

Our Ref: CAJ/AO/4/7/2013/VOL.1/RS

29th November, 2013

His Excellency Hon. Uhuru Muigai Kenyatta CGH,
President and Commander-In-Chief of the Defence
Forces of the Republic of Kenya
Office of the President
Harambee House
NAIROBI

**RE: ADVISORY OPINION ON THE DIFFERENCES BETWEEN THE NATIONAL
 ASSEMBLY AND THE JUDICIARY**

Your Excellency,

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions or proposals on improvement of Public Administration.

Your Excellency, our attention has been drawn to apparent differences between the Speaker of the National Assembly on the one hand, and the High Court, the Judicial Service Commission and the Chief Justice on the other hand. This standoff was apparently triggered by the decision of the Judicial Service Commission (JSC) to initiate investigations on the conduct of the erstwhile Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei, resulting in her removal from office. In our opinion, the matter is likely to affect good public administration and bears comment. In accordance with our mandate under Article 59(2) (h), (i) and (j), as read with section 8(h) of the Commission on Administrative Justice Act, we hereby render our Advisory Opinion which we hope will help address the outstanding matters, and smoothen public administration in this respect.

Your Excellency, in the course of examining the dispute, we have picked out four issues which require urgent clarity. First, we would like to point out the provisions of **Article 251(4)** of the Constitution which is very critical at this point. Once the National Assembly has considered a petition for removal of a member of a Constitutional Commission and conveys the same to the President, the President has no discretion but to appoint a tribunal to consider the same. Article **251 (4) (b)** is couched in mandatory terms and gives the President no discretion. In its clear terms, the President **'shall appoint a tribunal.'** Further, it is worth noting the provisions of **Article 2 (2)** of the Constitution which states that no person may claim or exercise State authority except as authorized by the Constitution. Similarly, **Article 129 (2)** states that executive authority shall be exercised in a manner compatible with the principles of service to the people of Kenya, and for their well-being and benefit.

That said, and the improprieties notwithstanding, there is a Constitutional obligation upon the President to appoint a tribunal. It is upon the tribunal to examine all the issues before it and make a determination. If the tribunal concludes that Parliament erred in its conduct in sending the report to the President despite the Court order then it will terminate the process at that stage. However, if it finds in the alternative it would proceed to examine the issues and forward its recommendations to the President.

Second, and notwithstanding the foregoing, on the issue of whether or not to suspend the six (6) named JSC members, it is our humble view that the six

(6) members can and should be allowed to continue serving pending the outcome of the tribunal. The Constitution under **Article 251 (4) (a)** makes the suspension discretionary. This is in the interest of allowing continuity and preventing the judiciary from grinding to a halt. The Constitution in its design did not envisage removal of commissioners' *en mass*, a situation that would result in crippling the operations of the Judicial Service Commission and the Judiciary as a whole.

Third, it is our considered opinion that it was clearly improper for Parliament to have ignored a High Court Order issued in **Petition No. 518 of 2013**. It is a well-established principle all over the world and in our constitution that the ultimate responsibility for the interpretation and enforcement of the Constitution lies with the Judiciary. The High Court is constitutionally empowered to interpret the Constitution and retains the residual jurisdiction to oversee the exercise of quasi-judicial functions by all organs of government, including Parliamentary Committees while conducting quasi-judicial functions. Your Excellency, we singularly implore you to make known to the leadership of the National Assembly that disregard of Courts and public pronouncements of contempt can easily result in the breakdown of law and order, with disastrous consequences for our lovely country.

Your Excellency, finally, we are also of the view that it was improper for the six (6) JSC commissioners to have ignored the Summons issued by the Parliamentary Committee on Justice and Legal Affairs. There is a distinction between the JSC's independence as a Constitutional Commission and the overall concept of the independence of the Judiciary. It was improper, in our opinion, for the JSC to hide behind the principle of judicial independence to seek to defeat the oversight role of Parliament. In this respect, we similarly implore you to make known to the leadership of the JSC that the Summons by the Parliamentary Committee derives from the sovereignty of the people in Article 1 of the Constitution. To that extent, and irrespective of ones view on its merits, Summons should be honoured and any objection raised before the Committee itself.

Your Excellency, We wish to draw your attention to the fact that there are two matters in Court touching on the above subject matter. The first case pits the former Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei against the Judicial Service Commission on the one hand while the second case is

between the Judicial Service Commission, the Speaker of the National Assembly and the Attorney General on the other. We have applied and have been joined as *amicus curiae* in both cases. While we shall endeavor to persuade the Court among others that such disputes as are being witnessed presently ought not to be openly litigated in Court, and can be confidentially mediated or negotiated, we humbly implore you to impress upon the Attorney General and the leadership of the National Assembly that snubbing the Court by deciding not to enter appearance sends fundamental negative signals on the rule of law and is to be avoided

Your Excellency, we note and welcome indications that you have initiated a process towards reconciling the two arms of government and offer our humble Advisory as above in the hope that all these will serve to return matters to normalcy and avert an otherwise imminent constitutional crisis.

We thank you and assure you of our highest regards.

Yours

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION ON ADMINISTRATIVE JUSTICE

Copy to: **Hon. Prof. Githu Muigai, MP**
Attorney General
State Law Office
Sheria House
NAIROBI