

# THE COMMISSION ON ADMINISTRATIVE JUSTICE

## “OFFICE OF THE OMBUDSMAN”



*Hata Mnyonge ana Haki*

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### **AN ADVISORY OPINION ON THE PARTICIPATION OF PUBLIC OFFICERS AND USE OF PUBLIC RESOURCES IN POLITICAL ACTIVITIES**

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#### **I. INTRODUCTION**

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission, alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based.

Further, Article 59(2)(h) and (i) of the Constitution, and Section 8 (a) and (b) of the Act grant the Commission powers to investigate any conduct of State officers, or any act or omission in public administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act empowers the Commission to issue Advisory Opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures while section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission’s attention has been drawn to statements in sections of the media on the involvement of some appointive public officers in the political

campaigns for some candidates and/or parties, and that some public officers are using public resources for their campaigns. Our concern relates to the legality of the alleged actions as well as the potential consequences on the efficiency and accountability of the public service in Kenya. This has prompted us to invoke our advisory jurisdiction under Article 59(2)(h),(i) & (j) of the Constitution as read together with Section 8(h) of the Commission on Administrative Justice Act to issue an Advisory Opinion on the same as hereunder.

## **II. PARTICIPATION OF APPOINTED PUBLIC OFFICERS IN POLITICAL ACTIVITIES**

The Constitution places premium on the professionalism and efficiency in public service as captured under Chapter Six, and Articles 10 and 232. In relation to appointed public officers, the Constitution requires them to maintain political neutrality at all times. Notably, Article 77(2) provides that *'an appointed State officer shall not hold office in a political party.'* The upshot of this provision is that appointed State officers should not engage in any political activity or act in manner that undermines the political neutrality and integrity of their offices. However, this does not affect their rights to vote for candidates of their choice during elections. This provision also applies to other public officers by dint of section 52 of the Leadership and Integrity Act, 2012, which extends the application of Chapter Six of the Constitution and the Act to other public officers. Evidently, the Constitution seeks to create a public service that is apolitical, professional and efficient. It also seeks to insulate public service from political patronage where political connection is the overriding factor in appointments, promotion, deployment, transfer and training.

It is worthwhile to note that the appointed officers referred to under the Constitution include the Cabinet Secretaries, Principal Secretaries and other senior public officers. This provision has been expounded under section 23 of the Leadership and Integrity Act which prohibits public officers from participating in politics in the following ways:

- i) act as an agent for, or further the interests of a political party or candidate in an election;
- ii) manifest support for or opposition to any political party or candidate in an election; or

- iii) engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

The Election Offences Act, 2016 also prohibits public officers from participating in political activities, including '*use of public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party.*' Similar provisions exist in the various codes of conduct and ethics of public bodies, including the Public Service Commission whose Code would apply to the majority of public officers in Kenya.

In view of the above, the involvement of public officers in political activities would contravene the Constitution and aforementioned statutes. It would also undermine the rule of law and transformation of the public service. In our view, the question of accountability by public officers should be continuous and not summative to coincide with the electioneering period since this blurs the line between accountability and political campaign.

### **III. USE OF PUBLIC RESOURCES IN POLITICAL ACTIVITIES**

As stated above, there have also been reports of possible use of public resources in political activities by some public officers who have access to public resources by virtue of their offices. This is alleged to have taken different forms such as advertisements in the media and websites of their offices, use of government vehicles and other facilities at their disposal and initiation of projects under the guise of development. While we take cognisance of the nature of responsibilities on various public offices, care should be taken to ensure that the occupants of those offices do not abuse the resources entrusted to them for their personal benefit. Accordingly, if true, the acts would amount to misuse of public resources which is not only unlawful, but also undermine good governance in the country. In particular, we reiterate that misuse of public resources by public offices breaches the national values and principles of governance under Article 10, the principles of leadership under Chapter Six, and the principles of public finance under Article 201 of the Constitution. Indeed, this can form the basis of removal from office and subsequent disqualification from holding any other State office in accordance with Article 75(2) of the Constitution.

Pointedly, we wish to remind elected public officers that the Election Offences Act, 2016 criminalises use of public resources entrusted to them for the purpose of campaigning during elections. While section 14(1) thereof outlaws use of public resources for campaigns during an election generally, section 14(2) prohibits 'publication of any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.'

#### **IV. THE IMPORT OF THE PARTICIPATION OF PUBLIC OFFICERS AND USE OF PUBLIC RESOURCES IN POLITICAL ACTIVITIES**

As aforesaid, the participation of public officers and use of public resources in political activities not only offend the Constitution, but also undermine constitutionalism. Such acts will, *inter alia*:

- i) subordinate the sovereignty of the people to political parties or candidates insofar as public officers will be responsible to them instead of the public as envisaged under Article 1 of the Constitution;
- ii) undermine the rule of law since they encourage the participation of public officers in politics and misuse of public resources;
- iii) politicize, and create anarchy and patronage in the public service and other appointive offices thereby undermining the Constitution, the various statutes on integrity and elections, and the values and principles of public service;
- iv) undermine the transformation and service delivery in the public service since the focus is likely to be on politics rather than service;
- v) contravene the principle of free and fair elections envisaged under the Constitution and various statutes on elections;
- vi) engender corruption, abuse of power, rent seeking, mismanagement of public funds which are the antithesis of good governance in public offices; and
- vii) undermine performance and merit in public offices as political connection and sycophancy are likely to be the overriding criteria for appointment, promotion, training, deployment or transfer.

#### **V. WAY FORWARD**

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

- i.) Appointed public officers should refrain from participating in the activities of political parties or candidates, or use public resources for such activities.
- ii.) Appointed public officers who wish to participate in politics or support any political party or candidate should resign from their positions immediately.
- iii.) Public bodies should refrain from undertaking activities, including publications during this electioneering period which could be interpreted as supporting a political party or candidate. Where it is inevitable to conduct such activities, the concerned public offices should consider an appropriate approach that would minimise the impression that the activity is a political campaign.
- iv.) Events or projects of the national or county governments should be separated from the activities of political parties in order to address the possible misuse of public resources and perception of advancement of the interests of a political party or candidate.
- v.) The Independent Electoral and Boundaries Commission (IEBC), and the Director of Public Prosecutions (DPP) should monitor and ensure strict compliance with the Election Offences Act, 2016 and other election laws. In cases of breach of the law, investigations and appropriate action, including prosecution, disqualification, surcharge and removal from office should be undertaken.
- vi.) IEBC should take action against any political party or candidate who is proven to have aided or abetted the participation of public officers or use of public resources in political activities. This could include disqualification from contesting the forthcoming general elections on 8<sup>th</sup> August 2017.

Pursuant to its mandate, the Commission will monitor the use of public resources and participation of public officers in political activities during the electioneering period and take appropriate action, including recommending prosecution by the DPP, and civil action for removal from office. In doing this, the Commission will work with other bodies, including

IEBC, DPP, Public Service Commission, Office of the Auditor General and Ethics and Anti-Corruption Commission to ensure compliance with the law on the aforementioned areas.

**DATED** this 5<sup>th</sup> day of **June 2017**

**DR. REGINA MWATHA, MBS, Ph.D**  
**Ag. CHAIR OF THE COMMISSION**