

**OUR REF: CAJ/OP/046/5/13-SAK**

9<sup>th</sup> May 2013

**His Excellency, the Hon. Uhuru Kenyatta, CGH, MP**

President and Commander in Chief of the Defence Forces  
of the Republic of Kenya  
Harambee House, Harambee Avenue  
P.O. Box 62345-00200

**NAIROBI**

Your Excellency,

**RE: APPOINTMENTS OF MEMBERS TO THE TEACHERS SERVICE COMMISSION**

Kindly receive warmest compliments from the Commission on Administrative Justice. The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission has a mandate, *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

Your Excellency, allow me to take the opportunity to express our concerns as relates to the appointment of members to the Teachers Service Commission. The Commission is particularly concerned by the failure to comply with the Constitution and the Teachers Service Act, No. 20 of 2012 even after the judgment of the High Court on the matter on 25<sup>th</sup> March 2013 (*Nairobi Petition No. 8 of 2012, Abdi Sitar Yusuf vs the Attorney General and Others*).

Your Excellency, we wish to give a brief background of the issue at hand. As you may be aware, the Teachers Service Commission (TSC) is a Constitutional Commission created under Chapters Thirteen and Fifteen of the Constitution. Pursuant to the Constitution, Parliament enacted the TSC Act in August 2011 to restructure TSC in accordance with the Constitution. Subsequent to the enactment of the TSC Act, a Selection Panel was constituted to commence the appointment of the Chairperson and Members of TSC. The Selection Panel interviewed the shortlisted candidates and pursuant to Section 8(6) of the TSC Act forwarded the names of the nominees to the President for appointment to TSC. The President in consultation with the Prime Minister duly appointed a Chairperson and three Members and subsequently forwarded their names to the National Assembly for approval in December 2012. However, the National Assembly rejected the names on 3<sup>rd</sup> January 2013 when they were presented before it for consideration.

The President in consultation with the Prime Minister thereafter submitted a fresh list of nominees to the National Assembly pursuant to Section 8(11) of the TSC Act. The fresh list submitted contained the names of a new nominee and three of the previous nominees that had been rejected by the National Assembly. The National Assembly subsequently on 9<sup>th</sup> January 2013 approved the names of the nominees for Member of TSC, but rejected the nominee for Chairperson of TSC. However, the approved nominees did not assume office since the matter was taken to the High Court to determine whether there was compliance with the TSC Act in the conduct of the appointment process. Ultimately, the Court delivered its judgment where it found that the President failed to comply with the TSC Act when he submitted the second list containing the names of individuals that had been rejected by the National Assembly. The upshot was that the appointees could not assume office except the one whose name was not in the initial list to the National Assembly.

Your Excellency, we wish to draw your attention to the provisions of Section 8(11) of the Teachers Service Commission Act which is relevant to the issue at hand. The Section provides that:

*Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit **fresh nominations** from amongst the persons shortlisted and forwarded by the Selection Panel under subsection.*

Your Excellency, the cited Section provides for the submission of fresh names from the list of the candidates who were shortlisted and interviewed by the Selection Panel, but who were not part of the rejected names by the National Assembly. Indeed, this position was emphasized by the Court when it stated that 'once all the nominees were rejected, it was not open to the President in consultation with the Prime Minister to submit fresh nominations which contained the persons so rejected by the National Assembly.' As further stated by the Court, the rejection of the nominees by the National Assembly left the President with the responsibility of submitting fresh nominations from amongst the persons shortlisted and forwarded by the Selection Panel under Section 8(6) of the TSC Act. In the circumstances, we agree with the decision of the Court that the submission of the second list containing the names of persons who had earlier been rejected by the National Assembly was in breach of Section 8(11) of the TSC Act.

Your Excellency, in light of the foregoing, we wish to advise that fresh nominees from the list of persons who were not part of the rejected list, but were shortlisted and interviewed by the Selection Panel should be submitted to the National Assembly for approval and subsequent appointment for the positions of Chairperson and Members of TSC.

Your Excellency, we take note of the important role that the Teachers Service Commission has been empowered to play in our new constitutional dispensation. In this regard, we have taken note of the possibility of TSC having only one Commissioner upon the expiry of the terms of the Commissioners currently serving at TSC, if the current state of affairs continues. In our view, further delay in making appointments to TSC will the Commission might not only constitute a breach of the Constitution and TSC Act, but might also impair the operational challenges at TSC. In the circumstances, we wish to advise that this

process should be undertaken as a matter of priority in line with the timelines in the TSC Act and to forestall any operational challenges that TSC may face arising from the anticipated expiry of the terms of the Commissioners presently serving at TSC.

We have herewith enclosed a copy of the judgment of the High Court and other relevant documents on this matter for your kind perusal and records.

The Commission appreciates the commitment and support of your office and assures you of our highest regards.

Sincerely,

**CMMR. OTIENDE AMOLLO, EBS**  
**CHAIRPERSON OF THE COMMISSION**

Cc:

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