

THE COMMISSION ON ADMINISTRATIVE JUSTICE

“OFFICE OF THE OMBUDSMAN”



Hata Mnyonge ana Haki

AN ADVISORY OPINION ON SUCCESSION PLANNING IN STATE AND PUBLIC OFFICES

I. INTRODUCTION

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the recent debate regarding retirement of Judges in the country. While the Commission is cognisant that the matter has been and continues to be the subject of

proceedings before the Court, it has noted that the debate has raised an ancillary, but fundamental issue of succession in State and Public Offices. The Commission further notes that while the Court will make a definitive pronouncement on the age of retirement of Judges, the decision may not address the broader question of succession in the Judiciary or the wider public service. The Commission notes that while the present situation has presented itself in the context of the Judiciary, it is an issue that cuts across all sectors of the Public Service, and which could be due to a vacuum in the legal and administrative frameworks which has the potential of causing a constitutional crisis.

The Commission notes that whereas it is important to determine the retirement age of Judicial Officers, it is equally critical that the question of succession in State or Public Offices be determined for certainty in public administration. The proceedings before the court will not address this issue. The foregoing has prompted the Commission to issue an Advisory Opinion on the matter in accordance with its advisory jurisdiction under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act as hereunder.

II. SUCCESSION PLANNING UNDER THE PRESENT DISPENSATION

Succession planning plays an important role in the development and stability of the public service. It not only ensures uninterrupted service delivery, but also leads to strategic management, leadership development, certainty and fairness in public administration. It takes cognisance of the fact that the exit of officers from service for various reasons, if not handled properly, can create a shut-down of services and instability. It is in this regard that Kenya's present dispensation provides for succession in State and Public Offices. In the first place, the Constitution provides for succession in all State Offices, including the Office of the President. It, for instance, provides an elaborate mechanism of succession of the President under Article 141 which involves both an outgoing and incoming Presidents.

However, while there are procedures for appointment to other State and Public Offices, the process is not elaborate and creates the potential of a vacuum in such offices in instances where the appointment process is not commenced early enough before the retirement of the holder of a given

office. This has been particularly evident in some State Offices whose positions remained vacant for long after the expiry of the office holders. A case in point is the Kenya National Commission on Human Rights whose new Members were appointed long after the expiry of the term of the then members. The situation is likely to worsen in the coming months given that various State Offices like Commissions will have the tenure of the members expiring. Similarly, the Judiciary will be affected regardless of the outcome of the matters presently in Court. Further, it is worth noting that certain offices such as those of the Chief Justice, Commission Chairpersons and Independent Office Holders should not remain vacant without substantive holders owing to the nature of their duties. In light of this, there is need to provide mechanisms for effective succession planning in State and Public Offices in Kenya.

III. SUCCESSION PLANNING IN THE JUDICIARY AND THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

Succession planning is integral in the context of our electoral cycle in which two State Offices, the Independent Electoral and Boundaries Commission (IEBC) and the Judiciary play important roles. It is, therefore, imperative that the offices are properly constituted to avoid creating a legal vacuum within months of the next elections. However, this is one of the significant challenges that both the Judiciary and IEBC are likely to face.

a) Succession Planning in the Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission is the sole body charged with the responsibility of conducting elections to any elective office established by the Constitution or an Act of Parliament. To this end, it is the body that declares the results of an election. In the case of election of the President, Article 138(10) of the Constitution makes it mandatory for the results of election to that office to be declared by the Chairperson of IEBC, and to transmit a written notification of the results to the Chief Justice and the incumbent President.

It is instructive to note that the IEBC Commissioners were gazetted on 9th November 2011 and subsequently sworn-in on 14th November 2011 for a fixed term of six (6) years. In case the date of gazettelement is considered as the date of appointment, then the term of Commissioners will end on 8th November 2017, whereas it will be 13th November 2017 if it is the date of swearing-in. Regardless of the date taken, there is a prospect of the process going beyond the end of the term of the IEBC Commissioners which would create a constitutional crisis as illustrated in the scenario hereinafter:

- The date of the next General Elections will be on 8th August 2017 as announced by IEBC;
- The results of the election must be declared within Seven (7) days as per Article 138(10) of the Constitution, which takes it to 15th August 2017;
- A Petition on the validity of presidential election must be filed in the Supreme Court within seven (7) days after the date of declaration of results as per Article 140(1), thus taking it to 22nd August 2017;
- The Supreme Court has Fourteen (14) days to determine the Petition [if not extended as proposed by the Judiciary], thus taking the process to 5th September 2017;
- In case the Court finds the election to be invalid, a fresh election must be held within Sixty (60) days after the determination [Article 140(3)], which takes it to 4th November 2017;
- The results of the election must be declared by IEBC within Seven (7) Days after the elections which takes the process to 11th November 2017;
- In the event a person is aggrieved by the results of the fresh Presidential election, he can file a petition in the Supreme Court to challenge the election of the President-Elect within Seven (7) Days after the declaration of the results, and the Court would have to determine the matter within Fourteen (14) Days after the filing of the petition. This would take the process to 2nd December 2017, and even then, the Court could make a decision for fresh elections;
- By this time, there would be no substantive Chairperson or Commissioner at IEBC!

It is instructive to note that the tenure of the Commissioners has been set by Article 250(6) of the Constitution as six years and cannot be extended

without an amendment of the Constitution by referendum (A. 255). The foregoing creates the possibility of a constitutional crisis due to the role of the IEBC Chairperson in presidential election. Further, it is worth noting that IEBC, like other Commissions, must have at least three Commissioners for it to be deemed properly constituted, and the fact of Commissioners forming the Commission; their roles cannot be performed by the Secretariat.

b) Succession Planning in the Judiciary

In relation to the Judiciary, the Supreme Court is the only court that determines the validity of a presidential election, and the Chief Justice or Deputy Chief Justice administers the oath of office of President to the President-Elect. These are enormous tasks that are not transferrable to any other person or institution and which, if not handled properly within the Constitution, could lead to a constitutional crisis.

It is worth noting that the positions of three out of the seven Judges of the Supreme Court may well be vacant before the next General Elections in August 2017. These are the positions for the Chief Justice, Deputy Chief Justice and a Judge. This creates the possibility of the Supreme Court not being properly constituted as required by Article 163(2) of the Constitution insofar as only four Judges instead of the minimum five will be available to preside over matters at the Court. Further, it could derail the swearing in of the President-Elect due to the absence of the Chief Justice, and/or Deputy Chief Justice one of whom must preside over the ceremony. This could create a constitutional crisis in case a presidential election petition is filed before the Court which must be determined within fourteen days of filing.

While the Chief Justice has commendably expressed his intention to retire early, as early as 2016, the two other Judges of the Court have contested their retirement in Court as permitted by law. However, while the matter has been determined by the High Court and is currently the subject of appeal at the Court of Appeal, we opine that the decision of the Court of Appeal ought to be accepted as final in the interest of justice. A further appeal to the Supreme Court would be inappropriate and riddled with conflicting interests. This is because of the Seven (7) Judges of the Supreme Court, Two (2) including the Chief Justice are members of the

Judicial Service Commission who took the view that retirement of Judges ought to be at 70; Two (2) other Judges are the subject of the appeal, while the remaining Three (3) Judges were part of the Bench that expressed the opinion that Judges ought to serve up to 74 years.

Further, we note with concern the recent amendment to the Judicial Service Act, which on the face of it, appears unconstitutional. The amendment requires the Judicial Service Commission to recommend names of three candidates each to the President for appointment as the Chief Justice or Deputy Chief Justice. This is a departure from the previous case where only one name for either position would be recommended to the President for appointment. Specifically, the amendment offends the Constitution for the following reasons:

- i) Article 166(1)(a) of the Constitution provides that 'the President **shall** appoint the Chief Justice and the Deputy Chief Justice, **in accordance with the recommendation** of the Judicial Service Commission, and subject to the approval of the National Assembly.'
- ii) In using the word 'shall', there is no discretion given to the President in the appointment of the Chief Justice or the Deputy Chief Justice. It should be noted that, by giving more than one name, the amendment gives the President a discretion which is not contemplated by the Constitution.
- iii) The wording of the Article is in singular (recommendation) as opposed to plural (recommendations) which clearly, therefore, limits the idea of recommending several names to the President.
- iv) Arguments to compare this provision with the appointment of Chairpersons of Commissions under Article 250(2)(a) is erroneous since the latter allows Parliament greater latitude as to recommend more than one name as they may deem fit.
- v) To argue to the contrary would suggest that in the event of vacancies in the rank of Judges, the Judicial Service Commission would be similarly required to forward names three times the number of vacancies to enable the President select a third of them

which would clearly contravene Article 166(1)(b) and 172(1)(a) of the Constitution.

- vi) In any event, the spirit of the Constitution as encapsulated in Article 259(1)(a) requires a purposive interpretation of the Constitution. The purpose of the wordings of Article 166 was always to limit the whims and discretion of the Presidency in appointing the Chief Justice and his Deputy.

Separately, we also note with concern the unfortunate trend of undertaking substantive amendments to various laws through an omnibus Statute Law (Miscellaneous Amendments) Bill whose effect is to negate public participation in the legislative process.

IV. WAY FORWARD

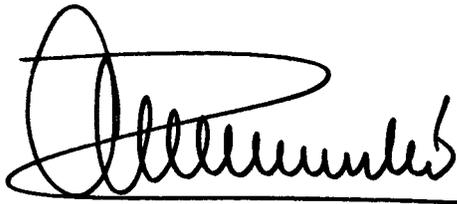
On the basis of the foregoing analysis, we specifically advise as follows:

- i.) There should be proper succession planning for all State and Public Offices which ensures that incoming officers are appointed well in advance before the end of the tenure of the outgoing officers to enable them acquaint themselves with the offices. Accordingly, the appointment process for State and Public Officers should be commenced six (6) months before the expiry of the tenure of the outgoing officers. This would also ensure ample time to address any issue that may arise in the appointment process.
- ii.) In the context of the Judiciary, there is need for the Chief Justice (as Chair of the Judicial Service Commission) to immediately commence the appointment process of the new Chief Justice to avert a constitutional crisis that may arise. Having signaled that he will leave office by June 2016, the process should commence no later than January 2016.
- iii.) The determination of matters regarding the retirement age of Judges that are presently before the Court should be fast tracked, and determined on high priority, since they have a bearing on succession planning in the Judiciary. This will reduce any uncertainty and anxiety that may affect service delivery by the Judiciary.

- iv.) The aforesaid amendment to the Judicial Service Act should be repealed to make the Act be in consonance with the Constitution. Further, the Speaker of the National Assembly and the Attorney-General should ensure that substantive amendments to any legislation is done through a specific Bill rather than an omnibus Statute Law (Miscellaneous Amendments) Bill and also ensure public participation in the legislative process.

- v.) In the interests of the country, and for the greater public good, IEBC Commissioners should be encouraged to voluntarily and honourably leave office about the same time as the Chief Justice, to enable appointment of their successors in good time to prepare for the 2017 General Elections. Since this would not be on account of removal for misconduct, their full benefits would be secured as if they had served their full term.

DATED this 5th day of **January 2016**

A handwritten signature in black ink, appearing to read 'Otieno Amollo', written over a horizontal line.

DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION