

170/for Inter partes Hearing on 02.02.11 at 3:00 p.m.  
MR ONGOYA

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
PETITION NUMBER 16 OF 2011



IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 3, 10, 27, 73(1)(a), 129, 131, 156, 166 228 OF THE CONSTITUTION OF THE REPUBLIC  
OF KENYA AND SECTIONS 12, 24 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA.

AND

IN THE MATTER OF THE NOMINATIONS FOR APPROVAL AND EVENTUAL APPOINTMENTS TO THE  
OFFICES OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS  
AND THE CONTROLLER OF BUDGET UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

1. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ..... 1<sup>ST</sup> PETITIONER
2. CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS ) ..... 2<sup>ND</sup> PETITIONER
3. TOMORROWS CHILD INITIATIVE ( TCI ) ..... 3<sup>RD</sup> PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT( K ) ..... 4<sup>TH</sup> PETITIONER
5. DEVELOPMENT THROUGH MEDIA ( DTM ) ..... 5<sup>TH</sup> PETITIONER
6. COALITION OF VIOLENCE AGAINST WOMEN (COVAW) ..... 6<sup>TH</sup> PETITIONER
7. YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI) ..... 7<sup>TH</sup> PETITIONER
8. THE LEAGUE OF KENYA WOMEN VOTERS ..... 8<sup>TH</sup> PETITIONER

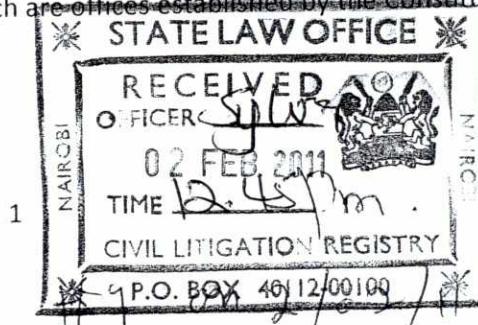
VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

CERTIFICATE OF URGENCY

I, Elisha Z Ongoya, advocate of the High Court of Kenya practicing as such in the firm of Asiema and Company Advocates and having the conduct of this matter on behalf of the petitioners do certify the same as extremely urgent and deserving a hearing on priority basis for the following reasons:

1. The office of the president has purported to nominate persons for approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget which are offices established by the Constitution of Kenya 2010.



for Inter partes

J. A. K. Njoroge

Hunyani & Company Advocates

at 3:00 p.m.

2. The said nominations are *prima facie* unconstitutional for being insensitive to gender equality, and equal opportunity provisions as well as provisions on consultations and public participation as guaranteed by the constitution.
3. The said nominations set a dangerous precedent and stand out as dangerous rodents eating at the very roots of constitutionalism and the rule of law that ought to be safeguarded by the constitution of Kenya 2010 and all persons responsible for implementation and execution of the constitution.
4. There is real and present danger that unless halted by this Honourable Court, other organs of state like the National Assembly may be buoyed by the President's unconstitutional acts and approve the same hence set in motion foundations of blatant disregard for the Constitution.
5. There is urgent need for this court to move with speed as a custodian of the majesty of the constitution and strike a blow for the twin principles of constitutionalism and the rule of law by halting any further blatant and unconstitutional processing of the president's nominations to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.
6. It is just and equitable that this application be heard and determined on priority basis.

Dated at Nairobi this 2<sup>nd</sup> day of February 2011

Asiema and Company  
Advocates for the petitioners

Drawn & Filed By

Asiema and Company

Advocates

Occidental Plaza, 4<sup>th</sup> Floor

Muthithi Road, off Mpaka Road

P.O. Box 11789 – 00400

Nairobi.

To Be Served Upon

The Hon. Attorney General

State Law Offices

Sheria House

Harambee Avenue

Nairobi

02 FEB 2011

CIVIL SIDE

IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

REPUBLIC OF KENYA  
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VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

CHAMBER SUMMONS

(Under Articles 23(3)(c) of the Constitution, Section 19 of the Sixth Schedule of the Constitution of Kenya and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights of the Individual) High Court Practice and Procedure Rules 2006.)

LET ALL PARTIES CONCERNED attend the Honourable Judge at the High Court of Kenya in Chambers on the 2<sup>nd</sup> day of February 2011 at 9.00 O'clock in the morning, in the forenoon or soon thereafter as counsel for the Petitioners/Applicants may be heard on an application for Orders:

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.

2. **That** pending the hearing and determination of this application *inter partes*, a conservatory order be issued restraining the Respondent and any State Officer or organ of state from carrying on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget on the strength of the nominations made by the office of the President on 28.01.2011 or other nominations that may be done in disregard of the constitutional provisions relating to gender equity and equality, equal opportunities for all, transparency and accountability and consultations.
3. **That** pending the hearing and determination of the substantive constitutional Petition a conservatory order be issued restraining the Respondent and any State Officer or organ of state from carrying on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget on the strength of the nominations made by the office of the President on 28.01.2011 or other nominations that may be done in disregard of the constitutional provisions relating to gender equity and equality, equal opportunities for all, transparency and accountability and consultations.
4. **That** the costs of this Petition be provided for.

**WHICH APPLICATION** is based upon the following grounds and further upon the annexed supporting affidavit of **Ann Wairimu Njogu** and on such other and further grounds as may be adduced at the hearing hereof.

- a) On 28.01.2011, the Office of the President in the Republic of Kenya announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget.
- b) All the persons nominated by the office of the President to the offices of the Chief Justice, the Attorney general, the Director of Public Prosecutions and the Controller of Budget were of the male gender.
- c) The office of the Prime Minister has claimed that it was not consulted before the said nominations were done.
- d) The Judicial Service Commission has also claimed that it did not make the recommendations for nomination to the office of the Chief Justice.

- e) The positions of Chief Justice, Attorney General, the Director of Public Prosecutions and the Controller of Budget were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration.
- f) The process of nomination of persons to the office of Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget has generated heat, controversy and tensions in a manner that threatens national unity.
- g) To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without nominating a person of the female gender for consideration, the following provisions of the Constitution were violated:
- i. Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
  - ii. Article 27(4) & (5) of the Constitution that prohibits the state and or a person from discriminating directly or indirectly against any person on any ground including sex.
- h) To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without any advertisements or other mode that invites application from all and desirous members of the general public, the same was contrary to the following provisions of the constitution:
- i. Article 3 that obligates every person to respect, uphold and defend the Constitution.
  - ii. Article 10 (2)(a) that guarantees the Rule of Law as one of the National values and Principles that bind **all state officers, public officers and all persons** whenever they apply or interpret the Constitution.
  - iii. Article 10(2)(b) that guarantees equity, inclusiveness, equality and non-discrimination as National Values and Principles that bind **all state officers,**

public officers and all persons whenever they apply or interpret the Constitution..

- iv. Article 10(2)(c) of the Constitution that guarantees good governance, transparency and accountability as national values and principles that bind all state officers, public officers and all persons whenever they apply or interpret the Constitution.
- v. Article 27(3) of the constitution that guarantees equal opportunities for men and women including the right to **equal opportunities** in political, economic, cultural and social spheres.

- i) To the extent that the nomination for National Assembly approval and eventual appointment of persons to the office of the Chief Justice was done without involving the Judicial Service Commission, the same violated the provisions of Article 166 of the Constitution of the Republic of Kenya.
- j) To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without exhaustive consultations with the office of the Prime Minister, the same violated the provisions of Section 12 and 24 of the Sixth Schedule of the Constitution.
- k) The said nominations set a dangerous precedent and stand out as dangerous rodents eating at the very roots of constitutionalism and the rule of law that ought to be safeguarded by the constitution of Kenya 2010 and all persons responsible for implementation and execution of the constitution.
- l) There is real and present danger that unless halted by this Honourable Court, other organs of state like the National Assembly may be buoyed by the President's unconstitutional acts and approve the same hence set in motion foundations of blatant disregard for the Constitution.
- m) There is urgent need for this court to move with speed as a custodian of the majesty of the constitution and strike a blow for the twin principles of constitutionalism and the rule of law by halting any further blatant and unconstitutional processing of the president's nominations to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.

n) It is just and equitable that the orders sought herein be granted.

Dated at Nairobi this

2<sup>nd</sup>

day of



2011



Asiema and Company

Advocates for the petitioners

Drawn & Filed By

Asiema and Company

Advocates

Occidental Plaza, 4<sup>th</sup> Floor

Muthithi Road, off Mpaka Road

P.O. Box 11789 – 00400

Nairobi.

To Be Served Upon

The Hon. Attorney General

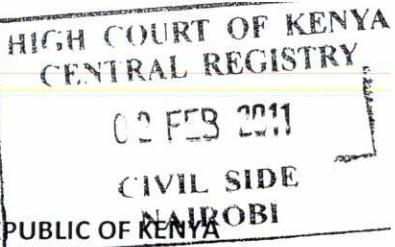
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VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

SUPPORTING AFFIDAVIT

I, Ann Wairimu Njogu, resident of Nairobi within the Republic of Kenya and of Post Office Box 11964 - 00100 Nairobi do hereby make oath and state as follows:

1. That I am the executive Chairperson of the Centre for Rights Education and Awareness, the 1<sup>st</sup> Petitioner herein with the knowledge of the facts attendant to this petition on the application for conservatory orders filed herein hence I am competent to swear this affidavit.
2. That I have the authority of all the Petitioners herein to swear this affidavit on their own behalf.

3. That I adopt and to the facts in the Affidavit sworn by myself in Support of the Petition as if the same were set out in this affidavit in support of the application for conservatory orders.
4. That what is deponed to herein is true to my own knowledge information and belief sources and basis whereof have been expressly disclosed.

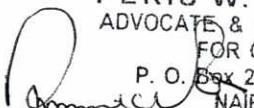
Sworn at Nairobi

By the said Ann Wairimu Njogu

This ~~2nd~~ day of ~~February~~ 2011

} .....  
} .....  
} Deponent  
}  
}  
}  
}  
}  
}

Before Me

  
PERIS W. KARANJA  
ADVOCATE & COMMISSIONER  
FOR OATHS  
P. O. Box 26679 - 00504  
NAIROBI.

Commissioner for Oaths

Drawn & Filed By

Asiema and Company

Advocates

Occidental Plaza, 4<sup>th</sup> Floor

Muthithi Road, off Mpaka Road

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VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

TO

The High Court of Kenya  
Nairobi

PETITION

The humble Petition of CENTRE FOR RIGHTS EDUCATION AND AWARENESS ( CREAW), CAUCUS FOR WOMEN'S LEADERSHIP ( CAUCUS ), TOMORROWS CHILD INITIATIVE ( TCI), WOMEN IN LAW AND AND DEVELOPMENT( K), DEVELOPMENT THROUGH MEDIA ( DTM), COALITION OF VIOLENCE AGAINST WOMEN ( COVAW), YOUNG WOMEN LEADERSHIP INSTITUTE ( YWLI), THE LEAGUE OF KENYA WOMEN VOTERS of Nairobi in the Republic of Kenya is as follows:

## THE PARTIES

1. The Petitioners are Non-Governmental Organizations and Associations incorporated and registered as such under the laws of Kenya. They are also members of the Gender 10 and Gender plus coalitions which are networks of civil society organizations advancing and advocating for gender considerations in all spheres of development. They bring this petition as groups and associations acting on behalf of their members, on behalf of the women of Kenya and in the public interest. Their address of service for purposes of this suit shall be **C/o Asiema and Company Advocates, Occidental Plaza, 4<sup>th</sup> Floor, Muthithi Road, off Mpaka Road, P.O. Box 11789 – 00400, Nairobi.**
2. The Respondent is the Attorney General of the Republic of Kenya. He is joined to this Petition as Respondent pursuant to the provisions of Article 156 of the Constitution of the Republic of Kenya in his capacity as:
  - a. The principal legal adviser to the Government of the Republic of Kenya.
  - b. The person authorized by law to represent the National Government in court or in any other legal proceedings to which the national government is a party.
  - c. The officer of government under a duty to promote, protect and uphold the rule of law and defender of the public interest.

## THE LEGAL FOUNDATIONS OF THE PETITION

3. The Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.
4. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds "***all State Organs at both levels of government***".
5. Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.
6. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
7. Article 10 of the Constitution of the Republic of Kenya sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they **apply or interpret the constitution**, enact, apply or interpret any law, make or implement public policy decisions.

8. Among the national values and principles of governance are, **national unity, the rule of law, participation of the people, equity, inclusiveness, equality, human rights, Non-discrimination, good governance, transparency and accountability.**
9. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that;
- a. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - b. Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
  - c. The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
10. Article 73 of the Constitution of the Republic of Kenya provides that authority assigned to a State Officer is a public trust to be exercised in a manner that is **consistent with the purposes and objects of the constitution**, demonstrates respect for the people, brings honour and dignity to the office and promotes public confidence in the integrity of the office.
11. Under Article 129 of the Constitution of the Republic of Kenya, the Executive Authority of the Republic should be exercised **in accordance with the constitution** and in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit.
12. Under Article 131 of the Constitution the President of the Republic of Kenya is under a duty to respect, uphold and safeguard the Constitution, promote and enhance the unity of the nation and ensure the protection of human rights and fundamental freedoms and the rule of law.
13. Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, which is, appointment by the president **in accordance with the recommendation of the Judicial Service Commission** and subject to the approval of the National Assembly.
14. Article 156 of the Constitution of the Republic of Kenya provides for the appointment of the Attorney General which is nomination and appointment by the President subject to approval by the National Assembly.

15. Article 157 of the Constitution of the Republic of Kenya provides for the process of appointment of the Director of Public Prosecutions which is nomination and appointment by the president subject to approval by the National Assembly.
16. Article 228 provides for the appointment of the Controller of Budget which is nomination and appointment by the President subject to approval by the National Assembly.
17. Section 12 of the Sixth Schedule of the Constitution of the Republic of Kenya saves the persons occupying the offices of the President and Prime Minister immediately before the *effective date( 27.08.2010) in accordance with the National Accord and Reconciliation Act, 2008* until the first General Election held under the Constitution.
18. Section 24 of the Sixth Schedule of the Constitution of the Republic of Kenya provides for the termination of the term of office for the person serving as Chief Justice on the effective date and provides that such person shall vacate office within six months from the effective date and that the successor in office shall be appointed by the President subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the Approval of the National Assembly.
19. Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and **contributes to good governance**.

## THE FACTS

20. On 28.01.2011, the Office of the President in the Republic of Kenya announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget.
21. All the persons nominated by the office of the President to the offices of the Chief Justice, the Attorney general, the Director of Public Prosecutions and the Controller of Budget were of the male gender.
22. The office of the Prime Minister has claimed that it was not consulted before the said nominations were done.
23. The Judicial Service Commission has also claimed that it did not make the recommendations for nomination to the office of the Chief Justice.

24. The positions of Chief Justice, Attorney General, the Director of Public Prosecutions and the Controller of Budget were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration.
25. The process of nomination of persons to the office of Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget has generated heat, controversy and tensions in a manner that threatens national unity.

#### **VIOLATIONS OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND FREEDOMS**

26. To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without nominating a person of the female gender for consideration, the following provisions of the Constitution were violated:
- a. Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
  - b. Article 27(4) & (5) of the Constitution that prohibits the state and or a person from discriminating directly or indirectly against any person on any ground including sex.
  - c. Article 129(1)&(2) of the Constitution which require that Executive Authority be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit.
  - d. Article 131(2) that obligate the president to respect, uphold and safeguard the constitution, promote and enhance the unity of the nation, ensure the protection of human rights and fundamental freedoms and the rule of law.
27. To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without any advertisements or other mode that invites application from all and desirous members of the general public, the same was contrary to the following provisions of the constitution:
- a. Article 3 that obligates every person to respect, uphold and defend the Constitution.

- b. Article 10 (2)(a) that guarantees the Rule of Law as one of the National values and Principles that bind **all state officers, public officers and all persons** whenever they apply or interpret the Constitution.
- c. Article 10(2)(b) that guarantees equity, inclusiveness, equality and non-discrimination as National Values and Principles that bind **all state officers, public officers and all persons** whenever they apply or interpret the Constitution..
- d. Article 10(2)(c) of the Constitution that guarantees good governance, **transparency and accountability** as national values and principles that bind **all state officers, public officers and all persons** whenever they apply or interpret the Constitution.
- e. Article 27(3) of the constitution that guarantees equal opportunities for men and women including the right to **equal opportunities** in political, economic, cultural and social spheres.
28. To the extent that the nomination for National Assembly approval and eventual appointment of persons to the office of the Chief Justice was done without involving the Judicial Service Commission, the same violated the provisions of Article 166 of the Constitution of the Republic of Kenya.
29. To the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were done without exhaustive consultations with the office of the Prime Minister, the same violated the provisions of Section 12 and 24 of the Sixth Schedule of the Constitution.

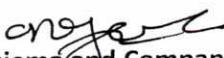
## **PRAYERS**

**Your Petitioners therefore humbly pray for the following orders**

- a) A declaration that the office of the President is an institution bound by the Constitution and that is under a duty to respect, uphold and defend the Constitution in terms of article 2(1), 3(1), 129 and 131 of the Constitution of the Republic of Kenya.
- b) A declaration that the nomination of only people of the male gender for approval by parliament in gender insensitive, discriminatory against women, disrespectful of women and contrary to articles 27, 129 and 131 of the Constitution of the Republic of Kenya and is therefore null and void.

- c) A Declaration that the nominations for purposes of approval and eventual appointment to the Offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 were in violations of articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.
- d) A declaration that any appointments that may be made in like manner as the appointments to the offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget made by the Office of the President on 28.01.2011 would be in violations of articles 3, 10, 27 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.
- e) An order restraining any further purported approval and eventual appointment of the nominations made by the office of the President on 28.01.2011 or any other nominations that may be made in like manner without compliance with the letter and majesty of the Constitution of the Republic of Kenya.
- f) Or that such other Orders as this Honourable Court shall deem just.

Dated at Nairobi this 2<sup>nd</sup> day of February 2011

  
Asiema and Company  
Advocates for the petitioners

Drawn & Filed By

Asiema and Company

Advocates

Occidental Plaza, 4<sup>th</sup> Floor

Muthithi Road, off Mpaka Road

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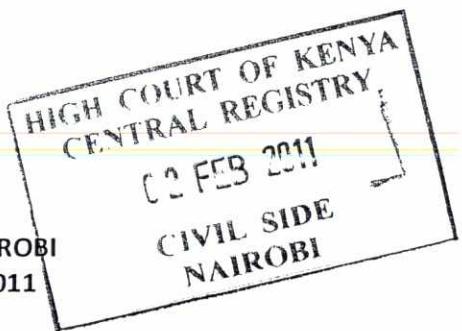
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Nairobi

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
PETITION NUMBER 16 OF 2011



IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 3, 10, 27, 73(1)(a), 129, 131, 156, 166 228 OF THE CONSTITUTION OF THE REPUBLIC  
OF KENYA AND SECTIONS 12, 24 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA.

AND

IN THE MATTER OF THE NOMINATIONS FOR APPROVAL AND EVENTUAL APPOINTMENTS TO THE  
OFFICES OF THE CHIEF JUSTICE, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC PROSECUTIONS  
AND THE CONTROLLER OF BUDGET UNDER THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

- |  |                            |
|--|----------------------------|
| 1. CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) ..... | 1 <sup>ST</sup> PETITIONER |
| 2. CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS ) .....           | 2 <sup>ND</sup> PETITIONER |
| 3. TOMORROWS CHILD INITIATIVE ( TCI) .....                 | 3 <sup>RD</sup> PETITIONER |
| 4. WOMEN IN LAW AND DEVELOPMENT( K) .....                  | 4 <sup>TH</sup> PETITIONER |
| 5. DEVELOPMENT THROUGH MEDIA ( DTM) .....                  | 5 <sup>TH</sup> PETITIONER |
| 6. COALITION OF VIOLENCE AGAINST WOMEN (COVAW) .....       | 6 <sup>TH</sup> PETITIONER |
| 7. YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI) .....           | 7 <sup>TH</sup> PETITIONER |
| 8. THE LEAGUE OF KENYA WOMEN VOTERS .....                  | 8 <sup>TH</sup> PETITIONER |

VERSUS

THE HON. ATTORNEY GENERAL ..... RESPONDENT

SUPPORTING AFFIDAVIT

I, Ann Wairimu Njogu, resident of Nairobi within the Republic of Kenya and of Post Office Box 11964 - 00100 Nairobi do hereby make oath and state as follows:

- That I am the Executive Chairperson of the Centre for Rights Education and Awareness, the 1<sup>st</sup> Petitioner herein with the knowledge of the facts attendant to this petition and the application for conservatory orders filed herein hence I am competent to swear this affidavit.
- That I have the authority of all the Petitioners herein to swear this affidavit on their own behalf.

3. **That** I am also a citizen of the Republic of Kenya and an Advocate of the High Court of Kenya familiar with the provisions of the law and more specifically the Constitution of the Republic of Kenya.
4. **That** on 28.01.2011, the Office of the President in the Republic of Kenya announced the nomination for approval and eventual appointment of persons to the offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget.
5. **That** all the persons nominated by the office of the President to the offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget were of the male gender.
6. **That** paradoxically, members of the female gender constitute over 50% of the population of Kenya according to the latest national population and housing census.
7. **That** the positions of Chief Justice, Attorney General, the Director of Public Prosecutions and the Controller of Budget were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration and for purposes of transparency and accountability and further in order to ensure that the most meriting Kenyans known or unknown to the political leadership of the country are nominated.
8. **That** the office of the Prime Minister has claimed that it was not consulted before the said nominations were done.
9. **That** the Judicial Service Commission has also claimed that it did not make the recommendations for nomination to the office of the Chief Justice.
10. **That** the process of nomination of persons to the office of Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget has generated heat, controversy and tensions in a manner that threatens national unity.
11. **That** I have been advised by the petitioners' advocate on record Mr E.Z. Ongoya which advice I verily believe to be sound and I further verily believe of my own knowledge as an advocate of the High Court that to the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions were done without any advertisements or other mode that invites application from all and desirous members of the general public, the same was contrary to the following provisions of the constitution:

a) Article 3 that obligates every person to respect, uphold and defend the Constitution.

- b) Article 10 (2)(a) that guarantees the Rule of Law as one of the National values and Principles that bind all state officers, public officers and all persons whenever they apply or interpret the Constitution.
- c) Article 10(2)(b) that guarantees equity, inclusiveness, equality and non-discrimination as National Values and Principles that bind all state officers, public officers and all persons whenever they apply or interpret the Constitution..
- d) Article 10(2)(c) of the Constitution that guarantees good governance, transparency and accountability as national values and principles that bind all state officers, public officers and all persons whenever they apply or interpret the Constitution.
- e) Article 27(3) of the constitution that guarantees equal opportunities for men and women including the right to equal opportunities in political, economic, cultural and social spheres.

12. That I have been advised by the petitioners' advocate on record Mr E.Z. Ongoya which advice I verily believe to be sound and I further verily believe of my own knowledge as an advocate of the High Court that to the extent that the nomination for National Assembly approval and eventual appointment of persons to the office of the Chief Justice was done without involving the Judicial Service Commission, the same violated the provisions of Article 166 of the Constitution of the Republic of Kenya.

13. That I have been advised by the petitioners' advocate on record Mr E.Z. Ongoya which advice I verily believe to be sound and I further verily believe of my own knowledge as an advocate of the High Court that to the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions without nominating a person of the female gender for consideration, the following provisions of the Constitution were violated:

- a) Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- b) Article 27(4) & (5) of the Constitution that prohibits the state and or a person from discriminating directly or indirectly against any person on any ground including sex.

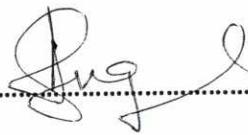
14. That I have been advised by the petitioners' advocate on record Mr E.Z. Ongoya which advice I verily believe to be sound and I further verily believe of my own knowledge as an advocate of the High

Court that to the extent that the nomination for National Assembly approval and eventual appointment of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions were done without exhaustive consultations with the office of the Prime Minister, the same violated the provisions of Section 12 and 24 of the Sixth Schedule of the Constitution.

15. **That** the nominations by the office of the president have attracted public outrage from the general public as well as responsible institutions of the state such as the Judicial service Commission and the Commission on the Implementation of the Constitution and threaten to cause national disunity and generate unnecessary suspicion between state institutions and communities that form public of Kenyan public contrary to the aspirations of the Constitution of Kenya. I attach hereto and mark AWN – 1 being true copies of relevant print media reports that capture the reactions to the impugned nominations.
16. **That** I have been advised by the Petitioners' advocate on record Mr Elisha Z Ongoya which advice I verily believe to be sound and I further verily believe based on my own knowledge as an advocate of the High Court of Kenya that the said nominations set a dangerous precedent and stand out as dangerous rodents eating at the very roots of constitutionalism and the rule of law that ought to be safeguarded by the constitution of Kenya 2010 and all persons responsible for implementation and execution of the constitution.
17. **That** I have been advised by the Petitioners' advocate on record Mr Elisha Z Ongoya which advice I verily believe to be sound and I further verily believe based on my own knowledge as an advocate of the High Court of Kenya that there is real and present danger that unless halted by this Honourable Court, other organs of state like the National Assembly may be buoyed by the President's unconstitutional acts and approve the same hence set in motion foundations of blatant disregard for the Constitution.
18. **That** I verily believe based on the foregoing averments that there is urgent need for this court to move with speed as a custodian of the majesty of the constitution and strike a blow for the twin principles of constitutionalism and the rule of law by halting any further blatant and unconstitutional processing of the president's nominations to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.
19. That I swear this affidavit in support of the substantive constitution petition as well as the application for conservatory orders filed herein.

20. That what is deponed to herein is true to my own knowledge, information and belief sources and basis whereof have been expressly disclosed.

Sworn at Nairobi }  
By the said Ann Wairimu Njogu } .....  
This 2nd day of February 2011 } Deponent  
} }  
Before M~~E~~ PERIS W. KARANJA }  
ADVOCATE & COMMISSIONER }  
FOR OATHS }  
P. O. Box 26679 - 00504 }  
NAIROBI }  
} }  
Commissioner for Oaths }  
}



Drawn & Filed By  
Asiema and Company  
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Occidental Plaza, 4<sup>th</sup> Floor  
Muthithi Road, off Mpaka Road  
P.O. Box 11789 – 00400  
Nairobi.

This is the exhibit marked "AWN-1....." affidavit referred to in the annexed..... declaration of Ann Wairimu Njogu..... sworn..... before me this 2nd day of February year 2011..... at Nairobi, in the Republic of Kenya..... Commissioner for Oaths

Also Inside

Life and times  
of 1998 bomb  
blast planner

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Libido jab for  
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**Instinct**

# THE STANDARD on Saturday. For Fairness and Justice.

TUG-OF-WAR

# Stock nominations

Stocks nominees for key positions amid standoff with Raila in what is seen as Kenya's bid to convince the world that it is ready to try post-election chaos suspects

By STANDARD TEAM

President Kibaki has nominated Justice Alnashir Visram for the Chief Justice position amid a standoff with Prime Minister Raila Odinga.

In a move that caught the Prime Minister's party off-guard for the second time in as many weeks, President Kibaki also nominated Prof Githu Muigai as Attorney General and Mr Kioko Kilukumi Director of Public Prosecutions.

A dispatch from PPS said the President "after consultation with the Prime Minister of the Republic of Kenya Raila Odinga" also appointed Mr William Kirwa as Controller of Budget.

But Lands Minister James Orengo, an ally of the PM, addressed a press conference shortly before the dispatch from the PPS, saying Raila had not been

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Githu Muigai (Attorney General)



Alnashir Visram (Chief Justice)



William Kirwa (Controller of Budget)

## NEWS

# Kibaki nomin

&lt;&lt; Continued from Page 1

consulted. President Kibaki made the key appointments in the Judiciary, barely an hour after Kenya set in motion the process of deferral of cases filed against six of its citizens at the International Criminal Court (ICC).

The timing of the appointment of the new Chief Justice (CJ), the Attorney General (AG) and Director of Public Prosecutions (DPP) is calculated to convince the international community on Kenya's commitment to judicial reforms.

It has been argued the ICC should handle the cases because the country lacks a credible Judiciary to dispense justice to victims of the 2007/2008 post-election violence.

The Government is in a rush to reform the criminal justice system as proof it was now capable of trying those who bear the greatest responsibility for the skirmishes in which more than 1,133 people were killed and over 650,000 displaced from their homes.

**Fresh row**

At his press conference last night, Mr. Orendo urged the President to embrace consultations and claimed the Head of Civil Service Francis Muthaura had confirmed the nomination of Justice Visram as the Chief Justice, with Muigai as the Attorney General and Kilukumi as the Director of Public Prosecution.

The fresh row rekindles memories of strained relationships between coalition partners PNU and ODM that squabbled over positions soon after the signing of the National Accord that ended the 2008 political crisis.

"I have been forced to call this press conference at this hour in regard to the impending appointments to various institutions of the government," said Orendo at 8.30 pm last night.

He said the ODM side of Government was also taken by surprise with the appointment of Major General Michael Gichangi as the Director General of the National Security Intelligence Service, last week.

He said: "The Head of Public Service Francis Muthaura called PM's Permanent Secretary Mohammed Isahakia this afternoon to tell him about the appointments and they were supposed to be announced anytime, but we are not going to accept them because there was no consultation and the Prime Minister who is in Ethiopia attending an AU Summit meeting is not aware."

On Wednesday, the two principals disagreed on who should be the next CJ after Kibaki insisted on High Court Judge Paul Kihara while Raila rooted for court of Appeal Judge Riaga Omollo.

**Accountable process**

It emerged the two had been meeting over the appointment of the CJ, Deputy CJ, Attorney General and the Director of Public Prosecutions all positions to be filled this year.

"They disagreed after Kibaki insisted on picking Kihara while Raila insisted on Justice Riaga Omollo," said a source close to the PM.

The two principals appear to have ignored appeals by the Judicial Service Commission (JSC) to allow it conduct the vetting before forwarding three names to Parliament for approval.

Some JSC members had suggested the appointment of the new Chief Justice be done through a transparent and accountable process.

Under the Sixth Schedule, the President is expected to consult the Prime Minister as provided for under the National Accord to nominate Chief Justice Evan Gicheru's successor.

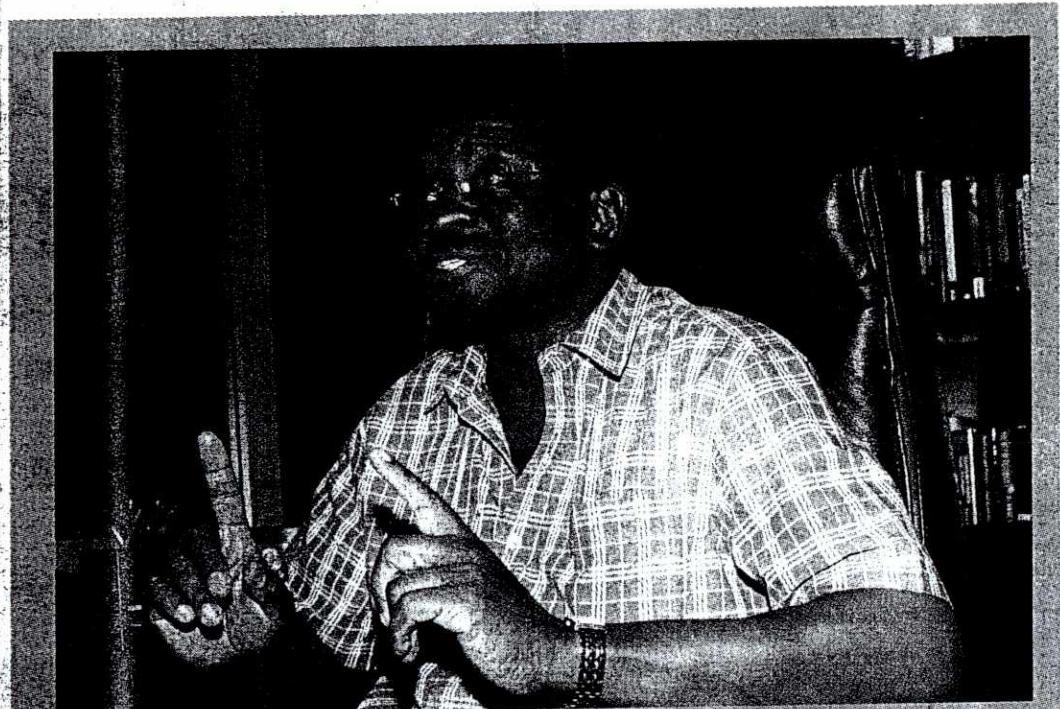
*The Standard on Saturday* has learnt Kibaki and Raila could not agree on the list of new appointees stipulated under the Constitution during the meeting that lasted between 12.30 to 1.30pm at the President's office in Harambee House.

President Kibaki proposed Kihara to be the next Chief Justice, replacing Justice Gicheru, and Lady Justice Hannah Okwengu the deputy Chief Justice.

Justice Omollo is a member of the Judicial Service Commission.

The meeting was postponed after Raila said he would like to consult

# ates CJ, AG amid spat



Lands Minister James Orengo at a press conference yesterday. [PHOTO:COLLINS KWEYU/STANDARD]

more on the proposed appointments. The naming of the new CJ, AG and DPP is central to reforming the Judiciary. These reforms, coupled with reforms in the police service, could bolster Kenya's case to have the ICC cede jurisdiction of the Kenyan cases. The Kenya National Commission on Human Rights (KNCHR) and civil society organisations had expressed concerns about horse-trading on the appointment of the Chief Justice.

#### Political affiliation

They said appointments made through a deal between the President and Prime Minister "loses sight of the history of the sweeping reforms articulated in the Constitution" and demanded "an open and credible process that gives all interested parties an equal chance of becoming Chief Justice."

The Kenya Episcopal Conference has also raised the red flag on unmerited public appointments based on tribalism, nepotism and political affiliation.

"The posts of CJ, AG and DPP are critical and need to be handled carefully. Horse-trading for such positions can be the highest culture of impunity, which the Grand Coalition cannot afford under the new Constitution," Orengo said.

But appointments to key positions arising from the new Constitution have been a cause of friction between ODM and PNU.

The coalition partners have also jointly come under fire from the public due to horse trading and apportioning of posts between themselves with scant regard to competitiveness.

Last week, the President reappointed National Security Intelli-

gence Services (NSIS) Director General Maj-Gen Michael Gichangi for another five-year term.

ODM cried foul saying the President had unilaterally renewed the term of the spy chief, reviving the discontent between the partners in the shaky coalition, whose biggest strain has remained sharing of public appointments.

Orengo claimed the reappointment "set a bad precedent" and was "mischievous" citing the timing while the PM was in Ivory Coast.

Justice Gicheru is expected to leave office by February 27, six months after the enactment of the new Constitution. The offices of AG and DPP must have new appointees by August 27 as the Constitution says they should be replaced within one year.

Reports by Biketi Kikechi, Ben Agina and Alex Ndegwa

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No. 16752

making last night after President made key appointments 'without PM's nod'

# Kibaki names new Chief Justice as ODM protests

Coalition partner says No to nomination of Visram as CJ, Githu Muigai as AG and Kioko Kilukumi as prosecutor

BY ERIC SHIMOLI  
eshimoli@ke.nationmedia.com  
AND EMEKA MAYAKA GEKARA  
gmayaka@ke.nationmedia.com

Court of Appeal Judge Alnashir Ramazanadi Magan Visram was last night named Chief Justice to replace Mr Justice Evan Gicheru.

President Kibaki also nominated law professor Githu Muigai to take over from Mr Amos Wako as Attorney General.

The President also proposed Mr Kioko Kilukumi, a Nairobi lawyer for the new powerful post of Director of Public Prosecutions.

The Managing Director of the Agricultural Development Corporation, Mr William Kirwa, was proposed for



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W YOUR  
TIES

**FRIDAY - SUNDAY**  
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NEW CRISIS | The appointments threaten to divide coalition government even further

# Kibaki appoints new CJ as ODM protests

**CONTINUED FROM PAGE 1**

the new position of Controller of Budget.

But the nominations threatened to divide the government further and provoke a major fight for nomination in parliament after ODM rejected them.

Lands Minister James Orengo protested the nomination of the candidates saying Mr Odinga had not been consulted.

Addressing a swift press conference, Lands Minister James Orengo said that Mr Odinga had advised that the release of the names be delayed awaiting further deliberations by after the two coalition leaders return home from the AU summit in Addis Ababa.

He said that the PM's position was communicated to the President through Public Service Head Francis Muthaura.

"However Mr Muthaura called Mohamed Isahakia (the PS in the office of Prime Minister) yesterday afternoon to inform him that the President had made a decision that the names of the nominees be announced."

The split of the key appointments effectively draws battle lines in Parliament between the President Kibaki's PNU and Mr Odinga's Orange movement.

The new Constitution mandates the President to make the appointment in consultation with the Prime Minister.

After identifying their choice, the candidate's name will be sent to Parliament for debate and approval before the President makes the final appointment.

Another source disputed that Prime

## MORE INFORMATION

### Work and academic history of appointees

**Chief Justice: Justice Afnashir Ramazanadi**

**Magan Visram**

Justice Visram graduated with a degree in law from the University of British Columbia in 1972. In 1978, he graduated with a second degree in Law from University of British Columbia, Canada. In

2006, he graduated with a Master of Laws degree in International Law from the University of Nairobi. While in practice he specialised in commercial, corporate and civil law. In 1999, he was appointed Commissioner of Assize, and in 2001,

he was sworn in as a Judge of the High Court of Kenya, and in 2009 as Judge of Appeal.

1999, he was appointed Commissioner of Assize, and in March 2001, he was sworn in as a Judge of the High Court of Kenya; and in April 2009 as Judge of Appeal.

Prof Muigai holds LLB and Ph.D degrees from the University of Nairobi and an LLM Degree from Columbia University School of Law, New York. He is also a Fellow of the Chartered Institute of Arbitrators (UK) and a member of the American Association of Trial Lawyers. In addition to the practice of law he is an Associate Professor of Public

law in the school of law of the University of Nairobi. He specialises in Public law and trans-national legal practice. He is a

Associate Professor of public law in the School of Law of the University of Nairobi.

He specialises in public law and trans-national legal practice. He is an Associate professor at the University of Nairobi,

an international human rights lawyer and a constitutional lawyer.

Mr Gichuru's term was to end by February 27 under the new constitution which also provides for the vetting of judges and magistrates.

The changes are intended to clean up the judiciary and prosecution services and demonstrate to the International Criminal Court that Kenya is capable of handing cases involving post-election violence suspects.

The new Constitution mandates the President to make the appointment in consultation with the Prime Minister.

After identifying their choice, the candidate's name will be sent to Parliament for debate and approval before the President makes the final appointment.

Another source disputed that Prime

**Attorney General: Prof. Gituu Muigai**

He holds LLB and Ph.D. degrees from the University of Nairobi in 1990. 1990-1993

— Worked with Kaplan and Stratton Advocates. 1993-

1996 — Appointed public prosecutor in the Kingdom of Swaziland. 1996-present

— Private legal practice and part time lecturer in criminal litigation.

**Controller of Budget: William Kirwa**

He is currently the managing director of the Agricultural Development Corporation. Holds an MBA in Banking and Finance.

Also holder of an MA in Agricultural Economics. Previously worked with Barclays Bank as a senior Manager.

**Director of Public Prosecutions: Kioko Kilukumi**

Graduated with an LLB from the University of Nairobi in 1990.

Straton Advocates. 1993-

1996 — Appointed public prosecutor in the Kingdom of Swaziland. 1996-present

— Private legal practice and part time lecturer in criminal

litigation since 1996.

Mr Kirwa holds an MBA in Banking and Finance and is holder of an MA in

ereted Constitution on nominations  
list to Speaker ready for debate

# 'It is wrong'

'There is urgent need for a rethink of the matter and to put the country first. That entails withdrawal of the nominations and a fresh start' (**Judicial Service Commission**)

'Appointment of CJ should start with JSC recommendation to President who in turn consults PM before forwarding names to Parliament' (**Implementation Commission**)

BY STANDARD TEAM

Could President Kibaki have bitten off more than he can chew in last week's nominations to four key constitutional offices?

Would Kenya's divided Parliament approve the President's nominees on the platform of ethnic and political considerations rather than the constitutionality of the process, competence and suitability of those proposed to the

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# Kibaki list: JSC, CIC say action is unconstitutional

Continued from P1

offices of Chief Justice, Attorney General, Director of Public Prosecutions, and the Director of Budget? Would the President's action backfire just as his decision to unilaterally give former anti-graft boss Justice Aaron Ringera another term? Or would the battle end up in Parliament with an unflattering ruling by Speaker Kenneth Marende that mirrors his choice of Vice President Kalonzo Musyoka as Leader of Government Business, given that the President has once again acted outside the provisions of the National Accord that holds together the Grand Coalition Government?

#### INDEPENDENT INSTITUTIONS

These are the questions Kenyans were left asking even as two key independent institutions — Judicial Service Commission (JSC) and the Constitution Implementation Commission (CIC) — returned the verdict the President subverted the Law.

The statement by JSC was notably signed by occupants of the two constitutional officers to be replaced — Chief Justice Evan Gicheru and Attorney General Amos Wako.

"There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start," said the JSC in its statement read by High Court Registrar Lydia Achode who is its secretary.

**“**There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh



#### CIC'S ADVICE ON THE NOMINATIONS ROW

Constitution Implementation Commission (CIC) chairman Charles Nyachae has advised President Mwai Kibaki to withdraw his nominees to the Constitutional Commission and call on the two officers to resign.

Mr Nyachae, who is also chairman of the Constitutional Commission, said in a statement that the President had violated Article 102(1) of the Constitution which requires that the President consult the Prime Minister before making appointments to the Constitutional Commission.

The wider implication of the President's move and Raila's remonstrations, was discernible from the voice of Dr Kofi Annan, who brokered Kenya's peace deal. In his usual diplomatic speak he urged Kibaki and Raila to "adhere to the Constitution".

The CIC, which is headed by lawyer Charles Nyachae, and whose mandate includes ensuring all aspects of the new constitution are implemented in line with the spirit with which it was written and passed in the 2010 national referendum, challenged Kibaki and Raila to "provide forward looking and selfless leadership".

The team also warned that the "ongoing debate is detrimental to implementation of the Constitution".



President Kibaki during the promulgation of the new Constitution at Uhuru Park last year. Dr Kofi Annan, who brokered Kenya's peace deal, has urged Kibaki and Raila to "adhere to the Constitution". [PHOTO: FILE/STANDARD]

The two bodies declared the President had "acted in bad faith" by failing to consult the two principals before his unilateral nominations. Prime Minister Raila Odinga, who is going ahead to pick the nominees, said they argued it goes against the spirit of the Constitution which requires there be consultation and unanimity of agreement between the two principals before appointments to the offices set up by or about to be rendered vacant by the new Constitution.

#### **KIBAKI IS WRONG**

The "Kibaki is wrong" verdict came as the storm stirred by the latest row in the troubled Grand Coalition Cabinet built up — despite the President's efforts to placate Raila — given through Interim Security Minister Prof George Saitoti and Defence Minister Yusuf Dahir. The inadequate consultations took place because there was no time to do otherwise, according to sources in the President's office. In the Civil Service and Secretariat Committee, Mr Francis Muthaura, the head of the civil service, forwarded the list of names to Parliament following by the House, which resumes its sittings today. National Assembly Clerk Mr Pauline Gichohi received the communication from

Muthaura. Curiously, the President's aide sent the names to Speaker Kenneth Marende on the day the JSC, which should vet the appointment of judges, called on Kibaki to withdraw the names. Yesterday, Marende said he had not received any communication from the PM informing him the list from Muthaura did not have his support.

The weight of the problem facing the country stood out in a letter Raila's Chief of Staff, Mr Karoli Omondi, sent on his behalf to Muthaura on January 27th, a day before the controversial nominations, informing him it was the PM's wish that the "consultations be held sometime next week on a date convenient to the two principals." Karoli explained to Muthaura the PM was headed to Ethiopia to present his report on the Ivorian political crisis, in his capacity as the African Union

way of power sharing between the two principals.

It was also revealed Raila's Orange Democratic Movement (ODM) party was planning to write to Marende spelling out its misgivings on the President's action, and asking him to rule if the appointments were in line with the Constitution, in the same way he did when the President sidestepped the PM and unilaterally picked the Vice President as the Leader of Government Business in Parliament.

But the President's Party of National Unity (PNU) — which is bracing for battle in Parliament over the nominations where it expects support from Rift Valley MPs who have rebelled against Raila — meets today under Kalonzo to plot against ODM. Marende explained now that he has Kibaki's list, parliamentary procedure will follow.

Meanwhile, in Parliament, MPs are expected to debate the Vetting of Judges and Magistrates Bill and Judicial Service Bill that seek to reform the judiciary.

(Read more stories Pages 7)

#### **CONSULTATIVE PROCESS**

But as Muthaura rushed Kibaki's list to Parliament, sources within Raila's office revealed the PM would write to President Kibaki to formally protest his exclusion from the consultative process, contrary to the spirit and letter of the new Constitution as well as the National Accord that calmed Kenya's post-election violence in 2008 by

To comment on this and other stories:  
[views@standardmedia.co.ke](mailto:views@standardmedia.co.ke)

Abide by law

# Commission trashes Kibaki list of nominees

Judicial Service  
Commission says  
process should be  
conducted as per the  
new Constitution

By EVELYN KWAMBOKA

The Judicial Service Commission (JSC) has rejected President Kibaki's list of nominees to four constitutional offices.

The members, among them Government legal advisor Attorney General Amos Wako, said the list should be withdrawn urgently and the process conducted as per the Constitution.

This is because the names were not recommended to the President by JSC as required by law and, therefore, went against the spirit and letter of the Constitution, they argued.

The JSC demanded a transparent, competitive, flawless, free and fair process devoid of partisan politics and which would win public confidence.

Article 166(1) of the Constitution states: "The President shall appoint the Chief Justice and Deputy Chief Justice, in accordance with the recom-

mendation of the Judicial Service Commission, and subject to the approval of the National Assembly."

"There is an urgent need for a rethink of the matter and to put the country first. That entails a withdrawal of the nominations and a fresh start," said JSC secretary, Lydia Achode.

Article 172(1)(e) of the Constitution, Ms Achode said, gives powers to the Commission to play an important role in the nomination of AG, CJ and DPP.

It states that JSC shall facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

## PRINCIPALS' POSITIONS

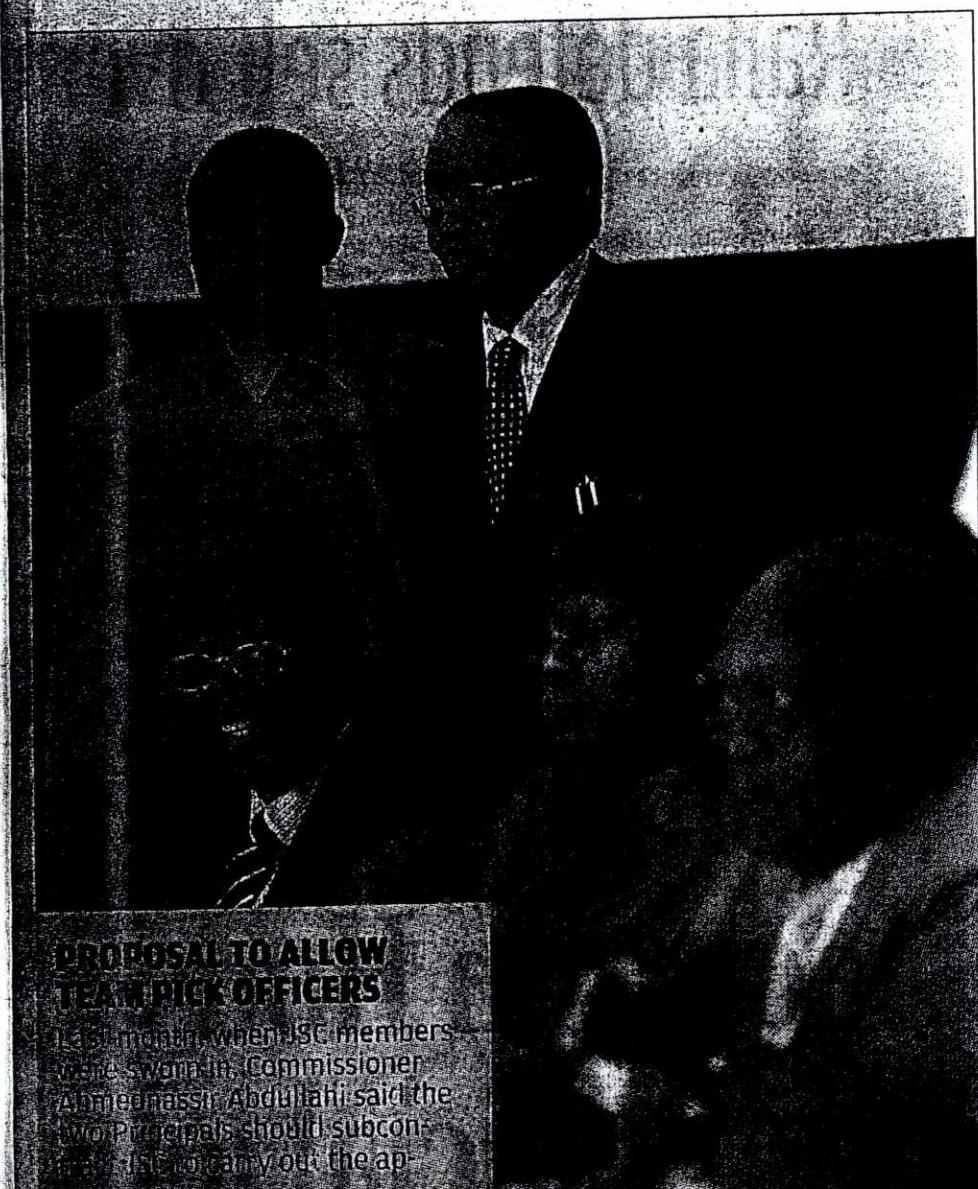
It further states that JSC shall advise the national Government on improving the efficiency of the administration of justice. "On our part, it is legitimacy, public confidence, ownership and acceptance by the people of Kenya, the JSC must play an integral role in the process," Achode said.

Yesterday, in a statement read on behalf of JSC, Achode said they were of the view that the two Principals need to reconsider their positions.

"In light of the divergent views coming from the Principals, we are of the view that they need to reconsider their respective positions," she said.

The statement was read at a press conference attended by Wako, Chief

# KIBAKI NOMINEES ALITION DIVIDED



## PROPOSAL TO ALLOW CONSTITUTIONAL OFFICERS

In Nairobi, when JSC members were sworn in, Commissioner Ahmednasir Abdullahi said the two Principals should subcon-  
tract law firms to carry out the ap-  
pointments.

"Even though the Constitution allows the President to appoint the CJ, he should give his powers to do the job," he  
said.

Article 16(1) of the Constitution states: "The President shall ap-  
point the Chief Justice and Deputy  
Chief Justice, in accordance  
with the recommendation of the  
Judicial Service Commission,  
and subject to the approval of  
the National Assembly."

Justice Evan Gicheru, Appellate judge  
Riaga Omolo, Justice Isaac Lenaola,

**The Judicial Service Commission  
yesterday rejected nominees to con-  
stitutional offices by President Kiba-  
ki.** [PHOTO: EVANS HABIL/STANDARD]

Ms Emily Ominde, Florence Mwan-  
gangi, Ahmednasir Abdullahi and Prof  
Christine mango.

Prof Githu Muigai was nominated  
for AG, Justice Alnashir Visram for CJ,  
and Mr Kioko Kilukumi for Deputy  
**Public Prosecutor**, while Mr William  
Kirwa was nominated for Controller  
of Budget.

Achode said both the Judiciary and  
Kenyans must start a new era on the  
right footing by adhering to the spirit  
of the new Constitution.

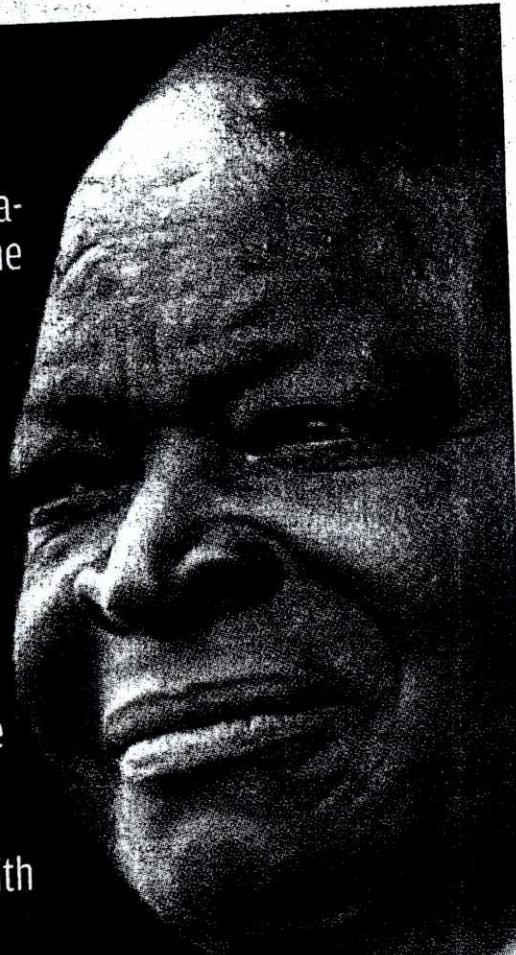
EPARING FOR BATTLE

# Answers Raila

‘We've confirmed with President indeed there were exhaustive consultations before these nominations were made as required by the Constitution’ – SAITOTI AND HAJI

‘AG is still there and women have been sidelined. If I sit with Kibaki we will agree. He has been misled. Where there is a will there is way’ – RAILA

‘PM requested the matter be left pending until he comes back only to be told President was set to announce new list with substituted names’ – IMANYARA



**Saitoti and Haji; ODM to ask for  
rendezvous; and Raila's  
diomatic option**

BY MARTIN MUTUA

President Kibaki answered Prime Minister Raila Odinga over his rejection of list of nominees he has picked for four constitutional offices — but through his Cabinet proxies.

They spoke out as MPs supporting Kibaki, mainly from Central Kenya, declared they were ready to face Raila's allies in Parliament when the time comes for the House to vet the appointees picked by President. Overall, going by reactions by both sides, the

CONTINUED ON PAGE 4

**South Africans pray for Mandela,**  
**INTERNATIONAL P.32**

# Nominations : P

Continued from P1

battle between Kibaki and Raila appeared headed for Parliament where MPs often vote along party and ethnic lines rather than the twin issues of constitutionalism and fairness to both sides of the ruling coalition.

Curiously, it is two members of the President's Party of National unity in the Grand Coalition Cabinet who both hold Security-related dockets, who picked up Raila's gauntlet on behalf of the President.

Further sign the ministers — Prof George Saitoti (Internal Security) and Mr Yusuf Haji (Defence) — were communicating the President's response to. Raila was discernible in the fact their statement was released by the Presidential Press Service, which is solely at the disposal of the President. Saitoti is the PNU Chairman while Haji belongs to Kanu, which is an affiliate of the larger PNU alliance.

"We have confirmed with H.E. the President that indeed there were exhaustive consultations before these nominations were made as required by the Constitution," said Saitoti and Haji.

The ministers responded to Raila's rejection of Kibaki's nominations on the premise he was not consulted, even though State House insisted the discussions actually took place, as the PM appeared to change tact and push for a diplomatic solution to the row between him at the President.

Raila told a city rally he was optimistic the controversial nominations of four individuals to the office of Chief Justice, Attorney General, Director of Public Prosecutions and Director of Budget, would be solved amicably. He, however, insisted the President might have been misled into making the nominations unilaterally.

In an apparent twist of tact, the PM announced he would not engage President Kibaki over the matter in public but would meet him and solve the matter diplomatically. "Mimi sitaki kupigana na Kibaki hadharani, nataka kusuluhisha haya maneno kiungwana," (It is not my wish to attack Kibaki in public. We will meet and solve this issue diplomatically) said the PM.

It also emerged the PM's side is planning to stall tabling of the names in Parliament by writing to Speaker Kenneth Marende requesting him to



**Central Organisation of Trade Unions (President Kibaki and Prime Minister Ri Controller.)** [PHOTO: KEVIN TUNOI/ STAND

make a ruling on whether the names should be accepted in the absence of consultation. "We hear they will try to force the Speaker to make a ruling, but Section 63 specifically gives the High Court the power to interpret the Constitution and that is the route those opposed to the appointments should take," argued an MP.

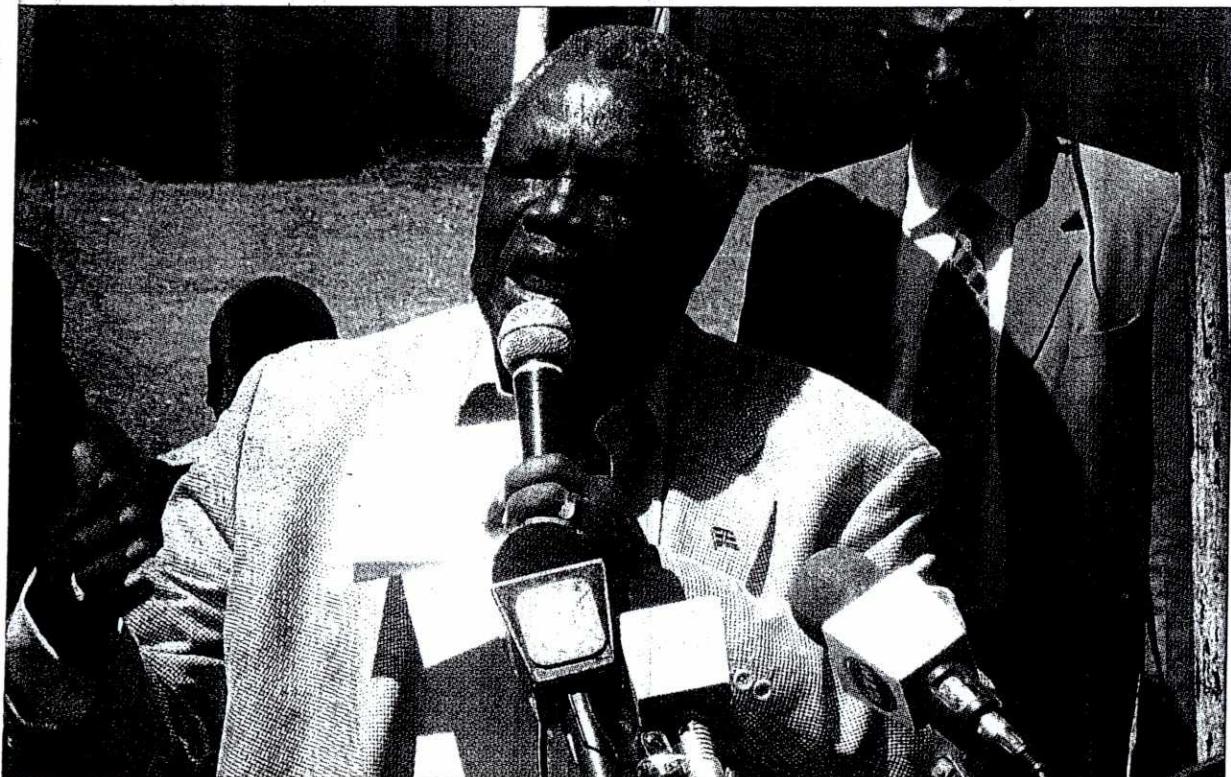
#### AT HARAMBEE HOUSE

Imenti Central MP Gitobu Imanyara claimed he had a list the President gave the PM when the issue first cropped up. According to him, the list the PM was shown at Harambee House shortly before he left for Ethiopia for an AU meeting had Justice Kariuki Kihara as CJ, lawyer Fred Ojiambo for AG and Kilukumi for DPP.

"There was no agreement reached then and the PM requested the matter be left pending until he comes back only to be informed that the President was set to announce the names which had been substituted," said Imanyara.

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and other stories.

# Parliament next battleground



**Cotu) Secretary General, Francis Atwoli, at St Francis Catholic Church in Mosoriot, Nandi County. The Cotu boss urged Raila Odinga to agree on the appointment of Attorney General, Chief Justice, Director of Public Prosecutions and Budget ARD]**

He said he was confident Speaker would not clear the names for debate in Parliament. Justice minister Mutua Kilonzo lamented the two principals having ignored his advice to advertise the positions must "now face the music in Parliament and risk damaging the Judicial renewal even before it begins."

Saitoti and Haji spoke as the President, who is busy with African Union and Igad meetings in Addis Ababa stuck to his traditional silence when a political storm is raging around him. Their statement that there was no constitutional crisis and there was adequate consultation between the President and the PM echoed sentiments raised by Government Spokesman Alfred Mutua on Saturday.

Dr Mutua usually communicates the stand of the President, communicated through Head of Civil Service Mr Francis Muthaura, when Kibaki and Raila, or their parties, are at odds on serious political issues at which they are expected to work together.

Given their dockets in Cabinet, which Raila's side could have noted, Saitoti and Haji warned politicians against making inflammatory statements that could cause anxiety. "We caution against divisive utterances by leaders that will generate unnecessary anxiety. Specifically, remarks to the effect that the President's decision has "thrown the country into a major constitutional crisis" are exaggerated and uncalled-for," they said.

#### HOUSE TO DECIDE

The two ministers also said Parliament would decide whether the nominees should be given the jobs for which Kibaki has nominated them.

Saitoti and Haji directly hit out at Raila, who is their senior in Government, saying they found the claim that the nominations were done without consultation and without adherence to the constitution "disturbing and unwarranted".

But addressing crowds at Makongeni Grounds in Nairobi, Raila said he

does not want a fight with Kibaki over the nominations of Justice Alnashir Visram to be the next CJ, Prof Githu Muigai to take over from Mr Amos Wako as AG, Kioko Kilukumi to be DPP, and Agricultural Development Corporation Managing Director Mr William Kirwa to be Controller of Budget.

Barring the possibility of intervention through a court injunction, the names of the nominees would be presented for approval or rejection to Parliament.

A preview of what could transpire in Parliament played out yesterday. A group led by spokesmen for MPs from different regional blocs met and announced they would vote for the nominees.

Leaders of the group of 16 MPs were Rift Valley Parliamentary Group spokesman Julius Kones, his Central Kenya counterpart Ephraim Maina

**“**We have confirmed with H.E. the President that indeed there were

# Kibaki faulted as Imanyara claims list not original

Mutula says nobody can tell who between the principals is saying the truth because their consultations are secret

By BEAUTTAH OMANGA

Cabinet Minister Mutula Kilonzo and Imenti Central MP Gitobu Imanyara have termed President Kibaki's move to 'unilaterally' nominate judicial chiefs as unconstitutional.

This came as it emerged the names Prime Minister Raila Odinga was shown when he met the President last week were soon after replaced.

The Justice minister said it was now hard for Kenyans to decide who to believe among the two principals, given that the said consultations normally take place at the exclusion of anybody else.

He said: "Who can legitimately talk of consulting when they meet as they do on their own? This is political comedy, sadly, for the rest of Kenya."

The minister said a demand for a withdrawal of the names was wrong, arguing the two principals had ignored his advice to advertise and go for transparent sourcing.

## JUDICIAL RENEWAL

"They must now face the music in Parliament and risk damaging the judicial renewal even before it begins," Mutula said.

"Nobody should expect me to support an illegality because I must side with some people," said Mutula.

On his part, Imanyara said he was in possession of a list that the President gave the PM when the issue first cropped up. According to Imanyara, the list that the PM was shown at Harambee House shortly before he left for Ethiopia for the AU meeting was changed.

He said the initial list had Justice Kariuki Kihara as Chief Justice, Lawyer Fred Ojiambo for Attorney General and Kioko Kilukumi for the position of DPP.

"There was no agreement reached then and the PM requested the matter be left pending until he returns on-



## IN HIS OWN WORDS

• "There was no agreement reached then and the PM requested the matter be left pending until he comes back only to be informed that the president was set to announce the names which had been substituted."

• "Mugai is the brain behind Kenya's efforts to withdraw from the ICC. He has been offering advise to those who want Kenya out of the ICC. He cannot be trusted to hold that crucial office when he has an interest already given his brief on ICC matters"

ly to be informed the President was set to announce the names, which had been substituted," he said.

Imanyara said he was confident the House Speaker would not clear the names for debate in Parliament.

## SET PARAMETERS

"This is a weighty issue and if the PM goes ahead to notify the Speaker in writing that he was not consulted, the Speaker will not clear the Motion," cautioned Imanyara.

He said even if the names were to be presented, MPs will reject them on the basis that those nominated have issues related to their past conduct, which will not meet the set parameters of the Constitution.

Assistant Minister Langat Magerer criticised the nomination terming it an act of impunity and an attitude of bullies' while his colleague Adan Duale welcomed the proposed names saying those with President Kibaki were enough to approve them.

# KIBAKI NOMINEES COALITION DIVIDED



**PNU legislators Jamleck Kamau, Johnstone Muthama and Beth Mugo during a press conference in support of President Kibaki's nomination of occupants of constitutional offices. They accused Prime Minister Raila Odinga of dishonesty, saying they were aware of the principals' consultations over the matter.** [PHOTO: JONAH ONYANGO/STANDARD]

## MPs fault Raila criticism on Kibaki's judicial nominations

By ALLY JAMAH

A section of MPs have defended President Kibaki's controversial appointment to key public posts and dared critics to meet them in Parliament during vetting.

In a news conference in Nairobi yesterday, 16 MPs accused Prime Minister Raila Odinga of misleading Kenyans by claiming he was not consulted before the appointments were made.

"We are aware there have been extensive consultations between the President and the Premier over the last few weeks. For him to turn around and claim the appointments have been made to serve the interests of a few people borders on incitement of the public," said Mathira MP Ephraim Maina, who read the statement.

They said on Friday, Lands Minister and Raila ally James Orengo released the names of the four appointees before the Presidential Press Service had even issued an official press statement.

"If it is true the President had not consulted with the PM, how come Orengo knew the appointees' details and names?" they asked.

They accused the PM of trying to "create a crisis where none exists" and turning the issue into a contest between him and the President.

### 'WAIT FOR DEBATE IN HOUSE'

"The PM has formed the habit of alleging that he has not been consulted, including the Kenyan request to the African Union members to support its request for the ICC matter to be deferred," they said.

The MPs also insisted all the appointees have the necessary qualifications and experience to carry out their mandate and urged Kenyans to ignore the critics.

"We advise those with queries to raise them when the matter comes to Parliament other than engaging in a public charade," they said.

Minister for Public Health Beth Mugo congratulated the President for

appointing what she termed as people of integrity and professionalism and accused the PM of trying to hold the country hostage.

"The process has passed the nomination stage with consultation and it is now for Parliament to approve or not," she said.

Kangundo MP Johnson Muthama accused Raila of trying to win the sympathy of Kenyans by claiming he was left out of the decision-making process, terming it a political game.

Konoin MP Julius Kones claimed while the Constitution called for consultation between the two principals before making appointments, it did not provide for consensus. He urged President Kibaki to quickly submit the appointees to Parliament for approval or rejection.

Other MPs who attended the conference include Samuel Kazungu, Jamleck Kamau, Moses Lessonet, Joseph Kiuna, Maison Leshomo, Kareke Mbiuki, Ferdinand Waititu, David Njuguna and Lee Kinyanjui.

# President urged to revoke list

Were said it was premature to nominate a new Attorney General, arguing Amos Wako's tenure had not expired.

"It is like Wako is going home together with Chief Justice Evan Gicheru. This is not fair," said Were. MPs Bonny Khalwale (Ikolomani) and Manyala Keya (Lurambi) welcomed the list on assumptions President Kibaki consulted widely. They said they would consider regional balancing before approving the list.

Bishop Titus Khamala of Cornerstone Ministries told MPs to reject the names in Parliament.

By ALLAN KISIA and JOEL OKWAYO

Shinyalu MP Justus Kizito and his Matungu counterpart David Were want President Kibaki to revoke recent nominations to top judicial jobs. Kizito said Kibaki should annul the nominations.

"The names were quite surprising and that is why there is so much noise. I know somebody misled the President," said Kizito.

He added the move could be part of a scheme to frustrate the International Criminal Court process.



**Were:** This is not fair.

# Women leaders say Kibaki wrong to leave out able female lawyers

By KEPHER OTIENO

President Kibaki has been blamed for failing to take into account affirmative action as provided in the Constitution.

Women professionals in Nyanza led by Prime Minister Raila Odinga's half sister Ruth Odinga termed the appointments of the judiciary officials as 'deeply flawed'.

"What Kenyans are witnessing is contrary to the standards of conduct

or morality bestowed upon the Executive," she said.

She told Kibaki to 'uphold the dignity and decorum' that he earned by supporting the passage of the laws in last year's referendum.

"We know the President has nothing to lose but Kenyans have — national cohesion," she added.

Executive Director of Shadow Kenya Women Parliamentary association Monica Amollo supported Ms Odinga's remarks.

# Minister wants State jobs advertised

Dalmas insists Kibaki move denies qualified Kenyans opportunity to apply and compete for public service jobs

By KEPHER OTIENO  
and WILLIS OKETCH

Public Service Minister Dalmas Otieno says top judicial jobs should have been advertised to allow free and fair competition.

He said nominations by President Kibaki denied qualified Kenyans the opportunity to apply and be considered on merit without political manipulation.

"The nominees should honourably reject the appointments and allow proper recruitment as the law requires," said Dalmas.

The minister, in whose docket falls the hiring of public service officials, said it was wrong the Judicial Service Commission was not consulted.

"The President has set up the nominees for further manipulation by the Executive. This is because those who are appointed will serve their masters and not Kenyans," said Dalmas.

He wondered why the JSC and Prime Minister Raila Odinga were overlooked when Kibaki made the key appointments.

"Chapter Six of the new laws tells us elaborately about exclusivity, non discrimination of all stakeholders yet all these factors were not considered at all, why reintroduce impunity?" said the minister.

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[www.standardmedia.co.ke](http://www.standardmedia.co.ke)



Fisheries Minister Amason Kingi (left) and Kisauni MP Hassan Joho speak in Mombasa, yesterday. [PHOTO: OMONDI ONYANGO/STANDARD]

Dalmas claimed the appointments were skewed in favour of PNU. "It is imminent that ethnicity and tribalism is fighting back. Too bad. Kenyans must rise up and say no to impunity," said the minister.

He also questioned why affirmative action was not considered, saying, "all sides of the coin were dented". Dalmas spoke as women professionals from Nyanza questioned why gender equity was not considered in the plum appointments.

#### RULE OF LAW

Meanwhile, two MPs have asked the Executive to follow the rule of law. Fisheries Minister Amason Kingi and Kisauni MP Hassan Joho asked President Kibaki and Prime Minister Raila Odinga to consult widely over the nomination of Chief Justice, Attorney General and Director of Public Pros-

**ED**

# plum rtised



## WHAT LEADERS SAY

- Coast leaders warned the President's action is a manifestation of impunity
- They said the law was clear that there must be consultation before such nominees are referred to Parliament
- Joho said leaders must learn to respect the law
- Public Service Minister Dalmas Otieno claimed the JSC and PM Raila Odinga were overlooked when Kibaki made the key appointments
- He wants the President to cancel the nominations

ecution. Kingi said Kenyans voted for the new Constitution to stop the Executive from exercising excess powers and ignoring consultations.

"Kenyans voted for the new Constitution because they were tired of misuse of powers," said Kingi.

He said the unfolding events confirmed no consultations took place between the principals.

# Ruto allies fault nomination of rival to key slot

**By STANDARD TEAM**

The nomination of William Kirwa for the powerful post of Controller of Budget could have been a smack in the face of suspended Agriculture Minister William Ruto.

Ruto allies led by MPs Charles Keter, Joshua Kuttuny and Aden Duale have protested the appointment and want it revoked.

Kuttuny, Duale and Keter said the nominee has pending questions before Parliament and was, therefore, not suitable for the nomination.

Elsewhere, Belgut MP Charles Keter has faulted President Kibaki over the appointment of Mr William Kirwa as the Controller of Budget.

Keter said he would reject Kirwa's nomination when brought before the House. "I can't just support him because he is from my community," the Belgut MP added.

Yesterday, the MPs claimed the Parliamentary Committee on Agriculture was probing Kirwa, who is the current Agricultural Development Corporation Managing Director.

Naivasha MP John Mututho confirmed to *The Standard* his committee was investigating Kirwa.

Mututho, however, declined to give details of the probe citing Parliamentary Standing Orders.

## HOUSE PROBE

"I can only confirm that we have been probing him. We have our findings which we expect to table before Parliament soon," Mututho said.

The MPs term Kirwa a politician, who should not be allowed to hold the budget office "whose duties should be discharged with impartiality".

"He is a politician and we doubt his ability to hold that position without influence," said Keter. Kirwa's past has not been lost to the leaders, particularly his attempt to unseat Ruto.

Kirwa has previously tried his hand in politics running against Ruto. His unsuccessful bid in the 2002 General Election left him at loggerheads with Ruto.

*Report by Anderson Ojwang, Martin Mutua and Vincent Bartoo*

# Njoya, civil society officials insist Kibaki move illegal

BY BEAUTIAH OMANGA

The civil society says President Kibaki's move to nominate new names to key constitutional offices is unconstitutional.

Led by retired clergy Timothy Njoya, the activists said the President had violated the Constitution, which he vowed to protect during its promulgation on August 28, last year. They said by failing to consult PM Raila Odinga, the President had gone against the law and action should be taken against him.

"Violation of the Constitution is not a party issue but a national one. As civil society, we are not concerned about wrangles between ODM and PNU. Those to us are sideshows. We

are concerned that the law be followed to the letter," said Njoya.

"We assert this is a war between the President and Kenyans and not a war between the coalition partners. In fact, the President has declared war on Kenyans," the group said. They said Kibaki should not be allowed to get away with abusing the sovereignty of the Kenyan people.

They questioned why Kibaki chose a new CJ from within the Judiciary when the law states the appointee must be sourced from outside. "We note that the unilateral action by the President is partly what almost led the country to civil war after the 2007 elections," they group said during a Press conference in Nairobi yesterday.

# LSK chairman 'misinterpreted' the law

BY BEAUTIAH OMANGA

Experts have differed with Law Society of Kenya chairman Kenneth Akide over the constitutionality of the recent nominations to key constitutional offices.

Lawyer Gitobu Imanyara and the East Africa Law Society Deputy President James Mwamu called *The Standard* yesterday to register their difference in opinion with Akide.

"The law is clear but it is strange the LSK chairman chose to mislead Kenyans on the interpretation of what the National Accord says," said Mr Mwamu.

He said under the Constitution, the two principals must consult.

Lawyer Paul Muite said the two

must consult and agree.

Akide was quoted in the media throwing his weight behind President

Kibaki's move, saying the LSK had no problem with it.

He said it was clear the new law had loopholes, which Kibaki could have exploited. Justice Minister Mutula Kilonzo said consultation did not necessarily mean consensus.

## LEGAL DEMAND

"The constitutional demand that the President and Prime Minister consult does not mean they have to agree and that is why there is the additional need for parliamentary approval," said the Justice Minister.

"How does the Constitution define consultation? Is it deemed to have taken place when the principals meet physically, engaged in a phone conversation, exchanged phone text messages, or written memos?" posed Akide.

Many legal experts have accused

the President of acting against the spirit of the law under the National Accord that demands power sharing.

Section 24 (Schedule 6) states that a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultations with PM and

with the approval of the National Assembly.

"That section is very clear and there is no ambiguity on it," said Mr Imanyara. However, the LSK chairman said the President might insist he consulted the PM by alerting him ahead of making pronouncements.

He said he expected Parliament to approve the names and urged the new CJ to steer desired reforms.

Akide said the Constitution gives the President the green light to make the appointments, subject only to parliamentary approval.

## KIBAKI NOMINEES COALITION DIVIDED

NATIONAL / Page 7

# Raila: I will negotiate with Kibaki

The PM seeks to settle the matter amicably as ODM vows to use all means to stop Kibaki from subverting laws

BY PETER OPIO

Prime Minister Raila Odinga is optimistic the controversial nominations of four individuals to key national positions would be solved amicably.

Yesterday, Raila said he would not engage President Kibaki in public but he would seek diplomatic means since the president may have been misled.

"Mimi sitaki kupigana na Kibaki hadharani nataka kusubisha haya maneno kiungwana (It is not my wish to attack Kibaki in public. We will meet and solve this issue diplomatically)," said the PM.

President Kibaki nominated Justice Alnashir Visram to the position of Chief Justice, Prof Githu Muigai as the Attorney General, Kioko Silukumi as Director of Public Prosecutions and Mr William Kiwa as Controller of Budget. Immediately after the announcement, the PM instead no consultations had been made. Parliament

will vet the nominees before they assume office

Raila said it was wrong to propose the name of a chief justice without going through the vetting process adding there is no hurry to replace Amos Wako.

"The AG still has a job so there is no hurry to appoint another one. His tenure has not expired. The women have also been sidelined yet they are also learned. If we talk with Kibaki, we will agree. *Ametoposhua* (he has been misled). Where there is a will there is a way," he said.

### POLL STRATEGY

Addressing a rally in Makongeni, Nairobi, Raila said discrimination against women is unconstitutional.

Immigration Minister Otieno Kajwang said ODM would "use both political and constitutional means to reverse the appointments." He said all public appointments should be made in consultation with the PM.

Kajwang said if the anomaly is not rectified, Kibaki might appoint commissioners to the Independent Electoral and Boundaries Commission

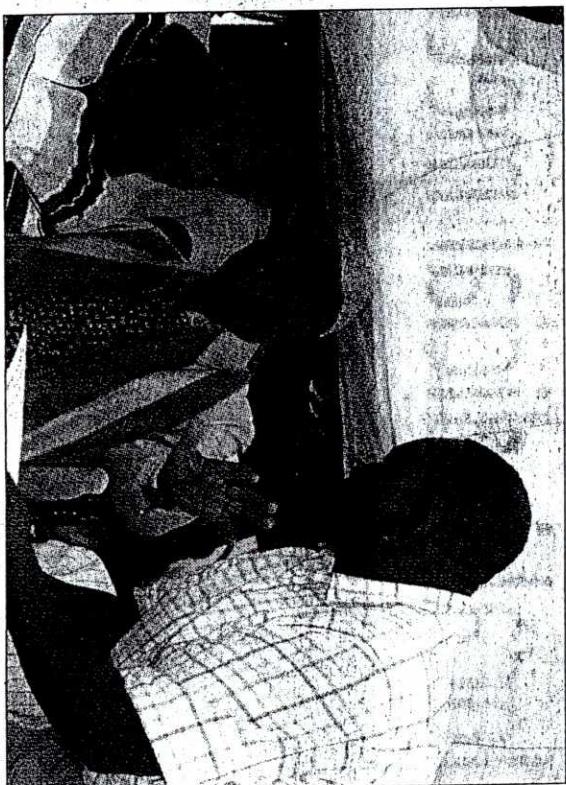
(IEBC) to gain advantage in 2012 elections.

Lands Minister James Orengo said

Kibaki should realise the new Constitution bestowed power on the people of Kenya and no one should go against the people's wish.

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**Nairobi Mayor George Aladwa (left) and former Makadara MP Reuben Ndolo (right).** [PHOTO: COLLINS KWEYU/STANDARD]

Metropolitan Assistant Minister Elizabeth Ongoro, Rangwe MP Martin Ogindo and nominated MP Rachael Shebesh.

Raila said it was imperative the implementation of the Constitution begins on the right footing. The PM also asked Kenyans to reject tribal politics and propagate by the KKK alliance. He also dismissed generational change as championed by certain politicians.

Minister tells principals to consult again

BY PETER MUTAI

Roads Minister Franklin Bett has asked President Kibaki to rescind his nomination of individuals to key constitutional offices.

Mr Bett called on the President and Prime Minister Raila Odinga to dialogue as stipulated in the Constitution and the National Accord.

"I urge the President and the government to save the country from frustration, fear and suspicion. They should sit down as family and consult over the matter," he added.

Speaking to the Press at Kericho yesterday, the minister said the two principals should begin fresh consultations. Last week, the President nominated Prof Githu Muigai as the new AG, Justice Alnashir Visram (Chief Justice), Kioko Kijukuni (Director of Public Prosecutions) and William Kirwa as Controller of Budget.

"We are a country governed by the law and leaders should follow procedure for the sake of peace," said Bett.

The minister said he was not opposed to the nominees, "but we are not happy with the process used as it contravenes the Constitution and the National Accord."



# like to forget in a hurry

**DN2** Lucy Njeri suffered negligence and survived but not her two friends

# DAILY



★ Nairobi | Monday, January 31, 2011

**APPOINTMENTS** | Row over Kibaki nominees opens new rifts in

# Raila urges calm PNU plots off

President was misled into nominating Chief Justice and other officials, says PM

BY DAVE OPIYO

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AND BERNARD NAMUNANE

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Prime Minister Raila Odinga yesterday moved to calm the waters as the row over President Kibaki's nomination of top judicial officers provoked serious rifts in the government.

Mr Odinga offered to meet the President in an effort to resolve the disagreement away from public exchanges.

But even as he spoke, the PNU wing of the coalition government was calling a meeting to map out strategies of taking the fight to Parliament.

#### Has publicly rejected

The PM told a rally in Nairobi that the President was misled into nominating Justice Alnashir Visram as Chief Justice, Prof Githu Muigai as Attorney-General, Mr Kioko Kilukumi as Director of Public Prosecutions and Mr William Kirwa as Director of Budget.

The PM, who has publicly rejected President Kibaki's nominations and



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#### EGYPT SHUTS INTERNET LINKS

The move is aimed at killing the Facebook and Twitter-driven revolution that spread to the country from Tunisia **Page 3**

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**CONTROVERSY** | Prime Minister says they will discuss rec

# Raila urges calm over judicial jobs

CONTINUED FROM PAGE 1

promised to block them said he said he did not wish to engage in a public spat, but was willing to resolve the matter amicably.

The PM said at a rally in Nairobi's Makongeni estate: "Mimi sitaki kupigana na yeye hadharani ... yale mimi ninasema ni tufanye mambo yetu kiungwana. Kuna watu wengine ambao wanamkuma... hao ndio watu ambao wanaharibu (I do not want to fight with him in public. What I am saying is that let's resolve this issue in a gentlemanly way. There are people who are pushing him to take certain decisions. They are the spoilers.)"

He expressed hope that the matter could be resolved.

"I am sure we shall arrive at a solution to this matter ... where there's a will, there's a way."

Mr Odinga arrived back in the country on Saturday from the African Union Summit in Addis Ababa and denounced the nominations on grounds that he had not been consulted. He vowed to use constitutional means to reverse them.

However, Government Spokesman Alfred Mutua insisted President Kibaki and Mr Odinga held several "intense" consultations over names of the nominees, with the first one being before Christmas and the last two days ago.

"Consultations do not mean one hundred per cent agreement or one hundred per cent consensus. Otherwise, the country would never move forward," he said.

Yesterday, Prof Saitoti (Internal Security) and Mr Haji (Defence) who are part of the President's delegation at the AU meeting described Mr Odinga's denial of consultations as "disturbing and unwarranted".

"We have confirmed there were exhaustive consultations before these nominations were made as required by the Constitution," they said.

The nominations have sparked a divisive debate among politicians on both sides of the Grand Coalition, threatening to derail the reform process.

Yesterday, Mr Odinga wondered why there was a rush to replace outgoing AG Mr Amos Wako yet his contract had not run out.

The new Constitution requires Mr Wako to vacate office 12 months from August 27, last year — the date of promulgation of the new laws.

He hinted at the possibility of the jobs being advertised by saying all Kenyans should be given an opportunity to apply for the jobs.

"Let those who excel in the interviews be given the jobs. Women should also be given a chance to apply for these positions," the PM said amid cheers from his supporters.

Mr Odinga was accompanied by Lands Minister James Orengo, his Immigration counterpart Otieno Kajwang, assistant minister Elizabeth Ongoro, MPs Rachael Shebesh and Martin Ogindo.

Mr Kajwang and Mr Orengo said it was clear the President

“

The new law is clear that the Prime Minister has to be consulted.”

Otieno Kajwang, Immigration minister

ent appointments with the President



STEPHEN MUDIARI | NATION

Youths listen to speakers during an ODM rally at Makongeni, Nairobi. Right: Mr Kevin Odhiambo, who was hit with a stone after a local politician allegedly ferried youths in his matatus to disrupt the rally.

flouted the Constitution in making the nominations.

"The new law is clear that the Prime Minister has to be consulted. Consultations means that there must be an agreement," Mr Kajwang' said.

Mr Orengo said the nominations were "unlawful, unconstitutional and ill advised".

"I therefore ask Kenyans to stand firm and ensure that the nominations are reversed," he said.

As they spoke, it emerged that Vice-President Kalonzo Musyoka who is expected back today from Nigeria has called for the PNU



parliamentary group to discuss their strategy in Parliament over the nominations.

Acting PNU chief whip Johnstone Muthama confirmed the meeting.

"There will be a PG meeting of

PNU affiliate parties and friendly MPs to discuss issues which have cropped up. We have to find a way of dealing with issues that are raising temperatures," he said.

See related story on Page 6

KIBAKI'S APPOINTMENTS | MPs banking on Ruto allies and ODM Kenya to pull the numbers

# Prepare for battle, warns PNU

**Principals  
'held talks  
on Judiciary'**

Legislators vow to use their numerical strength

in Parliament to push through the nominees

BY WALTER MENYA  
wmenya@ke.nationmedia.com

The rift within the coalition government over President Kibaki's choice of top Judiciary officials is set to move to Parliament. This is after a section of PNU allied legislators vowed to use their numerical strength in the House to push through the nominees.

As the 16 MPs were gearing for the battle in Parliament, their ODM counterparts urged National Assembly Speaker Kenneth Marende to reject the list of nominees unless Prime Minister Raila Odinga was consulted. The PNU legislators, who claimed to have 160 MPs on their side, even warned of moving a censure motion against Mr Odinga if he continued to "block reforms". They are banking on the political camaraderie among PNU MPs allied to Eldoret North MP William Ruto and those from ODM Kenya.

Those who attended yesterday's press conference at Panafriic Hotel in Nairobi included Public Health Minister Beth Mugo, MPs Julius Kones, Benjamin Langat and acting PNU

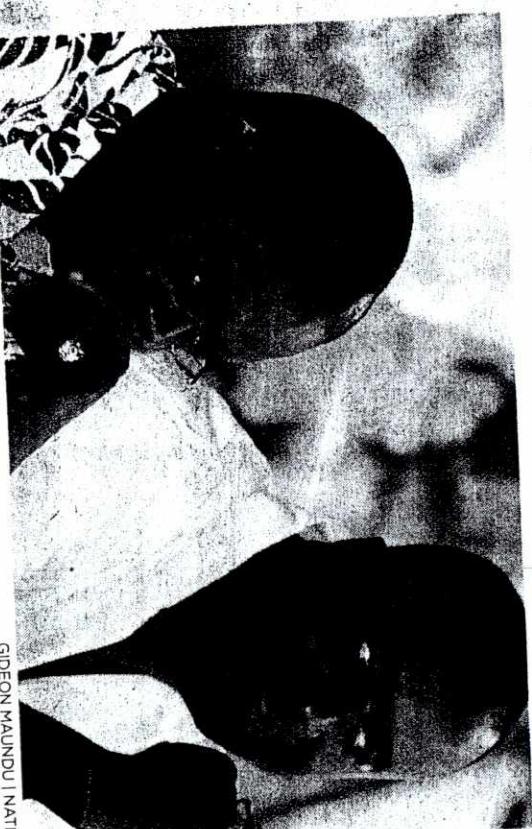
**THE NUMBERS  
How they intend  
to win the fight**

**16**

The number of PNU allied MPs who have vowed to use their numerical strength in the House to push through President Kibaki's nominees

**160**

The number of MPs the group claims are on their side in support of President Kibaki's nominees of Chief Justice and Attorney General



GIDEON MAINJU | NATION

Fisheries minister Amason Kingi (left) and Kisumu MP Hassan Ali Joho during a press conference at the Tamarind Village in Mombasa yesterday. They asked President Kibaki to follow the Constitution in nominating key Judiciary officials.

ter Kazungu Kambo hinted they were considering moving a motion of no confidence in the PM.

The current storm was triggered by Friday's decision by President Kibaki to nominate Appellate Judge Alashir Vistran as Chief Justice, lawyer Githui Muigai as Attorney-General, lawyer Kioko Kitukumi as Director of Public Prosecutions and Mr William Kirwa as Controller of Budget.

Mrs Mugo said it was the President who had the mandate from the people and MPs would use the floor of the House to support his nominees.

Additional reports by Benson

Amadala, Ashley Lime and Maurice

Kauoch

BY NATION REPORTER  
AND CORRESPONDENT

President Kibaki and Prime Minister Raila Odinga held "exhaustive" talks over top Judiciary nominations before State House made the announcement, two Cabinet ministers said yesterday.

Cabinet minister George Saitoti and Yusuf Haji yesterday said the President confirmed to them he held lengthy talks with the PM. In a statement dispatched to media houses from Ethiopia by the PPS, Prof Saitoti (Internal Security) and Mr Haji (Defence) described Mr Odinga's denial of consultations as "disturbing and unwarranted".

"We have confirmed there were exhaustive consultations before these nominations were made as required by the Constitution," they said.

The ministers are part of the President's delegation to the African Heads of State Summit taking place in Addis Ababa.

They were referring to Mr Odinga's statement at the weekend which denounced the nomination on the grounds that he had not been consulted.

The PM vowed to use constitutional means to block the nominations.



# Ruling deals blow to p

Back Page High Court halts the record

# DAILY



Nairobi | Tuesday, February 1, 2011

APPOINTMENTS | Contentious nominations present a major tes

# It's wrong, Kib as Speaker gets

Kofi Annan, the Judicial Service Commission and Implementation Commission join the plea for dialogue

BY BERNARD NAMUNANE

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AND JILLO KADIDA

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The controversy over President Kibaki's nominations to key justice, law and order offices took a step closer to a battle in Parliament as key institutions waded in with appeals to reason.

The President yesterday afternoon transmitted his contentious list of nominees for Chief Justice, Attorney General, Director of Public

Prosecutions and Controller of Budget to House speaker Kenneth Marende; and a few hours later Prime Minister Raila Odinga wrote to the Speaker asking him to reject the list he says was drawn unlawfully.

As all this was happening, former United Nations secretary-general Kofi Annan, who mediated the Kenya post-election conflict, the Judicial Service Commission and the Commission on Implementation of the Constitution, issued

CONTINUED ON PAGE 4



Kofi Annan

ROW | President says he nominated new Chief Justice

# Hold talks to avoid crisis, Top Two told

CONTINUED FROM PAGE 1

calls for dialogue to avert a looming political and constitutional crisis.

The Judicial Service Commission — including outgoing CJ Evan Gicheru and Attorney-General Amos Wako whose jobs are to be taken by the new appointments — spoke just ahead of a confrontation expected when Parliament comes from recess today with the stand-off on the radar.

President Kibaki moved speedily yesterday to present Parliament with his list of Appeal Judge Alnashir Visram to become the new Chief justice, and lawyers Githu Muigai for Attorney General and Kioko Kilukumi for Director of Public Prosecutions. He has also nominated Mr William Kirwa as Budget Controller.

The names were transmitted to Parliament by Public Service head Francis Muthaura at a time Mr Odinga was meeting with his allies to craft a counter asking the Speaker to reject the list.

The point of contention is whether the President made the list of nominations without consulting the Prime Minister.

Yesterday the Judicial Service Commission declared that the list was unprocedural and asked for withdrawal of the nominations to provide ~~fair fresh consultation between the~~ two coalition principals,

"In light of the divergent views coming from the principals, we are of the view that the principals need to reconsider their respective positions. There is an urgent need for a rethink of the matter and put the country first. That entails a withdrawal of the nominations and a fresh start," the Commission said in a statement read by High Court registrar Lydia Achode.

The statement said the President was required by law to consult the PM, and also involve the Commission.

### Mediator Kofi Annan

It asked that both the letter and the spirit of the new Constitution be respected. Those who were present at the meeting at the High Court and signed the statement were Justice Gicheru, Mr Wako, Appeal Judge Riaga Omollo, High Court judge Isaac Lenaola, Magistrate Emily Ominde, lawyers Ahmednasir Abdullahi and Florence Mwangangi, Prof Christine Mango and Mr Titus Gateere.

Chief mediator Kofi Annan also urged President Kibaki and Prime Minister Odinga to urgently meet and resolve the stalemate.

Expressing concern over the political heat generated by the stand-off, he said: "In line with the spirit of the Constitution, the two Principals ~~should work together through a transparent mechanism of consultations,~~

## AG in readinees for post election violence trials in the country



Chief Justice Evan Gicheru at the Nairobi law courts yesterday, moments after attending a press briefing by the Judicial Service Commission on the new nominations by President Mwai Kibaki.

PAUL WAWERU |  
NATION

ured by the Constitution. I urge the Principals to make every effort to solve the current impasse, and give this important task of true judicial reform, a high priority."

Commission for the Implementation of the Constitution, chaired by Mr Charles Njoroge, took a similar view, saying good stewardship is critical to success of the implementation of the Constitution. Discordant messages from the leadership, whether from the Executive or Parliament, may polarise the country and prejudice the fruitful implementation of the Constitution." The Commission pointed out

constitutional clauses requiring the President to consult the Prime Minister before publicly announcing nominees.

But meanwhile sleeves were being rolled up for a battle in Parliament.

Last evening, Mr Odinga was locked in a meeting with his inner circle crafting a letter asking the National Assembly Speaker not to accept the list on the basis that it was unconstitutional.

On the other side, MPs allied to President Kibaki were planning a meeting for this morning to discuss a strategy of pushing through the names.

### THE PROCESS

## What the law says on nominations



- 1 President writes to the Clerk of the National Assembly



- 2 The Clerk transmits the names to the Speaker



- 3 The Speaker passes to the Committee on Legal Affairs and the other on constitution oversight



- 4 The two committees interview and vet nominees and prepare reports



- 5 The committees agree on

## REPUBLIC OF KENYA



## OFFICE OF THE PRIME MINISTER

PMO/NEW.CONST/112/VOL.II

January 31st, 2011

Hon. Kenneth O. Marendi, EGH, MP  
Speaker of the National Assembly  
Parliament Buildings  
NAIROBI

Dear Sir,

## **RE: NOMINEES TO THE CONSTITUTIONAL OFFICES OF THE CHIEF JUSTICE, ATTORNEY GENERAL, DIRECTOR OF PUBLIC PROSECUTIONS AND CONTROLLER OF BUDGET**

On January 28th, 2011, while attending the 259th Meeting of the Peace and Security Council of the African Union held in Addis Ababa, Ethiopia, I learnt from the media that H.E. Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, had issued a Press Release (a copy of which is attached hereto) announcing the nomination of the following persons to the positions against their names:

*Hon. Justice Alnashir Ramazanadi Magan Visram – Chief Justice*

*Prof. Githu Mulgai – Attorney General*

*Mr. Kioko Kilukumi – Director of Public Prosecutions*

*Mr. William Kirwa – Controller of Budget*

The nominations, according to the said Press Release, were purportedly made "after consultation with the RT Hon Prime Minister of the Republic of Kenya Raila Odinga and in accordance with the Constitution".

I regret to hereby confirm that I was neither consulted on these nominees nor were the nominations made jointly by the President and myself. Indeed, on January 27th, 2011, my Chief of Staff did write to the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service informing the latter that I would be travelling to Ethiopia in the morning of January 28th, 2011 and as such "the consultations between H.E. Mwai Kibaki, C.G.H., M.P, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, and the Prime Minister on the appointments of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals". A copy of this letter is attached hereto.

### **Position of the Chief Justice**

Article 262 of the Constitution of Kenya provides that "*the transitional and consequential provisions set out in the Sixth Schedule shall take effect on the effective date*".

Section 24 of the Sixth Schedule to the Constitution of Kenya entitled "*Transitional and Consequential Provisions*" provides as follows:

- (1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either –
  - (a) to retire from the Judiciary; or
  - (b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal.
- (2) A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.
- (3) Subsection (2) also applies if there are further vacancies in the office of Chief Justice before the first general elections under this Constitution.

Section 24(2) therefore (i) makes the appointment of the new Chief Justice subject to the **NATIONAL ACCORD AND RECONCILIATION ACT AS AN INTEGRAL PART OF THE CONSTITUTION AND III**; establishes a three stage process for the nomination, vetting and appointment of any Chief Justice before the first General Elections under the New Constitution. The Constitutional stages in this respect are as follows:

**Stage 1: The Nomination Process:** The Nomination Process is regulated by the National Accord and Reconciliation Act, as entrenched in, and forming an integral part of the Constitution, and other relevant provisions of the Constitution on qualifications. The Identification and nomination of a candidate for the position of Chief Justice is to be done jointly by the President and the Prime Minister by way of consultation under the National Accord and Reconciliation Act.

The Agreement on the Principles of Partnership of the Coalition Government (Known as the National Accord in common parlance) commits the President and the Prime

Minister "as partners in a coalition government, .....to work together in good faith as true partners, through constant consultation and willingness to compromise." The President and the Prime Minister are "to work together in the spirit of partnership" and "to build mutual trust and confidence".

The nomination of a candidate for the new Chief Justice is to be made jointly by the President and the Prime Minister following consultation between them. Neither Principal may make a unilateral nomination of a candidate for the position of a new Chief Justice as the Constitution does not grant such power or confer such authority to any one of them.

Indeed, Article 2(2) of the Constitution provides that:

*"No person may claim or exercise State authority except as authorized under this Constitution".*

Article 3(1) of the Constitution provides that:

*"Every person has an obligation to respect, uphold and defend this Constitution".*

**Stage 2: Approval by the National Assembly:** The National Assembly shall consider, vet, approve or reject a candidate for the position of the new Chief Justice as nominated jointly by the President and the Prime Minister on the basis of consultations between them. But the National Assembly shall not consider, vet, approve or reject any such candidate where the nomination is not made jointly by the President and the Prime Minister. A candidate unilaterally nominated by the President without consultation with the Prime Minister shall not be a candidate validly nominated under the Constitution. The National Assembly shall not therefore consider, vet, approve or reject such candidate.

**Stage 3: Appointment by the President:** Upon the approval by the National Assembly of a candidate nominated jointly by the President and the Prime Minister, the President shall formally appoint such candidate to the position of Chief Justice.

In the event that the candidate nominated to the position of Chief Justice is serving as a judge or magistrate at the time of such nomination, then the candidate must be subjected to **Stage 4: "Vetting under Section 23 of the Sixth Schedule to the Constitution to determine his/her suitability to continue to serve in the judiciary".** As a matter of constitutional provision, even if the retiring Chief Justice chooses to continue to serve in the Court of Appeal, he will only be eligible to assume that position once he has been vetted and found suitable to continue to serve in the judiciary.

Under Section 24(1)(b) of the Sixth Schedule to the Constitution, it is not automatic that the retiring Chief Justice may immediately, upon retirement but without vetting, assume a position in the Court of Appeal. Similarly, a serving judge may only be nominated as a candidate for the position of Chief Justice after being vetted. Until and unless such vetting determines the suitability of a sitting Judge to continue serving in the judiciary, a serving judge is not eligible for nomination to the position of Chief Justice under Sections 23 and 24 of the Sixth Schedule to the Constitution. These two sections eliminate the possibility of the current Chief Justice continuing as Chief Justice or joining the Supreme Court. With such high standard, it therefore follows in the circumstances that no other sitting judge, whether vetted or not, may be appointed as Chief Justice or to the Supreme Court. The intention of the Constitution is to establish new order in the highest echelons of the judiciary.

Section 29(2) of the Sixth Schedule to the Constitution provides as follows:

*"Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly".*

Article 259(11) of the Constitution provides as follows:

*"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or*

## REPUBLIC OF KENYA



## OFFICE OF THE PRIME MINISTER

on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise".

All new appointments under the New Constitution between the effective date and the next General Elections are therefore subject to:

- (1) joint nomination by the President and the Prime Minister based on consultation between them under the National Accord and Reconciliation Act;
- (2) approval by the National Assembly; and
- (3) national values and principles of fair competition, equal opportunity to men and women, personal integrity, transparency, merit, etc as enshrined in the Constitution.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Hon. Justice Alnashir Ramazanadi Magan Visram as a nominee for the position of the new Chief Justice. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

**Position of the Attorney General**

Section 31(7) of the Sixth Schedule to the Constitution provides as follows:

*"Despite subsection (1), the Attorney-General and the Auditor-General shall continue in office for a period of no more than twelve months after the effective date and the subsequent appointments to those offices shall be made under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Attorney General.

Article 156(2) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

*"The Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Attorney General must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Prof. Githu Muigai as a nominee for the position of the new Attorney General. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

**Position of Director of Public Prosecutions**

Section 31(5) of the Sixth Schedule to the Constitution, provides that:

*"The functions of the Director of Public Prosecutions shall be performed by the Attorney-General until a Director of Public Prosecutions is appointed under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Director of Public Prosecutions.

Article 157(2) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

*"The Director of Public Prosecutions shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Director of Public Prosecutions must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Mr. Kioko Kilukumi as a nominee for the position of the new Director of Public Prosecutions. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

**Position of Controller of Budget**

Section 31(6) of the Sixth Schedule provides that:

*"The functions of the Controller of Budget shall be performed by the Auditor-General until a Controller of Budget is appointed under this Constitution".*

Section 29(2) of the Sixth Schedule aforementioned equally applies to the nomination, vetting and appointment of the new Controller of Budget.

Article 228(1) of the Constitution, as read together with Section 29(2) of the Sixth Schedule, provides as follows:

*"There shall be a Controller of Budget who shall be nominated by the President and, with the approval of the National Assembly, appointed by the President".*

Consequently, any nomination of a candidate to the position of Controller of Budget must be made jointly by the President and the Prime Minister after consultation between them in the First Stage. The Second Stage would be the vetting and approval by the National Assembly of such nominee. The Third Stage would be the appointment of such candidate by the President after approval by the National Assembly.

In view of the foregoing, it is therefore imperative that the National Assembly does not proceed to consider, vet, approve or reject Mr. William Kirwa as a nominee for the position of the new Controller of Budget. The National Assembly should await a nominee jointly made by the President and the Prime Minister following consultation between them and in compliance with our national values and principles.

**Other Relevant Constitutional Provisions**

Article 10 of the Constitution establishes our national values and principles of governance. Such values and principles of governance include transparency and accountability.

Article 73(2)(a) and (b) of the Constitution establish, as guiding principles of leadership and integrity, selection to public office on the basis of personal integrity, competence and suitability, objectivity and impartiality in decision making, and ensuring that decisions are not influenced by nepotism, favouritism and other improper motives.

Article 232(1)(g) of the Constitution establish, as the values and principles of public service, fair competition and merit as the basis of appointments and promotions.

Article 232(1)(i) of the Constitution establish, as the values and principles of public service, affording adequate and equal opportunities to appointment of men and women.

I respectfully urge the National Assembly not to receive, consider, vet, approve or reject Hon. Justice Alnashir Ramazanadi Magan Visram as nominee for the position of Chief Justice, Prof. Githu Muigai as nominee for the position of Attorney General, Mr. Kioko Kilukumi as nominee for the position of Director of Public Prosecutions and Mr. William Kirwa as nominee for the position of Controller of Budget on the following grounds:

- (1) These nominations were made without consultation with the Prime Minister as required under Sections 24(2) and 29(2) of the Sixth Schedule to the Constitution, as read together with Article 259(11) of the Constitution;
- (2) These nominations were not made jointly by the President and the Prime Minister as required under the National Accord and Reconciliation Act; and
- (3) These nominations violate the national values and principles established under Articles 10, 73 and 232 of the Constitution of Kenya, particularly those requiring equal opportunity for women and regional balance.

It is my intention to consult with the President on this matter with a view to asking the Judicial Service Commission to proceed under Article 166 of the Constitution to advertise, interview and recommend to the President and the Prime Minister suitable candidates for consideration for nomination to the position of Chief Justice. The Executive, I will further propose to the President, should adopt competitive and merit based recruitment process for nominating candidates jointly by the President and the Prime Minister to the positions of Attorney General, Director of Public Prosecutions, Controller of Budget and Auditor General in compliance with our national values and principles as enshrined in the Constitution.

Yours

Rt. Hon. Raila A. Odinga, EGH, MP

Kalonzo, Raila disagree over 'consultations'

# MARENDE TO RULE ON NOMINEES

Photo/JACK OWI



**OUR POSITION:** Kalonzo and other PNU members insisted yesterday that President Kibaki consulted PM Raila over nomination

BY ISAAC ONGIRI

House Speaker Kenneth Marende will tomorrow rule whether President Kibaki violated the new constitution in nominating three key judicial officers and the Budget Controller.

"I have the jurisdiction to determine this matter, I will give directions on Thursday at 2.30 pm," Marende said at the end of a heated debate in which the House extended

its session by half an hour yesterday evening. Debate over the nominations dominated proceedings in Parliament with Prime Minister Raila Odinga making a candid revelation of the discussions between him and President Kibaki over the matter.

Raila said that he and Kibaki discussed the possible nominees. But they had not reached a consensus before Kibaki announced on Friday the names of Justice Al-nashir Visram as Chief Justice, Prof Githu

Mugai as Attorney General, Kirubi kumi as the Director of Public Prosecu and William Kirwa as the budget chie

Raila appeared in Parliament after President Kalonzo Musyoka issued a ment earlier in the day insisting ther been "comprehensive consultations tween the two principals before the nomi nees were announced.

CONTINUED ON F

# Marende to rule on nominees

FROM PAGE 1

"Mr Speaker Sir, I insist that this process was done unconstitutionally, it needs to be nullified and started afresh," Raila told the House.

In his statement, Kalonzo gave a chronology of events leading to the announcement. He said the matter was first raised during a meeting of the two principals on December 16 last year. "At the time, Kibaki felt that it would be better if the issue was revisited after the New Year," Kalonzo said.

The VP said the two principals then discussed the issue on January 6, 2011, at Harambee House and agreed on the procedure to be followed in the appointments.

"The Prime Minister had expressed the view that we should have a foreign Chief Justice. However, the President insisted that at close to 50 years of independence we have very qualified Kenyans and to search for a Chief Justice outside Kenya would be improper and would send the wrong message to the Law Society of Kenya, the legal fraternity and the rest of Kenyans," said Kalonzo.

Kalonzo said the PM declined on two different occasions to respond to telephone calls from Kibaki who wanted to seek his opinion on the crucial appointments that have sparked controversy.

"At 6 pm on Friday, the

State House Comptroller called the Prime Minister for the President to speak to him. Caroli Omondi answered the Prime Minister's phone. After consulting, Caroli Omondi said the Prime Minister was busy and would call back after one and a half hours," the VP said.

"The President then felt that he had consulted extensively, had accommodated the Prime Minister and had fulfilled the constitutional requirements and therefore made the announcement."

Kalonzo said there was an urgency in having the appointments made because Kibaki wanted to make it clear to the AU that Kenya was serious about putting in place a local mechanism to try post-election violence cases.

He explained that a technical team comprising Head of Public Service Francis Muthaura and Nick Wanjohi from the Office of the President and Permanent Secretary Dr Mohamed Isahakia and PM's Chief of Staff Caroli Omondi had been established by the two principals with instructions to present the names of possible nominees.

The technical committee recommended three judges — Visram, Paul Kihara and Riaga Omollo as possible candidates for the Chief Justice, Githu Muigai as the Attorney General, Kioko Kilukumi as DPP and Kirwa as Controller of Budget.

"I wish the VP checked

with me before coming with the statement he was given to read here, maybe he would have thought otherwise," said Raila denying that he had been consulted.

"I have no problem with individuals but the process which was unconstitutional. This was done in a hurry because we were going to Addis to try and convince the African Union that we had done something to reform the Judiciary," said Raila.

Raila confirmed the two meetings between him and Kibaki. He said he advised Kibaki to appoint a Commonwealth judge to take over as CJ for a non-renewable, three-year period while local judges went through the vetting process.

He said during the January 6 meeting, Kibaki produced a list proposing Kihara for appointment as the CJ, city lawyer Fred Orijamo as AG, Kilukumi as DPP and Kirwa as budget chief. He said it was at that point that he asked for more consultations and pleaded with Kibaki to have the matter discussed after the AU summit. They both agreed to the formation of the technical committee.

Raila said he was shocked to learn while in Addis that Kibaki had gone ahead to announce the appointment of Visram and Muigai who had never featured in their discussions at all.

Raila said while in Addis Ababa, he was called by the

Comptroller of State House who told him that he could name the AG of his choice while Kibaki named the CJ.

He said he was shocked by the request as he felt the appointments should not be based on political or other interests but for the good of Kenyans.

"Let us not appoint people based on their tribal affiliations. The other issue is about gender balance. I would like this properly reflected in the appointments which are being made henceforth. That is why I found it extremely objectionable that we should appoint four people to very senior positions and there is not a single woman," he told the House. At least 17 MPs participated in the debate sparked by Imenti Central MP Gitobu Imanyara who sought the Speaker's intervention in the matter.

MPs who spoke remained true to their party positions with PNU demanding that Parliament decide on the President's list by voting on the matter.

Lands minister James Orengo and Gichugu MP Martha Karua backed Gicheru, Wako, the Judicial Service Commission and the Committee for the Implementation of the Constitution who on Monday issued a statement criticising Kibaki's appointments.

Mandera Central MP Abdikadir Mohamed urged the two principals to spare the country the ongoing drama.

# THE STANDARD

## on Sunday. For Fairness and Justice.

January 30, 2011  
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900/00 USh1700/00

Rift in Coalition

# 'It's null and void'



BY ALEX NDEGWA AND AUGUSTINE ODUOR

I am not  
I can't lie  
e indeed  
nsulted,"

Sister Raila Odinga

The political row over top judicial appointments snowballed into a crisis as Prime Minister Raila Odinga rejected the 'unilateral' nominations by President Kibaki and warned of a "major constitutional crisis".

Raila said he was "shocked and dismayed" at the "unilateral" appointment of the Chief Justice, the Attorney General, Director of Public Prosecutions and the >>PAGE 4

**Political intrigues:** A day after Kibaki nominates CJ, AG and DPP, Raila says he wasn't consulted and terms the nominations illegal, setting the stage for a fresh round of wrangling between political rivals PNU and ODM



"The two principals had 'exhaustive' consultations" - Government Spokesman, Alfred Mutua.

## Nominations' row

# Move by Kibaki an illegality, says Prime Minister

*<<Continued from Pg 1*

Controller of Budget.

And without mentioning names he made a damning allegation: "The appointments have been made to serve the interests of a few people, including elements within upper echelons of Government who have serious credibility and integrity issues and constitute the networks of impunity."

The PM insisted he was informed of the new appointments while in Addis Ababa, Ethiopia, contradicting a PPS dispatch that stated the President nominated the holders "after consultation with the Prime Minister".

"I can't lie if we indeed had consulted," Raila said. The PM recalled the controversy over the memorandum of understanding, which tore apart the National Rainbow Coalition, and the appointment of electoral commissioners in the run-up to the 2007 General Election "without consultations and we know where we ended. We must learn from past mistakes. The reform of the Judiciary and the entire law enforcement sector must be carried out carefully and with the involvement of the people of Kenya."

"The process cannot succeed if we begin with a serious dispute and controversy of this kind," Raila added.

He said public appointments should adhere to the principles in the Constitution for fair competition, merit and afford all Kenyans equal opportunities.

And after Raila had addressed

journalists at Jomo Kenyatta International Airport yesterday afternoon, Government Spokesman Alfred Mutua, who communicates the official position of the Executive, told a hastily convened press conference the two principals had "exhaustive consultations".

Mutua said by Friday evening Kibaki and Raila had agreed on the names of three of the four appointees, adding by the time the nominations were made public the PM had sanctioned all the nominees.

### Sparking outrage

President Kibaki announced the nomination of Justice Alnashir Visram for the Chief Justice position, Prof Githu Muigai as Attorney General, and Mr Kioko Kilukumi, Director of Public Prosecutions.

Also nominated was Mr William Kirwa as Controller of Budget, with the appointments sparking outrage in Raila's ODM party for the second time. The reappointment of Major-General Michael Gichangi as the Director General of the National Security Intelligence Service, last week, was also questioned.

Backing the Prime Minister's call, National Heritage Minister William ole Ntimama and former Constitutional Affairs Minister Martha Karua termed as unconstitutional the process of appointing key people to the Judiciary.

They said the move by President Kibaki to appoint the four was unacceptable.

They asked President Kibaki to



**It was not about the credibility of the individuals appointed but the process.**

withdraw the names until full consultations are done and due process followed.

"What I see happening is that the Executive is full of impunity and deliberately moving out to rob Kenyans of the new dawn," said Karua.

She said it was not about the credibility of the individuals appointed but the process.

For the Chief Justice to be appointed, Karua said, the Judicial Service Commission (JSC) should first recommend names and present the same to the President for him to pick the nominee. He has to do this in consultation with the Prime Minister.

The name of the person nominated by the President, she added, is then tabled in Parliament for vetting then formally appointed.

The Gichugu MP said the process of filling key positions in the Judiciary must be competitive, and not just names being bandied around.

"We must resist this move and demand that appointments are done properly and not through shortcuts.

#### Sixth Schedule

Karua appeared to be unhappy with Article 24 of the Sixth Schedule, which gives the President powers to expressly nominate the Chief Justice after consulting the Prime Minister under the provisions of the National Accord.

The Constitution says: "A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act 2008, and after consultation with the Prime

**Justice Alnashir Visram was nominated as Chief Justice.** [PHOTO: FILE/STANDARD]

Minister and with approval of the National assembly."

But Karua wondered why Kibaki hurriedly made the appointments just when Parliament convened and authorised the JSC and the Commission for Implementation of the Constitution, which are mandated to deal with such matters.

"I ask Parliament to reject the names until due process is followed," she said.

Ntimama said it was clear the two principals had not agreed on the nominees and the appointment made without consultations.

"I thought we were done with decrees and dictatorial pronouncements. This kind of manoeuvre is subverting the Constitution," he said, at his residence yesterday.

Ntimama read mischief, saying the names of trio were churned out during a peace meeting last week in Eldoret, which Kibaki attended.



# Siasa

Will Odinga phobia  
afflict a new Mount  
Kenya generation?

Feature: Page I



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Raila not consulted, ODM says

# KIBAKI APPOINTS NEW CHIEF JUSTICE, AG



DPP: Koko Kilukumi



ATTORNEY GENERAL: Githu Muigai



CHIEF JUSTICE: Alnashir Visram

## BY STAR TEAM

JURNEY GENERAL: Githu Muigai

## CHIEF JUSTICE Alnaashir Visram

In a surprise move President Kibaki last night appointed a new Chief Justice, Director of Public Prosecutions and Attorney General. The Chief Justice will be Justice Visram; the Attorney General Githu Muigai; Director of Public Prosecutions

Kioko Kilukumi; and Controller of Budget William Kirwa. The Presidential Press Service announced that the appointments had been made "in consultation with the Prime Minister". The announcement apparently caught Prime Minister Raila Odinga by surprise as he had flown out to Addis

Ababa to attend to the African Union summit. "The Prime Minister had expected to finalise discussions about the appointments with Kibaki next week. This is a total outrage. It is also unconstitutional. We must oppose these

**CONTINUED ON PAGE 8**

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# Kibaki appoints new Chief Justice, AG and DPP

FROM PAGE 1

appointments," said an angry ODM official last night.

"This is a civilian coup. The appointments should have gone to Parliament to be ratified, even if they had been agreed by the President and Prime Minister," he said.

The appointments have been made under the transitional arrangements before the new constitution comes into force.

However many observers have argued that even now the appointments should be made on the recommendation of the Judicial Service Commission, as will be the case under the new constitution.

President Kibaki is supposed to consult the Prime Minister over major appointments in the transitional period under the terms of the February 2008 coalition agreement.

If the announcement of these appointments was unilateral, it may destabilise the coalition arrangement in the final run-up to the 2012 elections.

Justice Alnashir Visram was appointed a judge of Court of Appeal in April 2009. A member of the Ismaili community, he was born in Kisii and is a third generation Kenyan. He went to Kisumu Boys High School before joining the University of Nairobi.

In 1978 he graduated with a second degree in Law from University of British Columbia, Canada. In 2006 he graduated with a Master of Laws degree in International Law from the University of Nairobi.

While in practice he specialised in commercial, corporate and civil law, during which time he represented several insurance companies, banks and multi-nationals.

In June 1999 President Moi appointed Justice Visram Commissioner of Assize, and in March 2001, he was sworn in as a Judge of the High Court of Kenya; and in April 2009 as Judge of Appeal.

Githu Muigai has been a partner in the leading law firm Mohammed Muigai for 16 years. He holds LLB and PhD degrees from the University of Nairobi and a masters degree from Columbia University School of Law, New York. He is also a Fellow of the Chartered Institute of Arbitrators in the UK and a member of the American Association of Trial Lawyers. He was called to the bar in 1985. In addition to the practice of law he is an Associate Professor of Public law in the School of law of the University of Nairobi. He specialises in public law and trans-national legal practice. He is a recognized authority on business regulatory matters and in international commercial arbitration.

Kioko Kilukumi is the main partner in the law firm Kilukumi and Associates. He has recently been representing suspended Higher Education minister William Ruto in the case where he is being prosecuted for the fraudulent sale of Ngong Forest land to the Kenya Pipeline Company.

William Kirwa is former Managing Director of the Agricultural Development Corporation.

day, February 2, 2011

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# THE STANDARD

For Fairness and Justice.

**Kibaki, Raila spill the beans on their 'consultations'; House turns into battlefield; and fate of President list now in Marende hands**

# CONFRONTATION

By STANDARD TEAM

The standoff between President Kibaki and Prime Minister Raila Odinga imploded in Parliament, but the final verdict on admissibility of the President's list now lies with Speaker Kenneth Marende. The confrontation between President and PM who claims he was not consulted on the final list and who has since written to Marende seeking his intervention, played out in Parliament where both sides put up their case for and against the nominations.

After both sides prosecuted their case, which literally cast the image of a President and a PM washing their dirty linen in public

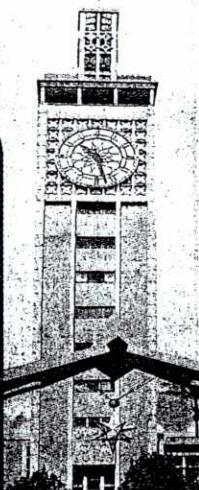
CONTINUED ON PAGE 6

## BAKI SIDE OF STORY

I insisted on Justice Omollo after Kihara went picked on Visram for neutrality  
I chose Visram to accommodate Raila's wish  
I did not do it after I could not reach him in Addis

I insisted on having Justice Omollo as new CJ after I insisted on Kihara seen as 'reformer'  
Raila kept President waiting for his call from Addis Ababa for hours despite being informed

President is satisfied that adequate consultations with Raila took place



## RAILA SIDE OF STORY

Kibaki wanted Kihara to be CJ and I proposed Commonwealth Judge but President refused

He bypassed Justices Tunoi and Bosire after rejecting Omollo though far senior to Visram

I never proposed Omollo but his name topped seniority list of Appeal Judges from Judiciary

I was in AU meeting till night, could not call and had asked consultations be postponed

After I wrote to President on postponement I was shocked to learn Kibaki had acted alone

**OUTUTUO LAW: Judge says drinking alcohol not a crime, NEWS P.9**

\$9

## STAND

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**Imenti Central MP Gitobu Imanyara** sought to have the Speaker guide Parliament on what position to take over the nominations by the President



"The only issue for this House to consider is whether there was any consultation between the President and the Prime Minister" — **Farah Maalim**

# Face-off: House clash over Kibaki list of nominees

Continued from P1

through letting out the not so flattering discussions on who should take which position, Marendre announced he would rule on Thursday at 2:30pm.

Marendre's ruling is now awaited with the same magnitude of interest as that he made last year after Kibaki and Raila once again locked horns over the President's unilateral appointment of Vice-President Kalonzo Musyoka to be the Leader of Government Business and House Business Committee. Marendre, who was in receipt of contradictory letters from Kibaki and Raila, threw the matter back to the principals with a further ruling the President's action did not respect the spirit and letter of the National Accord and Reconciliation Act 2008.

"The matters canvassed before the House are a matter of great national importance. I am satisfied I have jurisdiction over the matters raised, and the ruling sought by Mr Gitobu Imanyara and supported by 17 other MPs. I have the locus standi to make the ruling. I will do so on Thursday at 2:30pm," Marendre ruled, and adjourned the sitting of the House.

#### PATTERN OF DEBATE

In her debate, former Justice Minister Martha Karua captured the attention of the country when she called for sobriety in the House arguing the issue was bigger than Kibaki and Raila.

"The pattern of this debate is based on who is on the side if which principal. I am not in either side. I am on the side of the law and Kenya." She added: My conclusion is that there was no agreement between the two principals. The President got tired. The President cannot tire. On important matters the President cannot tire."

Lands Minister James Orengo said: "This is a new Kenya. You cannot expect to make a backroom appointment and expect to get away with it."

He added: "If approved some of these nominations will lead to some offices dominated by people from one region. In the State Law office the Attorney General, Solicitor General, deputy Solicitor General, and Registrar General would all come from Central Province."

The day was dramatic in the way Raila gave his account of the 'consultations' with the President, which in many aspects differed with Kibaki's

#### THE DEBATE AT A GLANCE

- The row over the controversial nomination of three key judicial office holders took centre stage in Parliament after it re-opened on yesterday afternoon

- MPs were divided down in the middle over the nominations with those supporting President Kibaki supporting the move while those allied to Prime Minister Raila Odinga protested against the list

- Speaker Kenneth Marendre will rule whether the Parliament will continue to vet the names as required by law

account of what transpired as told by Vice-President Kalonzo Musyoka in a 14-point statement later publicised by the Government Spokesman Alfred Mutua in the local dailies and his website. It described how the President sat at Harambee House on Friday between 12:30pm to 3pm waiting for Raila's call from Addis Ababa. The President later left a number on which the PM could get him, then left for State House for lunch and another wait. "At 6pm, the State House Comptroller called the Prime Minister for the President to speak to him. Mr Caroli Omondi, (the PM's administrative secretary), answered the Prime Minister's phone. After consulting, Mr Caroli Omondi said the Prime Minister was busy and would call back after one and a half hours," said Kalonzo, who read the pre-prepared statement on the President's side.

#### FELT HE CONSULTED

It went on: "The President then felt that he had consulted extensively and had accommodated the Prime Minister and had fulfilled the constitutional requirements and therefore, made the announcement on Friday, January 28, at 8.30pm."

But whereas Kibaki's account was that the consultations were long-drawn and adhered to the Constitution, it was glaring in the concession that he made the announcement after failing to get Raila's final word, because he was apparently held up in the Africa Union Summit.

The PM said the announcement went against their agreement the discussions were deferred until the African

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# LITION DIVIDED



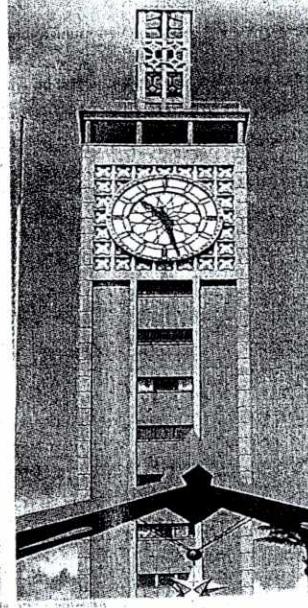
"This is a matter [nominations of judicial officials] of national importance and I will make a ruling on Thursday at 2.30pm"  
— Kenneth Marende



"As a commission, we don't support an illegality. The President ought to have followed provisions of the law on the appointments"  
— Mzalelendo Kubunja



"The process of appointing eligible candidates is as crucial as the product and Kibaki should stop abusing his powers to impose his people"  
— Danson Mungatana



Union summit and it was on this understanding that Raila left for Addis. Raila said the decision was taken after the President dismissed his proposal for a foreign lawyer for CJ, and the second on lawyer Pheroze Nowrojee on the basis he is an 'activist'. He made the proposal, Raila said, after the President's first nominee, Justice Kihara Kariuki, turned out to have been ranked number 21 among the High Court judges in the list provided by the Judiciary to the joint technical team, and that he was not even an Appellate Judge. Raila explained the President had pushed for Justice Kariuki on the basis he was a 'reformer'.

#### PECKING ORDER

He revealed the President rejected his proposal for a foreign CJ from the Commonwealth, arguing that 50 years after Independence, it would not go down well with Law Society of Kenya.

Kibaki's argument, as told by the PM, was that Kihara was the best suited for the job, but Raila argued the current team of judges had not been vetted. But after he gave in to the President's push for a local judge, he proposed that Justice RCS Omolo, who

#### FOR

**Jeremiah Kioni (Ndaragua)**  
**Erastus Mureithi (Ol Kalou)**  
**Lenny Kivuiti (Siakago)**  
**Jamleck Kamau (Kigumo)**  
**Nderitu Murithi (Laikipia West)**  
**Elias Mbau (Maragua)**  
**Ephraim Maina (Mathira)**  
**Kareke Mbiuku (Nithi)**  
**David Njuguna (Lari)**  
**Beth Mugo (Dagoretti)**  
**Dr Julius Kones (Koino)**  
**Fred Kapondi (Mt Elgon)**  
**Lee Kinyanjui (Nakuru Town)**  
**John Mututho (Naivasha)**  
**Joseph Kiuna (Molo)**  
**Luka Kigen (Rongai)**  
**Zakayo Cheruiyot (Kuresoi)**  
**Benjamin Langat (Ainamoi)**  
**Charles Keter (Belgut)**  
**Isaac Ruto (Chepalungu)**  
**Dr. Julius Kones (Koino)**  
**Sammy Mwaiwa (Baringo Central)**  
**Nelson Gaichuhie (Subukia)**  
**Joshua Kuttuny (Cherangany)**  
**Joshua Chepkiton (Keiyo North)**  
**Ferdinand Waititu (Embakasi)**  
**Kiraitu Murungi (Imerti South)**  
**Eugene Wamalwa (Saboti)**  
**Kalonzo Musyoka (Mwingi North)**

was ranked number one on the list of Appeal Court judges, takes it on the basis of seniority.

But after Raila's departure and inaccessibility the President decided to go for a judge from 'minority group' for reasons on neutrality, in the process jumping over eight Appellate Judges, including Justice Phillip Tunoi and Justice Samuel Biosire who were ranked second and third after Omolo, and picked Justice Alashir Visram.

The PM insisted as part of the trade-off the Kibaki side offered to strike off the President's nominee of lawyer Fred Ojiambo as AG and allow Raila to pick his replacement, because Ojiambo was reportedly rated low on the basis of post-graduate training. The name, which came up was that of Githu Muigai, proposed by the technical teams representing both principals.

#### AGAINST

**Martha Karua (Gichugu)**  
**Gitobu Imanyara (Imerti North)**  
**Musalia Mudavadi (Sabatia)**  
**Yusuf Chanzu (Vihiga)**  
**Wilbur Otichilo (Emuhaya)**  
**Wycliffe Oparanyah**  
**Bonny Khalwale (Ikolomani)**  
**Cyrus Jirongo (Lugari)**  
**Manyala Keya (Lurambi)**  
**David Were (Matungu)**  
**Evans Akula (Khwiser)**  
**Ben Washiali (Mumias)**  
**Esseli Simiyu (Kilimili)**  
**Bifwoli Wakoli (Bumula)**  
**Alfred Khangati (Kanduyi)**  
**Alfred Sambu (Webye)**  
**Paul Otuoma (Funyula)**  
**Ababu Namwamba (Budalangi)**  
**Alfred Odhiambo (Butula)**  
**Sospeter Ojaamong (Amagoro)**  
**Otieno Kajwang' (Mbita)**  
**James Orengo (Ugenya)**  
**Fred Outa (Nyando)**  
**Olago Aluoch (Kisumu Town West)**  
**James Rege (Karachunyo)**  
**John Mbadi (Gwasi)**  
**Oyugi Magwanga (Kasipul Kapondo)**  
**Shakeel Shabbir (Kisumu Town East)**  
**Jakoyo Midiwo (Gem)**  
**Pollyns Ochieng (Nyakach)**  
**Ayiecho Olweny (Muhoroni)**  
**Nicholas Gumbo (Rarieda)**  
**Edwin Yinda (Alego/Usonga)**  
**Edick Anyanga (Nyati)**  
**Manson Nyamweya (South Mugirango)**  
**Chris Obure (Bobasi)**  
**Richard Onyoka (Kitutu Chache)**  
**Simon Ogari (Bomachoge)**  
**Franklin Bett (Bureti)**  
**Joyce Laboso (Sotik)**  
**Beatrice Kones (Bomet)**  
**Magerer Lang'at (Kipkelion)**  
**Nkodila Lankas (Narok South)**  
**William ole Ntimama (Narok North)**  
**Mutula Kilonzo (Mbooni)**  
**Joseph Nkaisery (Kajiado Central)**  
**Katoo ole Mitiito (Kajiado South)**  
**Fred Gumo (Westlands)**  
**Elizabeth Ongoro (Kasarani)**

# Mutula says law must be respected

BY RAVIN NEHAMIA

Justice Minister Mutula Kilonzo accused the two principals of exposing the country to an unnecessary debate. He said the appointments must be based on holistic interpretation of the Constitution including Chapter Six on leadership and integrity.

"I believe there were consultations. I know these gentlemen (President Kibaki and Prime Minister Raila Odinga) met but I cannot say for sure what they discussed," he said.

Murungi declared that the Judicial Service Commission (JSC) has no role in appointment of a Chief Justice after the retirement of Justice Evan Gicheru, according to the new charter's Sixth Schedule of the new supreme law.

"The JSC is not referred to in the Sixth Schedule. It has absolutely no role," he said.

Kiraitu said the outgoing CJ and Attorney General Amos Wako who signed a statement on Monday de-

clared their interest in the matter and should not be allowed to preside over the nomination of their successor.

And Deputy Speaker Farah Maalim Mohamed said Parliament cannot discuss the list of the nominees because "this matter is not validly before this House" and said the President cannot exercise power alone under the National Accord.

He said no women were considered in the list announced last week by President Kibaki.

★ Nairobi | Wednesday, February 2, 2011

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APPOINTMENTS | Kenneth Marend has another landmark decision to deliver

# The Speaker takes charge on fate of Kibaki nominees

LEGISLATIVE HEAD TO REFEREE EXECUTIVE CONFLICT



“

This is a matter of great national importance. I have the jurisdiction and *locus standi* to intervene”

Speaker Kenneth Marend



President Kibaki: Provided list of nominees for key judicial appointments



PM Raila Odinga: President he was not consulted; maintaining that the nominations are illegal

House given rare accounts of meetings between the President and Prime Minister

BY NATION TEAM  
newsdesk@ke.nationmedia.com

**T**he fate of the three judicial officers proposed by President Kibaki is now in the hands of House Speaker Kenneth Marend.

Mr Marend declared that he will tomorrow rule on the legality of the nominations at the conclusion of heated arguments between MPs supporting the President and those backing Prime Minister Raila Odinga's protest that he was not consulted.

"This is a matter of great national importance. I have the jurisdiction and *locus standi* to intervene in this matter," Mr Marend said.

It will be the latest in a series of disputes between President Kibaki's PNU and Prime Minister Odinga's ODM where Mr Marend has been called upon to arbitrate.

This time, even Justice and Con-

CONTINUED ON PAGE 4

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Launch of ISO QMS Certification

Better Service Delivery for Realization

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NUMBER 16 OF 2011**

**IN THE MATTER OF ARTICLES 22 AND 23 OF THE CONSTITUTION  
OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 27, 73(1) (A), 129,  
131, 156, 166, 228 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA AND SECTIONS 12, 24 OF THE SIXTH SCHEDULE OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE NOMINATIONS FOR APPROVAL AND  
EVENTUAL APPOINTMENTS TO THE OFFICES OF THE CHIEF  
JUSTICE, THE ATTORNEY GENERAL, THE DIRECTOR OF PUBLIC  
PROSECUTIONS AND THE CONTROLLER OF BUDGET UNDER THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

1. CENTRE FOR RIGHTS EDUCATION  
AND AWARENESS (CREAW)..... 1<sup>ST</sup> PETITIONER
2. CAUCUS FOR WOMEN'S LEADERSHIP (CAUCUS) .... 2<sup>ND</sup> PETITIONER
3. TOMORROWS CHILD INITIATIVE (TCI) ..... 3<sup>RD</sup> PETITIONER
4. WOMEN IN LAW AND DEVELOPMENT (K) ..... 4<sup>TH</sup> PETITIONER
5. DEVELOPMENT THROUGH MEDIA (DTM) ..... 5<sup>TH</sup> PETITIONER
6. COALITION OF VIOLENCE AGAINST  
WOMEN (COVAW) ..... 6<sup>TH</sup> PETITIONER
7. YOUNG WOMEN LEADERSHIP INSTITUTE (YWLI) .... 7<sup>TH</sup> PETITIONER
8. THE LEAGUE OF KENYA WOMEN VOTERS ..... 8<sup>TH</sup> PETITIONER

**VERSUS**

**THE HON. ATTORNEY GENERAL ..... RESPONDENT**

## **RULING**

The petitioners are non Governmental Organizations and Associations incorporated and registered as such under the Laws of Kenya. They are also members of the Gender 10 and Gender Plus coalitions which are networks of Civil Society Organizations advancing and advocating for gender considerations in all spheres of development. They brought a petition as groups and associations acting on behalf of their members, on behalf of the women of Kenya and in the public interest.

The petitioners moved this court by way of a petition dated 2<sup>nd</sup> February, 2011 where they sought the following orders:

- “(a) A declaration that the office of the President is an institution bound by the Constitution and that is under a duty to respect, uphold and defend the Constitution in terms of Article 2(1), 3(1), 129 and 131 of the Constitution of the Republic of Kenya.**
- (b) A declaration that the nomination of only people of the male gender for approval by Parliament is gender insensitive, discriminatory against women, disrespectful of women and contrary to Articles 27, 129 and 131 of the Constitution of the Republic of Kenya and is therefore null and void.**
- (c) A declaration that the nominations for purposes of**

approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 were in violations of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.

- (d) A declaration that any appointments that may be made in like manner as the appointments to the office of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget made by the Office of the President on 28.01.2011 would be in violation of Articles 3, 10, 27, 129, 131 and 166 of the Constitution and Sections 12 and 24 of the Sixth Schedule of the Constitution hence are unconstitutional, null and void.
- (e) An order restraining any further purported approval and eventual appointment of the nominations made by the Office of the President on 28.01.2011 or any other nominations that may be made in like manner without compliance with the letter and majesty of the Constitution of the Republic of Kenya.
- (f) Or that such other orders as this honourable court shall deem just.”

It is important that the court highlights various contents of the petition so that the context in which the aforesaid prayers were made can be grasped. I can do no better than cite a portion of the petition as hereunder:

#### **“THE LEGAL FOUNDATIONS OF THE PETITION.**

3. The Constitution of Kenya 2010 was promulgated and came into force on 27.08.2010.
4. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds all State organs at both levels of government.
5. Article 2(5) of the Constitution of the Republic of Kenya provides among other things that any act or omission in contravention of the Constitution is invalid.
6. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
7. Article 10 of the Constitution of the Republic of Kenya sets out the national values and principles of governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy decisions.
8. Among the national values and principles of governance are, national unity, the rule of law, participation of the people, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency and accountability.
9. Article 27 of the Constitution of the Republic of Kenya provides for equality and freedom from discrimination and in particular provides that:

- (a) every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - (b) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
  - (c) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
10. Article 73 of the Constitution of the Republic of Kenya provides that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with the purposes and objects of the Constitution, demonstrates respect for the people, brings honor and dignity to the office and promotes public confidence in the integrity of the office.
11. Under Article 129 of the Constitution of the Republic of Kenya, the Executive Authority of the Republic should be exercised in accordance with the Constitution and in a manner compatible with the principle of service to the people of Kenya and for their well being and benefit.
12. Under Article 131 of the Constitution the President of the Republic of Kenya is under a duty to respect, uphold and safeguard the Constitution,

promote and enhance the unity of the nation and ensure the protection of human rights and fundamental freedoms and the rule of law.

13. Article 166 of the Constitution of the Republic of Kenya provides for the process of appointment of the Chief Justice, which is, appointment by the President in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.
14. Article 156 of the Constitution of the Republic of Kenya provides for the appointment of the Attorney General which is nomination and appointment by the President subject to approval by the National Assembly.
15. Article 157 of the Constitution of the Republic of Kenya provides for the process of appointment of the Director of Public Prosecutions which is nomination and appointment by the President subject to approval by the National Assembly.
16. Article 228 provides for the appointment of the Controller of Budget which is nomination and appointment by the President subject to approval by the National Assembly.
17. Section 12 of the Sixth Schedule of the Constitution of the Republic of Kenya saves the persons occupying the offices of the President and

the Prime Minister immediately before the effective date (27.8.2010) in accordance with the National Accord and Reconciliation Act, 2008, until the first General Election held under the Constitution.

18. Section 24 of the Sixth Schedule of the Constitution of the Republic of Kenya provides for the termination of the term of office for the person serving as the Chief Justice on the effective date and provides that such person shall vacate office within six months from the effective date and the successor in office shall be appointed by the President subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.
19. Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.”

The petitioners complained that on 28<sup>th</sup> January, 2011 the Office of the President announced the nomination for approval and eventual appointment of persons to the offices of

the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget in a manner that is unconstitutional. They stated that all the persons so nominated are of the male gender. They further stated that the Office of the Prime Minister has claimed that it was not consulted before the said nominations were done. They further stated that the Judicial Service Commission has also claimed that it did not make recommendations for nomination to the Office of the Chief Justice. The petitioners further stated that the aforesaid positions were never advertised in order to give every eligible Kenyan an equal opportunity to apply for consideration. That process of nomination has generated heat, controversy and tension in a manner that threatens national unity, the petitioners added.

Together with the petition, the petitioners filed an application by way of chamber summons brought under **Articles 23 (3) (c)** of the **Constitution**, **Section 19** of the **Sixth Schedule** of the **Constitution** and **Rules 20** and **21** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights of the Individual)** High

**Court Practice and Procedure Rules, 2006.** They sought the following relief:

**“That pending the hearing and determination of the substantive Constitutional petition a conservatory order be issued restraining the Respondent and any state officer or organ of State from carrying on with the process of approval and eventual appointment to the offices of Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget on the strength of the nominations made by the Office of the President on 28.01.2011 or other nominations that may be done in disregard of the Constitutional provisions relating to gender, equity and equality, equal opportunities for all, transparency and accountability and consultations.”**

The application was supported by an affidavit sworn by **Ann Wairimu Njogu**, the Executive Chairperson of the 1<sup>st</sup> petitioner. The affidavit reiterates the contents of an affidavit sworn by the same deponent in support of the petition. That affidavit amplifies the issues raised in the petition as summarized hereinabove and refers to the various provisions of the Constitution that were alleged to have been violated in making the four nominations as aforesaid. The application seeking the conservatory orders was argued this morning. The petitioners were represented by Mrs. Judy Thongori, Mrs. Alice Wahome and Mr. Ongoya. The respondent was represented by

Miss Wanjiku Mbiyu, Mr. Antony Ombwayo and Mr. Kefa Onyiso. The Party of National Unity was represented by Mr. C.N. Kihara and Dr. Stephen Njiru.

The main arguments of the petitioners in seeking the conservatory orders may be summarized as hereunder:

- **The averments in the petition and the depositions in the affidavit sworn by Ann Njogu clearly demonstrate that the petitioners have a *prima facie case* with a likelihood of success.**
- **The manner in which the four nominations were done violate the following Articles of the Constitution:**
  - (i) Article 27(3) of the Constitution that guarantees the fundamental right and freedom of women and men to equal treatment.
  - (ii) Article 27(4) & (5) which prohibits the State and/or person from discriminating directly or indirectly against any person on any ground including sex.
  - (iii) Article 3 that obligates every person to respect, uphold and defend the Constitution.
  - (iv) Article 10(2) (a) that guarantees the rule of law as one of the national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.
  - (v) Article 10(2) (b) that guarantees equity, inclusiveness, equality and non-discrimination as national values that

bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.

- (vi) Article 10(2) (c) of the Constitution that guarantees good governance, transparency and accountability as national values and principles that bind all State officers, public officers and all persons whenever they apply or interpret the Constitution.
- The nomination for the appointment of the person to the office of the Chief Justice was done without involving the Judicial Service Commission contrary to the provisions of Article 166 of the Constitution. They referred to a statement that was issued by the Judicial Service Commission on 31<sup>st</sup> January, 2011. The statement was duly signed by the Chief Justice, the Attorney General and other members of the Judicial Service Commission.
- The Office of the Prime Minister alleged that it was not consulted before the nominations were announced. The petitioners' Counsel referred to various newspaper cuttings annexed to the petitioners' affidavit.

In support of the argument that the nominations infringed the right to equality, the petitioners cited a decision of the Constitutional Court of South Africa, JACQUES CHARL HOFFMANN vs. SOUTH AFRICAN AIRWAYS, CCT 17 OF 2000 where the court stated:

"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the

**provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”**

The petitioners urged the court to interpret the provisions of the Constitution as required under **Article 259(1)** and grant the orders sought in the application.

Miss Mbiyu for the Attorney General submitted that there is no material evidence, other than media reports, that there was no consultation between the President and the Prime Minister. In the circumstances, she stated, the court cannot determine whether there was consultation or not.

Regarding nomination of a new Chief Justice, she urged the court to apply liberal interpretation of the Constitution. Counsel stated that **Sections 23(1) and 24(2)** of Schedule Six should be read together with the provisions of **Article 166(1)**.

To that extent, she stated, the Attorney General concedes that the Judicial Service Commission was entitled to make a recommendation to the President before he nominated the new Chief Justice, in consultation with the Prime Minister, for approval by the National Assembly.

As to whether the provisions of **Article 27(3)** was violated by virtue of the four nominations aforesaid, all of them being of the male gender, counsel conceded, not without some hesitation, that indeed there was discrimination against women.

Mr. Kihara for the Party of National Unity submitted regarding appointment of the Chief Justice during this transition period, the only applicable provision of the Constitution is **Section 24(2)** of Schedule Six which states as follows:

**“A Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.”**

Counsel further submitted that **Article 166** is of no relevance to the appointment of the Chief Justice before the first General Elections under this Constitution.

As to whether there were consultations between the President and the Prime Minister, Mr. Kihara submitted that in the absence of any affidavit sworn by the two Principals, there is no sufficient evidence for stating that there were no consultations. He said that the court should not rely on media reports on the issue. Counsel discredited the positions taken by both the Judicial Service Commission and the Commission on the Implementation of the Constitution (CIC) to the effect that the nominations were not done in accordance with the provisions of the Constitution.

Regarding the provisions of **Article 27(3)** of the Constitution, Mr. Kihara's view was that the fact that the four nominees were all men did not necessarily imply that there was discrimination without taking into consideration the full statistics of personnel in those four public offices.

Counsel urged the court no to grant the conservatory orders as sought because, given the nature of the relief sought, there is likelihood of infringement on the doctrine of separation of powers. By granting the conservatory orders the court will be stopping the National Assembly from performing

its statutory duties, counsel submitted. He however, conceded that the court has power to make an appropriate declaratory order.

I have anxiously considered the petition and the affidavit sworn in support thereof and all the submissions made by counsel. My determination of this application for conservatory orders starts with a consideration of **Article 1** of the Constitution which states as hereunder:

- "(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.**
- (2) The people may exercise the sovereign power either directly or through their democratically elected representatives.**
- (3) Sovereign power under this Constitution is delegated to the following state organs, which shall perform their functions in accordance with this Constitution –**
  - (a) Parliament and the legislative assemblies in the county governments;**
  - (b) the national executive and the executive structures in the county governments; and**
  - (c) the Judiciary and independent tribunals."**

The supremacy of the Constitution is expressly declared by **Article 2** which states, *inter alia*, that the Constitution is the

supreme law of this Republic and binds all people and all state organs at both levels of government. Every person has an obligation to respect, uphold and defend the Constitution.

Article 10 sets out the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. Those national values and principles include:

- “(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”**
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**
- (c) good governance, integrity, transparency and accountability; and**
- (d) sustainable development.”**

In interpreting the Constitution, this court is bound by the provisions of **Section 259** which requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of

rights, permits the development of the law and contributes to good governance. **Article 259(3)** states that:

**“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking .....**”

**Article 259(11)** states that:

**“If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with the approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”**

In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of **TINYEFUZA vs. ATTORNEY GENERAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997**, the court held as follows:

**“The entire Constitution has be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy of the written Constitution.”**

A similar principle was enunciated by the United States Supreme Court in **SMITH DAKOTA vs. NORTH CAROLINA** **192 U.S. 268 [1940]**. The court stated:

**"It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."**

In **NDYNABO vs. ATTORNEY GENERAL [2001] 2 E.A. 485** the court held as follows:

**"The Constitution is a living instrument, having a soul and consciousness of its own ..... it must be construed in line with the lofty purpose for which its makers framed it. .... A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document."**

It is in the background of the foregoing principle of harmonization that I will interpret the various Articles of the Constitution that were cited before this court.

It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and

law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

What are the major violations of the Constitution complained of by the petitioners?

**(i) That the nomination of the Chief Justice was unconstitutional.**

I have already highlighted the provisions of **Article 166** of the Constitution as well as **Section 24(2)** of Schedule Six of the Constitution. Although Mr. Kihara for the **Party of National Unity** submitted that the Judicial Service Commission has no role in the nomination of a new Chief Justice before the first General Elections under the new Constitution are held, the position taken by the petitioners and the Attorney General is different. Miss Mbiyu on behalf of the Attorney General conceded that the President ought to have received recommendations from the Judicial Service

Commission before he made the aforesaid nomination. It is in the public domain that the Attorney General, who is a member of the Judicial Service Commission, signed a joint statement of the Commission to that effect. That was done just about four days ago. Under **Article 156(1)** of the Constitution, the Attorney General is the principal legal advisor to the government. The qualifications for appointment as an Attorney General, are very high, they are the same as four appointments of a Chief Justice. He is a person who is highly learned and experienced in law. The President is therefore supposed to take his advice seriously.

On the basis of the concession made by the Attorney General, who is the respondent in this petition, it must be accepted that the said nomination did not comply with the constitutional requirements of **Article 166(1) (a)** as read together with **Section 24(2)** of **Schedule Six** of the Constitution. To that extent, the petitioners have proved that the nomination was unconstitutional. The rule of harmony in interpreting the Constitution as earlier stated has to be borne in mind.

The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after consultation between the President and the Prime Minister in accordance with the **National Accord and Reconciliation Act**. The Constitution does not define the word “**consultation**”. Other than media reports that were annexed to the petitioners’ affidavit, there is no other evidence relating to the consultations. What does the word “consultation” therefore mean? The **Shorter Oxford English Dictionary** defines “consult” as, *inter alia*, “**take counsel together, deliberate, confer.**” “Consultation” is said to mean, *inter alia*, “**the action of consulting or taking counsel together, deliberation, conference.**” **Websters New Universal Unabridged Dictionary** suggests that it means “**consulting, a meeting of persons to discuss, decide, or plan something**”, while ‘**consult**’, in the relevant context means “**to ask advice of, to seek the opinion of as a guide to one’s judgment**”. In the **Readers Digest Universal Dictionary**, ‘**consult**’ is rendered in such context as “**to exchange views, confer,** and ‘**consultation**’ as “**the act or**

**procedure of consulting, a conference at which advice is given or views are exchanged."**

In the South African case of **MAQOMA vs. SEBE & ANOTHER 1987 (1) SA 483** the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define 'consultation'. Pickard J observed:

**"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party ..... in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."**

In **AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD [1972] 1 All ER 280** at 284 it was held that:

**"The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be**

**consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.”**

From the definitions of the word ‘**consultation**’ as hereinabove stated and from the authorities cited and from the annexures to the petitioner’s affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of **Section 24(2)** of Schedule Six of the Constitution. That notwithstanding, the values and principles stated under **Article 10** and the spirit of the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.

**(ii) Violation of Article 27(3) regarding equal treatment of men and women.**

To the extent that all the nominees to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget were all men, the spirit of equality and freedom from discrimination was not given due

consideration. While it may be argued that in future appointments to public offices women were likely to be included as submitted by Mr. Kihara, no reasonable explanation was given by the respondent why none of the four appointees was a woman.

In view of the violations to the letter and spirit of the Constitution as shown hereinabove, even without considering other relevant provisions of the Constitution, like **Article 10**, which spells out national values and principles of governance, I am satisfied that the petitioners have demonstrated that they have a *prima facie* case with a likelihood of success.

**Article 22(1)** states that:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”**

Under **Article 23** the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. In proceedings brought under **Article 22**, this court

may grant appropriate relief including a declaration of rights, an injunction, or a conservatory order.

**Article 165(3) (d)** grants this court jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

Should this court grant the conservatory order as sought by the petitioners? The court acknowledges that the National Assembly represents the people of Kenya and **Article 95(2)** states that:

**“The National Assembly deliberates on and resolves issues of concern to the people.”**

The National Assembly must also approve the appointment of each of the four nominees to the offices of the Chief Justice, the Attorney General, Director of Public Prosecutions and Controller of Budget. The court cannot restrain the National Assembly from performing its constitutional duty. But where it is demonstrated that in giving its approval, the National

Assembly will be perpetuating an unconstitutional act, unless the Speaker of the National Assembly points out the unconstitutionality of the intended action and thus disallows the process of approval, this court is under an obligation to make an appropriate declaration and bring it to the attention of the National Assembly. The oath of office which all judges took on the 27<sup>th</sup> of August, 2010 was to the effect that they will individually:

**“diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill will, prejudice, or any political, religious or other influence.”**

We further solemnly swore that:

**“In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect of the Judiciary and the Judicial System of Kenya and promoting fairness, independence, competence and integrity within it.”**

In light of that, this court must uphold the twin principles of constitutionalism and the rule of law in its decisions. Consequently, and in view of the court's findings regarding

constitutionality of the manner in which the aforesaid nominations were done, I make a declaration that it will be unconstitutional for any State officer or organ of the State to carry on with the process of approval and eventual appointment to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget based on the nominations made by the President on 28<sup>th</sup> January, 2011. That will have to await the hearing of the petition or further orders of this court. The petitioners will have the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>rd</sup> day of February, 2011.**



**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Ongoya, Mrs. Judy Thongori, Mrs. Alice Wahome, Mrs. Judith Sijeny, Mr. Chigiti, Miss Victoria Wambua, Mr. Timothy Mwaura - for the petitioners**

**Miss Wanjiku Mbiyu, Mr. Ombwayo, Mr. Onyiso – for the respondent**

**Mr. C. Kihara and Dr. Stephen Njiru – for the Party of National Unity.**