

REPUBLIC OF KENYA



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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT - FOURTH SESSION, 2012

THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS

REPORT ON THE PROPOSED RULES OF PROCEDURE FOR THE ELECTION OF MEMBERS
TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY (EALA)

THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS
OF THE ASSEMBLY) RULES, 2012)

Clerk's Chambers
PARLIAMENT BUILDINGS,
NAIROBI

APRIL, 2012

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REPORT ON THE PROPOSED RULES OF PROCEDURE FOR THE ELECTION OF MEMBERS TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY (EALA)

1.0 PREFACE

1.1 Committee Mandate

Mr. Speaker,

The Departmental Committee on Defence and Foreign Relations is established pursuant to the provisions of Standing Order 198 (1). Under the provisions of Standing Order 198 (3) the Committee is mandated to:-

- (a). investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;*
- (b). study the Programme and policy objectives of the Ministries and departments and the effectiveness of the implementation;*
- (c). study and review all legislation referred to it;*
- (d). study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with its stated objectives;*
- (e). investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House or a Minister; and*
- (f). make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.*

The Committee is also mandated to scrutinize the budget of line Ministries as provided under Standing Order No. 152 states which that:-

- (i) Upon being laid before the National Assembly, the annual estimates shall stand committed to the respective departmental Committees according to their mandates.*
- (ii) Each departmental Committee shall consider, discuss and review the estimates committed to it under this standing order and submit its report thereon to the House within twenty one days after they were first laid before the House.*

The Committee oversees the performance of the following Ministries and Government departments:-

- (i) Defence;
- (ii) Foreign Affairs;
- (iii) East African Community; and

- (iv) National Security Intelligence Service.

Under the above Ministries, the Committee covers the following subjects;

- (i) Defence matters;
- (ii) Foreign policy;
- (iii) Treaties , Conventions and Agreements;
- (iv) International and Regional Organizations;
- (v) Bilateral and Multilateral Relations;
- (vi) Regional Cooperation policy;
- (vii) East African Community Affairs;
- (viii) National Security Intelligence.

1.2 Committee Membership

The Committee comprises the following Members of Parliament:-

The Hon. Adan W. Keynan, MP – Chairperson
The Hon. Benedict F. Gunda, MP – Vice Chairperson
The Hon. George O. Nyamweya, MBS, MP
The Hon. Jeremiah N. Kioni, MP
The Hon. Charles M. Kilonzo, MP
The Hon. Peter E. O. Anyanga, MP
The Hon. Wilson M. Litole, MP
The Hon. Martin O. Ogindo, MP
The Hon. Mohamed Hussein Ali, MP
The Hon. Julius K. Kilonzo, MP

2.0 Justification for Consideration of New Rules of Procedure for election of Members of the East African Legislative Assembly

2.1 Speaker's Communication on the matter

Mr. Speaker,

On Thursday, 8th March, 2012 you delivered a communication to the House (Annex One) regarding the process for the election of Members to represent the Republic of Kenya in the East African Legislative Assembly. Mr. Speaker, you reminded members that the five year term of the present East African Legislative Assembly, which is the 2nd Legislative Assembly of the East African Community, will come to an end on 4th June, 2012. You impressed on Members that it was imperative that the House commences and concludes the process of election of Members of the East African Legislative Assembly (EALA) in good time, ahead of

the inauguration of the 3rd East African Legislative Assembly due on 5th June, 2012 and to avoid repeat of the pitfalls and challenges experienced in the last exercise on this matter..

Further, Mr. Speaker, you reminded Members of Article 50 of the Treaty for the establishment of the East African Community which require the National Assemblies of each partner State to come up with rules of procedure that govern the election of Members to the East African Legislative Assembly. You informed the Members that the draft Rules of procedure contemplated by Article 50(1) of the Treaty were ready and would be forwarded to the Departmental Committee on Defence and Foreign Relations, which would then be required to table a Report for debate and adoption.

2.2 The Committee's Responsibility on the matter

Mr. Speaker,

While taking heed of your advice and directive, the Committee swiftly seized of the matter. The Committee noted that as clearly ruled by the East African Court of Justice at Arusha, the previous election rules, i.e. *Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001* did not meet the threshold set by Article 50 of the Treaty. It was noted that the Government of Kenya lost colossal sums of taxpayers' money in form costs of suit, arising from previous inadequate handling of the matter. The Committee further noted the need to avoid recurrence of similar scenario and the need to develop rules that will be useful to the country and for posterity purposes. The Committee therefore did not leave anything to chance when scrutinizing the draft rules. Every necessary aspect was considered, relevant stakeholders were engaged/ consulted, and appropriate documents were used as reference.

In this report, the Committee incorporated provisions that ensure that not only transparency and accountability takes place in the nomination process but also in the elections. It will be recalled that during the last elections, it was alleged that the House Business Committee had forwarded the wrong list of nominees to the East African Legislative Assembly. Some parties claimed that the names of the Members that they had nominated were not the same ones that had been forwarded to the East African Legislative Assembly. The East Africa Court of

Justice too, held that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty. It was noted that what had transpired was not an election by the National Assembly, but was at best “an appointment” by the Government controlled House Business Committee.

2.3 Committee Meetings

The Committee held five (5) meetings to review and consider the draft rules of procedure for the election of Members to the East African Legislative Assembly. The minutes of the deliberations are attached. When reviewing the rules, the Committee was guided by the following factors: -

- i) The Constitution of Kenya;
- ii) The Standing Orders;
- iii) The Treaty for the Establishment of the East African Community (Annex Two)
- iv) The Ruling of the East African Court of Justice at Arusha (Annex Three);
- v) Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001 (Annex Four);
- vi) Information regarding practice by other partner states; and
- vii) Public views.

After extensive deliberations, the draft rules of procedure were subjected to a number of amendments (as reflected in the minutes of the 157th and 159th sittings of the Committee).

2.4 Acknowledgment

Mr. Speaker,

I wish to express my appreciation to Members of the Committee who took time to read the draft rules of procedure for the election of Members to the East African Legislative Assembly, and compiled the report for debate and adoption by the House.

2.5 Adoption of Report

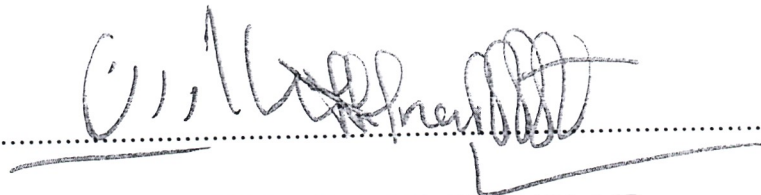
Mr. Speaker,

The finalized rules of procedure for the election of Members to the East African Legislative Assembly contained in this report were unanimously approved by the Members of the Committee.

All the resolutions of the Committee were arrived at by consensus.

It is my pleasant duty and privilege on behalf of the Departmental Committee on Defence and Foreign Relations to present this report and recommend it to the House for adoption pursuant to the provisions of the National Assembly Standing Order 181.

Signed:



THE HON. ADAN W. KEYNAN, MP

CHAIRPERSON,

DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS

Date: 12/4/2012

3.0 CONSIDERATION OF THE DRAFT RULES OF PROCEDURE FOR THE ELECTION OF THE MEMBERS TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY –

(THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE ASSEMBLY) RULES 2012)

3.1 Requirements of the Treaty for the Establishment of the East African Community

Article 50 of the Treaty, which is part of Kenya's laws, governs the election of Members to the East African Legislative Assembly. This Article provides as follows:

50. "Election of Members of the Assembly"

1. The National Assembly of each partner State shall elect, not from among its Members, nine Members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that partner State, in accordance with such procedure as the National Assembly of each partner State may determine.

2. A person shall be qualified to be elected a member of the Assembly by the National Assembly of a partner State in accordance with paragraph 1 of this Act, if such a person:-

(a) is a citizen of that partner State;

(b) is qualified to be elected a Member of the National Assembly of that partner State under its Constitution;

(c) is not holding office as a Minister in that partner State;

(d) is not an officer in the service of the Community; and,

(e) has proven experience or interest in consolidating and furthering the aims and the objectives of the Community.

It was against this background that the National Assembly in the year 2001, in exercise of the powers conferred on it by this Article made the *Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001(Appendix Four)*. The

first nine members of the Assembly were elected under these rules. Their term expired on 29th November 2006.

On 25th and 26th October 2006, pursuant to the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001, the House Business Committee of the National Assembly deliberated upon lists of names presented to it for nominees of the three parliamentary political parties then entitled to nominate candidates for election to the Assembly. The parties were the Kenya African National Union (KANU), the Forum for the Restoration of Democracy-People (FORD-P), and the National Rainbow Coalition (NARC). The House Business Committee then approved the list of the nominees and tabled the list in the National Assembly in a Ministerial Statement by the Leader of Government Business. Thereafter, the names were remitted to the Clerk of the East African Legislative Assembly as members of the Assembly elected by the National Assembly of Kenya.

However, on 9th November 2006, nearly two weeks before the 2nd Assembly of the East African Legislative Assembly was due to commence, a suit was filed in the East African Court of Justice at Arusha, challenging the nomination of the nine nominees to the East African Legislative Assembly.

3.2 The Ruling of the East African Court of Justice at Arusha

The petitioners (Prof. Peter Anyang' Nyong'o, Abraham K. Chepkonga, Fidelis M. Ngulii, Hon. Joseph Kamotho, Mumbi Ngaru, George Nyamweya, Hon. John Munyes, Dr. Paul Saoko, Hon. Gilbert Ochieng Mbeo, Yvonne Khamati, Hon. Rose Waruhiu) in the suit sued the Attorney General of Kenya and 5 others claiming that the whole process of nomination and election of Members to the East African Legislative Assembly, as adopted by the National Assembly of Kenya, was incurably and fatally flawed in substance, law and procedure, and contravened Article 50 of the Treaty in so far as no election was held nor debate allowed in Parliament over the matter. They further averred that any such rules that may have been invoked by the Kenya National Assembly which do not allow elections is null and void for being contrary to the letter and spirit of the Treaty. The applicants submitted to the Court that what transpired was not an election but an appointment, and that the Election Rules used did not conform to the procedure as envisaged under the East African Community Treaty.

The East Africa Court of Justice in delivering its judgment mainly looked at three issues for determination:

- (a) Whether the applicants had disclosed any cause of action within the meaning of Article 30 of the Treaty;
- (b) Whether there was an election undertaken within the meaning of Article 50 of the Treaty; and
- (c) Whether the Kenyan Election Rules, that is, The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules, 2001, complied with Article 50 of the Treaty.

On the first issue, the Court ruled in that the claimants had established a cause of action. The court stated that the Claimants had sought an action for enforcement of the provisions of the Treaty through a procedure prescribed by the Treaty. The Court referred to Articles 28, 29 and 30 of the Treaty, which created special causes of action. These provisions did not directly or impliedly require the Claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of in the reference. The Court further held that Article 30 did confer on a litigant resident in any Partner State the right of direct access to Court for determination of the issues set out therein, and that there was no requirement that a litigant had to “ exhaust the local remedy” before bringing a reference under Article 30.

The Court held that the main thrust of the suit was the determination of the second and the third issues. The Claimants submitted that no election, within the meaning of Article 50 of the Treaty was undertaken and that the election rules did not actually provide for an election. The Claimants submitted that what had transpired was not an election by the National Assembly, but was at best “an appointment” by the Government controlled House Business Committee. In construing Article 50 of the Treaty, the Court stated that the overriding purpose and object of this Article is to prescribe a special mode of constituting the first category of membership to the Assembly, which was (at the time) to be constituted of 27 Members, elected severally by the National Assemblies of the Partner States, each of which is to elect nine members. This provision did not leave it open to the National Assemblies of the Member states to appoint the nine Members to the Assembly. The National Assemblies of the

Member States were unconditionally assigned the function of electing nine members of the Assembly. The court found it very unlikely that in adopting Article 50, the parties to the Treaty contemplated, that the National Assembly would elect the members of the Assembly other than through a voting procedure. In their view, the bottom line for compliance with Article 50 was that the decision to elect was a decision of and by the National Assembly.

The East Africa Court of Justice held that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty.

On the third issue, the Claimants contended that the election rules did not meet the threshold set by Article 50, and to that extent, it had no bearing on the Article. The Claimants further claimed that in formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under Article 50. This, they claimed, was clearly brought out from the Hansard reports of the debate in the National Assembly in 2001. The Claimants alleged that the rules were adopted notwithstanding the fact that their inconsistency with Article 50 was articulated by a number of contributors to the debate. The Court found that Rules 6 and 7 of the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules, 2001 contravened Article 50 of the Treaty. The Court further held that Rule 7 provided for a fictitious election in lieu of a real election.

The Court held that the election rules did infringe Article 50 to the extent of their inconsistency with it, and that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty.

3.2.1 Consequences of the Ruling

This Ruling did cause an embarrassment not only to the Government but to the people of Kenya as well. The Government was also ordered to pay costs of the suit. The costs are in hundreds of millions of Kenya Shillings which is a huge loss to the Government. It is against the background of this ruling that the House set out to draft new Rules of procedure that shall govern the election of Members to the East African Legislative Assembly in conformity with Article 50 of the Treaty.

3.3 Public Participation

Our national values and principles of governance as espoused under Article 10 of the Constitution of Kenya provides for public participation as one of our core national values. The Committee, guided by this national value, first caused the draft Rules to be published in the website of the Kenya National Assembly and the public's attention drawn to the draft Rules through an advertisement placed in two daily newspapers with national circulation. The public was invited to Committee meeting and/or submit views on the draft Rules via mail.

The Committee considered the views submitted by the public and also heard from Hon. Gervase B.K. Akhaabi, MP who is currently a member of the East African Legislative Assembly appeared before the Committee. Hon. Gervase B.K. Akhaabi, MP, in making his submission declared his interest that he shall not be seeking re-election to the East African Legislative Assembly. The Committee is grateful to Hon. Gervase B.K. Akhaabi, MP for the insights into the East African Legislative Assembly that he provided. The Committee is also grateful to Hon. Ochieng Mbeo and Hon. Maxwell Shamalla for their written memoranda on the draft rules.

3.4 The Draft Rules of Procedure for the election of the Members to the East African Legislative Assembly

The Draft Rules of Procedure herein referred to as "The Treaty for the establishment of the East African Community (Election of Members of the Assembly) Rules, 2012" were thoroughly scrutinized by the Committee.

The Draft Rules of Procedure contain the following FIVE (5) parts and one schedule, clearly described as follows:

(a) Part 1: Preliminary

Part I of the Rules provide for the citation, coming into force and the interpretation sections of the Rules. Under Rule 2, the word "voter" has been included in the interpretations section. This word has been defined to mean a Member of the National Assembly other than the Speaker and the Attorney General.

Committee Observation on Part II

This is to remove any doubt as to the nomination process of the Members to the East African Legislative Assembly, and to define who exactly is meant to vote in the process.

(b) Part II: Qualification and Nomination of Candidates

This is provided for under Part II of the Rules. New procedures for nomination of candidates have been introduced.

Rule 3 provides for the qualifications for a person to stand for election as a Member of the East African Legislative Assembly. These are the qualifications set out at Article 50(2) of the Treaty for the Establishment of the East African Community, Article 99 of the Constitution and section 22 of the Elections Act, 2011.

Rule 4 sets out the procedure for notification of elections through gazette and advertisement in at least two daily newspapers of national circulation. This Rule provides that the Returning Officer shall by notice in the Gazette notify and invite interested qualified persons to apply, within a period of seven days, for nomination by a party. In addition, the Returning Officer is required by notice in the Gazette and in at least two daily newspapers of national circulation to appoint a nomination day, and indicate the venue for the receipt of the nomination papers.

Rule 4 provides for the process of nomination of candidates which shall be through nomination by a party in the form set out in the schedule. Parties are required to nominate candidates through a transparent and democratic process and are required to keep a written record of the proceedings at which the final decision to nominate any candidate was reached at.

Rule 5 sets out the nomination formula which is by party strength based on the number of Members each party has in Parliament. The formula takes cognizance of the fact that the National Assembly is required to elect only nine persons to be Members of the East African Legislative Assembly. The parties should as much as it is feasible take into account the need for fair representation of the various political parties in the National Assembly, shades of

opinion, geographical representation, gender and other special interest groups in Kenya. This is in conformity with Article 50(1) of the Treaty.

Rule 6 provides for a pre-nomination briefing of all parties entitled to nominate candidates by the relevant Departmental Committee. The object of this briefing is to ensure that the parties are aware of the need to adhere to the requirement that, as much as is feasible, the nominations shall take into account the need for fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of its nominees are women.

Rule 7 provides for the delivery of the nomination papers to the Returning Officer. If it becomes apparent that, from the list of all nominees, it shall not be possible to obtain a list of Members of the East African Legislative Assembly with a representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of its Members are women, then a fresh nomination may be ordered.

Rule 8 provides for the withdrawal or death of a candidate. A party whose candidate dies or for any other reason ceases to be a candidate before the election day may nominate another person in place of the deceased.

Rule 9 provides for inspection of nomination papers, by any person, who shall also be entitled to lodge a complaint with the Returning Officer in relation to candidate's nomination.

Rule 10 provides for forwarding of the nomination papers to the relevant Departmental Committee, for its consideration of the names and nomination papers of all duly nominated candidates.

Committee Observation on Part II

It is worth noting that these provisions have been incorporated to ensure that there is transparency and accountability in the nomination process. It will be recalled that during the last elections, it was alleged that the House Business Committee had forwarded the wrong list of nominees to the East African Legislative Assembly. Some parties claimed that the names of the Members that they had nominated were not the same ones that had been forwarded to the East African Legislative Assembly.

(c) Part III: Election campaigns and voting

This is provided for under Part III of the Rules.

Rule 11 provides that an aspiring candidate may seek support from a Member of Parliament entitled to vote, before the nomination day and if nominated, after the nomination day. Candidates shall also be permitted to appear before the relevant Departmental Committee, for purposes of addressing the Committee and to answer such questions if any as the Committee may determine. The Committee shall thereafter table a report of its meeting with the candidates for the information of the National Assembly. *The report shall enable Members of the National Assembly make informed choices when it comes to the elections. The report shall not recommend the election of any candidate as to do so would be to preempt the elections.*

Rule 12 provides for the Election day which shall be published in the Kenya Gazette and in at least two daily newspapers of national circulation.

Rule 13 provides for the Ballot paper, which shall be prepared by the Returning officer, and who shall issue to each voter one ballot paper for purposes of voting.

Rule 14 provides for the actual voting procedure which shall be conducted under the general supervision of the Speaker, in the place appointed by the Speaker.

Rule 15 provides for the counting of votes which shall be done by the Returning Officer, in the presence of two counting agents as witnesses, appointed by the Speaker.

Rule 16 provides for the declaration of results to be done by the Speaker at the end of the counting process. The Returning Officer shall be in charge of the counting process and shall report to the National Assembly the results of the elections for each candidate under the cluster of each party. The Speaker then shall announce to the National Assembly and declare to be duly elected to the East African Legislative Assembly the nine persons who receive the highest votes.

Rule 17 provides for the publication and transmission of names of the person duly elected to the East African Legislative Assembly by the Clerk. This Rule provides that the names should be published in the Kenya gazette and transmitted to the Clerk of the East African Legislative Assembly.

Rule 18 provides for the custody of the ballot papers, which shall be kept safely by the Returning Officer who shall cause such documents to be destroyed after the expiration of six months from the Election day.

(d) Part IV: Voidance of Election

This is provided for under Part IV of the Rules.

Rule 19 provides that any question that may arise as to whether a person is validly elected a Member of the East African Legislative Assembly or whether a seat in that Assembly is vacant shall be determined by the High Court.

Rule 20 provides that the procedure for voidance of elections in respect of Members of Parliament shall apply *mutatis mutandis* to members of the East African Legislative Assembly.

(e) Part V: Miscellaneous

Rule 21 provides for the procedure of filling of a vacancy of a Member. The Speaker shall upon notification by the Speaker of the East African Legislative Assembly, facilitate the election of a member in accordance with the procedure set out under these Rules.

Rule 22 provides that for any matter not specifically provided for in the Rules, the Speaker shall make a ruling directing what is to be done and in making such a ruling, the Speaker shall be guided by the practice and procedure normally followed in similar situations with regard to the conduct of elections in the National Assembly.

Rule 23 provides for the transitional period and takes cognizance of the fact that elections may have to be done urgently, thereby necessitating the granting of discretion to the Returning Officer to reduce the period for the doing of anything required under the Rules.

Rule 24 provides that the Rules shall supercede any previous rules, procedure or practice for the elections of members of the East African Legislative Assembly.

(f) Schedule: rule 5(1)

The schedule is a specimen of nomination form for election of a member of the East African Legislative Assembly.

4.0 COMMITTEE OBSERVATIONS AND RECOMMENDATION

The Committee observed that as clearly ruled by the East African Court of Justice at Arusha, the previous election rules, i.e. *Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001* did not meet the threshold set by Article 50 of the Treaty. The Committee notes that the Draft rules of Procedure proposed in this report adequately address the shortcomings of the previous election rules.

The Committee therefore recommends that the House adopts the attached Proposed Rules of Procedure for the election of Members to the East African Legislative Assembly, i.e. The Treaty for the establishment of the East African Community (Election of Members of the Assembly) Rules, 2012.

THE PROPOSED RULES OF PROCEDURE FOR THE ELECTION OF MEMBERS TO THE EAST AFRICAN LEGISLATIVE ASSEMBLY

LEGAL NOTICE NO.

THE TREATY FOR THE ESTABLISHMENT OF THE
EAST AFRICAN COMMUNITY ACT.

(No. 2 of 2000)

IN EXERCISE of the powers conferred by Article 50(1) of the Treaty for the Establishment of the East African Community Act, the National Assembly of Kenya makes the following Rules-

THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE ASSEMBLY) RULES, 2012.

PART I - PRELIMINARY

- Citation and commencement.
1. These Rules may be cited as the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules, 2012 and shall come into force upon adoption by the National Assembly.
- Interpretation.
2. In these Rules, the parliamentary words and expressions used have the same meaning as that assigned to them in the Standing Orders of the National Assembly and unless the context otherwise requires-
- “candidate” means a person who is nominated to stand for election to the East African Legislative Assembly;
- “election” means an election to the East African Legislative Assembly;
- “nomination” means nomination as a candidate to stand for election to the East African Legislative Assembly;

“party” means a parliamentary political party;

“relevant Departmental Committee” means the Departmental Committee of the National Assembly responsible for Foreign Affairs;

“Returning Officer” means the Clerk of the National Assembly;

“voter” means a Member of the National Assembly other than the Speaker and the Attorney-General.

PART II – QUALIFICATIONS AND NOMINATION OF CANDIDATES

Qualification for election.

3. No person shall be qualified to stand for election unless he or she is qualified to be elected in accordance with Article 50(2) of the Treaty for the Establishment of the East African Community, Article 99 of the Constitution and section 22 of the Elections Act, 2011.
4. (1) Where an election is to be held, the Returning Officer shall by notice in the Gazette notify that fact and invite interested qualified persons to apply, within a period of seven days, for nomination by a party.

Notification of election

- (2) The Returning Officer shall by notice in the Gazette and in at least two daily newspapers of national circulation appoint a nomination day, which shall be at least seven days from the expiry of the period prescribed under sub-rule (1) and shall indicate in such notice the venue for the receipt of nomination papers.

Process of nomination of candidates

5. (1) In order to be validly nominated as a candidate for an election, a person shall be nominated by a party in the form set out in the Schedule.
- (2) A party shall nominate candidates through a transparent and democratic process and shall keep a written record of the

proceedings at which the final decision to nominate any candidate was made.

- Number of nominees of each party
6. (1) A party shall be entitled to nominate for election under these Rules any number of candidates not exceeding three times the figure arrived at by multiplying the number of elected members of the National Assembly of that party by nine and dividing the result by the total number of elected members of the National Assembly.
- (2) In making nominations, each party shall as much as it is feasible take into account the need for fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and shall ensure that at least one third of its nominees are women.
- Pre-nomination briefing
7. The relevant Departmental Committee may, prior to the expiry of the period prescribed under Rule 3(2), invite the party leaders or the party whips of all parties entitled to nominate candidates for a pre-nomination briefing on the nomination requirements under the Treaty for the Establishment of the East African Community and under these Rules.
- Delivery of nomination papers.
8. (1) On nomination day, at any time not later than four o'clock in the afternoon, a candidate or the party leader or the party whip of a party entitled to nominate candidates shall deliver the nomination papers of the candidate or candidates nominated by the party to the Returning Officer.
- (2) The Returning Officer may reject the nomination papers of any candidate if it is apparent from the contents of the nomination papers that the candidate is not qualified to stand for election.
- (3) The Returning Officer may, after consultation with the relevant Departmental Committee, reject all nominations and order a fresh nomination if it is apparent from the list of nominees that it shall not be possible, upon the holding of elections, to have, as much as is feasible, a fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of the persons elected are women.
- (4) In the event a fresh nomination is ordered, the Returning Officer may shorten the periods specified under Rule 3.

- Withdrawal or death of a candidate.
9. A candidate may, not later than four o'clock in the afternoon of the day following the nomination day, withdraw his or her candidature by notice in writing signed and delivered to the Returning Officer with a copy to the party leader or party whip of the party that nominated the candidate.
- (2) No withdrawal of a candidate shall be accepted after the expiry of the period prescribed under sub-rule (1).
- (3) Where a candidate dies after four o'clock in the afternoon of the nomination day, and before the election day, the election shall proceed, but the voters shall be informed of such death.
- (4) The party which nominated a candidate who dies or for any other reason ceases to be a candidate before the election day, may notwithstanding rule 7, nominate another person in place of the candidate.
- Inspection of nomination papers
10. Subject to such conditions as the Returning Officer may prescribe, any person may during office hours for two working days from the nomination day, inspect the nomination papers of any candidate and may lodge a complaint with the Returning Officer in relation to a candidate's nomination.
- Forwarding of nomination papers to relevant Departmental Committees.
11. Within two days after the expiry of the period provided for in rule 8, the Returning Officer shall forward to the relevant Departmental Committee, for its consideration, the names and nomination papers of all duly nominated candidates.

PART III – ELECTION CAMPAIGNS AND VOTING

- Audience before the relevant Departmental Committee.
12. (1) An aspiring candidate may approach and seek the support of a Member of Parliament entitled to vote, before the nomination day and may, if nominated continue to do so after the nomination day.

(2) On a date to be appointed by the relevant Departmental Committee, not being less than three days before the election day, the relevant Departmental Committee shall convene and a meeting at such place as it may determine, at which each candidate shall be permitted to appear before the Committee and to address the Committee in English or Kiswahili for such length of time and to answer such questions if any as the Committee may determine.

(3) The relevant Departmental Committee shall prepare a report of the meeting with the candidates for tabling before the National Assembly for its information but the report shall not recommend the election of any candidate.

Election day

13. (1) The Returning Officer shall, by notice published in the Gazette and in at least two daily newspapers of national circulation appoint an election day which shall be not more than seven days and not less than three days after the nomination day.

Ballot paper

14. (1) The Returning Officer shall prepare and at the time appointed for the election, shall issue to each voter one ballot paper on which shall be written in alphabetical order, the names of all duly nominated candidates, clustered under the heading of the names of the respective parties that nominated them.

(2) A voter shall be required to cast a specified number of votes, which shall be clearly indicated on the ballot paper, in respect of the candidates nominated by each party.

(3) The number of votes to be cast under sub-rule (2) in respect of each party shall be the figure arrived at by multiplying the number of elected members of the National Assembly of that party by nine and dividing the result by the total number of elected members of the National Assembly.

Voting

15. (1) The voting shall be conducted under the general supervision of the Speaker, in the place appointed by the Speaker.

(2) On receiving a ballot paper, a voter shall secretly record his or her votes by putting a mark against the names of the nine candidates that the voter wishes to elect as members of the East African Legislative Assembly, in the respective proportions specified under sub-rule (3) of rule 13.

(3) A voter shall cast as many votes as the number of candidates to be elected, otherwise the ballot paper of that voter shall be regarded as spoilt

(4) A voter who accidentally spoils a ballot paper while voting is in progress shall, on surrendering the spoilt ballot paper, be issued with a replacement ballot paper.

Counting of
votes

16. (1) Immediately after all voters have cast their votes, the Speaker shall appoint two members to act as counting agents for all the candidates.

(2) The Returning Officer shall, in the presence of the two counting agents as witnesses, count the votes cast.

Declaration of
results

17. When the votes have been counted and the results of the election have been ascertained-

(a) the Returning Officer shall report to the National Assembly the results of the election together with the number of votes recorded for each candidate under the cluster of each party; and

(b) the Speaker shall announce to the National Assembly and declare to be duly elected as members of the East African Legislative Assembly the nine persons, in the proportions specified under sub-rule (3) of rule (13) in respect of each party, who receive the highest number of votes.

Publication and
transmission of
names.

18. Within seven days after the Speaker announces the names of the elected members of the East African Legislative Assembly, the Clerk shall-

(a) publish the names in the Gazette; and

(b) transmit to the Clerk of the East African Legislative Assembly the names of the elected members as published in the Gazette.

Custody of
ballot papers

19. The Returning Officer shall ensure safe custody of all ballot papers and other documents relating to the conduct of the election and shall cause all such documents to be destroyed after the expiration of six months from the election day.

PART IV – VOIDANCE OF ELECTION

- Determination of validity of candidate's election
20. Any question that may arise whether a person is an elected member of the East African Legislative Assembly or whether a seat in that Assembly is vacant shall be determined by the High Court.
- Procedure for voidance of elections
21. The procedure, jurisdiction and grounds for election petitions in respect of Members of Parliament shall apply *mutatis mutandis* for members of the East African Legislative Assembly.

PART V – MISCELLANEOUS

- Filling of vacancy.
22. Where the seat of a member elected under these Rules becomes vacant, the Speaker shall upon receipt of notification of the vacancy from the Speaker of the East African Legislative Assembly, facilitate the election of a member to replace the member in accordance with the procedure set out under these Rules.
- Matters not specifically provided for.
23. If any matter arises which is not specifically provided for in these Rules, the Speaker shall make a ruling directing what is to be done and in making such a ruling, the Speaker shall be guided by the practice and procedure normally followed in similar situations with regard to the conduct of elections in the National Assembly.
- Transitional
24. In respect of the first election to be held after the coming into operation of these Rules, the Returning Officer may reduce the period for the doing of anything required to be done by such reasonable period as the Returning Officer may determine.
- Supercession.
25. These Rules supersede any previous rules, procedure or practice for the election of members to the East African Legislative Assembly.

SCHEDULE

(rule 5(1))

NOMINATION FORM FOR ELECTION OF A MEMBER OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY

I, the undersigned, being the party leader/party whip of the parliamentary party shown below hereby certify the nomination of the under mentioned person as a candidate at the said election.

Table with 3 columns: Candidates Name in Full, Address, Occupation or Description

Full Names.....

Parliamentary Political Party.....

Party Office Held (Party Leader/Party Whip).....

.....

Signature of Party Leader/Party Whip.

And I, the aforesaid

do hereby consent to my nomination as a candidate for election as a member of the East African Legislative Assembly and hereby certify that I am in all respects qualified for nomination as such candidate.

I have attached herewith

(a) a photocopy of my national identity card/passport; and

(b) my detailed curriculum vitae showing my educational and other qualifications.

.....

Signature of Candidate.

Dated the2012

KENNETH MARENDE, EGH, ACI Arb, MP

Speaker of the National Assembly

MINUTES

MINUTES OF THE 153RD SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS HELD ON WEDNESDAY, 4TH APRIL, 2012 IN THE COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 10.30 AM

PRESENT

Hon. George Omari Nyamweya, MBS, M.P - Ag. Chairperson
Hon. Wilson Litole, M.P
Hon. Jeremiah Kioni, M.P
Hon. Peter Edick O. Anyanga, M.P

ABSENT WITH APOLOGY

Hon. Adan Keynan, M.P - Chairperson
Hon. Benedict Fondo Gunda, M.P - Vice Chairperson
Hon. Mohamed Hussein Ali, M.P
Hon. Charles Kilonzo, M.P
Hon. Martin Ogindo, M.P
Hon. Kiema Kilonzo, M.P

IN ATTENDANCE: NATIONAL ASSEMBLY

Mr. Julius Ariwomoi - Second Clerk Assistant
Ms. Maureen Mwendwa - Parliamentary Intern

EAST AFRICAN LEGISLATIVE ASSEMBLY (EALA)

Hon. Akhaabi, Gervase M. B. K. , M.P (Chairperson, EALA Kenya Chapter)
Hon. Bonaya Sarah, M.P
Hon. Lotodo, Augustine L. , M.P

MINISTRY OF EAST AFRICAN COMMUNITY

Hon. Musa Sirma, MP – Minister
Mr. Francis Ongaki - Senior Deputy Secretary
Mr. Barrack Ndegwa - Integration Secretary
Ms. Pauline Luganjo - Chief Finance Officer
Mr. David Njoka - Director

MINISTRY OF FINANCE (TREASURY)

Mr. Onderi Otweka – Senior Director/Budget
Mr. Stephen Karani – Assistant Director/Budget

MIN . NO. 638/2012: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

Confirmation of Minutes of previous sittings was deferred to a later date.

MIN. NO. 639/2012: PRELIMINARIES AND REMARKS BY THE CHAIRPERSON

The proceedings commenced with a word of prayer. The Chairperson welcomed all the guests and Committee Members for the deliberations. Upon commencement of deliberations, the Committee noted with concern the absence of the Minister for Finance in the meeting despite adequate notification and noting the significance of his presence on the matter. The Committee was assured that the officials of the Treasury present in the meeting would adequately represent the Ministry (on behalf of the Minister) and take full responsibility of the issues addressed to the Ministry and decisions arrived at by the Committee.

MIN. NO. 640/2012: MEETING WITH THE MINISTER FOR EAST AFRICAN COMMUNITY

ON THE BUDGETARY ALLOCATION OF EALA

a) Introduction

It was noted that on 8th March 2012, while meeting with the Members of the East African Legislative Assembly (EALA), the Committee noted with concern that the budgetary allocation for 2011/2012 financial year on sub-head 0416 (East African Community Legislation) amounting to Ksh. 45.8 million is yet to be disbursed to EALA.

b) Presentation by the Minister

- i) The Minister outlined rules and regulations governing facilitation of the Kenya National Assembly Members of Parliament as prescribed by the National Assembly Remuneration Act, Cap. 5 covering payment of salaries and allowances, gratuities and further allowances specified in schedule II of the Act. He explained that the rules and regulations only apply to Members of Parliament of the National Assembly. The terms and conditions of service of the EALA Members are determined by the summit of the EAC Heads of State on recommendation of the Council pursuant to Article 51 (2) of the Treaty for the Establishment of the East African Community. He further said that the current terms were reviewed in June 2010. He concluded that the funding is done through equal contribution by each partner state.
- ii) In the Financial Year 2011/2012, Kshs. 45.8 million was re-allocated to EALA. Treasury gave the authority for re-allocation with a condition that the Ministry accounts for the funds. The re-allocated funds were to be utilized as follows:
 - Ksh. 25.8 million on Kenya Tour; and

- Ksh. 20 million on sensitization exercise.

The dilemma of utilization of the funds has been that since they are not part of the assessed equal contributions by the partner States, the rules governing EAC funds may not be applicable. Due to challenges regarding framework to disburse the funds, Treasury has not been able to release the exchequer for the Ksh. 25.8 million. The Ministry has also no rates to apply especially for the sensitization activities.

iii) Initiative to address the challenge

There is urgent need to come up with a legal framework for the facilitation of EALA Kenya chapter for locally generated activities outside the Community Budgetary provisions; A team is already working to develop a framework and make recommendations for future use.

c) Explanation by EALA Members

The Members of EALA explained that prior to 2008, funds for EALA representation was organized by the National Assembly and the arrangement had no problems. Problems arose when, from 2008/2009 financial year the funds for EALA representation were channeled through the Ministry of East African Community. It was reported that the Ministry instead utilized the funds for other purposes without undertaking the purpose intended.

d) Committee's concerns

It appeared that despite EALA matters falling within the docket/domain of the Ministry of EAC, CLEAR POLICY GUIDELINES and APPROPRIATE MECHANISMS/STRUCTURES have never been developed to deal with EALA (K) Chapter issues, several years after the establishment of EAC and EALA. The ministry has been addressing issues of EALA in ad hoc basis.

The Committee was also concerned that the matter regarding the budgetary allocation had taken too long to resolve. The Committee also noted with concern that Treasury has not been availing adequate funds to the Ministry on EALA matters.

e) Committee's resolutions

The Committee directed the Minister to ensure that appropriate policy guidelines and legal framework is put in place to deal with EALA (K) Chapter issues. It was also resolved that

the Ministry of EAC should urgently write to Treasury to release the funds in order for the EALA activity on Kenya Tour be undertaken as planned.

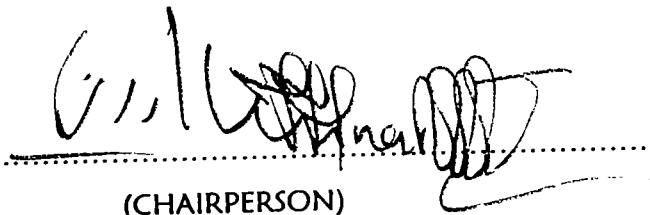
MIN.NO.641/2012: ANY OTHER BUSINESS

- The Draft Rules of Procedure for the election of EALA Members
- i) The Committee was informed that the Draft Rules of Procedure for the election of EALA Members developed by the Legal Department of the National Assembly were ready for consideration by the Committee. It was explained that due to the urgency of the matter, Members were required to familiarize themselves with the draft rules, with a view to adding input and review by the Committee.
- ii) It was also noted that since the Constitution on Article 118 (1) requires facilitation of public participation in the legislative and business of Parliament, there was need to post an advertisement on the media inviting public views. The views (written memoranda) should reach the Committee on or before Tuesday 10th April, 2010 or presented to the Committee in the sitting scheduled for Wednesday 11th April, 2012 at 11.30am.

MIN.NO.642/2012: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at 1.50 pm until a Tuesday 10th April, 2012 at 10.00am.

Signed.....


(CHAIRPERSON)

Date.....

12/4/2012

MINUTES OF THE 154TH SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS HELD ON TUESDAY, 10TH APRIL, 2012 IN THE COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 10.30 A.M

PRESENT

Hon. Adan Keynan, M.P - Chairperson
Hon. Wilson Litole, M.P
Hon. George Omari Nyamweya, MBS, M.P
Hon. Peter Edick O. Anyanga, M.P
Hon. Martin Ogindo, M.P

ABSENT WITH APOLOGY

Hon. Benedict Fondo Gunda, M.P - Vice Chairperson
Hon. Charles Kilonzo, M.P
Hon. Mohamed Hussein Ali, M.P
Hon. Jeremiah Kioni, M.P
Hon. Kiema Kilonzo, M.P

IN ATTENDANCE: NATIONAL ASSEMBLY

Mr. Njenga Njuguna	Principal Research Officer
Mr. Anthony Njoroge	Legal Counsel
Mr. Julius Ariwomoi	Second Clerk Assistant
Ms. Leah Wanjiru	Third Clerk Assistant
Ms. Maureen Mwendwa	Parliamentary Intern

MIN. NO .643/2012: PRELIMINARIES

The Chairman called the meeting to order. Thereupon, the meeting commenced with a word of prayer.

MIN.NO. 644 /2012: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

Confirmation of Minutes of previous sittings was deferred to a later date.

MIN.NO. 645/2012: MEETING WITH THE COMMISSIONER OF POLICE

Mr. Mathew K. Itere (Commissioner of Police) and Mr. Ndegwa Muhoro (Director, CID) submitted the findings of the investigation that had so far been carried out. The Committee was informed as follows:

- i) The Commissioner commenced investigations on the authenticity of the two sets of documents regarding allegations against the United Kingdom (UK) relating to International Criminal Court (ICC);
- ii) The Office of the Director, CID could not as a matter of protocol engage directly with the foreign mission and therefore wrote to the Ministry of Foreign Affairs asking to be facilitated to interview the officials of the British High Commission about the documents;
- iii) Further, the Director, CID held a meeting with the Ambassador in Charge of Europe Missions at the Ministry of Foreign Affairs who gave a copy of the a note verbale No. 199/12 dated 9th March 2012;
- iv) The note verbale had reiterated the policy of Her Majesty's Government on their intention not to comment on leaked documents. The note verbale further indicated that the documents were not genuine and they had a plethora of spellings and grammatical mistakes. The contents of the documents were also said to be misleading and implausible;
- v) The Commissioner of Police further requested the Ministry of Foreign Affairs to assist them in obtaining the following information from the British High Commission:
 - a. Clarification of whether the persons alleged to have signed the documents are known to the Government of the United Kingdom;
 - b. If so, assistance in obtaining the contacts of the said persons; and
 - c. Within the framework of the 1961 Vienna Convention on Diplomatic Relations, to have an audience with an appropriate officer at the High Commissioner to assist in investigations.
- vi) The Ministry of Foreign Affairs forwarded the request by the Commissioner of Police to the British High Commission. Subsequently, the British High Commission responded in a Note Verbale stating that given documents are not genuine, and that the High Commission did not wish to make further comments beyond what they had stated earlier in their Note Verbale No. 199/12 dated 9th March 2012 and the statement made by the UK Minister for Africa, United Nations and Overseas Territories during his visit to Kenya;
- vii) The Office of the Commissioner of Police further interrogated the documents and particularly telephone Line No.2020-70083597. The inquiries from Telkom Kenya established that the subject number does not belong to Telkom Orange since all the numbers have a maximum of

seven (7) digits while the purported telephone line had eight (8) digits and was not licensed by the Communication Commission of Kenya;

- viii) The alleged author of one set of the documents dated 6th February, 2012, Mr. Edward Inglet was Kenya's Desk Officer but was transferred eight months ago;
- ix) The Director of Criminal Investigations, however was not able to interview the Members of Parliament due to the Parliamentary immunity enjoyed by them through the National Assembly (Powers and Privileges) Act;
- x) In addition, the Commissioner of Police stated that he needed the cooperation of the Members of Parliament to be able to conclusively carry out forensic examinations on the documents. Further the Director of Criminal Investigations informed the Committee, that subjecting documents to forensic examination required one to have another original document (which they did not have) to make a comparison; the Commissioner clarified that at this stage he could not ascertain whether the document is genuine or not.
- xi) Finally, the Commissioner of Police indicated that the investigations were inhibited by the Parliamentary and diplomatic immunities accorded to key witnesses such as the relevant Members of Parliament and the foreign officials.

Committee's Concerns

Owing to the sensitivity of the matter, and the immense interest generated, the Committee noted the need to get deep into the root of the matter with a view to ascertaining the authenticity of the documents and addressing the content. The Committee directed the officers to continue with the investigations.

MIN.NO.646/2011: ANY OTHER BUSINESS

- a) Members were advised against pre-empting the outcome of the investigations until all the facts are obtained.
- b) The Draft Rules of Procedure for the election of EALA Members

The Committee was informed that the Draft rules had been published on the local newspapers on Sunday 8th April, 2012 for purposes of inviting public views. The Committee also noted the urgency in considering the Draft rules in readiness for presentation to the House upon resumption from recess. The Committee scrutinized the draft Rules and Article 50 of the Treaty for the Establishment of the East African Community and noted that the provision that

requires voting makes it more difficult (than through selection or appointment), to achieve fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of the persons elected are women. The Committee resolved to consult and think through a way of having elections with the attendant freedom to vote while ensuring fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of the persons elected are women.

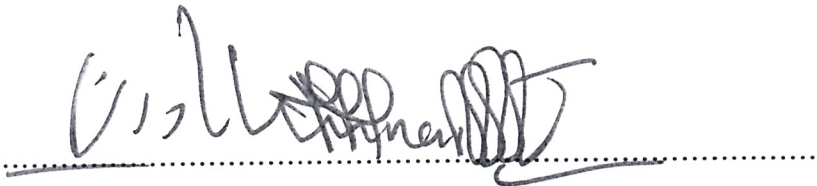
c) Bereavement

Members were informed that the Vice-Chairman had lost his mother and that there was need to show moral support to him. Members resolved to visit his home later in the day.

MIN.NO.647/2011: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at 11.30am.

Signed.....



(CHAIRPERSON)

Date.....

12/4/2012

MINUTES OF THE 157TH SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS HELD ON WEDNESDAY, 11TH APRIL, 2012 IN THE COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 12.15 P.M

PRESENT

Hon. George Omari Nyamweya, MBS, M.P – Ag. Chairperson
Hon. Mohamed Hussein Ali, M.P
Hon. Jeremiah Kioni, M.P
Hon. Peter Edick O. Anyanga, M.P

ABSENT WITH APOLOGY

Hon. Adan Keynan, M.P - Chairperson
Hon. Benedict Fondo Gunda, M.P - Vice Chairperson
Hon. Wilson Litole, M.P
Hon. Martin Ogindo, M.P
Hon. Charles Kilonzo, M.P
Hon. Kiema Kilonzo, M.P

IN ATTENDANCE: NATIONAL ASSEMBLY

Mr. Njenga Njuguna	Principal Research Officer
Mr. Anthony Njoroge	Legal Counsel
Mr. Dennis Abisai	Legal Counsel
Mr. Julius Ariwomoi	Second Clerk Assistant
Ms. Leah Wanjiru	Third Clerk Assistant
Ms. Maureen Mwendwa	Parliamentary Intern

MIN. NO .652/2012: PRELIMINARIES

The Ag. Chairperson called the meeting to order. Thereupon, the meeting commenced with a word of prayer.

MIN.NO. 656 /2012: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

Confirmation of Minutes of previous sittings was deferred to a later date.

MIN.NO. 657/2012: RECEIVING PUBLIC VIEWS ON THE DRAFT RULES OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE ASSEMBLY), 2012

- i. Meeting with the Hon. Gervase B.K. Akhaabi, M.P (EALA Kenya Chapter)

The EALA Member presented two proposals for amendments on the draft rules as follows:

- a) Rule 16 be amended so that the returns of the elected Members is submitted to the Clerk of the East African Legislative Assembly and not the Secretary General as proposed in the draft rules.
- b) Rule 6 be amended to require the National Assembly as the electoral college to ensure that in electing Members consideration is given to gender, youth and special interests.

The Committee agreed with the first amendment on Rule 16. However, the second amendment on rule 6 was left for further discussion.

ii. Memoranda submitted by other members of the Public

The Committee considered a proposal to insert additional clause on Rule 3 concerning qualification of candidates. The Committee noted that the proposal had already been captured in Rule 3 to include the qualifications required by Article 50 (2) of the Treaty for the Establishment of the East African Community, article 99 of the Constitution and Section 22 of the Elections Act, 2011.

MIN.NO. 658/2012: CONSIDERATION OF THE WHOLE DRAFT DOCUMENT ON THE RULES

After considering all the proposals presented by the public, the Committee extensively deliberated on all the proposed clauses of the rules and unanimously concurred with them, except for rule 6 that was left for further discussion.

MIN.NO.659/2011: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at fifteen minutes past one O'clock.

Signed.....

(CHAIRPERSON)

Date..... 12/4/2012

MINUTES OF THE 159TH SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS HELD ON THURSDAY, 12TH APRIL, 2012 IN THE COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 9.30 A.M

PRESENT

Hon. Adan Keynan, M.P - Chairperson
Hon. George Omari Nyamweya, MBS, M.P
Hon. Mohamed Hussein Ali, M.P
Hon. Wilson Litole, M.P
Hon. Jeremiah Kioni, M.P
Hon. Peter Edick O. Anyanga, M.P
Hon. Martin Ogindo, M.P
Hon. Kiema Kilonzo, M.P

ABSENT WITH APOLOGY

Hon. Benedict Fondo Gunda, M.P - Vice Chairperson
Hon. Charles Kilonzo, M.P

IN ATTENDANCE: NATIONAL ASSEMBLY

Mr. Njenga Njuguna - Principal Research Officer
Mr. Anthony Njoroge - Legal Counsel
Mr. Julius Ariwomoi - Second Clerk Assistant
Ms. Leah Wanjiru - Third Clerk Assistant
Ms. Maureen Mwendwa - Parliamentary Intern

MIN. NO .665/2012: PRELIMINARIES

The Chairperson called the meeting to order. Thereupon, the meeting commenced with a word of prayer.

MIN.NO. 666/2012: CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS

Minutes of the 153rd, 154th and 157th. sittings were confirmed by the Members present and signed by the Chairperson.

MIN.NO. 667/2012: DELIBERATIONS ON THE DRAFT RULES OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE ASSEMBLY), 2012

The Committee deliberated on the draft Rules of the Treaty for the Establishment of the East African Community (Election of Members of the Assembly), 2012.

The following amendments were made to the draft EALA Rules:

- a) Rule 1
- b) Insert the phrase “*and shall come into force upon adoption by the National Assembly*”.
- c) Rule 2
Replace “*Member of Parliament*” with “*Member of the National Assembly*”
- d) Rule 3
Replace “fourteen days” with “seven days”
- e) Rule 4
Delete the phrase “*through its parliamentary group meeting*”
- f) Rule 5
Insert the phrase “*regional balance*”
- g) *Rule 6 to read as follows:*
“The relevant Departmental Committee may, prior to the expiry of the period prescribed under Rule 3(2), invite the party leaders or the party whips of all parties entitled to nominate candidates for a pre-nomination briefing on the nomination requirements under the Treaty for the Establishment of the East African Community and under these Rules”.
- h) *Rule 7(3) to read as follows:*
“The Returning Officer may, after consultation with the relevant Departmental Committee, reject all nominations and order a fresh nomination if it is apparent from the list of nominees that it shall not be possible, upon the holding of elections, to have, as much as is feasible, a fair representation of the various political parties in the National Assembly, regional balance, shades of opinion, gender and other special interest groups in Kenya and to ensure that at least one third of the persons elected are women”.

Introduce a new clause 7 (4) as follows:

“In the event a fresh nomination is ordered, the Returning Officer may shorten the periods specified under Rule 3.”

- i) *Rule 8(4) to read as follows:*

“The party which nominated a candidate who dies or for any other reason ceases to be a candidate before the election day, may notwithstanding rule 7, nominate another person in place of the candidate.”

MIN.NO. 668/2012: ANY OTHER BUSINESS

Refusal by the Director General, National Security Intelligence Service to attend Committee meetings

The Committee noted that the Director General was initially invited to appear before the Committee in order to shade light on the matter. Instead of coming to give evidence as

requested, the Director General chose to write back indicating his refusal to honour the invitation, citing reasons that were dismissed by the Committee. The Committee noted that two summons were later issued to him on various dates after failing to honour the invitation. Similarly, he failed to honour the two summons.

The Committee also noted various other instances when the Director General behaved in similar manner. The Committee further noted that in order to avoid recurrence of similar scenario of refusal by witnesses, adequate measures should be taken specifically by the Committee and Parliament by extension. The Committee resolved to invoke Sections 18 and 23 of the National Assembly (Powers and Privileges) Act to address the matter.

After extensive deliberations and upon considering, not only the appropriate measures provided for in the National Assembly (Powers and Privileges) Act, but also other Parliamentary measures, the Committee resolved as follows: -

- a) All the Eight Members present resolved that punitive measures should be taken against the public entity - National Security Intelligence Service, including budgetary sanctions; and
- b) The Committee resolved to compile a report to the Speaker recommending the prosecution of the Director General. While the other six Members agreed to this action, two Members (Hon. Jeremiah Kioni, MP and Hon. George Omari Nyamweya, MBS, M.P) registered their dissenting views regarding prosecution.

MIN.NO.669/2011: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at fifteen minutes past one O'clock.

Signed.....

(CHAIRPERSON)

Date.....12/4/2012

MINUTES OF THE 160TH SITTING OF THE DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS HELD ON THURSDAY, 12TH APRIL, 2012 IN THE COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS AT 2.30 PM

PRESENT

Hon. Adan Keynan, M.P - Chairperson
Hon. Wilson Litole, M.P
Hon. Peter Edick O. Anyanga, M.P
Hon. Jeremiah Kioni, M.P
Hon. Martin Ogindo, M.P

ABSENT WITH APOLOGY

Hon. Benedict Fondo Gunda, M.P - Vice Chairperson
Hon. George Omari Nyamweya, MBS, M.P
Hon. Charles Kilonzo, M.P
Hon. Kiema Kilonzo, M.P
Hon. Mohamed Hussein Ali, M.P

IN ATTENDANCE: NATIONAL ASSEMBLY

Mr. Njenga Njuguna	-	Principal Research Officer
Mr. Julius Ariwomoi	-	Second Clerk Assistant
Ms. Leah Wanjiru	-	Third Clerk Assistant
Ms. Maureen Mwendwa	-	Parliamentary Intern

MIN. NO .670/2012: PRELIMINARIES

The Chairman called the meeting to order. Thereupon, the meeting commenced with a word of prayer.

MIN.NO. 671/2012: CONFIRMATION OF MINUTES OF PREVIOUS SITTING

Minutes of the 159th sitting were confirmed by the Members present and signed by the Chairperson.

MIN.NO. 672/2012: MEETING WITH MR. DENNIS ITUMBI

Mr. Dennis Itumbi (a trained journalist allegedly accused of hacking ICC and the Foreign Commonwealth Office emails) appeared before the Committee. Mr. Itumbi was expected to explain the relationship between the allegations leveled against him and the documents investigated by the Committee. The Committee was informed as follows:

- i. Mr. Itumbi informed the Committee that he is a web blogger and author of a number of County Newspaper editions; and that he was detained and interrogated by police last month, allegedly for tempering with ICC witnesses and illegally acquiring ICC confidential information, but was later released without charges;
- ii. Upon interrogation by the Committee, the witness said that he could not tell whether the documents being investigated were genuine or not. He however, explained that if at all the police could ascertain that indeed, he hacked the ICC website, then the documents were genuine; he accused the ICC prosecutor of possibility of being careless with confidential information;
- iii. He said that he came across information in the web that reveals the identities of ICC witnesses. He presented documents purporting to be email traffic between prominent human rights activists and ICC witnesses and between the ICC and the UK's Foreign and Commonwealth Office;
- iv. The witness informed the Committee that the information he got, had been sourced from the internet including *nipate.com* which was accessible by anyone;
- v. Further, the witness claimed that the email traffic provided tallied with some of the information in the documents investigated by the Committee.
- vi. Mr. Itumbi was asked to explain a claim that the documents under investigation by the Committee originated from him. He refuted the claims.

The Committee directed Mr. Itumbi to compile a written submission on the alleged correlation between the documents tabled in the House and the email traffic he presented to the Committee, (the submission to be availed by the following Monday).

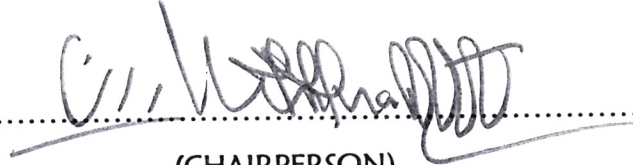
MIN.NO. 673/2012: CONSIDERATION AND ADOPTION OF DRAFT RULES OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE ASSEMBLY), 2012

The Committee scrutinized the report for the final time and unanimously adopted it in readiness for tabling in the House.

MIN.NO.674/2011: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at 5.45 p.m.

Signed.....


(CHAIRPERSON)

Date.....

12/4/2012

ANNEXURES

(From next pages)

Annex One

Speaker's Communication on the matter

SPEAKER'S COMMUNICATION ON THE MATTER

be forwarded to the Departmental Committee on Administration and National Security for consideration prior to approval by the House. The Committee is subsequently hereby directed to table its report on or before Thursday, 29th March, 2012.

PROCESS OF ELECTING MEMBERS TO EALA

Hon. Members. I wish to communicate as follows regarding the process for the election of Members to represent the Republic of Kenya in the East African Legislative Assembly.

As Hon. Members may be aware, the five-year term of the present East African Legislative Assembly, which is the 2nd Parliament of the East African Community, will come to a close on 4th June, 2012. It is, therefore, imperative that this House commences and concludes the processes for the election of Members of the Assembly ahead of the inauguration of the 3rd East African Legislative Assembly due on 5th June, 2012.

Hon. Members, the election of Members of the East African Legislative Assembly is governed by Article 50 of the Treaty for the establishment of the East African Community which is part of Kenya's law pursuant to the Treaty for the establishment of the East African Community Act, Act No.2 of 2000. Article 50 of the Treaty, to which the elections must conform, provides as follows:-

50. "Election of Members of the Assembly"

1. The National Assembly of each partner State shall elect, not from among its Members, nine Members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that partner State, in accordance with such procedure as the National Assembly of each partner State may determine.

2. A person shall be qualified to be elected a member of the Assembly by the National Assembly of a partner State in accordance with paragraph 1 of this Act, if such a person:-

- (a) is a citizen of that partner State;
- (b) is qualified to be elected a Member of the National Assembly of that partner State under its Constitution;
- (c) is not holding office as a Minister in that partner State;
- (d) is not an officer in the service of the Community; and,
- (e) has proven experience or interest in consolidating and furthering the aims and the objectives of the Community.

Hon. Members, the Draft Rules of Procedure contemplated by Article 50(1) of the Treaty have been drafted and will shortly be forwarded to the Departmental Committee on Defence and Foreign Relations, which will then be required to table a Report for debate and adoption. Thereafter, the election of Members to serve in the East African Legislative Assembly will be undertaken by this House in accordance with those Rules.

It may be important to note that parliamentary political parties have a significant role to play in the nomination process. I would, therefore, urge the leadership and the members of parliamentary political parties to prepare to actively discharge their mandate in this process since Article 50(1) requires that the nine members of the Assembly should "represent as much as it is feasible, the various political parties represented in the

National Assembly, shades of opinion, gender and other special interest groups in that Partner State”

Hon. Members, the matter of the election of Members of the East African Legislative Assembly (EALA) needs to be handled with circumspection as Kenya has previously had her nominees contested in the East African Court of Justice. Hon. Members will recall that in the 2006 Reference, the East African Court of Justice found that the Kenya National Assembly’s rules infringed on Article 50 of the Treaty to the extent of their inconsistency therewith. The Court, therefore, declared that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty and issued an order restraining the Clerk to the EALA from recognizing nine persons named in the order as duly elected by the National Assembly of Kenya to the EALA, or permitting them to participate in any function of the EALA. Perhaps just to add that, that whole process and the case will cost your Treasury an amount in excess of Kshs350 million in costs.

Hon. Members, it is, therefore, imperative that the rules that we adopt for the election of Members to the EALA and the election process we conduct as a whole, adhere to the Treaty.

I thank you.

MINISTERIAL STATEMENTS

Mr. Speaker: Hon. Members, we have many Statements which are due today but we will begin with the one by the Minister for Education, Prof. Ongeru. Leader of Government Business, please, note that Prof. Ongeru will give the Statement because he has reported to me that he is not feeling too well. So, we will let him go first.

EXAMINATION IRREGULARITIES IN NORTH EASTERN PROVINCE IN 2011

The Minister for Education (Prof. Ongeru): Mr. Speaker, Sir, on Tuesday, there was a Ministerial Statement required by this House on the examination irregularities in the 2011 KCSE examinations, with particular reference to North Eastern Province. I would like to present the following:-

During the release of the 2011 Kenya Certificate Secondary Education Examinations, a total of 2,927 candidates out of the total of 411,783 who sat for the examination, had their results cancelled by the Kenya National Examination Council (KNEC) due to examination irregularities. Since then, a lot of concern has been expressed about the cancellation of those results, especially in North Eastern Province. Subsequently, I directed the KNEC to re-examine all the cases of cancelled results, especially those from North Eastern Province, and give me a comprehensive brief on the same. The 2,927 candidates who had their results cancelled as a result of involvement in examination irregularities were from 154 centres countrywide. Most of the cases were mainly as a result - and I repeat - of collusion and smuggled materials. I wish to state that my Ministry is determined and committed to uphold the national curriculum evaluation system that is fair and will, therefore, not condone any form of cheating in examinations, and those found guilty will continue to be firmly dealt with in accordance with the operative statutes.

Annex Two

The Treaty for the Establishment of the East African Community

TREATY ESTABLISHING THE

EAST AFRICAN COMMUNITY

- (f) shall recommend to the Council the appointment of the Clerk and other officers of the Assembly; and
- (g) shall make its rules of procedure and those of its committees.

3. The Assembly may perform any other functions as are conferred upon it by this Treaty.

ARTICLE 50

Election of Members of the Assembly

1. The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.

2. A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:

- (a) is a citizen of that Partner State;
- (b) is qualified to be elected a member of the National Assembly of that Partner State under its Constitution;
- (c) is not holding office as a Minister in that Partner State;
- (d) is not an officer in the service of the Community; and
- (e) has proven experience or interest in consolidating and furthering the aims and the objectives of the Community.

ARTICLE 51

Tenure of Office of Elected Members

1. Subject to this Article, an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years.

Annex Three

The Ruling of the East African Court of Justice at Arusha

**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA**

*(Coram: Moijo M. ole Keiwua P, Joseph N. Mulenga VP, Augustino S.
L. Ramadhani J, Kasanga Mulwa J, Harold R. Nsekela J)*

REFERENCE NO. 1 OF 2006

BETWEEN

PROF. PETER ANYANG' NYONG'O 1ST CLAIMANT
ABRAHAM KIBET CHEPKONGA..... 2ND CLAIMANT
FIDELIS MUEKE NGULI..... 3RD CLAIMANT
HON. JOSEPH KAMOTHO..... 4TH CLAIMANT
MUMBI NGARU..... 5TH CLAIMANT
GEORGE NYAMWEYA..... 6TH CLAIMANT
HON. JOHN MUMYES..... 7TH CLAIMANT
DR. PAUL SAOKE..... 8TH CLAIMANT
HON. GILBERT OCHIENG MBEO..... 9TH CLAIMANT
YVONNE KHAMATI..... 10TH CLAIMANT
HON. ROSE WARUHIU..... 11TH CLAIMANT

AND

ATTORNEY GENERAL OF KENYA1ST RESPONDENT
CLERK OF THE EAST AFRICA LEGISLATIVE
ASSEMBLY.....3RD RESPONDENT
SECRETARY GENERAL OF THE EAST AFRICAN
COMMUNITY.....4TH RESPONDENT

AND

ABDIRAHIN HAITHA ABDI)
SARAH GODANA TALASO }..... 1ST INTERVENERS
CHRISTOPHER NAKULEU)

REUBEN ONSERIO OYONDI..... 2ND INTERVENER

SAFINA KWEKWE TSUNGU)
CATHERINE NGIMA KIMURA)
CLARKSON OTIENO KARAN }..... 3RD INTERVENERS
AUGUSTINE CHEMONGES LOTODO)
GERVASE BULUMA KAFWA AKHAABI)

HON. UHURU KENYATTA)
HON. WILLIAM K.S. RUTO }..... 4TH INTERVENERS
HON. BILLOW KERROW)

DATE: 30TH DAY OF MARCH, 2007

JUDGMENT OF THE COURT.

This is a reference under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty), in which the above named claimants seek to invoke this Court's jurisdiction under Article 27 of the Treaty. They contend that the process in which the above named 1st, 2nd and 3rd interveners were deemed to be elected as Kenya's nine members of the East African Legislative Assembly (the Assembly), and the rules made by the Kenya National Assembly and invoked for effecting the said process infringe the provisions of Article 50 of the Treaty. They make diverse prayers, but we need refer to only the pertinent ones with which this judgment is concerned and which we would paraphrase as follows, -

- (a) That this Court interprets and applies Article 50 of the Treaty to the said process and rules and declares them to be void;
- (b) That costs of the reference be awarded to the claimants.

We consider the rest of the prayers are not maintainable under Article 30.

Background

Under Article 2 of the Treaty, the contracting parties, namely the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda, (the Partner States) established among themselves an East African Community (the

Community) and under Article 9 established diverse organs and institutions of the Community. One of the eight organs established under the Treaty is the East African Legislative Assembly (the Assembly), which is the legislative organ of the Community. It consists of twenty-seven elected members and five *ex officio* members.

Article 50 of the Treaty provides that the National Assembly of each Partner State shall elect nine members of the Assembly in accordance with such procedure as it may determine. The Article also stipulates that the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election.

When the first Assembly was due to be constituted in 2001, the National Assembly of Kenya, "in exercise of the powers conferred by Article 50(1) of the Treaty" made *The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001*" (the election rules). The first nine members of the Assembly, whose term expired on 29th November 2006 were elected under those rules.

On 25th and 26th October 2006, pursuant to the election rules, the House Business Committee of the National Assembly deliberated upon lists of names presented to it as persons that were nominated by the three parliamentary political parties entitled to nominate candidates for election to the Assembly. The parties are the Kenya African National Union (KANU), the Forum for the Restoration of Democracy – People (FORD – P), and the National Rainbow Coalition (NARC). All together, five lists were presented to the Committee. Two lists, of three nominees each, were from KANU; one list of one nominee only, was from FORD – P. Each of the other two lists contained five nominees

of NARC. One was submitted by the party leader through the Clerk to the National Assembly as provided by the election rules. The other was presented to the Committee, in its afternoon session on 25th October, by the Government Chief Whip.

The Committee unanimously approved the only nomination from FORD – P. In the course of the deliberations, KANU withdrew one of its lists and the Committee approved, also unanimously, the three nominees on the remaining list. Finally, with regard to the nominations from NARC, the Committee considered the two lists and then, according to its minutes, *“resolved to consider the list submitted by the Government Chief Whip for purposes of nomination...”* Although it is not expressly stated in the minutes, and no reasons therefor were recorded, the Committee thereby impliedly rejected the nominees on the list submitted by the party leader of NARC, except for one Gervase Buluma Kafwa Akhaabi who was on both lists.

On 26th October 2006, the Committee, after amending the previously approved list of KANU nominees, approved –

1. Tsungu Safina Kwekwe,
2. Kimura Catherine Ngima,
3. Karan Clarkson Otieno,
4. Lotodo Augustine Chemonges,
5. Akhaabi Gervase,
6. Bonaya Sarah Talaso.
7. Nakuleu Christopher,
8. Abdi Abdirahin Haither, and
9. Reuben Onserio Oyondi

as “*duly nominated to serve*” in the Assembly and “*further resolved that the list be tabled before the House*” in accordance with the Election Rules.

The list was accordingly tabled in the National Assembly on that day in a Ministerial Statement by the Vice President of the Republic of Kenya, as Leader of Government Business in the National Assembly and Chairman of the House Business Committee. Thereafter the names were remitted to the 3rd Respondent as members of the Assembly elected by the National Assembly of Kenya.

On 9th November 2006, nearly three weeks before the 2nd Assembly was due to commence, the claimants filed the reference in this Court with an *ex parte* interlocutory application for an interim injunction to prevent the said nine persons from taking office as members of the Assembly until determination of the reference. By order of the Court the interlocutory application was heard *inter partes* on 24th and 25th November 2006. The Court delivered its ruling on the application and on two objections raised therein on 27th November 2006, in which *inter alia*, it granted the interim injunction restraining the 3rd and 4th respondents from recognizing the nine nominees as duly elected members of the Assembly until disposal of the reference.

Parties to the Reference

All the claimants are resident in Kenya. In the reference, the 1st and 2nd claimants are stated to be suing as officials of the Orange Democratic Movement (ODM) and the 4th and 5th claimants are stated to be suing as officials of the Liberal Democratic Party (LDP). The 3rd, 6th and 7th claimants

are stated to be suing as officials of NARC, Democratic Party (DP) and Forum for Restoration of Democracy in Kenya (FORD – K) respectively. But despite highlighting the stated official capacities in the pleading, nothing significant turned on them during the trial and therefore, in this judgment, we consider the said claimants in the same individual capacities as the 8th, 9th, 10th and 11th claimants. It should be mentioned, however, that the 3rd, 9th, 10th and 11th claimants were the NARC nominees on the list submitted by the party leader, which was inexplicably rejected by the House Business Committee.

Six respondents were initially cited in the reference. At the hearing of the aforesaid interlocutory application the 2nd, 5th, and 6th respondents objected to their being joined to the case, and the Court upheld the objection in its ruling delivered on 27th November 2006, on the ground that the only matters whose legality the Court had to determine were those done by Kenya as a Partner State through its National Assembly. They were struck out, leaving the three respondents named above.

Following the interim injunction, which took immediate effect, the nine affected nominees and the KANU party filed separate applications under Article 40 of the Treaty and r.35 of the Court Rules, for leave to intervene in the reference. By a consolidated consent order dated 17th January 2007, leave to intervene limited to supporting the respective cases of the claimants or the respondents was granted. The 1st interveners are the three KANU nominees, the 2nd is the nominee of FORD – P and the 3rd interveners are the five persons approved by the House Business Committee as the NARC nominees. The 4th interveners are officials of KANU party.

Pleadings and Issues

There are numerous averments in the reference, many of which are unnecessary, notwithstanding counsel's explanation that their purpose is to show the full context of the claimants' case. With due respect to learned counsel, we are constrained to observe that much of the "over-pleading" has led to some degree of confusion in regard to the jurisdiction of this Court and the claimants' cause of action. Be that as it may, in our view, the claimants' core pleading that leads to the prayers we referred to at the beginning of this judgment is captured in two paragraphs, which read thus –

“29. It is the contention of the claimants that the whole process of nomination and election adopted by the National Assembly of Kenya was incurably and fatally flawed in substance, law and procedure and contravenes Article 50 of the East African Community Treaty in so far as no election was held nor debate allowed in Parliament on the matter.

30. The claimants also contend that any such rules that may have been invoked by the Kenya National Assembly which do not allow election directly by citizens or residents of Kenya or their elected representatives is null and void for being contrary to the letter and spirit of the Treaty.”

In a nutshell, the response of the 1st respondent is premised on the following four propositions as basic pleas, namely, that –

- c In 2001, the Kenya National Assembly, pursuant to Article 50 of the Treaty, determined its own procedure for election of the nine members of the Assembly in form of the election rules, which embody the democratic principle of proportional representation.

- In October 2006, the National Assembly, acting through its House Business Committee, in accordance with its Standing Orders and the election rules, went through the process of electing the nine members to the 2nd Assembly.
- Neither the election rules nor the process of electing the nine members constitute an infringement of the Treaty or are otherwise unlawful.
- The reference does not disclose a cause of action.

The 3rd and 4th respondents plead jointly that no cause of action is disclosed against them as they were not privy to the activities of the Kenya National Assembly about which the reference complains. In the alternative they plead that the cause of action, if any, ceased when they obeyed the interim injunction, which had been the purpose for their being made parties in the case.

Out of these pleadings, the Court framed the following three broad issues –

1. Have the complainants disclosed any cause of action within the meaning of Article 30 of the Treaty?
2. Was an election undertaken within the meaning of Article 50 of the Treaty?
3. Do the Kenya Election Rules i.e. *The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001*, comply with Article 50 of the Treaty?

Evidence

The main facts relied on by all the parties, most of which are outlined in the background section of this judgment, are not in controversy. Only one witness, Yvonne Khamati, the 10th Claimant, gave oral evidence and was

cross-examined at length by counsel for all the parties. We hasten to observe, however, that the lengthy questioning of the witness appeared to be more for eliciting from her some desired evidence than for challenging the veracity of her testimony. Even the uncommon mode of adducing evidence of a speech made by Hon. Norman Nyagah, the Government Chief Whip, through her producing a DVD recording of the speech, for the Court to view and hear, was not challenged. The rest of the evidence was adduced by affidavits.

At the scheduling conference, it was intimated that the 1st respondent would object to the Hansard copies annexed to the reference being used in evidence. This appears to have prompted the claimants to adduce affidavits from Members of Parliament who participated in the proceedings reported in the said Hansard copies. During the trial, however, the course of objecting to the use of Hansard was not pursued, and counsel for all the parties, including the 1st respondent, referred to the copies annexed to their respective pleadings without objection.

In view of our finding that the evidence material to the issues for determination is not contentious, it is unnecessary to discuss it in any detail. Where necessary, we shall consider the evidence that is not reflected in the background section of the judgment, as we discuss the framed issues.

The Advocates for the claimants, the 1st respondent and the 1st interveners filed written submissions. In addition, the respective counsel for all the parties as well as for the *amicus curiae* made oral submissions at the hearing.

Applicable principles

The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions. In Article 23, the Treaty provides –

“The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”

It then provides thus in Article 27(1) -

“The Court shall initially have jurisdiction over the interpretation and application of this Treaty.”

The Treaty, being an international treaty among three sovereign states, is subject to the international law on interpretation of treaties, the main one being “*The Vienna Convention on the Law of Treaties*”. The three Partner States acceded to the Convention on different dates; (Uganda on 24 June 1988, Kenya on 9 November 1988 and Tanzania on 7 April 1993). The Articles of the Convention that are of particular relevance to this reference are Article 26 that embodies the principle of *pacta sunt servanda*, Article 27 that prohibits a party to a treaty from invoking its internal law as justification for not observing or failing to perform the treaty and Article 31, which sets out the general rule of interpretation of treaties. Article 31 reads –

1. ***A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.***
2. ***The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:***
 - (a) ***any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;***
 - (b) ***any instrument which was made by one or more parties in connection with the conclusion of the***

treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

(Emphasis is added)

Learned counsel for the claimants urged that in addition to seeking guidance from the Vienna Convention in interpreting the Treaty, the Court should, in respect of Article 50 of the Treaty, apply what he referred to as the principle of equivalence, which ensures that in the interpretation and application of rights and obligations created under a treaty there is equivalence in the states that are bound by the treaty. In other words, treaty provisions must be uniformly interpreted and applied in the states that are parties to the treaty.

For the 1st respondent on the other hand, the Court was urged to exercise its jurisdiction with care bearing in mind the historical perspective of the Treaty with particular reference to the recitals in its preamble in which the Partner States recall the causes of the collapse of the former East African Community in 1977 and in which they resolve to act in concert to strengthen their co-operation adhering to fundamental and operational principles set out in the Treaty. In apparent support of this submission learned counsel for the 3rd interveners stressed the fundamental principle in international law of sovereign equality of states, under which any matter over which a state does not

expressly relinquish sovereignty, remains within its sovereignty. A state cannot lose sovereignty over any matter by implication of international law.

Submissions on Issue No. 1

The claimants' submission on the first framed issue is that the averments in the reference show a cause of action within the meaning of Article 30 of the Treaty. They argue that the claimants are competent to make the reference since they are legal and natural persons resident in East Africa. The reference and the supporting documentary evidence, show that the contentious nominations were made pursuant to Article 50 of the Treaty as were the election rules under which the nominations were done. The election rules and the process of the nominations and approval of the nominees as members of the Assembly are "regulations, decision and action" of a Partner State whose legality is contestable under Article 30. In the reference, the claimants ask the Court to interpret Article 50 relative to the said process and rules and to determine if the process and the rules infringe the Article. They contend that this is therefore, a justiciable cause of action. They also reiterate that this Court has jurisdiction to determine the reference and to grant the prayers made therein.

On the other hand the 1st respondent submits that the claimants have not disclosed any cause of action under Article 30 of the Treaty. In order to establish a cause of action, a litigant must have *locus standi*. The litigant must have sufficient interest in the subject matter upon which a court is to adjudicate. Secondly, the litigant must be seeking a remedy in respect of a legal right, which has been infringed or violated.

According to the 1st respondent there are two view points of the issue of *locus standi* in the instant reference. First, from a strict perspective, since the subject matter of the reference, namely whether the election of Kenya's members of the Assembly was undemocratic and unlawful, is a matter of public interest, the only person that has *locus standi* as the protector of public interest, is the Attorney General of the Republic of Kenya. Secondly, from a broader perspective, the 1st, 4th and 7th claimants, being members of the National Assembly, may claim to have *locus standi* on the ground that they have personal interest to ensure that the National Assembly elects strictly in accordance with Article 50. That approach, however, should be avoided as it would make a mockery of democracy to allow them to refer to the Court an issue that they lost to the majority in a democratic debate in the House.

The 1st respondent also maintains that the claimants failed to show that they have a right conferred by the Treaty, which was contravened. Article 30 does not confer any right on any of the claimants. It is only a procedural provision for enforcing rights conferred under other provisions of the Treaty. If Article 30 is interpreted to confer a right on every resident of the Partner State, the Court would be turned into an institution of resolving philosophical discussion and speculation and cease to be a court of law. Since under Articles 34 and 52 the Treaty vests interpretation jurisdiction in the national courts also, the substance of the reference should be dealt with by the High Court of Kenya under Article 52. If this Court rules on the legality of the contentious election it would be usurping the power of the High Court of Kenya.

In support of the foregoing submissions, learned counsel for the 3rd interveners, also contended that the claimants do not have a cause of action maintainable in this Court, which is an international court. Their grievance raises the question

whether the 3rd interveners were elected to the Assembly. The Treaty expressly provides in Article 52 that when that question arises, it shall be determined by the relevant institution of the Partner State. The claimants did not seek remedy from the High Court or other institution of the Republic of Kenya. Under the principles of international law, they cannot access this Court before exhausting the local remedy provided by the Treaty itself.

Learned counsel for the 3rd and 4th respondents, stressed that both under the pleadings and in the evidence no claim was made against either of the two respondents. They were not alleged to be persons whose activities gave rise to the reference. They were not shown to have infringed a right conferred on the claimants by the Treaty. No nexus was established linking the 3rd and 4th respondents to the activities complained of in the reference. The claimants did not disclose, let alone prove, any cause of action entitling them to a claim and an award against the two respondents. Although, in the interlocutory application for injunction they were properly joined, they ought to have been discharged after compliance with the injunction order.

Further, the 3rd and 4th respondents contend that they cannot be party to the reference because they are neither a Partner State nor an institution of the Community whose acts or regulations are referred to the Court under Article 30.

Finding on Issue No.1

From the submissions, we discern the following five grounds upon which the contention of non-disclosure of a cause of action is based, i.e that -

- the claimants failed to show the essential elements of a cause of action, namely, that their rights or interests were violated or infringed upon;
- Article 30 does not create any right; it creates a forum for adjudication of rights vested by other provisions of the Treaty;
- The substantial question raised in the reference, whether the 3rd interveners are elected members of the Assembly, is not within this Court's jurisdiction;
- the claimants have not exhausted the local remedy provided by the Treaty; and
- in the case of the 3rd and 4th respondents, it is not shown that they are liable for the matters, which are subject of complaint in the reference.

A cause of action is a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy. In *Auto Garage vs. Motokov*, (No.3) (1971):EA 514, a decision of the Court of Appeal for East Africa, Spry V.P., described a common law cause of action at p.519 D thus –

“if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.”

That description sets out the parameters of actions in tort and suits for breach of statutory duty or breach of contract. However, a cause of action created by statute or other legislation does not necessarily fall within the same parameters. Its parameters are defined by the statute or legislation which creates it.

This reference is not an action seeking remedy for violation of the claimants' common law rights. It is an action brought for enforcement of provisions of the Treaty through a procedure prescribed by the Treaty. The Treaty provides for a number of actions that may be brought to this Court for adjudication. Articles 28, 29 and 30 virtually create special causes of action, which different parties may refer to this Court for adjudication. Under Article 28(1) a Partner State may refer to the Court, the failure to fulfill a Treaty obligation or the infringement of a Treaty provision by another Partner State or by an organ or institution of the Community. Under Article 28(2) a Partner State may also make a reference to this Court to determine the legality of any Act, regulation, directive, decision or action on the ground that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Under Article 29 the Secretary General may also, subject to different parameters, refer to the Court failure to fulfill a Treaty obligation, or an infringement of a provision of the Treaty, by a Partner State.

Article 30 provides –

“Subject to the provisions of Article 27 of this Treaty, any person resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.”

It is important to note that none of the provisions in the three Articles requires directly or by implication the claimant to show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter

complained of in the reference. We are not persuaded that there is any legal basis on which this Court can import or imply such requirement into Article 30.

In the 1st respondent's written submissions, and in the supplementary oral submissions by the learned Deputy Solicitor General of Kenya a number of authorities were cited in support of the contentions that the claimants had no *locus standi* and/or had not disclosed a cause of action. Unfortunately no copies were availed to the Court despite undertaking to do so. One that we are able to comment on is the decision of the High Court of Kenya in *Jaramogi Oginga Odinga vs. Zachariah R. Chesoni & Attorney General*, Misc.Appl. No.602 of 1992, a copy of which was availed by counsel for the 6th respondent at the hearing of the interlocutory application. In that case, the High Court of Kenya held that section 60 of the Constitution of the Republic of Kenya does not confer any right to a litigant nor create a cause of action. By way of analogy, it is argued that Article 30 ought to be interpreted in the same way. We do not need to discuss the decision in any detail. We respectfully agree with that interpretation. But we hasten to point out that the provisions of section 60 of the Constitution of Kenya are not similar or comparable to the provisions of Article 30 of the Treaty. The section only vests jurisdiction, *albeit* unlimited jurisdiction, in the High Court of Kenya. The court held –

“The court’s unlimited powers ought to be and are used with judicial restraint and only in situations where ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60(1) provides for. It does not create causes of action or courses to follow in those actions.”

In Article 30, however, the Treaty confers on any person resident in a Partner State the right to refer the specified matters to this Court for adjudication and as we have just said, by the same provision it creates a cause of action.

Section 60 of the Kenya Constitution, is comparable to provisions of the Treaty that only vest jurisdiction without creating causes of action, like Articles 27, 31 and 32, which respectively vest in this Court jurisdiction to interpret the Treaty, to hear and determine disputes between the Community and its employees and to hear and determine arbitration disputes in specified circumstances. We find a more plausible comparison with Article 30 of the Treaty to be in Article 137 of the Constitution of the Republic of Uganda, which in clause (1) vests in the Constitutional Court the jurisdiction to interpret the Constitution and in clause (3) confers on any person the right to petition that court on an allegation that any Act of Parliament or other law, or any act or omission by any person or authority is inconsistent with, or contravenes the Constitution, for a declaration to that effect. The Supreme Court of Uganda has in several decisions held that the Article thereby creates a cause of action. (See *Ismail Serugo vs. Kampala City Council & Attorney General*; Constitutional Appeal No.2/98).

Turning back to the claim in this reference, we note that the claimants make no secret of the fact that they were prompted to bring this reference by what they claim to be unlawful substitution of the 3rd interveners for the 3rd, 9th, 10th and 11th complainants as the NARC nominees and the resultant deeming of the former as elected members of the Assembly. Those circumstances *per se* raise the question whether the 3rd interveners are elected members of the Assembly and the question is squarely within the parameters of Article 52(1), which provides –

“Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of members of the National Assembly responsible for the election in question.”

Needless to say, this provision also creates a cause of action under the Treaty. However, it is the one cause of action under the Treaty over which this Court has no jurisdiction. Obviously, that is why the 1st respondent persistently seeks to strait-jacket this reference into the parameters of Article 52(1), to cushion the initial argument that this Court has no jurisdiction over the reference, and additionally to contend that no cause of action triable by this Court is disclosed.

We should mention at this juncture that the same argument is reiterated in submissions on the second framed issue, presumably in an effort to show that it is a non-issue. There, it is argued that the fact of the election is not disputable, and that the substantive dispute arises from the two lists of nominees submitted by NARC’s party leader and party whip, respectively. Four of the nominees on the party leader’s list who were not elected, claim that they were the rightful nominees who should have been elected instead of the 3rd interveners who were on the party whip’s list. That dispute is not within the ambit of Article 30. Basically, it is a dispute on who should have submitted the NARC party nominees, which dispute should have been solved through the internal party mechanism. Outside the party, it is, at most, a dispute as to whether the 3rd interveners were lawfully elected and should have been referred to the High Court of Kenya under Article 52.

But, under whatever context, the arguments turn round to one central theme, namely that the Court ought not to determine this reference. In our view, the subtle variation introduced in submissions by learned counsel for the 3rd

interveners that the Court had jurisdiction to grant the interim injunction and to hear the reference but has no jurisdiction to grant the remedies prayed for, makes no material difference. We shall dispose of the said theme here and will not return to it under any other framed issue.

We agree that if the only subject matter of the reference were those circumstances surrounding the substitution of the 3rd interveners for the said four claimants, this Court would have no jurisdiction over the reference. In paragraphs 29 and 30 of the reference, however, the claimants have referred to the Court two other issues, which we consider to be the core and material pleadings for purposes of the reference. It is those pleadings that disclose the special causes of action, which evoke this Court's jurisdiction under the Treaty. And it is only those pleadings that will be subject of adjudication in this reference. While it is apparent that the reference of the two issues is an after thought, in our considered opinion it is not tantamount to abuse of court process as submitted by the 1st respondent.

In the ruling delivered on 27th November 2006, we held that the Court has jurisdiction to hear and determine the reference. We find no reason to review that decision. Whatever we say on the matter hereafter is to provide the details of our reasons for the decision as we undertook to do in the said ruling.

Under Article 33(2), the Treaty obliquely envisages interpretation of Treaty provisions by national courts. However, reading the pertinent provision with Article 34 leaves no doubt about the primacy if not supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty. For clarity, it is useful to reproduce here, the two Articles in full. Article 33 provides –

“1. Except where jurisdiction is conferred on the Court by the Treaty, disputes in which the Community is a party shall not on

that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.

2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of the national courts on a similar matter.
(Emphasis is added)

And Article 34 provides –

“When a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.”

The purpose of these provisions is obviously to ensure uniform interpretation and avoid possible conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.

Article 33(2) appears to envisage that in the course of determining a case before it, a national court may interpret and apply a Treaty provision. Such envisaged interpretation, however, can only be incidental. The Article neither provides for nor envisages a litigant directly referring a question as to the interpretation of a Treaty provision to a national court. Nor is there any other provision directly conferring on the national courts jurisdiction to interpret the Treaty. Article 30 on the other hand, confers on a litigant resident in any Partner State the right of direct access to the Court for determination of the issues set out therein. We therefore, do not agree with the notion that before bringing a reference under Article 30, a litigant has to “exhaust the local remedy”. In our view there is no local remedy to exhaust.

We would express reservations about the supplementary or alternative notion that a litigant who fails to secure relief from the national courts under Article 52 would have recourse to this Court to seek the same relief.

Lastly, the 3rd and 4th respondents were not joined for being privy to the actions of the Republic of Kenya or for any wrong they did. They were joined, as learned counsel rightly concedes, because of the relief sought by the claimants, namely the prayer that they be restrained in the terms set out not only in the interlocutory application but also in the reference. The submission would have made more sense if it came prior to the hearing of the reference.

Accordingly we answer issue no.1 in the affirmative.

Submissions on Issue No.2

The main thrust of the claimants' submissions on the second and third issues is that no election, within the meaning of Article 50 of the Treaty, was undertaken and that the election rules do not provide for election. The process provided for by the election rules and what actually transpired amount to the antithesis of an election.

The claimants maintain that the expression "shall elect" as used in Article 50 can only mean "shall choose by vote". That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced not only in all three Partner States, but also in international democratic practice worldwide. Under the Constitution and electoral laws of Kenya that govern the elections of the President, and of the Speaker, Deputy Speaker and Members of Parliament, election means election through voting. The provision in the Treaty that "the

National Assembly “shall elect” therefore, does not import a concept that is unknown to or that differs from that envisaged and practiced by the Republic of Kenya.

The affidavit evidence shows that three parliamentary political parties, namely NARC, KANU and FORD-K, submitted to the House Business Committee names of persons nominated for election as members of the Assembly. On 26th October 2006, the Chairman of the House Business Committee simply tabled in the National Assembly a list of names of nine persons stated to be nominated by the said political parties. That list did not include the names of the 3rd, 9th, 10th and 11th claimants who had been validly nominated as NARC nominees because at the initiative of Hon. Norman Nyagah, the Government Chief Whip, the House Business Committee had replaced them with the names of the 3rd interveners. As stipulated by the election rules, the nine persons were thereby deemed to be elected by the National Assembly.

Significantly, when introducing the nine names to the House, the Vice-President, who is also Leader of Government Business, said, as his predecessor had said on the equivalent occasion in 2001, that the nine persons were “appointed”. Both leaders knowing the difference between “elected” and “appointed”, used the latter word because what had transpired in the House Business Committee was not an election but an appointment of the nine persons. Besides, this was consistent with what the said Government Chief Whip said in his speech recorded on the DVD, bragging immediately prior to the process, that only he would name those to be sent to the Assembly. All that goes to show that what transpired was not an election by the National Assembly, but was at best “an appointment” by the Government controlled House Business Committee.

The submissions on this issue, for the 1st respondent and the supporting interveners, may be summarised as follows. The words “election” and “elect” as used in Article 50 do not necessarily connote choosing or selecting by voting. They are not defined in the Treaty. Black’s Law Dictionary defines “election” as –

“the process of selecting a person to occupy an office (usually a public office)”

Furthermore, though under Article 6 of the Treaty the Partner States are committed to adhere to “*democratic principles*”, no specific notion of democracy is written into the Article or the Treaty. Besides, while Article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, it gives no directions on how the election is to be done, except for the stipulations that the nine must not be elected from members of the National Assembly and that as far as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in Article 50 is that “*the National Assembly of each Partner State shall elect ... nine members of the Assembly ... in accordance with such procedure as [it] may determine.*”

Learned counsel for the 1st interveners, supplements this submission with the argument that the power and discretion of the National Assembly under Article 50(1) is so unfettered that the National Assembly may determine a procedure of election that excludes itself from actual or physical voting. In exercise of that

power and discretion, the Kenya National Assembly determined its procedure in 2001 by making the election rules, which must be respected.

It is not in dispute that only entitled parliamentary political parties nominated candidates for election and submitted their names to the House Business Committee. Being satisfied that they were qualified to be elected and that they complied with the terms of Article 50, the House Business Committee approved nine of the nominees on 26th October 2006 and on the same day tabled their names before the National Assembly. Thereupon, by virtue of the election rules, the nine nominees were deemed to be elected by the National Assembly. The Speaker confirmed that the process was conducted in accordance with the election rules. The process is a mode of democratic election by proportional representation as practiced not only in Kenya but also in several other democratic countries.

The question that the Court should have been appropriately asked to consider is whether the process conforms to the conditions stipulated in Article 50. However, the question did not arise since it was neither alleged, let alone proved, that any of the nine elected persons was not qualified nor that the specified representations, namely representations of various political parties, shades of opinion, gender and other special interest groups were not achieved.

Learned counsel for the 2nd intervener supplemented the submissions in support of an affirmative answer to the second framed issue, with the contention that a proper interpretation of Article 50 is not to consider the meaning of the expression "to elect" in isolation but as one with the procedure that Article 50 empowers the National Assembly to determine. For the purpose of Article 50

therefore, an election means the process determined by the National Assembly as set out in the election rules. If the Court undertakes the task of giving dictionary meaning to the expressions “to elect” and “an election” it will be assuming the role of making rules of procedure, which is the preserve of the National Assembly.

Finding on Issue No.2

The first step towards answering the second framed issue is to resolve the conflict of two basic concepts on the import of Article 50 that underlie these submissions. One concept is that the Article imposes on each National Assembly the function of electing nine members of the Assembly from the respective Partner States, with a discretionary power to determine the procedure it will follow in executing that function. The other concept is that the Article confers on the National Assembly of each Partner State the responsibility, with unfettered discretion, to determine how the nine members of the Assembly from the respective Partner States are to be elected. To find out which of the two concepts reflects the correct object and purpose of Article 50 as intended by the parties to the Treaty, we have to consider the provisions of the Article in the context of the Treaty as a whole.

However, in view of paragraph 3(b) of Article 31 of the Vienna Convention, it is necessary to consider first if Kenya’s practice in its application of Article 50 since 2001, establishes any agreement of the parties regarding the interpretation of that Article. No evidence was adduced on the practice by the other two parties in their application of Article 50. However, from the differences between the election rules and the equivalent rules of procedure adopted by the National Assemblies of Tanzania and Uganda, copies of which were availed to

Court in the course of oral submissions by counsel, it is evident, and we are able to conclude, that no agreement of the parties regarding interpretation of Article 50, can be inferred from the said practice. On the surface, the Tanzania rules provide for elaborate elections by the National Assembly, while the Uganda rules are silent on the issue of election, save that in rule 2 “election” is defined as “a process of approval of names nominated by political parties and presented to the House by the Speaker”, and in rules 10 and 11 they provide for the Speaker to announce to the House the “nominations” of members of the Assembly and for the publication in the Gazette of the names of the “elected members” as soon as the Speaker announces them. Clearly, there is glaring lack of uniformity in the application of Article 50.

As we said earlier in this judgment, the Treaty creates eight organs of the Community. It prescribes the composition of each organ and how its membership is to be constituted. Memberships of four of the organs, namely, the Summit, the Council, the Co-ordination Committee and Sectoral Committees are principally constituted by specified *ex officio* members and additional members determined by the Partner States from time to time. They are all serving officials of the Partner States. The membership of the Court, the judicial organ of the Community, consists of judges appointed by the Summit on recommendations of the Partner States. The Secretariat, the executive organ of the Community is also constituted by appointees. The Secretary General is appointed by the Summit upon nomination by a Head of State. The Deputy Secretaries General are appointed by the Summit on recommendation of the Council. And the Counsel to the Community is appointed on contract.

The Assembly is differently constituted. Its composition is prescribed in Article 48. It is the only organ composed of two categories of membership, namely, 27 elected and 5 *ex officio* members. In Article 50, the Treaty prescribes how the first category of membership is to be constituted, and qualifications of members.

Article 50 is titled –

“Election of Members of the Assembly”

and the full text reads –

1. ***The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.***

2. ***A person shall be qualified to be elected a member of the Assembly by the National Assembly of a Partner State in accordance with paragraph 1 of this Article if such a person:***
 - (a) *is a citizen of that Partner State;*
 - (b) *is qualified to be elected a member of the National Assembly of that Partner State under its Constitution;*
 - (c) *is not holding office as a Minister in that Partner State;*
 - (d) *is not an officer in the service of the Community;*
and
 - (e) *has proven experience or interest in consolidating and furthering the aims and objectives of the Community.”*

Clearly, the overriding object and purpose of Article 50 is to prescribe a special mode of constituting the first category of membership of the Assembly. This is done by providing in express, unambiguous and mandatory terms that the section of the Assembly comprising 27 members shall be constituted by members elected severally by the National Assemblies of the Partner States, each of which is entitled to elect nine members. We should observe that this is a notable departure from provisions of Articles 56 and 57 of the *1967 Treaty for East African Co-operation*, under which each Partner State was mandated to “appoint nine” of the “twenty-seven appointed members” of the Legislative Assembly.

It is also significant that unlike in respect of the other organs, the Treaty does not leave it to each Partner State to appoint or nominate for appointment or otherwise determine the members of the Assembly. In our view, according to the ordinary meaning of the expression “the National Assembly of each Partner State shall elect nine members of the Assembly”, the National Assembly of each Partner State is unconditionally assigned the function of electing nine members of the Assembly. In other words Article 50 constitutes the National Assembly of each Partner State into “an electoral college” for electing the Partner State’s nine representatives to the Assembly. We think that there can be no other purpose of naming the National Assembly in this regard other than to constitute it into an electoral college.

The rest of the provisions of Article 50 do not add to or subtract from that assignment. They only serve to leave two matters in the National Assembly’s discretion. First, while the Article provides that the nine elected members shall as much as feasible be representative of the specified groupings, by implication

it appears that the extent of the feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has the discretion to determine the procedure it has to follow in carrying out the election.

In our considered view, the decision to constitute the National Assembly of each Partner State into an electoral college was a deliberate step towards establishing a legislature comprising people's representatives. The National Assembly, being an institution of people's representatives, is next to the people themselves, the second best forum for electing such representatives. We are therefore not persuaded by the submission of counsel for the 1st interveners that the discretion of determining the procedure of electing the representatives includes an option for the National Assembly to assign the function to any other body. That submission has the effect of extending the discretion beyond what is provided in Article 50. It also offends the well established principle articulated in the maxim: "*Delegata potestas non potest delegari*" (a delegated power cannot be delegated).

The next step towards answering the second framed issue is to consider what is meant by the words "election" and "elect" in the setting they are applied in Article 50 and in the context of the Treaty as a whole. The 1st respondent and the supporting interveners capitalise on the absence of any definition of those words in the Treaty and on the fact that the words are capable of bearing meanings other than choosing by vote. However, neither fact leads to any material consequence. The absence of any definition of the words in the Treaty is not ground to contend that the parties to the Treaty attached no meaning to them. The phenomenon of double or even multiple meanings of words is a

common occurrence but does not prevent a court giving the word interpretation in the context it is used. In *International Law and Order* by Prof. Georg Schwarzenberger, (Stevens & Sons, London 1971), under the Chapter on Treaty Interpretation, the learned author, commenting on Article 31 of the *Vienna Convention on the Law of Treaties*, which we reproduced earlier in this judgment, says at p.121 –

“In accordance with the general rule on interpretation in the Vienna Convention, the object of treaty interpretation is to give their “ordinary” meaning to the terms of the treaty in their context and in the light of its object and purpose.

Unfortunately, almost any word has more than one meaning. The word “meaning” itself has at least sixteen different meanings. Thus if parties are in dispute on any term of a treaty, each one of them is likely to consider the meaning it attaches to a particular word as the ordinary meaning in the context and in the light of the object and purpose of the treaty.”

Fortunately, the words that are under consideration do not bear a multiplicity of meanings. It is common ground that the ordinary meanings of the words “election” and “to elect” are “choice” and “to choose” respectively; and that in the context of Article 50 the words relate to the National Assembly choosing or selecting persons to hold political positions. What is in contention is whether the parties to the Treaty intended the choice or selection to be done through a process of voting or through any other process to be determined by each of the three National Assemblies.

The phenomenon of multiple meanings of words makes interpretation of documents a very difficult task; but the task is not insurmountable. Rules of interpretation have been designed to ease the burden, hence the need to invoke them. Indeed, in the instant case, the contention revolves more on the intention

of the parties to the Treaty than on the meaning of the words. Two trite rules of international law, which emanate from the principle of *pacta sunt servanda*, are of particular relevance here. One is that treaty provisions are presumed to have meaning and must not be construed as void for uncertainty, in the way contracts between private persons may be construed at municipal law. The other is that the parties to a treaty cannot be taken to have intended an absurdity. (See *Manual of Public International Law* Edited by Prof. Max Sorensen, Uganda Publishing House Ltd. 1968; para. 4.30 and 4.31).

In our view, it would lead to unnecessary uncertainty, if not to absurdity, if Article 50 were construed to mean that the parties to the Treaty intended to attach no meaning to the words "election" and "to elect" used in Article 50, leaving it to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. Counsel for the 1st interveners advanced a theory that the matter was intentionally left open-ended because of differences in the level of political development of the Partner States, and in support of the theory relied on the inclusion of the principle of asymmetry among the operational principles of the Community set out in Article 7 of the Treaty. With due respect to learned counsel, we find no legal or factual basis for his perception or speculation that at the time of entering into the Treaty the Partner States were at different levels of political development. To our understanding, the operational principle of asymmetry he cited in support of his argument, relates to the acknowledged economic imbalances for whose rectification the parties have, by appropriate protocol, set a formula and time-frame. It is not applicable to any imagined uneven political development of the Partner States.

We think that Articles 5 and 6 have a bearing on the subject at hand. By the Treaty, the Partner States established themselves into the Community, for the achievement of elaborate objectives set out in Article 5. For purposes of this judgment it suffices to say that the overall objective is developing and strengthening co-operation in specified fields for the mutual benefit of the Partner States; and further establishing among themselves into several stages of integration up to a Political Federation, in order to attain *inter alia* raised standard of living and improved quality of life for their populations. Article 6 outlines five sets of fundamental principles that the parties chose to govern their achievement of the Community objectives. Again for the purpose of this judgment it suffices to highlight only (a) and (d), namely the principles of –

- *mutual trust, political will and sovereign equality;*
- *good governance including adherence to the principles of democracy.....*

Two other facts are worthy of taking into account. Ordinarily a reference to a democratic election of persons to political office is understood to mean election by voting. Secondly, in all three Partner States, the National Assembly has the function of electing its Speaker and Deputy Speaker. It executes that function by voting in one form or another.

The Constitution of the Republic of Kenya provides in sections 37 and 38 that the Speaker and the Deputy Speaker, respectively, shall be elected by the National Assembly. Those provisions are reiterated in the Standing Orders, which then set out elaborate procedure of conducting the election by ballot. In contrast, Order 154 provides that Members and the Chairman of any select committee shall be “nominated” by the House Business Committee unless

nominated by the House on setting up the select committee. Under Order 155, the House Business Committee may “appoint” in place of a member whose membership has ceased or who is absent, another member to act. In the scenarios under Orders 154 and 155, no voting is envisaged.

In view of all the foregoing, we find it very unlikely that in adopting Article 50, the parties to the Treaty contemplated, let alone intended, that the National Assembly would elect the members of the Assembly other than through voting procedure. Needless to say, an election through voting may be accomplished using such diverse procedures as secret ballot, show of hands or acclamation. The electoral process may or may not involve such preliminaries as campaigns, primaries and/or nominations. An election may be contested or uncontested. In our considered view, the bottom line for compliance with Article 50 is that the decision to elect is a decision of and by the National Assembly.

The evidence before us leads to only one conclusion, namely that the National Assembly of Kenya did not undertake or carry out an election within the meaning of Article 50 of the Treaty.

Submissions on Issue No.3

On the third issue specifically, the claimants contend that the election rules do not meet the threshold set by Article 50. and to that extent have no bearing on the Article. In formulating the election rules, the Kenya National Assembly disregarded the limits of its discretion under Article 50. This is particularly borne out by the evidence from the Hansard reports of the debate in the

National Assembly in 2001. The evidence clearly indicates that the rules were adopted notwithstanding that their inconsistency with Article 50 was articulated by a number of contributors to the debate. In that connection, during the proceedings of 26th October 2006, in the course of ruling that the National Assembly was bound by the election rules it adopted against his advice in 2001, the Speaker observed that the Kenya National Assembly was *living a lie* with regard to election of members of the Assembly and urged the House to re-look at his rejected draft rules as it had a right and duty to amend *inter alia* rules that are not in consonance with the expectations of the public.

Learned counsel for the claimants urged that in interpreting the Treaty relative to the election rules, the Court must bear in mind the principle of equivalence, which requires that the Treaty be applied uniformly among the Partner States; and the principle of primacy of Community law in case of conflict with national law.

The 1st respondent on the other hand submits that the election rules do comply with Article 50. Under the Treaty each Partner State has the discretion to choose any democratic electoral system for the election of the members of the Assembly. The election rules made by the Kenya National Assembly establish such a democratic electoral system of proportional representation. They do not infringe Article 50 in any way and the Court should respect them.

The 1st interveners support the submission that the election rules were lawfully made by the Kenya National Assembly within its discretion under, and in compliance with, Article 50(1). They submit that in interpreting that Article and applying it to the election rules, the Court should take the rules as they are, and not consider whether the rejected drafts were better. The Court cannot question

the validity of the rules on basis of whether they are democratic enough. They were made by the competent authority, and were adopted in a democratic manner after a detailed and focused debate. The Court may only determine if in making the rules the National Assembly complied with its mandate to determine a procedure that caters for the stipulations under Article 50.

In addition it is contended that the claimants are estopped from challenging the validity of the election rules, which they recognised and relied on up to the conclusion of the election.

Findings on Issue No.3

We should at the outset reiterate that the point we have to decide on under this issue is whether the election rules constitute an infringement of Article 50 of the Treaty. It is therefore, immaterial that the claimants or any of them may have previously regarded the election rules as valid or may have done anything or taken any step in pursuance of their provisions. We say this because it is our firm view that once a question of infringement of the Treaty is properly referred to this Court under Article 30, the question ceases to be of purely personal interest. This court would be failing in its duty under Article 23 if it refuses to determine the question on the ground of the claimant's previous conduct or belief.

Furthermore, it is well settled that the doctrine of estoppel cannot be raised against the operation of statute. (See Maritime Electric Co. Ltd vs. General Dairies Ltd., (1937) 1 All ER 748; Southend-on-Sea Corporation vs. Hodgson (Wickford) Ltd., (1961) 2 All ER 46 and T. Tarmal Industries vs. Commissioner of Customs and Excise (1968) EA 471. Similarly in our view, estoppel cannot be invoked to prevent an inquiry into an alleged infringement

of the Treaty. If the rules made in exercise of power conferred by Article 50 are *ultra vires*, they cannot be saved on the ground that the claimants previously regarded them as *intra vires*.

The point of inquiry under this issue is what the rules provide in regard to “election of the members of the Assembly.” Consequently, the 1st respondent misses the point when he submits that through the rules the National Assembly adopted a democratic system of proportional representation. Proportional representation can be effected through nomination and/or appointment as is the case, under Article 33 of the Kenya Constitution, for the “nominated members” of the National Assembly. In any case, it is the Treaty that provides for proportional representation in the Assembly, and which directs that the representation shall be achieved by election. The critical point is not whether the rules provide for proportional representation but whether they provide for election of members of the Assembly on basis of proportional representation as provided by Article 50.

The election rules provide in rule 4, that the National Assembly shall elect the nine members of the Assembly “*according to the proportion of every party in the National Assembly*”. To that extent, there is partial compliance with Article 50. However, the apparent absence of any provision to cater for gender and other special interest groups is a significant degree of non-compliance, notwithstanding the discretion of the National Assembly in determining the extent and feasibility of the representation.

The major deviation from Article 50 is that the election rules do not provide for the National Assembly to elect the members of the Assembly. Rule 5 provides for the nomination of candidates by the political parties and sets out the

procedure for submitting nomination papers to the House Business Committee.

Rules 6 and 7 then provide –

“6. The House Business Committee shall consider the nominees of the parties delivered to it under sub-rule (4) of rule 5 and shall ensure that the requirements of Article 50 of the Treaty are fulfilled.

7. Upon being satisfied that the requirements of rule 6 have been complied with, the House Business Committee shall cause the names of nine nominees of the parties to be tabled before the National Assembly and such nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with Article 50 of the Treaty.”

(Emphasis is added)

It is not clear if “the requirements of Article 50” mentioned in rule 6 and “the requirements of rule 6” mentioned in rule 7 are the same or different, thus making the role of the House Business Committee in the process rather uncertain. What we can deduce from the rules is that its role is to vet the nominees to ensure that they qualify to be elected and presumably that they are representative of the groupings specified in Article 50. Be that as it may, it is plain from the two rules that the nine nominees are not elected by the House Business Committee, contrary to a spirited effort by counsel for the 3rd interveners to argue that the House Business Committee is “an electoral college”. If that were so, it would be unnecessary to stipulate that the nominees are deemed to be elected by the National Assembly. Indeed the use of the expression “nominees are deemed to be elected” signifies that the nominees are not elected.

The same learned counsel persuasively argued that the word “deem” is a good legal word in common usage. He asserted: “We deem that which in law ought to have taken place, to have taken place”.

We agree that the word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction*. The legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist. In *St. Aubyn (LM) vs. A.G.* (1951) 2 All ER 473, Lord Radcliffe describes the various purposes for which the word is used where, at p.498 he says –

“The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

It is common ground that the election rules were made “in exercise of the powers conferred by Article 50(1) of the Treaty”, and obviously for the purpose of implementing the provisions of the said Article. In rule 7, the legislature used the word “deemed” in order to create the fiction that upon the names of party nominees being laid on the table they would in law be elected by the National Assembly as members of the Assembly although in reality they are not so elected. The reason for creating that fiction is that Article 50 of the Treaty expressly provides that the nine members of the Assembly from each Partner State shall be elected by the National Assembly. In other words the fiction was created to circumvent an express provision of the Treaty.

In *Indira Sawhney vs. Union of India*, JT (1999) (9) SC 557; (2000) 1 SCC 168, a statutory declaration of non-existent facts as existing, which was unrelated to existing facts was held to be in violation of Articles 14 and 16 of the Indian Constitution. Similarly we hold that rules made for the purpose of

implementing provisions of the Treaty cannot be permitted to violate any provision of the Treaty through use of legal fiction. To uphold the legal fiction in rule 7 of the election rules would be tantamount to upholding an amendment of Article 50, by one Partner State unilaterally. We can find no justification for doing so.

The dichotomy that this situation poses is as follows: The National Assembly of any democratic sovereign state has the powers of regulating its conduct through rules of procedure by whatever name called. Once made and adopted, they are binding until revoked, amended or otherwise modified by the National Assembly itself. Ordinarily what the National Assembly does in accordance with such rules is lawful and valid. However, a state, which in exercise of its sovereign power binds itself to an international treaty, may end up facing conflicting demands, namely the demand to abide by its treaty obligations and the demand to abide by its own rules that conflict with the former.

In the reference, the claimants plead, and in the written submissions by counsel it is reiterated, that the election rules were not gazetted or published. However it was not seriously canvassed, let alone proved, that failure to gazette or publish them rendered the rules invalid or of no legal effect. In the written submission the rules are described as "window dressing" with no bearing on Article 50, with the additional passing remark: "*They have not even been gazetted or published independently*". We make this observation because proof that the rules are of no legal effect would have erased or avoided the dichotomy. As it is, however, we start from the position that the rules are binding on the National Assembly and then consider if their inconsistency with or infringement of Article 50 renders them unlawful and not binding on the National Assembly.

As we pointed out earlier in this judgment, the Treaty provides in Article 33(2) that decisions of this Court on the interpretation of provisions of the Treaty shall have precedence over decisions of national courts on a similar matter. That provides a clear-cut solution in the event of conflicting court decisions. But the Treaty does not provide a similarly explicit solution to the dichotomy where a Treaty provision (say Community rule) is in conflict with a national rule.

We think the solution lies in the basic principle at international law, to the effect that a state party to a treaty cannot justify failure to perform its treaty obligation by reason of its internal inhibitions. It cannot be lawful for a state that with others voluntarily enters into a treaty by which rights and obligations are vested, not only on the state parties but also on their people, to plead that it is unable to perform its obligation because its laws do not permit it to do so. The principle is embodied in Article 27 of the Vienna Convention on the Law of Treaties, which reads -

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen [1963] ECR 1; Flaminio Costa vs. ENEL [1964] ECR 585; and Amministrazione delle Finanze dello Stato vs. Simmenthal [1978] ECR 629). In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either case where there is conflict between the Community law and the national

law the former is given primacy in order that it may be applied uniformly and that it may be effective.

For purpose of illustration, it suffices to briefly describe what are commonly called the Factortame cases. Spanish fishermen who owned British registered fishing boats challenged in the British courts new English legislation for being discriminatory in breach of European Community law. They applied for an interim injunction to postpone the operation of the new legislation pending a preliminary ruling on a reference made to the European Court of Justice (ECJ) to determine if the law was contrary to Community law. The House of Lords dismissed the application on the ground that under the English law the courts cannot issue an injunction against the Crown. That decision was also referred to the ECJ which held that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting an interim relief. On basis of the preliminary ruling by the ECJ, the House of Lords in R vs. Secretary of State for Transport, ex p. Factortame Ltd. (No.2) [1991] 1 A.C. 603, reconsidered and reversed its previous decision.

In the instant reference, the position of the 1st respondent and the supporting interveners appears to be on weaker ground. First, while we appreciate that the election rules were subject of a full debate touching on the provisions of Article 50, and that the rules were adopted through a democratic decision, the decision was made irrespective of the awareness of the possibility that the rules were an infringement on Article 50. Secondly it is noteworthy, that the National Assembly made the rules not in exercise of sovereignty inherent in a state, but in exercise of a discretionary power conferred on it by the Treaty. It was bound to make rules that conform to the primary purpose of the Article that conferred

the power, which primary purpose is to provide for the election of nine members of the Assembly by the National Assembly of each Partner State. That purpose is defeated by the provision of rule 7 of the election rules, which provides for a fictitious election in lieu of a real election.

We therefore find that the election rules infringe Article 50 to the extent of their inconsistency with it, which we have identified.

In the result we declare that the National Assembly of Kenya did not undertake an election within the meaning of Article 50 of the Treaty, and that the election rules in issue infringe the same Article.

We order that the claimants shall have costs of the reference to be borne by the 1st respondent and to be taxed by the Registrar taking into account that a single applicant could have presented the reference. All other parties shall bear their own costs.

Before taking leave of this reference we are constrained to observe that the lack of uniformity in the application of any Article of the Treaty is a matter for concern as it is bound to weaken the effectiveness of the Community law and in turn undermine the achievement of the objectives of the Community. Under Article 126 of the Treaty the Partner States commit themselves to take necessary steps to *inter alia* "**harmonise all their national laws appertaining to the Community**". In our considered opinion this reference has demonstrated amply the urgent need for such harmonization.

Secondly, we also are constrained to say that when the Partner States entered into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they



EAST AFRICAN COMMUNITY

PROCLAMATION

THE HEADS OF STATE OR GOVERNMENT OF THE COUNTRIES OF BURUNDI, KENYA, RWANDA, UGANDA AND TANZANIA PARTNER STATES ON THE DISSOLUTION OF THE SECOND EAST AFRICAN LEGISLATIVE ASSEMBLY

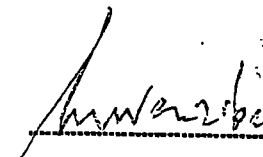
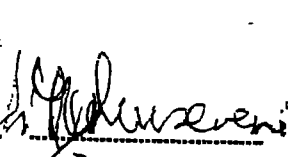
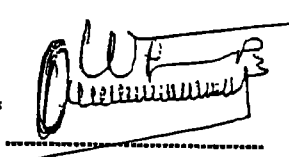
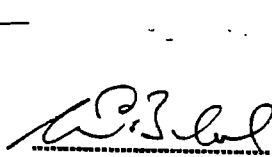
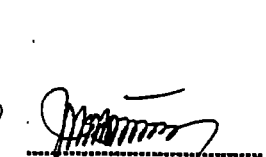
WHEREAS pursuant to Article 51 of the Treaty for the Establishment of the East African Community, elected members of the East African Legislative Assembly hold office for five years;

AND WHEREAS the term of office of the elected Members whose tenure started on the 5th day of June, 2007 expires on the 5th day of June 2012;

NOTING that under Rule 86 of the Rules of Procedure of the East African Legislative Assembly at the expiry of the term of the Assembly, the Heads of State or Government of the Partner States are mandated to issue a proclamation dissolving the Assembly;

NOW THEREFORE, in exercise of the powers conferred upon the Heads of State or Government of the Partner States by Rule 86 of the Rules of Procedure of the East African Legislative Assembly, we hereby proclaim that the first Assembly will stand dissolved with effect from the 5th day of June 2012.

MADE under our hands this.....30th day of November.....2011

				
HE Mwai Kibaki	HE Yoweri Kaguta Museveni	HE Pierre Nkurunziza	H.E Dr. Mohamed Gharib Bilal	Rt. Hon. Pierre Damien Habumuremyi
President Republic of Kenya	President Republic of Uganda	President Republic of Burundi	Vice President The United Republic of Tanzania	Prime Minister Republic of Rwanda



EAST AFRICAN COMMUNITY

PROCLAMATION

BY THE HEADS OF STATE OR GOVERNMENT OF
THE EAST AFRICAN COMMUNITY PARTNER STATES ON THE COMMENCEMENT OF
THE THIRD EAST AFRICAN LEGISLATIVE ASSEMBLY

WHEREAS pursuant to Article 51 of the Treaty for the Establishment of the East African Community, elected members of the East African Legislative Assembly hold office for five years;

AND WHEREAS the term of office of the elected Members, whose tenure started on the 5th day of June, 2007 expires on the 5th day of June 2012;

NOTING THAT under Rule 5 of the Rules of Procedure of the East African Legislative Assembly, the Heads of State or Government of the Partner States are mandated at the beginning of the term of the Assembly to issue a Proclamation for the commencement of a new Assembly;

FURTHER NOTING THAT the Members of the Second Legislative Assembly took Oath of Allegiance as required under the Treaty for the Establishment of the East African Community on 5th June 2007;

AND FURTHER NOTING THAT on the 18th day of June 2007 we issued a Proclamation to the effect that the second Legislative Assembly shall be deemed to have commenced on 5th June 2007;

NOW THEREFORE, in exercise of the powers conferred upon the Heads of State or Government of the Partner States by Rule 5 of the Rules of Procedure of the East African Legislative Assembly, we hereby proclaim that the third Legislative Assembly shall commence on 5th June 2012.

MADE under our hands this.....^{30th} day of ^{November}.....2011

HE Mwai Kibaki

President
Republic of Kenya

HE Yoweri Kaguta
Museveni

President
Republic of Uganda

HE Pierre Nkurunziza

President
Republic of Burundi

H.E Dr. Mohamed
Gharib Bilal

Vice President
The United Republic of
Tanzania

RT. Hon. Pierre Damien
Habumuremyi

Prime Minister
Republic of Rwanda

Annex Four

Treaty for the Establishment of the East African Community
(Election of Members of the Assembly) Rules, 2001

The Clerk

SPECIAL ISSUE

567

Kenya Gazette Supplement No. 77

26th October, 2001

(Legislative Supplement No. 48)

LEGAL NOTICE NO. 154

THE TREATY FOR THE ESTABLISHMENT OF THE EAST
AFRICAN COMMUNITY ACT, 2000
(No. 2 of 2000)

IN EXERCISE of the powers conferred by Article 50 (1) of the
Schedule to the Treaty for the Establishment of the East African
Community Act, 2000, the National Assembly makes the following
Rules:—

THE TREATY FOR THE ESTABLISHMENT OF THE EAST
AFRICAN COMMUNITY (ELECTION OF MEMBERS OF THE
ASSEMBLY) RULES, 2001

1. These Rules may be cited as the Treaty for the Establishment of
the East African Community (Election of Members of the Assembly)
Rules, 2001.

Citation.

2. In these Rules, unless the context otherwise requires—

Interpretation.

“candidate” means a person who is nominated to stand for election to
the East African Legislative Assembly;

“election” means an election to the East African Legislative
Assembly;

“House Business Committee” means the House Business Committee
set up under the Standing Orders;

“nomination” means nomination as a candidate to stand for election
to the East African Legislative Assembly;

“party” means a parliamentary political party;

“party leader” means the leader of a parliamentary political party;

“party whip” means the person designated as such by a parliamentary
political party;

“Returning Officer” means the Clerk of the National Assembly;

“Treaty” means the Treaty for the Establishment of the East African
Community set out in the Schedule to the Act;

“Standing Orders” means the Standing Orders of the National
Assembly made pursuant to section 56 of the Constitution of Kenya.

3. No person shall be qualified to be a candidate for election to the
East African Legislative Assembly unless he or she is qualified to be so
elected in accordance with Article 50 (2) of the Treaty.

Qualification
for election.

4. (1) The National Assembly shall elect the nine members of the
East African Legislative Assembly required to be elected under Article 50
of the Treaty according to the proportion of every party in the National
Assembly.

Election on
basis of party
strength.

(2) For the avoidance of doubt, the number of candidates a party shall be entitled to nominate for election under subrule (1) shall be arrived at by multiplying the number of elected members of the National Assembly of the party by nine and dividing the result by the total number of elected members of the National Assembly.

Nomination procedure.

5. (1) In order to be validly nominated as a candidate for an election, a person must be nominated by a party pursuant to rule 4.

(2) A nomination under these Rules shall be in the prescribed form set out in the Schedule, signed by the candidate and by the party leader or party whip of the party nominating him or her.

(3) Every nomination form shall be accompanied by the following—

(a) proof of citizenship of the Republic of Kenya;

(b) a detailed curriculum vitae of the candidate.

(4) The party leader or the party whip of each party entitled to nominate candidates shall submit the nomination forms of the candidate or candidates nominated by the party to the Returning Officer for onward transmission to the House Business Committee.

Vetting of nominations.

6. The House Business Committee shall consider the nominations submitted to it under subrule (4) of rule 5 and shall ensure that the requirements of Article 50 of the Treaty are fulfilled and that at least one third of the nominees of the parties are women.

Tabling of nominees in the National Assembly.

7. Upon being satisfied that the requirements of rule 6 have been complied with, the House Business Committee shall cause the names of nine nominees of the parties to be tabled before the National Assembly and such nominees shall be deemed to have been elected as members of the East African Legislative Assembly in accordance with Article 50 of the Treaty.

Matters not provided for.

8. If any matter arises which is not specifically provided for in these Rules, the Speaker shall make a ruling directing what is to be done in accordance with the Standing Orders of the National Assembly.

SCHEDULE

(rule 5 (1))

NOMINATION FORM FOR ELECTION OF A MEMBER OF THE EAST AFRICAN LEGISLATIVE ASSEMBLY

Election of a member of the East African Legislative Assembly to be held on the

..... day of20.....

I, the undersigned, being the party leader/party whip of the parliamentary party specified hereunder hereby certify the nomination of the undermentioned person as a candidate at the said election.

Candidate's Name in Full	Address	Occupation or Description