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JUDICIARY

TEMPORARY PRACTICE DIRECTIONS FOR THE COURT OF APPEAL ACTING AS THE SUPREME COURT - UNDER SECTION 21(2) OF THE SIXTH SCHEDULE OF THE CONSTITUTION

PRACTICE DIRECTIONS

11TH MARCH, 2011

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**TEMPORARY PRACTICE DIRECTIONS FOR THE COURT OF APPEAL ACTING
AS THE SUPREME COURT- UNDER SECTION 21(2) OF THE SIXTH SCHEDULE
OF THE CONSTITUTION**

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TEMPORARY PRACTICE DIRECTIONS FOR THE COURT OF APPEAL ACTING AS THE SUPREME COURT- UNDER SECTION 21(2) OF THE SIXTH SCHEDULE OF THE CONSTITUTION

- Commencement 1. These Practice Directions issued shall commence on the **14th March, 2011**.
- Application 2. **The Practice Directions shall apply until the establishment of the Supreme Court under Article 163(1) of the Constitution.**
- Definitions 3. In these practice directions:
- “Court”, means the Supreme Court established under section 21(2) of the sixth schedule of the Constitution.
- “Judge”, means a Judge of the Court of Appeal acting under section 21(2) of the Sixth Schedule of the Constitution.
- “Registry”, means the registry of the Court
- “Registrar”, means Registrar of the Court
- “Advocate”, means a person who has the right of audience before the court under direction 19.
- Jurisdiction 4. The purpose of these Practice Directions is to assist the Court and the Parties in dealing with the issue of the jurisdiction of this Court acting as the Supreme Court pursuant to the request by the Commission on the Implementation of the Constitution or any such other requests for directions regarding advisory opinions under the provisions of Article 163 (6) of the Constitution as read with section 21(2) of the Sixth Schedule of the Constitution.
- By virtue of Article 163(6) of the Constitution, the Supreme Court may give an advisory opinion under the request of the National Government, any state organ, or any county government with respect to any matter concerning county government.
- By virtue of section 21(2) of the sixth schedule of the Constitution, the Court of Appeal shall have jurisdiction over matters assigned to the Supreme Court until the Supreme Court is established.
- Registry 5. The registry of the Court shall be situated at Nairobi.

Hours for Lodging Documents	6. The Presiding Judge may from time to time direct the hours during which the registry shall be open for the receipt of documents lodged under the provisions of these directions
Maintenance of Registers	7. The Registrar shall maintain a register in regard to matters lodged in the registry.
Numbering of matters	8. A matter once lodged in the registry shall be given a serial number and for this purpose there shall be maintained in the registry a register.
Endorsement of Documents Lodged	9. Once a motion is lodged in the registry in accordance with these Practice Directions, the Registrar shall cause it to be endorsed showing the date and time when it was lodged.
Requirement as to size and production of documents, binding of records and numbering Of pages and lines,	<p>10. 1. Unless the nature of the notice of motion renders it impracticable, the motion prepared for use in the court shall be on foolscap paper of durable quality; only one side of the paper shall be used and a margin of not less than one and a half inches shall be left on the left side of the sheet.</p> <p>2. The motion prepared for use in the court and all other necessary documents shall be clear and easily legible and may be produced by printing, type lithography, stencil duplicating, photography, xerography, typewriting, writing, other appropriate technology or any combination of these media.</p> <p>4. The motion filed in the court shall be bound in book form with a cover of stout paper and shall not be less than five copies and the title of the matter shall appear on the cover.</p> <p>5. In the motion lodged in the court, every tenth line of each page of the record shall be indicated in the margin on the right side of the sheet.</p>
Power for Registrar to reject documents	<p>11. 1. The Registrar, as the case may be, may refuse to accept the motion or any documents lodged which does not comply with the requirements of Practice Direction Number 10</p> <p>2. Subject to waiver of fees, the Registrar, as the case may be, shall refuse to accept the motion or any documents tendered without the required fee.</p> <p>3. If, as a result of an error, the motion or any other document is accepted which ought to have been rejected under sub rule 2, the document shall be deemed to have been duly lodged but the person who lodged it shall</p>

as soon as practicable after the error is discovered pay the fee of the balance thereof.

4. Any person who is dissatisfied with a decision of the Registrar rejecting the motion or any document under the powers conferred by this direction may require the matter to be referred to a Judge for his decision and an application under this sub direction may be made informally at the time when the decision is given or in writing within 7 days thereafter.

Signature of Documents

12. The motion or any document may be signed on behalf of the person making it or by any person entitled to appear on his behalf.

Form of amendments

13. 1. Where any person obtains leave to amend the motion or any document, the motion or document itself may be amended or, if it is more convenient, an amended version of the motion or document may be lodged
 2. Where any person lodges an amended version of the motion or a document, the person shall show clearly
 - (a) any words or figures deleted from the original, by including those words or figures and striking them with red ink, so that what was written remains legible;
 - (b) any words or figures added to the original, by writing them in red ink or underlining them in red ink.
 3. Where the motion or any record includes any amended document, the amendments shall similarly be shown in each copy of the record.

Service and Transmission of documents

14. 1. Where by these Directions the motion or a document is required to be served on any person, service shall be effected in such way as the court may in any case direct, and in the absence of any special directions shall be made personally on the person or any person entitled to appear on his behalf or by any other recognized mode of service as provided under Order 5 of the Civil Procedure Rules, 2010
 2. For the purpose of this Direction, service on a partner or a clerk of an Advocate at the office of an Advocate shall be deemed to be service on the Advocate.
 3. Proof of service may be given where necessary by affidavit unless in any case the Court require proof by oral evidence.
 4. Where a motion or any document is required to be sent to any person, ~~the motion or document may be sent by hand, a licensed courier service~~

- provider approved by court or by registered post to that person or to any person entitled to appear on his behalf.
- Change of address for service
5. Notice of the date fixed for the hearing of the motion or for the delivery of a ruling or the reasons for any decision may be given by telephone or telegram or other electronic means approved by the court.
15. A person who has given an address for service may at any time change such address for service by lodging a notice of change in the registry and serving copies of it on all persons who have been served with the previous address
- Sittings of the Court
16. The sittings of the court shall be determined by the Presiding Judge and shall be advertised and notified in such manner as he may direct.
- Appearances
17. 1. A party to any proceedings in the Court may appear in person or by Advocate
2. A State Organ may appear either by Advocate or Secretary thereof appointed by resolution under the seal of the State Organ, a sealed copy of which resolution shall be lodged with the Registrar.
3. A person under disability may appear by Advocate or by his nominee, next friend or guardian ad litem as the case may be.
- Change of Advocate
18. 1. Where a party changes his Advocate or having been represented by an Advocate decides to act in person or having acted in person engages an Advocate, shall as soon as practicable lodge with the Registrar a notice of the change and shall serve a copy of such notice on the other party and on every other party appearing in person or separately represented as the case may be.
2. An Advocate who desires to cease acting for a party may apply by notice of motion before a single Judge for leave to so cease acting and such Advocate shall be deemed to have ceased to act for such party upon service on the party of a certified copy of the order of the Judge.
- Right of Audience of Advocate
19. 1. The Attorney General and Solicitor General shall have the right of audience before the court and shall take precedence over all other Advocates.
2. Every Advocate who is for the time being entitled to practice before the superior courts shall have the right of audience before the Court; provided

that an Advocate who has been struck off the roll of Advocates or who is under suspension from practice shall have no audience before the Court.

3. Any other person entitled to appear as counsel or Advocate before any court of unlimited jurisdiction, if licensed in that behalf by the Chief Justice and subject to payment of prescribed fee, shall have the right of audience before the Court.

List of Authorities
and Copies of
Judgments to be
referred to

20. 1. An Advocate who intends at the hearing to rely on the judgment of any reported case or to quote from any book shall lodge with the Registrar, a list containing the titles of such cases with their citations and the names, authors and editions of any such books and shall serve a copy of such list on the other party and on each party or on each other party appearing in person or separately represented as the case may be:
provided:

- (a) that a supplementary list may, when necessary, be produced at the time of hearing.
(b) such lists shall unless the Presiding Judge otherwise directs, be not less than five copies and shall be lodged at least 24 hours before the motion is due to be heard.
2. An Advocate who intends at the hearing of any motion to rely on the judgment of any unreported case, shall at or before the hearing produce a certified or a photostat copy of such judgment.

Judgment/Ruling/
Opinion

21. 1. Judgment, opinion or ruling may be given at the close of the hearing or reserved for delivery within 90 days unless the Court, for reasons to be recorded, orders otherwise
2. A judgment, opinion or ruling shall be dated as of the day it is delivered.

Correction of errors

22. A clerical or arithmetic mistake in the judgment, opinion or ruling of the Court or an error arising therein from an accidental slip or omission may at any time, whether before or after the judgment, opinion or ruling, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what the intention of the Court was when the judgment, opinion or ruling was given.

Signature and
sealing of
documents

23. Every summons, notice or other formal document issued by the Court **shall be signed by a judge or by the Registrar and shall be sealed with the seal of the Court.**

Form of
Application to
Court

24. Applications to the Court shall be instituted by way of **Notice of Motion** and shall be in the form set out in the second schedule.

Supporting
Documents

25. 1. Every formal application to the court shall be supported by one or more affidavits of the applicant or of some other person(s) having knowledge of the facts
2. An applicant may with the leave of a judge or with the consent of the other party(s) lodge one or more supplementary affidavits and application for such leave may be made informally.

Urgent
applications

26. 1. Any application which the applicant desires to set down for hearing as a matter of urgency shall be accompanied by a certificate of urgency signed by the applicant or his Advocate, supported by affidavit setting forth the matters upon which the applicant relies as showing that his application should be heard without delay.
2. The application together with the certificate and the supporting affidavit shall be placed before a single judge, who shall peruse it, and the application shall not be set down for hearing as a matter of urgency unless the judge certifies that it is urgent.
3. The Registrar shall maintain in addition to the court register a separate register of every application made as a matter of urgency which shall be numbered consecutively for each year, showing the date it is made, the parties if any and the decision of the single judge thereof.
4. The refusal of the judge to certify an application as urgent under this rule shall not be subject to a reference to the Court but the applicant may apply informally for the matter to be placed before a single Judge for hearing *inter partes*.

Number of copies
of application
required

27. When an application is to be heard by a single Judge, the application and other documents relating thereto shall be filed in two copies and in all other cases in eight copies

Service of notice
of motion

28. 1. The notice of motion and copies of all affidavits shall be served on all necessary parties not less than two clear days before the hearing:

Provided that in case of urgency, an application, may be made ex parte, but in any such case, if the applicant is represented by an Advocate, the Advocate shall sign a certificate of urgency, which shall be filed with the proceedings.

2. Where any person required to be served with a notice of motion gave an address for service in or in connection with the proceedings in the superior courts and has given no subsequent address for service, the notice may be served on him at that address notwithstanding that it may be that of an advocate who has not been retained for the purpose of any subsequent proceedings.

- Affidavits in reply
29. 1. Any person served with the notice of motion under rule 28 may lodge one or more affidavits in reply and shall as soon as practicable serve a copy(s) thereof on the applicant.
 2. Any such person may, with the leave of a judge or with the consent of the applicant, lodge one or more supplementary affidavits

- Application for leave to withdraw
30. An applicant may at any time apply to the Court for leave to withdraw the application and such application may be made informally.

- Procedure on Non-appearance
31. 1. If on the day fixed for hearing of the application, the applicant does not appear, the application may be dismissed unless the Court sees it fit to adjourn the hearing.

2. Where application has been dismissed under sub-direction 1, the party in whose absence the application was determined may apply to the Court to restore the application for hearing or to re-hear it as the case may be if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.
3. An application made under sub-direction 2 shall be made within 30 days of the decision of the Court or in case of a party who would have been served with notice of the hearing but was not so served, within 30 days of his first hearing of that decision.

FEES

- Fees payable
32. Subject to waiver, fees shall be payable as set out in the First Schedule in respect of any motion and services set out
Provided that-
 - (a) no fees shall be payable by the government in respect to the motion
 - (b) copies of any documents may be issued without fee to such persons as the Presiding Judge may direct or at such reduced fees as the Presiding Judge may direct.

Time of
Payment of
fees

33. 1. The fee payable on lodging of a motion shall be payable at the time the motion is lodged
2. The Registrar may require the payment in advance of the fee for any other service or where the amount of the fee cannot conveniently be ascertained when the service is requested, may require a deposit towards it and any fees so paid in advance or deposit made shall be refunded if the request for the service is cancelled before the service has been undertaken.
- Revocation 34. These Practice Directions shall stand revoked once the Supreme Court is established or otherwise as may be directed by the Presiding Judge.

FIRST SCHEDULE (Rule 32)

Fees in connection with the application under article 163(6)

	Kshs.
1. Upon lodging the notice of motion	6,000
2. Upon Lodging a notice of motion under certificate of urgency	750
3. Upon lodging an affidavit , other than an affidavit annexed to a notice of motion	150

MISCELLANEOUS

4. For serving a document in connexion with the civil Application, in addition to all necessary expenses of travel –	
(a) Where the person to be served resides or has his place of business within the city town where the registry of the court is situated	400
(b) In any other case	1,000
5. For sealing an order in a Civil Application	250
6. For preparing a certified copies of a document –	
(a) For each folio or part thereof	20
(b) For each subsequent copy	10
7. Upon applying to inspect the proceedings or an application That has been determined	300

Form 1A

SECOND SCHEDULE (Rule 24)

**IN THE COURT OF APPEAL SITTING AS SUPREME COURT AT NAIROBI
CONSTITUTIONAL APPLICATION NO.....OF 2011**

In the matter of Advisory Opinion of the Court under Article 163(6) of the Constitution

AND

In the matter of Section 21(2) of the Sixth Schedule of the Constitution

The Advisory Opinions of the Court is sought on the following matters:

1. Sections 24 (2), (3) and Section 29 (2) of the Sixth Schedule to the Constitution provide for the procedure of appointment of Constitutional Office Holders and Public Officers in the transitional period until the holding of the first election under the Constitution.

- ❖ Whether and to what extent the appointing authority, in making an appointment under sections 24(2), (3) and section 29 (2) of the sixth schedule, must have regard to the provisions of the main text of the Constitution.

2.

3.

4.

5. e.t.c.

Dated thisday of.....2011

**XYZ
Advocates for the Applicant**

Lodged in the Registry on theday of.....2011

REGISTRAR

This notice of motion was taken out, filed and served by:

XYZ
Advocates for the Applicant
ABC building
Supreme Court Road
P.O. Box 9999

NAIROBI **Ref: 1/SC/01/000**

To be served upon:

1. ABC
2. BAC
3. CBA
4. ACB e.t.c.