madam Temporary Deputy Speaker, I look forward to a healthy debate this afternoon so that Clauses 6, 7 and 8 of the First Schedule of these processes can be fertilized by the brainpower, the leadership and the abilities in this House. Again, for the first time in the history of this country, for that matter, the East African region – and I say so with confidence – the criteria for evaluating qualifications of the individual applicant are also pre-determined in the law. You will no longer have to draw names from briefcases or from desk drawers or, for that matter, from under the bed. The criteria is clear. That is Clause 13 of the First Schedule. I do hope that hon. Members will digest this as carefully as possible because I do not pretend to know everything; I would like to be educated by any input coming from the Floor.

With regard to the removal, Madam Temporary Deputy Speaker, the Bill, for the first time again in the history of the country sets out an elaborate procedure to be used in the event of a question of removal of a judge. That is in Clause 31 of the Bill as read with the provisions in the Second Schedule. The process clearly protects the interests of those judges under investigation while, at all time, upholding the principle of substantial justice. Never again shall this country allow the radical surgery of 2003, where both the doctor, the patient and the surgeon died.

Madam Temporary Deputy Speaker, again, I am proud to present this to my country and I hope that Parliament will accept it. For the first time, we have introduced a National Council for the Administration of Justice. You will find that in Clause 34 of the Bill. Its purpose is to ensure a co-ordinated, efficient, effective and consultative approach

in the administration of justice and reform of the judicial system. Again, you will find that in Clause 35.

Unknown to the country, Madam Temporary Deputy Speaker – and I say so with confidence – when the Judiciary is hearing cases; when the Attorney-General or the prosecutor is preparing charges; when the prison authorities are dealing with prisoners; when the police are investigating crime, there is no common trend in this country and, therefore, by introducing the National Council on the Administration of Justice comprising everybody, including the private sector, we are hoping that we will have a co-ordinated approach to this very, very important area of the administration of justice.

Finally, Madam Temporary Deputy Speaker, the Bill also proposes a transparent and competitive process for promotions, transfers, confirmation and termination of appointment of judicial officers and staff and other judges. Again, this is something unheard of in Kenya. You will find that in Clause 32 of the Bill as read with the provisions of the Third Schedule.

Madam Temporary Deputy Speaker, you will recall that during the radical surgery, the country was subjected to allegations that a judge was involved in sexual harassment of members of staff. There were allegations that judges were being transferred for reasons other than the purposes of justice. We are aware of situations in which a judge of Kenya ended up resigning, although he was a foreigner, partly because he was transferred in circumstances that suggested that he was being punished. In fact, in that particular situation, the wife was caught driving the judge's car and instead of using some other methods, the judge was then subjected to arbitrary transfer.

Madam Temporary Deputy Speaker, allow me also to mention that the Bill is a product of extremely extensive stakeholder consultation as is evidenced by the Report of the Taskforce on Judicial Reforms chaired by honorable Mr. Justice William Ouko, whom I wish to thank. I have already tabled that document before this House. But, above all, allow me also to refer to the Report of the International Legal Assistance Consortium that visited Kenya in February, 2010, and this was through the International Legal Assistance Consortium of the International Bar Association, Human Rights Institute together with the Law Society. They published a report in February, 2010.

Madam Temporary Deputy Speaker, the bulk of the recommendations that appear in this Bill have taken account of all these reports and I, therefore, without any hesitation whatsoever and without any fear, recommend this law to my wonderful country.

Madam Temporary Deputy Speaker, allow me to quote a book written in 1850 by a Frenchman called Mr. Frederic Bastiat, which has formed the basis of debate all over the world. It says:-

“We hold from God the gift, which includes all others. This gift is life - physical, intellectual and moral life”.

He continues to say:-

“Life, faculties, production - in other words individuality, liberty, property - this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation and are superior to it”.

He continues to say:-

“If this is true then, nothing can be more evident than this: The law is the organization of the natural right of lawful defence. It is the

substitution of a common force for individual forces. And this common force is to do only what the individual forces have a natural and lawful right to do: to protect persons, liberties and properties; to maintain the right of each and to cause justice to reign over all of us”.

He continues to say:-

“If a nation were founded on this basis, it seems to me that order will prevail among the people, in thought as well as in deed. It seems to me that such a nation would have the most simple, easy to accept, economical, limited, non-oppressive just and enduring Government imaginable - whatever its political form might be”

Madam Temporary Deputy Speaker, I adopt those comments of Mr. Bastiat and recommend them very seriously to this hon. House. I also suggest that this Bill that we are presenting be interrogated with a view to making it law, as quickly as possible, so that our Principals; His Excellency the President and the Right Hon. Prime Minister, can utilise the authority now conferred on them to use the Judicial Service Commission (JSC) to source out qualified Kenyans for appointment as judges, so that we can have new judges in order to answer, among other things, the demands of justice in the first place. Secondly, in order to address the demands of the challenges that the country is facing right now, on the issue of the Rome Statute and the ICC.

Madam Temporary Deputy Speaker, this is a law I recommend to this country. Let me read the Memorandum of Objects and Reasons on page 86 of the Bill. It says:-

“The principle objects of this Bill are to improve the provision of the judicial services and administration of justice. It achieves this by reconstituting and incorporating the JSC, modernizing and expanding its functions, including clearly articulating the procedure for appointment and removal of judges and listing of other judicial officers and staff. The Bill also enhances the Commissions as well as the Judiciary’s operational and financial autonomy and to ensure a co-ordinated, efficient, effective and consultative approach, in the administration of justice and reform of the justice system. The Bill establishes the National Council on administration of justice”

Madam Temporary Deputy Speaker, if I do nothing else for my country, I am happy to present this Bill and I beg to move. My learned friend, hon. Orengo, Minister for Lands has agreed to second the Bill.

**The Minister for Lands** (Mr. Orengo): Madam Temporary Deputy Speaker, again, I wish to commend the hon. Minister for preparing this Bill. Let it be known that in preparing this Bill, there were the widest possible consultations. I for one, together with other Cabinet Ministers, including hon. Kingi, Kajwang and quite a number of others, participated together with the Attorney-General, members of the Law Reform Commission and various leaders from the civil society organizations and other stakeholders. They all actually participated in the formulation of this Bill, even before we started working on the draft.

I wish to commend the Minister in the manner in which he made himself available and to be the chief pilot in the preparation of this Bill. In all meetings, where this Bill was presented, including the Cabinet and civil society organizations, he did a commendable job. Not just to present the Bill in these meetings, but being always ready to adopt any

other views or comments from those who had issues with one or two provisions in the Bill.

It went through several drafts. Even when it was first published, the Minister was humble and courteous. He said he wanted this Bill to be discussed in an inclusive manner and was willing to have the Commission on the Implementation of the Constitution have a look at it. The time it was being drafted or formulated, the Commission on Implementation of the Constitution (CIC) had not been appointed or established. So, I wish to commend him very much for the work he has done.

Madam Temporary Deputy, it is the second time we are talking about the Judiciary. We had the other Bill which went through the Second Reading yesterday. Now we have another opportunity to look at how the Judiciary has been run and how we want it to be run. What I am happy about is the manner in which the judges and other judicial officers will be appointed. There were days that I know that people literally used to campaign to become judges. It depended on the type of god father you had. We know, in fact, that some people had been able to persuade authorities to appoint judges sometimes on account that they were going to be possible in parliamentary election. Not on the basis that they were competent to occupy judicial office.

So, this is a great moment for me being a lawyer. I have witnessed the manner in which judicial officers have been appointed in this country. At one point, we found that the Bench was very junior compared to the Bar. Those members of the bar who were senior and available to be appointed as judges would never be appointed. However, when they were approached for appointments, then they saw in the order of seniority at the time when the offer was made, they were going to be very junior in the Bench. But this JSC is hinged on the Constitution and all the values that are contained in the Constitution go to the JSC. This Bill must also be in compliance with the Constitution of Kenya being the supreme law of the land. I hope that even before we talk about judges and JSC that other organs of State, will not wait until we have an election under this Constitution, but begin to live by the requirements of this Constitution.

Madam Temporary Deputy Speaker, Mr. M. Kilonzo, who is my senior, has elaborated on the qualifications required for judges, the balances that are required under the Constitution and the values under Article 10 of the Constitution. I would recommend to all other organs of State, as we speak today, to begin to interrogate themselves carefully. I have in mind the higher offices in the Government, including the Office of the President, the Office of the Prime Minister, the Office of the Vice-President and the various parastatals. In their structures, they should reflect what the Constitution talks about. They should have gender, regional and ethnic balance! We should not just talk about the courts. We should talk about those institutions. I want to invite the National Commission on Cohesion and Integrity to begin to audit various offices of State, beginning from the Office of the President, Office of the Prime Minister and all other State organs to find out whether they are truly living by the dictates and requirements of this Constitution.

*(Applause)*

I want this Parliament to look at the Ministry of Lands and find out whether, in that Ministry, we are living per the requirements of this Constitution. Are we still living under



the requirement of the old Constitution? To that extent, the Principals must show leadership. I want to urge the President and the Prime Minister to have a little bit of a conversation with their conscience and look at their surroundings to see whether they represent the face of Kenya in their daily lives. If you are sitting in a public office and everybody who is around is your village mate or from your county or province, you fail on that account on the requirements of this Constitution. There are senior offices in the Government which we must begin to look at thoroughly because those are the roots of conflict. Exclusion is a basis of conflict. The fact that a meeting can be held in the Office of the Prime Minister and for convenience, a discussion can be held in that office in the mother tongue, that is a source of conflict. If, in the Office of the President, there is a meeting going on and the parties concerned happen to come from the same area, that is a source of conflict.

Sometimes, it has also consequences. If you look at the Ocampo Six, probably some of them made the list by virtue of the offices they occupy and not by virtue of what they really did--- I want to say that no one is guilty! But if you fill your clansmen in the entire security structure, when that security structure is being interrogated for anything, you should be the last to cry because you asked for it. So, I want to say that, sometimes, the former President, Mr. Moi, was more astute in some of these matters. During his entire service until the very last term of his presidency, there was no Kalenjin who was made the Head of Civil Service or a Minister for Finance. In fact, there was never a Minister for Finance from that part of the world or a substantive Attorney-General or Chief Justice from that part of the land. So, to that extent, I am prepared to say that he did some good to this country. If you were to compare what is happening--- We are saying that we want Kenya to be better. We have promulgated a new Constitution and when we want to test you just on that elementary - because the standards in this Constitution are very high--- But even on that elementary requirement, we find that the offices of various State organs fail on that account. I think this is something that we need to address because it can be a source of conflict.

Madam Temporary Deputy Speaker, I also want to urge - and I am saying this on the background of what I am going to say about the Judiciary - that, under this new Constitution, the organs are known. If I want to talk to people in a particular county, there is a way of talking to them. If I want to talk to people from a particular area, there is a way of doing that. If there are affairs of State, there are State organs but at this age and time, it would be wrong; be it the Prime Minister or the President, to call what is essentially a tribal meeting in a State office and people are called there not on account of being Members of Parliament, but on account of their ethnicity. I think those are some of the practices that, if we want to live by this modern Constitution, we have to say very clearly that this Constitution says we must abide by it. In our quest to adopt the principle of constitutionalism and good governance, there are things that we must do to give this Constitution a new life.

It is not us but it was Mr. Moi, who we blame very much, who stopped tribal associations. But now, we have tribal meetings or politics organized on tribal basis. You want a good Judiciary and yet, you are holding tribal meetings that the Constitution is talking about. What are the qualifications of a new President? We, Members of Parliament, go somewhere and say that in order to produce the next president, we have to sit as tribes as if that is a qualification. I think that is not the way to start. Things went

wrong, as I said yesterday, on account of the old Constitution, where people now started meeting on the basis of their ethnicity and the power to be protected.

Madam Temporary Deputy Speaker, there was a time that I was appearing for a former Member of Parliament in this House. He had lost an election petition but he had not lost his parliamentary seat. He filed an election petition - and probably, I have said this before - and a judge hid that file until the last year of that Parliament. By the time that petition was heard and he won the election petition, within one month, Parliament was dissolved and, therefore, he did not find the fruits of judgment. That was the Judiciary meeting acting by the whims of the Executive. As one of the British judges said, the courts should never be more executive than the Executive, if we want to have a truly independent and impartial Judiciary. One of the things that this Bill that I recommend to the House wants to address is not to have a Judiciary of that time. Even on the hearing of cases, it is obvious that there are those standards or principles that are set out. Cases should be decided on time and that justice should be done to all; big and small, so that everybody feels that they are all equal before the law. The Judiciary should become the main arbiter between disputes among citizens and also an arbiter of disputes between various arms of Government and between the Government and its own people and do it in a fair, open and transparent manner.

I have to say that one of my proudest submissions in a court of law was in the Court of Appeal when I was appearing at the request of my senior, Mr. Pheroze Nowrojee. In fact, we were in those proceedings with Mr. M. Kilonzo and he was appearing for the former President and I was appearing for the current President. I told the judges that my client, who is President Kibaki, may one day become the President of this country and he will think of that particular day in court and decide whether justice was done to him.

Madam Temporary Deputy Speaker, I am glad that one of the judges who was in that petition was talking to me the other day and he has ceased to be a judge in that court. He said that we should not take any situation or any person for granted. He confessed to me that as he sat in that court he never believed that His Excellency President Mwai Kibaki would ever become the President of this country. He was very arrogant in that court because for him former President Moi was *baba na mama*. For purposes of those proceedings, His Excellency President Mwai Kibaki was just a passing cloud. We want a Judiciary which would never look at individuals on the basis of their station in life but one that is able to give justice expeditiously.

Madam Temporary Deputy Speaker, in conclusion, in the 1950s during the Korean war, President Harry Truman, in exercise of presidential authority was taking over industries saying that America was at war, but it is the supreme court that stood up and said: "You cannot do it." For that reason, Americans sometimes do not want their people to be taken to the Hague because they believe they have the best judicial system. They may be right or wrong. They justify that if an American appears before a foreign tribunal, he will be appearing before an inferior court.

So, I want to urge everybody who is talking about how we will reform the Judiciary which begins with the appointments that we want to make that appointments that are being made are to be made for Kenya. They are meant to make Kenya better and for Kenya to have a good Judiciary. They should be made to meet the exigencies of the moment. This is because apparently, this exercise that we are involved in is not about

reforming the Judiciary at all--- When you want to reform the Judiciary you come with a Bill like my learned senior has done or with a constitutional Bill, so that we can ensure that we, as Kenyans, have confidence in the structures established and the persons appointed.

What was happening regarding the appointments that we were talking about--- You cannot have a thief appointing a judge and a prosecutor to preside over his trial. Where in the world does that happen? Where is the rest of the country involved? So, the Principals must go back to the drawing board. They are given power under this Constitution to exercise it according to it. Every time they make a decision that claim to power or exercise of authority must be derived from this Constitution. We want Kenya that will accommodate all of us.

Madam Temporary Deputy Speaker, we went to the same school with Eng. Ephraim Maina. However, looking at our politics, it appears like we went to different schools. We were in the same school during the day, but at night, we went to different schools. This is because I do not like his utterances and he does not like my utterances either. The driving force is not the values that are contained in the Constitution we just promulgated.

I am saying this on a light note because we normally talk openly over the affairs of this country with the hon. Member as we should. I want to encourage that any time you are holding a public meeting or doing public service and you are doing it on the basis of regional or ethnic hegemony, you are violently destroying the country and this Constitution.

With those remarks I beg to second.

**Eng. Maina:** On a point of order, Madam Temporary Deputy Speaker. Truly we were in Alliance High School together with Mr. Orengo. We proceeded to the University of Nairobi where he happened to be our student leader during that famous demonstration of that Norwegian who was the head of the Architecture Department. At that time, the late President Kenyatta sided with the students.

I have that regard for him and I have due respect for him. He is a personal friend. However, my conduct and utterances in this country have always been nationalistic. This is not to mean as Paul says in Rome that he is a Jew that I was not born in some---

**The Temporary Deputy Speaker** (Dr. Laboso): Could you now get to your point of order?

**Eng Maina:** Madam Temporary Deputy Speaker, even with a light touch the likely conclusion of the statement made by my dear friend is that I am inclined to be not thinking rationally in various utterances. Is he in order to say so, without bringing some evidence to this House? I am committed to the reconciliation of this country. I am committed to one Kenya. I am committed to the good and unity of Kenya.

Thank you.

**The Temporary Deputy Speaker** (Dr. Laboso): I am still waiting for your point of order.

**Mr. Mbadi:** On a point of information, Madam Temporary Deputy Speaker.

**Eng. Maina:** Madam Temporary Deputy Speaker, I do not want to be informed, but I would wish that the former speaker would rise and say that he withdraws any statement that could likely render the wrong meaning to the good intentions which I know that he has as a friend.

**The Temporary Deputy Speaker** (Dr. Laboso): Hon. Minister, did you imply in any way in your statement that the hon. Member was not nationalistic in his politics?

**The Minister for Lands** (Mr. Orengo): Madam Temporary Deputy Speaker, that would be a matter of opinion. There is no point of order that has been breached. I quite believe that he is a good friend of mine. He has invited me to his home. We have had discussions. I have gone to his rural home during the day, but when I left it was only hon. Members from his area who were invited. So, I was wondering why does my friend invite me for goat eating in the day in his house and when I think the night is the time that the music starts playing, he tells me there is another meeting of which I was not qualified to attend. So, I was just speaking figuratively.

**The Temporary Deputy Speaker** (Dr. Laboso): Hon. Members, I think we should let that matter to rest. If I remember correctly Mr. Orengo said it was with a light touch. Let us not belabour the point.

*(Question proposed)*

**Mr. Mungatana:** Thank you, Madam Temporary Deputy Speaker. I will straightaway go away from the praises and all the good things that have been said and ask the Minister to pay attention to a few things because he really needs our minds here to fertilize the Bill and not for us to praise singers.

Madam Temporary Deputy Speaker, the first thing I want to raise concerns the principle of separation of power. We have brought into this Judicial Service Bill, the terminology “President of Supreme Court, President of Court of Appeal, Vice-President of what and not”. We must not confuse our people out there. The only President is the one that we will elect through the ballot. We do not want this terminology to be brought into the Judiciary. The word “president” has political connotations in it. The word “president” has been the preserve of the people who have been elected through the ballot. We have thousands of terminologies that we can use. You can say: “My Lord, the Chief Justice.” You can call him whatever you want. You refer to him as My Lord or whatever you want. We do not want to import those terminologies into the political arena. Why should this Parliament import those terminologies into the Judiciary? Why are we letting our terminologies to be taken? We just heard the Speaker say very clearly that we must not be impeded in terms of the way we conduct our business here. There must be separation, even in terminology. It would be absurd to refer to the Head of the Executive or the Head of Parliament as hon. Chief Justice or hon. President. Let us leave it the way it is. I will be suggesting, very strongly, to the Minister to remove all those references. They can find other references to refer to the Judiciary so that we keep it in that manner. I am referring, specifically---

**The Minister for Justice, National Cohesion and Constitutional Affairs** (Mr. Kilonzo): On a point of order, Madam Temporary Deputy Speaker. Is the hon. Member, who is my very good friend and a very senior lawyer, in order to mislead the House by suggesting that the words I have used are an invention when, for example, Article 164(2) says:-

“There shall be a President of the Court of Appeal who shall be elected by judges of the Court of Appeal from amongst themselves.”

For the High Court, it says: “There shall be a principal judge of the High Court who shall be elected by the judges of the High Court. “

Is he in order to mislead the House? I suggest that he pays keen attention to the Constitution.

**Mr. Mungatana:** Madam Temporary Deputy Speaker, I said that in this law, it is my opinion that we do not use those terminologies. With regard to the principal judge, I have no issue with that. I think you got my point. Let us not run away from the principles according to separation of powers. I and you can understand that very clearly, senior counsel. However, it may not go down well with the people of Garsen or Mbooni for that matter.

Madam Temporary Deputy Speaker, the second point I want to make is in relation to Clause 6. In this clause, there are positions of judges that have been created. We have a resident judge; in particular, as the Head of High Court Division, we have the chief registrar and the posts of principal judges that have been created under this. I strongly suggest that we must, at this point, create the position of a county judge. In this Constitution, we have talked a lot about devolution. We created the position of a governor who is the head of the executive at the county level. We have created the Speaker of the County Assembly who is the head of the County Assembly. We have not created the head of the Judiciary at the county level. We must find a way in which this is clear. I do not see any difficulties in that. What are the duties of the resident judge here? It says that he shall be responsible to the Principal Judge of the High Court Division for the administration of their station or division. We can rename this and create 47 county judges. It would be the first time in the County of Tana River--- I said this the other day when the Chief Justice went to open a court in Garsen. There was need for us to have our own High Court. In this respect, I say that we must create the office of the County Judge. I know that there are very many places in this country where there is no High Court. There are Resident Magistrates in those areas and for you to make an appeal, you have to go long distances before you can reach the courts where appeals can be made. I do not need to belabor that point. I know that many hon. Members have suffered the same way that we have suffered. We need services. This devolution must be given effect. This Constitution must not be theoretical. We must make it real. To make it real, this Parliament must create and make it necessary and compulsory that the Judiciary appoints those judges so that those services can be reached right down at the county level.

Madam Temporary Deputy Speaker, I also want to bring to the attention of the Minister my third point regarding Clause 18. This is with regard to the commissioners who have been appointed as members of the Judicial Service Commission. We said that those who cannot sit in that Commission include Members of Parliament, a member of a local authority and a member of the executive committee of a political party. I propose that we make it very clear in law here in Parliament, so that we avoid the controversy that was there with regard to one nominee. Maybe, in future, any person who is appointed to this high exalted position should stop any practice of law. We should not have a person who is a lawyer coming to court while he is a Judicial Service commissioner at the same time. It can be intimidating when your employer is before you, as a judge or a potential judge, and still has to come before your court when you are a Resident Magistrate or a Chief Magistrate. The same person is practicing before your court and, maybe, you are

interested in applying to be a judge in the next round of applications. You will definitely feel intimidated and, maybe, bend to his or her whims.

I very strongly recommend that any person who accepts to take a position in the Judicial Service Commission or any other Commission that is connected to the Judiciary completely gives up practicing as an Advocate of the High Court.

In connection with Clause 20, I will make my fourth point which talks about the Secretariat of the Commission. I want the Minister to report, with regard to this one, the idea of a County Judge being the administrative head in the County. However, he will need some secretarial support. Let us create the reality here. Let us build it because we have the power, as the Parliament of Kenya, to require the Judiciary to fund a secretariat so that we make it real and the judges will be able to administer county level judicial services.

I come to my fifth proposal with regard to the monies we will be voting as Parliament to the Judicial Service Commission. You will see that under Clause 27, a Judiciary Fund has been set up by law. I agree completely that we must have, and I have urged for this position many times, an independent Judiciary. It must be at the level of Parliament where once they make their budget and present it as a first charge to the Consolidated Fund, it is funded without many questions or procedures, including an extra appropriation law for it to take effect. However, I think in the creation of this law, matters of finance of the Judiciary have gone a bit too far. I want to propose that the Minister considers deleting Clause 27(3). Here, it is suggested that the receipts, earnings and accruals of this Fund and any balances at the closing financial year, they shall not be paid back to the Consolidated Fund. They will be retained in the Judiciary Fund for the purposes of running it.

They then say that the money that has been made, for example, from the court fines and all the other things through which the courts raise revenue. So, they should be allowed to retain it as the Judiciary. Then, if they have proposed developments within the Judiciary and they do not use that money, they also keep the money. I am wondering where we are going with this. Parliament itself, if we do not use our funds to the end, we must return it to the Consolidated Fund. First of all, as an institution, we have the first charge on the Consolidated Fund. Secondly, there are requirements in terms of planning that the Treasury must take into consideration. If we say that Parliament can remain with whatever remains from what is voted to it and in the next year, they can charge the Consolidated Bank, this will mean that if it saves, it will continue growing its Fund on one side and continue making accruals on the other side in complete and total disregard of what is happening at the Treasury and the rest of the country. We cannot have that situation continue. I will propose that we should not go too far. They have a first charge in the Consolidated Fund just like Parliament. If they do not utilize those funds, they should return the money to the Consolidated Fund and let it be planned as usual with every other institution of the Government.

Looking at Clause 28(3), I want to ask the Minister why there is reference to the word "Minister" even at the introduction. In the section that talks about interpretation, there is also reference to "Minister". In a very interestingly manner, the same law seems to impute the idea that, in fact, there will still be a Minister for Finance. Unless this Bill was drafted before the promulgation of the new Constitution, we do not have Ministers. I

am afraid, it appears that even the CIC must have missed this. What happened? Did they just pull this Bill from the drawers and said: “Let us panel beat it and take it to Parliament”. This is a very bad indication. It means that people are not going through the Bill line by line. We want this law to be good. So, can we remove all references to the “Minister”? Here, we are talking about the Cabinet Secretary. The Constitution is clear that we are now dealing with Cabinet Secretaries. That is a point that needs to be looked at.

In Clause 34, you have talked about the National Council of the Administration of Justice. This is an excellence idea and I have no problem with it, but it does not import, in this law, the engendering of this Council. It says that the Chief Justice shall be the Chairman and it returns back to the Minister. It should be the Cabinet Secretary for the time being responsible for matters of justice, the Attorney-General, the Deputy Public Prosecutor and the Commissioner. In all these people, there is no engendering of this law, so that we do not have a repetition of what happened in the East African Legislative Assembly sometimes ago in a different time in a different place that we used to live in this country, where we just sent men and Kenya was the only country that sent men only and refused to follow the question of gender as we should.

Madam Temporary Deputy Speaker, Sir, we need to relook the interview procedures. I am looking at page 60, Part IV of the First Schedule, Clause 10. I agree with all the good things that they have said about the interviewing procedure and I must congratulate the Minister and all the people who were involved in this because we definitely have a far more superior system of getting our judges and the men and women who want to serve in the Judiciary, but I just have two comments to make about this interview procedure. First of all, we are choosing men and women who are going to occupy an exalted office. We have chosen the Executive, the President and the people in that team, Members of Parliament, the Senators and the people in that team and it is all open and transparent. In this Constitution, there is a great requirement of transparency. There is a clear requirement in this Constitution that we have voted for transparency. This, indeed, is a national value if you look at the provisions of our national values. When we will be electing the President, it will be transparent. In fact, I am aware that the ballot boxes will be transparent. When we will be electing the Members of Parliament and the Senators, it will be transparent. Why are we putting in this law, the other exalted arm of Government, that all the interviews shall be conducted in private? What are we hiding? Is this provision, first of all, constitutional?

If we are interviewing a judge and all we are asking is: “Are you qualified? Where did you go to school and have you been paying your taxes, what is private about this? After all, these people are going to be sitting in very exalted positions. What is it that we want to hide? Hon. Orendo has been talking about a Judiciary which used to operate on the whims of the Executive. This was because nobody used to know about the systems of appointments. People used to be drawn from drawers and appointed and even people who were supposed to be contesting parliamentary seats were told: “You come and be a judge, so you can leave so-and-so to be a Member of Parliament”. Why is it that we want to return, through the back door, what we have left behind? Why should we conduct these interviews in private? Let us be transparent. Let us remove this requirement that the interview shall be conducted in private. It should be open, so that those who are interested in listening to the interview can do so. If there is anything confidential or that

judge who feels that, maybe, the line of questioning should be private. There will be a procedure for private matters. Indeed, the Judicial Service Commission will regulate its own procedures. Kenyans will know that judges are going to be chosen and then they are told: "By the way, this is now your judge". How did you arrive at him and what did you ask him? Since the Judicial Service Commission is going to be at the same level as Parliament and the Executive, the interviews must be in the open. So, I will be proposing an amendment to this issue.

Still on the interviews and I said this yesterday, I will request that we also delete Clause 13(e) that talks about the temperament. It states that one of the things that they should consider is the temperament and the elements of which shall include demonstrable possession of compassion, humility, history of courtesy and civility. When you are dealing with thugs, you need a hard judge. You do not need a person who is compassionate and human. Then all these people will be walking free. We do not need this kind of thing. How do you judge some of these criteria? None of the people in the Judicial Service Commission is a Psychologist; none of them is a medical doctor. So, how do we judge things like that? If the qualifications and all the other criteria are good, then it is fine,

Madam Temporary Deputy Speaker, I support with amendments.

**The Minister for Education** (Prof. Ongeru): Madam Temporary Deputy Speaker, I thank you for giving me the opportunity to contribute to this Bill.

I have seen this Bill at another level, and I want to support the Minister for Justice, National Cohesion and Constitutional Affairs on the way and the manner in which he has presented this document.

Madam Temporary Deputy Speaker, there is one area which has been mentioned, which I want to re-emphasise. Now that we have 47 counties, there should be an express provision in the law for the establishment of a county judge and the retinue of judges that go with such an office, because one of the biggest problems we are experiencing at the county-level is backlog of cases.

Some cases are as old as 20 years, and you wonder how justice is being dispensed in some of those areas. You cannot get the necessary space to be heard in the courts, so that your case can be disposed of. We have experienced this as Members of Parliament. People have come to us requesting that we make appeals. Now that we have a law establishing the offices of judges, one cardinal office we, as Parliament, must establish is the office of the county judge and all other judicial offices that go with it, in line with the Office of the Governor within the county and other offices within the county level.

Madam Temporary Deputy Speaker, another issue I want to address is that the expenses of the Judicial Service Commission. They are now provided for by directly accessing the Consolidated Fund. Therefore, the story of lack of resources to dispense justice should be an historical matter. Clause 26(1) of the Bill clearly states that they shall access resources directly from the Consolidated Fund. One of the areas I heard my friend, hon. Mungatana, criticise heavily is the question of retention of these resources. I have a different opinion. Now that the county courts must catch up with the rest of the High Courts in Nairobi, Kisumu and other major cities, it is only fair and important that they retain those funds for the purpose of renovating or rehabilitating existing court houses in the country, which are in a dilapidated form. When you go out there, you will be very



uncomfortable. Even a suspect is entitled by law to enjoy fresh air within the courtroom, and not in the congested form in which we find them today.

Madam Temporary Deputy Speaker, a matter which draws tremendous interest to me is that under Clause 30, on page 46 of the Bill, which is about the procedure for appointment and removal of judges and discipline of other judicial officers and staff. I fully agree with that process, except what is provided under Clause 32(2)(d).

I want to re-emphasise that in order to be able to bridge the digital divide, it must be mandatory not only for judges, but for everybody, including parliamentarians, to be computer literate. Proficiency in computer is a must not only for judges but for everybody, if we are going to expedite the functions of either Parliament or the courts. The only problem is that the litigant before the court, who may not be computer literate, may be at a disadvantaged position.

Madam Temporary Deputy Speaker, I was going to take leave of the House to request, through this provision of the law that more monies be voted for my Ministry later on, so that we can be able to make every Kenyan computer literate, so that whenever they want to deal with these matters, they can do it quite effectively.

I agree with the question of gender as captured under Clause 34. There is a point I want to bring out regarding the provisions of Clause 13B(c)(ii), on page 62 of the Bill. It is about the respect for professional duties arising under the codes of professional and judicial conduct. Earlier on, there was a litany of views on how they should look. On page 61, there is something about intellectual capacity, judgement, diligence, organizational and administrative skills.

Madam Temporary Deputy Speaker, we must protect our judges from very flimsy and misplaced allegations that may be made against them, particularly through the Advocates Complaints Board. Somebody may just forward a name against a particular individual, who may by all practical purposes be competent enough to be a judge but, because some people may not want him for that purpose, they may bring all manner of allegations against him, and there will be no time for such an individual to have an opportunity to exonerate oneself before the judges appointing panel. So, we have to find a way of handling such flimsy complaints. When you have such rather flimsy and uncalled for complaints, how would you handle them for a prospective candidate who wants to be appointed to a high office of the Judiciary? We should be able to come up with appropriate provisions for that matter, because it is very important.

Madam Temporary Deputy Speaker, Clause 14(1), on page 63 of the Bill, talks about nomination of the most qualified applicants taking into account gender, regional and ethnic balances and other diversities of the people of Kenya. One of my colleagues mentioned something about tribes. We cannot run away from what we are. This country is constituted of 42 tribes. This very same law recognises the fact that in appointing the individuals, apart from the qualifications, which are a general point you must consider, you must also consider gender as well as regional and ethnic balances.

So critical is this that if you run away from that very position, you would be telling us: "This was the most qualified person but he could not be selected because Prof. Ongeru is a Kisii, and he is a Member of Parliament. Therefore, he cannot be appointed." It would be a very disastrous way of tuning people to think; along such lines in this country. We recognise our ethnic constitution. It is a blessing. Diversity is not in itself a

misnomer. It is a blessing for all of us. Therefore, we must take into account those aspects, which are very important.

Madam Temporary Deputy Speaker, one of the problems is on the administration of the tribunal. Those of you who have appeared before tribunals, be it the one on rent or arbitration of some kind, know that it takes awfully long for one to be heard. There are so many procedures and rules governing the proceedings of tribunals such that when the lawyers for both parties come in, their clients and other people are left lost. It is my prayer that while constituting panels of the tribunal that may be necessary for expeditious disposal of matters before the tribunal, the rules of procedure will be simplified, so that we are not caught up in the way of rules of procedure, which may lead to a matter taking many months before it is determined.

Madam Temporary Deputy Speaker, if we go that way, we will not be able to get that tribunal disposing of its business. We are already seeing some of the examples where such tribunals have been set up. Therefore, I would urge my colleagues that the rules of procedure must be candid, clear and simple. They must not be the kind of rules of procedure that you follow in court.

I do not know how you will be able to handle that aspect. Therefore, I want to reemphasize what is captured on page 69, Clause 13 where it says that the tribunal shall not be bound by strict rules of evidence, but shall be guided by the rules of natural justice and relevance. I would like that particular clause to be expanded by the tribunal itself, so that we can make it as simple as possible in order to dispense justice expeditiously.

Finally, the purpose is to reconstitute our Bench. We have many pending issues. We have issues of acceptance by the public and by ourselves. I still think that we have very fine men and women in the Judiciary, but somehow we have bracketed them in a way that they now need to come out through this process of vetting. Therefore, when the vetting is finally done, I hope that history will not judge us harshly because we vetted some judges out because we did not like their political inclination, or where they came from. It should be based on the merits and demerits that have been enumerated in this Bill.

With those few remarks, I beg to support.

**Eng. Maina:** Madam Temporary Deputy Speaker, Sir, I wish to congratulate and commend the Minister and his staff for coming up with this Bill, which is timely for our country. This Commission has become necessary, because there is a culture that we must create within our judicial system. The issue of the Judiciary being financially independent is very important but we must ensure that the same independence goes with accountability. A rigorous system is required to ensure that the people appointed to the Commission are accountable.

The issue of money being retained by anybody within the Government is, in my point of view, irregular. This Parliament cannot abandon making laws, voting for the Budget and monitoring the use of the funds that it votes. When an institution is going to retain some money, one wonders how that money is going to be accounted for. That defeats the principle of this Government or this country ensuring that public use of funds is properly monitored by Parliament. Therefore, the provision on retention of any money should be scrapped from this Bill. Just like other bodies, they should only use money that has been voted for by this Parliament. The same thing should happen to the Judicial

Service Commission. If they need any money for any development or capital expenditure, then they will put it in their budget and account for it properly. If you give money so that they can come and say that they had surplus money that they used to buy a new car or furniture, that will be very dangerous. This Parliament should not do that.

Madam Temporary Deputy Speaker, I want to tell the Minister that this country has recently gone through some changes. A change can be good, but it can be applied in a manner that does not do good, for example, the radical surgery which was undertaken in the Judiciary. I want to say that whatever is done, Kenya must recognize that we have a Judiciary that is actually respected irrespective of the difficulties we have. Kenya must have a functional Judiciary. In fact, when you compare Kenya to other countries in Africa, it has one of the best judiciaries. Therefore, as much as we want change, we must be careful that we do not condemn and destroy the system we have, as it happened with the radical surgery that we conducted. This feeling that anything new or any experiment will bring good results, I am sorry that this should not apply to systems that have been working. I wish that the Judiciary itself comes up and actually corrects itself as time goes by. The Judicial Service Commission should actually ensure that. There are people who believe that there is prosperity from the aliens. There is none. You just have to improve yourself to become a better person. Kenya must do the same.

I wish to tell the Minister that the recruitment of judges must be transparent and competitive, but what are we talking about? A judge is man or woman of honour. Big corporations all over the world do not advertise the position of a managing director. They have a panel which goes head hunting. Similarly, we must be careful with our Judiciary, so that we do not embarrass or slight the same judges whom we expect to act with honour when they sit in their positions. It is my considered opinion that advertising in the local dailies for a judge is not good. I do not support it because this is somebody who went to a university, and who has been in the legal profession for 30 or 40 years. They will not apply for that job because honour does not allow them to do that. The person will also face a panel for fairly young people to be interviewed. I am sorry; that is my considered opinion. I am not sure if we are copying from other traditional democracies like Britain or the United States of America (USA) who advertise for the position of judges. I think we must be careful here.

We are stretching things a bit too far. We are being a bit theoretical. Jobs are advertised for the lower ranks even in major corporations. I do not feel that somebody like a judge, who is going to act with honour and protect people's lives through judgements, should be subjected to this kind of demeaning system in the name of being transparent and accountable. I request you, Mr. Minister, let us look at other democracies and see where we can improve.

**The Assistant Minister for Foreign Affairs (Mr. Onyonka):** On a point of order, Madam Temporary Deputy Speaker. Is it in order for the hon. Member to keep on referring to Mr. Minister instead of addressing the Speaker?

**Eng. Maina:** I have a lot of regard for the Chair. I started by seeking the permission of the Chair; I am addressing the Minister through the Chair. I hope that is forgotten.

Madam Temporary Deputy Speaker, I wish to say that justice delayed is justice denied. Even without all these we are doing in the Judiciary, I would ask the Minister to look at the Judiciary today and ask himself, why does it take five years for some cases to

be concluded? A judge can give you a hearing date for today and after that, he fixes another hearing date in June. Why? Mr. Minister, I want to beseech you; I do not think we need to wait until the Judicial Service Commission (JSC) looks internally at what is ailing the justice system in our country. We are suffering very much. Otherwise, the JSC may not be able to eradicate that culture.

Madam Temporary Deputy Speaker, I wish to say justice will not be achieved if the investigating arm is not well co-ordinated and looked into the way we are looking at the judicial system. Again, I wish to request the Minister to co-ordinate carefully, so that the police and the investigating machinery are looked at the way we are doing to the Judiciary. The judges rely on what they get from the investigators. Justice will not be achieved this way.

I wish to support wholly the issue of a county judge. This is not just because of the devolution we are undertaking, but because everybody in this country is entitled to services. Therefore, I think this is something that should be done as a matter of priority.

Somebody commented here about nominations as being a necessity. What are we talking about? The USA had Abraham Lincoln. I want to tell this House the story of Abraham Lincoln. There is a lawyer with whom he was in class. He kept going to him and telling him, "Mr. President, appoint me a judge". Abraham Lincoln would politely say, "There is no vacancy". So, one day a judge drowned in Portmark River in Washington, and the man rushed to the White House and told the President, "Mr. President, now I come. God has been on my side. Judge so-and-so has drowned; appoint me to be a judge". Abraham Lincoln told him, "I am sorry my friend, by the time you arrived here from Portmark River, I had appointed another judge". Abraham Lincoln could not just appoint that man a judge, because they were classmates. He said he believed he would not be a competent judge. That is the culture we want. It is not that we should stand here and say that things are going wrong because it is a necessity. No! I want to say tribes in Kenya are here to stay. Tribes are good. I am proud to be what I am. My brother, Kajwang, is proud that he was born a Luo. What is bad is to put that in our minds and hearts to be the driving force behind our decisions. We should emulate Abraham Lincoln. Again, when Clinton became President, all the White House staff came from Little Rock. President Kennedy appointed his brother as the Attorney-General. So, what are we talking about and what are we preaching? Nature is nature. Nature is such that if you asked me whom I think is a good lawyer, I will tell you, Mr. Mutula Kilonzo. I call him "*wakili*". He is the one I know. If I was to appoint somebody a judge, I would most likely appoint Mutula Kilonzo. This is not because I do not know anybody else. If I do not believe he will do the job, I should not appoint him. That is the culture that we have got to create in this country. It is not time to think that we can get rid of our skin, which is black. No! We are wasting time because the problem is not in our skin. The problem is in other areas and let us tackle it. The problem we have is putting ethnicity in our hearts.

Madam Temporary Deputy Speaker, this is not just in appointments. Three years down the line, I would not say that this country has reconciled. What are we doing as leaders? What are we doing as a Parliament? The other day, we witnessed an ugly incident in Nakuru. What have we done? That is the issue. Let us tackle that, and not try to say that appointments are the issue.

*[The Temporary Deputy Speaker  
(Dr. Laboso) left the Chair]*

*[The Temporary Deputy Speaker  
(Prof. Kaloki) took the Chair]*

Mr. Temporary Deputy Speaker, Sir, I wish men of great statesmanship and honour will be chosen to the panel of the JSC, though not necessarily based on academic ability.

**An hon. Member:** And women!

**Eng. Maina:** Of course. "Men" in the Bible means both men and women, unless you are not a Christian.

Let us try to have a panel of great honour and great respect, which is going to be dealing with some of these matters because of what justice is.

I wish to stop there. I support all the measures by the Minister and the Government to put our Judiciary in a better form.

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang'): Mr. Temporary Deputy Speaker, Sir, thank you for this opportunity.

First and foremost, we have run the Judiciary for the last almost 50 years without a Judicial Service Act. We have run the Judiciary without rules on how to manage it. We have run the Judiciary on the whims of whoever is chosen by some luck to be the Chief Justice, and whoever has been chosen to be the Registrar. This has been done without any rules.

Mr. Temporary Deputy Speaker, Sir, it is a pity that we have done that. In fact, we are very lucky that we have run the Judiciary without rules for 50 years and it has been running, anyway. I do not know whether it has been running forward or backwards. However, I think most of the people in this country believe that we have not been running forward. In fact, I think that is the reason we have talked of radical surgeries, reforming the Judiciary and now we are attempting to have a Judicial Service Act in place, so that the Judiciary can run on some rules.

There was a time when you could walk into the Office of the Chief Justice at anytime, especially when they were *wazungus* and you were listened to. In fact, if you had an application which you insisted that you wanted the Chief Justice to hear, the Chief Justice would gladly listen to you anytime. Incidentally, the Chief Justice would even give you tea, something which you rarely got.

The current Chief Justice of the Republic of Kenya, who is retiring in March--- If you tried to make an appointment to see the Chief Justice, first of all, you would wait for ages.

If you wrote to the Chief Justice to get an appointment, you would not be replied to. If you tried to knock the door of the Chief Justice, the policemen would stop you. I am saying that we have been running the Judiciary without rules and certain standards of how they manage this very important institution.

*[The Temporary Deputy Speaker  
(Prof. Kaloki) left the Chair]*

*[The Temporary Deputy Speaker  
(Mr. Ethuro) took the Chair]*

Mr. Temporary Deputy Speaker, Sir, the Judicial Service Commission Bill actually expands the principles that we have put in the Constitution. First of all, it recognizes the fact that the country has said that we want the appointment of judges to be transparent; that is, we do not want somebody to go to the President at night, like that judge who went to Abraham Lincoln and asked to be appointed a judge. I know that to be appointed a judge in this country, you need to know a very good politician. By “a good politician”, I mean “a connected politician” in fact, the word is influential. An influential politician is the one that knocks the door of State House at any time. That is how to become a judge. Otherwise, there is no other way of becoming a judge in the Republic of Kenya. If I am appointed by somebody in that manner, why do I not protect him? Why do I not support him? Why do I not check with him whenever I am about to make a judgment; whether it is pleasant? Why should I not check with him whether to jail this man for life or to give him 10 years because it just fell on me that I was appointed? It is overwhelming and I must pay back. So, that is how the Judiciary has been working.

The Judicial Service Commission that I know of, until the other day when we added some very young energetic people, was all appointees of the President. The Chief Justice was an appointee of the President through an announcement at 1.00 p.m., news. There were two judges whom the Chief Justice himself appointed from among the judges, which judges were also appointed at 1.00 p.m. So, all the three were appointees of the same President. And then there was the Attorney-General who was also appointed at 1.00 p.m. Then, of course, there is the Head of Public Service Commission who was also appointed at 1.00 p.m. So, if all these people were appointed by the President and the he wanted Otieno Kajwang to be a judge, how can they refuse? How can they even advise him? He is the one to tell them what he wants. This is the culture from which the Constitution is removing us. I think that is what the Judicial Service Commission Bill is expanding so that we know how to appoint people in offices and how the courts will be managed. That is why I think it would have been very un-advisable, if I was a lawyer of the Orange Democratic Party the other year, to advise them to go to court if you look at what I have just said that all of them are appointees of the President.

Mr. Temporary Deputy Speaker, Sir, the only other person who can also remove them is the President because he is the one to appoint a tribunal to check your conduct. So, if you misbehave or you refuse to do what he wants, then there will be a commission to check your conduct. We are coming out of a very dark Judiciary to a new dispensation.

Hon. Mungatana said that the word “President” is reserved for the President of the Republic. I think when we were fighting, hon. Orenge, at one time was President of the Students in Nairobi University. Everybody else was a president, including a president of a club of a village. There was a president of a tribunal court in Ndhiwa and he never gave us problems. So, some of these people who grew up when Moi was the only President think that the word “President” means President of the Republic of Kenya. In fact, it was Mr. Njonjo who made it unlawful for anybody to call himself a President. We even had the president of the Seventh Day Adventist Church where I pray and it had never given anybody problems until Mr. Njonjo said that there will be no other President in the Republic of Kenya other than the President of the Republic of Kenya. I love the writers

of the Constitution; they demystified this word called “President” and have included it in the Constitution and now we can use it liberally. I think this now gives every other chairman of the association in the village the latitude to call himself president, if he wants to.

Mr. Temporary Deputy Speaker, Sir, I want to give you a story of two judges that I know of. One was called Justice O’Connor. Justice O’Connor would handle almost 50 cases every morning and every time, he would be very satisfied. He would come when he has read your file, he already knows what you are seeking and even if you asked for an adjournment, he would tell you: “Even before I give you the adjournment, I can see you have no case”. Then he would dismiss it. Justice O’Connor worked tirelessly and so hard, until one morning he told me: “You know, Kajwang, I have just received a letter from the Head of Public Service that I have been fired. I said: “But the Head of Public Service did not hire you; how can he fire you?” He told me: “That is the letter I have got. Can I hire you as my lawyer to defend me”. It was very sad for me, because I thought he was a very good judge and very active. He would be quick in delivering justice but he went. He was warned that if he tried to go to court to embarrass anybody, he would be deported forthwith.

The other judge was Justice Togbo. Justice Togbo found in a petition court that was filed against President Moi by hon. Matiba then, that although hon. Matiba did not sign the petition; it was signed by his wife, the petition was properly before the court. I think it was the current Minister for Justice, National Cohesion and Constitutional Affairs who was the lawyer of President Moi. For that reason, Justice Togbo was forced to leave the Judiciary.

But when you have the courage and the ability to deliver justice and deliver it swiftly, usually you leave your job in the Judiciary. If you are moribund and always ask: “what can I do here,” you rise in the Judiciary. That is where we are coming from. I understand that Justice Togbo is now a big administrator all over Africa and abroad, doing very good cases and settling very many issues that he would have done when he was a judge. So, we have lost very good people because we were managing the Judiciary without rules. I like what we are trying to do now.

Mr. Temporary Deputy Speaker, Sir, there is a provision which we liked in Article 13 that talks of technology; that a judicial officer should be somebody who can use the latest technology. What I have in mind and why we introduced that--- No, I think it is in Article 3 (l) on page 33. It says that: “A judge should apply modern technology in his operations.” If you go to a court of law, most judges have the tradition of using ink; they write with a pen in long hand and they write slowly because you know some judges are now 70 and above. They do not hear fast because they have to say it loud; and they strain to read or see. For him to write “communicate,” it takes minutes! So, the judge can decide what to write and what not to write during the proceedings. If he decides not to write one of your best points or the best part of your evidence, then it means that even if you go to appeal, there will be no record that that matter ever rose. So, I was telling them that in Parliament here, as I speak now, if leave here after an hour and went to the HANSARD, most likely I will be given a transcript of what I have spoken. We need to have a verbatim transcript of what happened; so that if the judge abused or harassed me, because we are talking of temperament, it would also be in the transcript. I think we should make it a rule, Minister – and I am also talking to the new Chief Justice, whoever

he will be – that all proceedings must be transcribed by the HANSARD so that whatever I say and, especially, when you want to go to appeal – of course, somebody else will have to type those proceedings, you know we have even mentioned that the judge should have a good handwriting – some judges write things you cannot read and then somebody will have to type it – somebody who knows his handwriting, because it is very difficult to read it – and then, somehow, if the person who knows the handwriting is not there, then you will have to call the judge to start the case afresh; or get somebody else to start the case afresh. These are some of the things that delay justice. If they use technology, then the judges will be free from writing and they will listen to you; look at your demeanor, ask relevant questions and get evidence down. So, I agree that sometimes changing the Judiciary is difficult, because they also say that they are independent, but I hope that we will get a Chief Justice who can get some of these sentiments made real.

On funding, Mr. Temporary Deputy Speaker, Sir, actually the Judiciary has suffered a great deal because of funding. The Treasury does not understand that the Judiciary needs funds. In fact, if you ask them, they will tell you: “What does the Judiciary want to do with money?” That is why our Judiciary has lagged behind. We do not have space in the High Court here; judges are sitting on top of each other.

In fact, we have magistrates on some mabati roof courts. The Treasury does not understand the needs of the judiciary. It is a good thing that for the first time, the Constitution recognized this need, like we did with Parliament. Right now, Parliament is getting some facilities that were never there.

In fact, I am not bothered about retention of monies that could be raised by the judiciary. Why? Every other Ministry sometimes also retains some money, so long as when the Budget is being done, the Treasury knows how much you retained and how much to add. It becomes part of the Consolidated Fund. However, it becomes available to the Judiciary to use it as they proceed with administration of justice.

Mr. Temporary Deputy Speaker, Sir, I have been told that judges would be very shy to apply. In fact, I want to agree with hon. Maina on this. I have been told that judges will be very shy to apply for any position. What if you apply and an interview were done and then there was a finding that you did not qualify. How do you go back and sit on the bench because many of the people who will be appearing before you will say: - “This one could not make it”? How do you sit there? It is very embarrassing for them. I think as much as we need a panel that will do this in a transparent manner, it is very demeaning for a judge to apply for a job and not get it. In fact, I get the feeling that most of the judicial officers, if they are asked to apply for the job of the Chief Justice, they will not apply. Sometimes, the ones who will not apply are the best. So, we must find a mechanism of head hunting and interviewing them in private. This idea of bringing a judge to interview him on live television and asking him about his girlfriends and children is not good for the country. If you still want him to be a judge. I think we will make amendments. In some of these things, we must look at the kind person we want to be there and the prestige of that office and the respect people give to that office. That is why you cannot interview a President. Of course, you can say as many things about him. He will always deny. So, we cannot interview the President of the Republic of Kenya. He will just win an election. However, if you are to bring somebody here, that you want to choose a President transparently by interviewing him, nobody will apply.



**Mr. Oyongo Nyamweya:** On a point of order, Mr. Temporary Deputy Speaker, Sir. Is the hon. Member in order to say that we are not able to have a President elected transparently?

**The Temporary Deputy Speaker** (Mr. Ethuro): Order, hon. Oyongo Nyamweya! You are seeing the disorder in your own mind. The Member did not say so.

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): Thank you, Mr. Temporary Deputy Speaker, Sir, for protecting me. I only said that, of course, we go through elections, which are transparent to get a President. However, if the Office of the President were to be filled by interviews---

**The Temporary Deputy Speaker** (Mr. Ethuro): Hon. Kajwang, your time is up!

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang): I beg to support.

**Mrs. Odhiambo-Mabona:** Thank you, Mr. Temporary Deputy Speaker, Sir, for giving me this opportunity to contribute to this Bill.

I want to thank the Minister for bringing this Bill at such a time when we are talking about issues of the Judiciary and separation of powers. I have worked for a long time on the issues of access to justice and reform of the Judiciary when I was in the civil society. I particularly worked in the programme called the Governance, Justice and Law Order Sector Reform Programme (GJLOs), that was working around issues of reforms of the Judiciary. That is why the Judicial Service Bill is necessary because it sets the stage and agenda for the reform of the Judiciary.

I want to say that if there is one challenge that we face in terms of access and reforms in the Judiciary. There are many people who are unable to get access to the Judiciary. They include especially women and children. This is because of the perception that the Judiciary is corrupt. If the Judiciary is corrupt, then the children and women who are not financially endowed very often do not have access to justice. I mean children and women whose fathers and husbands, respectively, have refused to take care of them. We have many cases - and most of them have been in court for years and years - where women have been chased out of their homes with children. For many of them, if you looked at their cases critically, you will find that it was because somebody was compromised.

Mr. Temporary Deputy Speaker, Sir, I started my legal career with the election petition court which was then one court. I am happy that even though our Judiciary is not where we want it to be, at least, a little has changed. But we do not want just a little but a lot. When I sat in that election petition court, I was shocked. I am sure Mr. Kombo cannot remember but I was a very young petite girl. I can see the Minister is nodding because he remembers very well. I was the one representing the Attorney-General and I sat through when his election was declared unconstitutional. I remember Mr. Kajwang abusing the judges together with his clients. He said that one day, he shall reform this country. I remember he came in a torn gown and as a young lawyer, I was looking at them. I looked at all those heavy weights and said: "Wow!" I did not know that one day, they will be sitting on the same side with Mr. M. Kilonzo as the Minister for Justice, National Cohesion and Constitutional Affairs. So, indeed, it is something that is changing but we want more changes than what we are seeing.

I also want to talk about what Eng. Maina said on the issue of renewal of our minds. I know that those who are calling for judges from outside the country--- It is not

that we do not have confidence in our skin. I do not know if he was talking about George Laming's *In the Castle of my Skin*. I think when George Lamming was writing his book, he was talking about the issue of discrimination. We could look at it in reverse and in our circumstances. We have ethnic discrimination and I know there are speakers who have spoken about it, including Prof. Onger. I want to say that one of the things that we do not want to talk about - and I heard the Prime Minister when he was giving his speech over the contentious nominations--- He was really sort of being put in a fix by being told: "Just tell us. Do you want Justice Riaga Omollo?" I could see the Prime Minister at pains to explain that he did not want Justice Riaga Omollo. My concern is this: Why would the Prime Minister backtrack? What is a fact? The fact is that Justice Riaga is the most senior judge. Why do we want to back off saying that Justice Riaga is qualified? Is it because his name starts with "O"?

*(Applause)*

Those are the things and questions we must ask ourselves as a country. There are many tribes in this country. I have heard Ms. Karua complaining before and I want to complain on her behalf that we cannot make tribes apologize for who they are. We need to be proud of our ethnic background! I was born a Suba, which is a Bantu tribe, but I have chosen to be a Luo and I have no apologies. I will not apologize for being either! I am married out of this country to a different ethnic community. Those are choices; some are not my choice but others are by my choice of what I have decided to associate with or what I have decided to become. I cannot be made to apologize for that.

So, Mr. Temporary Deputy Speaker, Sir, I want to say that, other than changing the Judiciary, we must renew our minds because it does not matter who we put in that Judiciary. If our minds are corrupt, whether we put a black, a white or a yellow person, it does not matter.

Mr. Temporary Deputy Speaker, Sir, I would like to raise the issue of separation of powers.

What I would want to encourage the Judiciary is to be more assertive. For the first time, I have seen the judiciary actually trying to assert itself. But unfortunately, they are only doing it this time because, in my view, it could be to do with issues that affect them. Other than that, the Judiciary must hold its ground; the Executive must hold its ground and the Legislature must also hold its ground. When you have checks and balances, then we would not have the sort of confusion and mayhem that we see in this country.

Mr. Temporary Deputy Speaker, Sir, I want to talk about the issue of the independence of the Judicial Service Commission (JSC) in light of the issues and circumstances that are surrounding us. Depending on what we say or do, we may be setting a very dangerous precedent. The Constitution says that the judges shall be appointed with the recommendation of the JSC. I wonder when the time comes, whether we will be defining what recommendation means. Will the JSC give names, we discard them, pick new ones and then say that we are reforming our judiciary and then we might as well use the old Constitution? Let us not renew institutions alone, but let us also renew our minds.

Mr. Temporary Deputy Speaker, Sir, there is a dangerous trend that I see emerging in this country. I come from a civil society background. Fortunately for me,

God gave me a very good gift. I am proud of who I am and I have no apologies to make about it. We criminalise and demonize this thing called activism. This country would not be where it is without activism. If, for instance, I wanted to be a judge or anything else, then I am precluded because I fought for change in this country. It cannot be a crime.

I am seeing Prof. Yash Pal Gai wearing T-shirts which he never used to wear before because he is not happy with what is going on. Does that make him a bad person? No! It just makes him a Kenyan that wants change and we cannot criminalize that. So, it would be very unfortunate, the day that, say, the name of Prof. Yash Pal Gai comes here and we start calling him an activist. I am an activist. I was an activist and will always be an activist. I am proud to be an activist because it makes things happen in this country.

Mr. Temporary Deputy Speaker, Sir, I want to speak about temperament which Mr. Mungatana spoke about. I know this is a good Bill. However, I will be proposing some amendments. One of them is on the issue of temperament. I am not a psychologist. However, working with children, I have been forced to train a little on issues of psychology. I can tell you from what you have prescribed here, we will be hiring a judiciary of melancholics and phlegmatics. The rest of us who are sanguines and choleric will be out of the equation. Those are personality types. That is what we talk about when we are talking about temperaments.

Mr. Temporary Deputy Speaker, Sir, God ordained us to be what we are and who we are. There are those of us who are loud. We make the world beautiful by being loud. There are those who are quiet. We make the world beautiful by being quiet. So, we cannot pick a personality type and say that in the Judiciary, we want a personality type.

I saw a lot of resistance when Mr. Ahmednassir Abdulahi came before us and yet if you really ask what the issue is, people say: "This guy is rude". So, what? I have never seen any law in Kenya which says it is a crime to be rude. It is about manners. If you cannot learn manners, that is a different thing. However, it is not a crime to be rude. It would be good to be courteous. But we cannot put it in a law that if you are not courteous, you cannot have a job. This is because half of this country would be jobless, anyway.

Mr. Temporary Deputy Speaker, Sir, I want to talk about the issue of the need for judicial reforms.

**The Temporary Deputy Speaker** (Mr. Ethuro): Order, Mrs. Odhiambo-Mabona! I hope you have your statistics right.

**Mrs. Odhiambo-Mabona:** Mr. Temporary Deputy Speaker, Sir, from the way we are reacting in this country, even from what is shown from the post-election violence, half of this country would be jobless.

I also want to talk about the issue of technology. In this century and time, if you do not have basic technological expertise, really you are a relic. It looks like it is a difficult thing, especially for persons who are a little older, but it is not too late. I would want to say that in my activism spirit, today a lot of women are wearing black in protest.

We are dressed in black in protest because there are no women in the four positions that have been presented to us. I will not talk about the constitutionality of it because I sit in the Justice and Legal Affairs Committee and I will address the matter there. However, from a factual perspective, there are eminent women in the Office of the Attorney-General. I have given their names before. There are eminent women in the

Office of the Director of Public Prosecution and even in the Judiciary and I can supply their names.

Mr. Temporary Deputy Speaker, Sir, finally, I want to talk about the reason why ODM did not go to court. ODM did not go to court because it did not have faith in the Judiciary. If we do not work on that, we will find ourselves in the same situation not now, but in the future. I hope that we can change our country and take the right path for the sake of our country. That is why I have to say that it is utterly shocking, embarrassing and sad for a person in the calibre of the Vice-President and Minister for Home Affairs to use lopsided information on an unfortunate incident as the post-election violence, to go round the whole of Africa, giving false information by omission. I know many of us would want to wish certain facts away, especially in the wake of the new alliances. However, we cannot change the history of this country. It is unfortunate, but it happened and Kenyans were killed. We know where and how they were killed and who killed who. We can never change that fact.

I would like to encourage the Vice-President and Minister for Home Affairs that, as a born-again Christian, to think, even if not for this country, but for his own salvation, that God will ask him this question: "You had this information, what did you use it for and how did you use it in relation to communities that you did not think supported you?" So, even if it is not for him as the Vice-President and Minister for Home Affairs, but as a born-again Christian, I want him to remember that.

With those few remarks, I beg to support.

**Mr. Oyongo-Nyamweya:** Thank you, Mr. Temporary Deputy Speaker, Sir for giving me this chance to support this Bill. This is a very important day since we passed the new Constitution. This country is moving forward, but the biggest challenge that we have is that we are not respecting the new Constitution. The three arms of Government - Parliament, Judiciary and the Executive, are not respecting the new Constitution. As far as I am concerned, people have been saying that the Judicial Service Commission should not appoint the Chief Justice. My take is that the Judicial Service Commission is the one mandated by the Constitution to appoint the Chief Justice. Why do I say that? Some people have said that the Attorney-General and Chief Justice are leaving their offices; that is true. However, they are not the only sitting members of the Judicial Service Commission. There are other capable members of that Commission.

We all know that the Prime Minister will be running for the Presidency of this country and we know that the President will be leaving office. For this nation to move forward, we need to have a Chief Justice who people will not see as a man or woman who has been given the job. He or she must have the credentials and experience in an independent legal system. If you allow me, I will refer to Chapter 17 of this Constitution. It says; "Every person has the right to institute court proceedings---"

That means that this Constitution has been contravened. According to me, Parliament can go on and debate whatever it wants to debate. However, the High Court of Kenya, which is a separate body mandated by the Constitution to make decisions, has clearly stated that the appointment of the Chief Justice was a contravention of the Constitution. Parliament could adopt the Speaker's ruling and talk about it. However, what message are we sending to Kenyans and to the whole world? When we say that we have a new Constitution which we swore in this House to protect---

## **ADJOURNMENT**

**The Temporary Deputy Speaker** (Mr. Ethuro): Order! Hon. Oyongo Nyamweya, you will still have 17 minutes to contribute to this matter when it comes up again.

Hon. Members, it is now time to interrupt the business of the House. The House is, therefore, adjourned until Tuesday, 15<sup>th</sup> February, 2011 at 2.30 p.m.

The House rose at 6.30 p.m.