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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT - FOURTH SESSION (2010)

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REPORT OF THE DEPARTMENTAL COMMITTEE  
ON JUSTICE AND LEGAL AFFAIRS

ON THE APPROVAL OF THE CHAIRPERSON AND MEMBERS OF THE  
COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION

Clerk's Chambers,  
Parliament Buildings,  
NAIROBI.

November, 2010

## PREFACE

Mr. Speaker Sir,

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing Order 198(3) which defines function of the Committee as being:

- a) To 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) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Schedule II of the Standing Orders, the Committee is mandated to consider:-

- a) Constitutional Affairs
- b) The administration of law and order (Judiciary, police, prisons department, and community service orders)
- c) Public prosecutions
- d) Elections
- e) Integrity
- f) Anti-corruption and human rights.

The Committee oversees the following Ministries/Departments:

- a) Ministry of Justice, National Cohesion and Constitutional Affairs
- b) State Law Office
- c) The Judiciary

- d) Kenya Anti-Corruption Commission
- e) Interim Independent Electoral Commission
- f) Interim Independent Boundaries Commission

The Committee also has the mandate to oversee all matters relating to political parties.

### **Committee Membership**

The Committee comprises of the following members:

- i) Hon. Ababu Namwamba, M.P - Chairperson
- ii) Hon. Njoroge Baiya, M.P - Vice-Chairperson
- iii) Hon. Abdikadir Mohammed, M.P
- iv) Hon. Millie Odhiambo-Mabona, M.P
- v) Hon. Mutava Musyimi, M.P
- vi) Hon. George Omari Nyamweya, M.B.S., M.P
- vii) Hon. Amina Abdalla, M.P
- viii) Hon. Olago Aluoch, M.P
- ix) Hon. Isaac K. Ruto, E.G.H., M.P
- x) Hon. Sophia Noor Abdi, M.P
- xi) Hon. Eugene Wamalwa, M.P

### **Establishment of the Commission for the Implementation of the Constitution**

The Commission for the Implementation of the Constitution (CIC) is established under Article 5 of the Sixth Schedule to the Constitution. The Commission consists of a chairperson and eight other members. Further, Parliament enacted *the Commission for the Implementation of the Constitution Act, 2010*, to provide for the functions, powers, qualification of and appointment procedure for the chairperson and eight members of the Commission. The nine nominees are to be appointed upon approval by the House.

## Committee Sitings

By a letter Ref. No. OP/CAB.27/1/2 dated November 23<sup>rd</sup>, 2010 the President in consultation with the Prime Minister nominated the following persons to serve on the CIC:-

- |       |                              |   |             |
|-------|------------------------------|---|-------------|
| i)    | Mr. Charles Nyachae          | - | Chairperson |
| ii)   | Prof. Peter Wanyande         | - | Member      |
| iii)  | Dr. Ibrahim M. Ali           | - | Member      |
| iv)   | Dr. Elizabeth Muli           | - | Member      |
| v)    | Dr. Florence Omosa           | - | Member      |
| vi)   | M/s Catherine Muma           | - | Member      |
| vii)  | Mr. Kamotho Waiganjo         | - | Member      |
| viii) | Mr. Philemon Mwaisaka Wawaka | - | Member      |
| ix)   | Mr. Kibaya Imaana Laibuta    | - | Member      |

The Committee held a meeting on November 25<sup>th</sup>, 2010 to consider all the nominees to the CIC. The Committee's hearings were open to the public and the minutes thereof are annexed to this report.

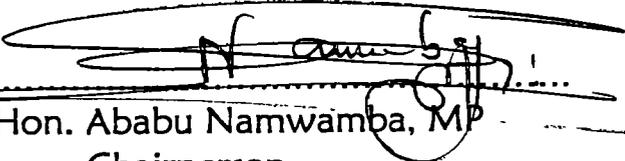
## Acknowledgements

The Committee wishes to thank the offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

**Mr. Speaker, Sir,**

It is my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and commend this report to the House for adoption pursuant to Standing Order 181.

Signed.....

  
Hon. Ababu Namwamba, MP  
Chairperson

Date: .....

28/11/2010

## BACKGROUND

1. The Commission for the Implementation of the Constitution is established by Article 5 of the Sixth Schedule to the Constitution, and has statutory anchorage in *the Commission for the Implementation of the Constitution Act, 2010*. The said Article 5 of the Sixth Schedule to the Constitution as read together with Section 4 of the *Act, 2010* provides for the functions of the Commission as being to:-
  - a) *Monitor, facilitate, and oversee the development of legislation and administrative procedures required to implement the Constitution;*
  - b) *Co-ordinate with the Attorney-General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement the Constitution;*
  - c) *Work with each constitutional Commission to ensure that the letter and the spirit of the Constitution is respected;*
  - d) *Report at least once every three months to the Parliamentary Select Committee on-*
    - i) *The progress in the implementation of the Constitution; and*
    - ii) *Any impediments to the implementation of the constitution;*
  - e) *Exercise such other functions as are provided for by the constitution or any other written law.*
  
2. Section 7 of the *Commission for the Implementation of the Constitution Act, 2010* sets the qualifications of the chairperson and members of the Commission as follows:-
  7. (1) *A person is qualified for appointment as the chairperson or a member of the Commission if such person:*
    - a) *is a citizen of Kenya;*
    - b) *is the holder of a degree from a recognized university;*
    - c) *has knowledge and experience and has had a distinguished career of not less than five years in, but not limited to, any of the following fields –*
      - i) *law;*
      - ii) *public administration;*
      - iii) *economics;*
      - iv) *human rights; or*
      - v) *government;*
    - d) *meets the requirements of Chapter Six of the Constitution.*

(2) *The chairperson of the Commission shall be a person who is qualified to hold the office of Judge of the Supreme Court under the Constitution.*

(3) *No person shall be qualified for appointment as a member if such person:-*

*a) is a State officer;*

*b) is a member of a local authority;*

*c) is bankrupt; or*

*d) has served as a member of the Committee of Experts appointed under the Constitution of Kenya Review Act, 2008.*

3. Section 25 of the Sixth Schedule of the Constitution provides that Commission on the Implementation of the Constitution should be constituted within ninety days of the effective date. The effective date being 27<sup>th</sup> August 2010, the Commission should therefore be constituted **on or before 25<sup>th</sup> November 2010.**
4. Provisions of Chapter 15 (*Commissions and Independent Offices*) of the Constitution apply to this Commission.
5. Pursuant to provisions of the *Commission for the Implementation of the Constitution Act, 2010*, H.E. the President, on 1<sup>st</sup> November, 2010, declared and Gazetted vacancies in the Commission.

### **COMMITTEE DELIBERATIONS AND OBSERVATIONS**

6. At a meeting held on November 25, 2010, the Committee orally interviewed all the nine nominees.
7. In conducting the vetting process, the Committee examined the candidates against the criteria set out in the Second Schedule of the *Commission for the Implementation of Constitution Act, 2010* (Criteria for vetting/approval of nominees for appointment to public office by the National Assembly). That criteria requires the nominees to disclose information on their personal and professional life including their political affiliations, tax compliance and potential conflict of interests.

8. At the conclusion of the vetting exercise, the Committee made the following observations on the nominees:-
- i) **Mr. Charles Ayako Nyachae:** A holder of a Master of Laws (LLM) degree from the London School of Economics, the nominee for Chairperson is academically and professionally qualified for the position. He is an attorney of repute with considerable experience spanning 25 years with proven service to justice and the rule of law. Mr. Nyachae and has also been actively involved with civil society reform-related activities, including serving as chairman of the International Commission of Jurists (ICJ) (1991-1993) and the Institute of Education in Democracy (1999-2003). He also served a three-year stint as a member of the Law Reform Commission (LRC) between 2003 and 2006. His moral standing has not been called into question, nor can he be said to hold any known partisan political persuasions.
  - ii) **Prof. Peter Wanyande:** A Professor of political sciences from the University of Nairobi, Prof. Wanyande is a long-serving Associate Professor at the University of Nairobi where he currently teaches in the department of Political Science. The Committee found the nominee qualified on the basic evaluation grounds of academic qualification, professional competence, moral probity and apparent capacity for non-partisanship. He possesses impressive credentials as a champion for reform, democracy, the rule of law and civil liberties.
  - iii) **Dr. Ibrahim M. Ali:** Dr. Ali holds a Ph. D in Chemistry from the University of East Anglia, Norwich, UK. He has vast experience in the field of environmental research, where he is a pioneer, and has similarly impressive credentials in community service and philanthropic work. The committee found this nominee qualified on the required grounds of academic and professional competence, moral probity and political non-partisanship.

- iv) **Dr. Elizabeth Muli:** The nominee holds a Ph.D in Law from Stanford University Law School, and currently teaches law at the University of Nairobi where she also chairs the Department of Commercial Law. Between 1995 and 1998 she served as a State Counsel in the State Law Office's Department of Treaties and Agreements. The Committee found Dr. Muli duly qualified on the basic evaluation grounds of academic qualification, professional competence, moral probity and apparent political non-partisanship.
- v) **Dr. Florence Y.B.N. Omosa:** Dr. Omosa holds a Ph.D in Decision Science from the London School of Economics and is a distinguished consultant and advisor in the field of decision making and Institution development. She currently works as a Consultant Advisor for Canadian International Development Agency (CIDA), and has previously served IGAD and USAID/ASARECA, among others, as a consultant. Dr. Omosa projects a strong, strict personality and appears to be a stickler for deadlines and discipline. The Committee found her qualified on the basic evaluation grounds of academic and professional competence, moral probity and had no apparent political affiliations.
- vi) **Ms Catherine Mumma:** Ms Mumma is a holder of Master of Laws (LLM) degree from the University of London, and is a distinguished expert on human rights, governance and gender. She has previously served as a State Counsel (1995-2003), Commissioner on the Kenya National Commission on Human Rights (2003-2006), and a Commissioner on the Independent Review Commission on the 2007 Elections (IREC) (the Kriegler Commission - 2008). She currently undertakes consultancy services for diverse clients, including the Ministry of Justice and Constitutional Affairs, Ministry of Gender and the KNCHR. On the evaluation grounds of academic and professional competence, moral probity and capacity for political non-partisanship, the committee found the nominee qualified.

**DISCLOSURE:** The committee, nonetheless, wishes to bring to the attention of the House some allegation that was brought to its attention in the course of vetting Ms Mumma. Indeed Ms Mumma, to her credit, had already volunteered information on the same matter on her own volition right at the commencement of her vetting, subsequent to which the committee received documentation regarding the same.

The matter, which is now subject of civil litigation, arose from a report of the Efficiency Monitoring Unit (EMU) which had questioned some allowances paid to officers, including the nominee, when they served a task force established in 2000 by the National Aids Control Council (NACC) to develop the law on HIV/Aids. Ms Mumma served as Joint Secretary to the Task Force on secondment from the State Law Office.

The committee considered this matter at length, and even invited the nominee back for further clarification. In doing this, the committee inquired into whether this matter raised a question of integrity in the terms of Chapter Six of the Constitution that speaks to the subject of leadership and integrity. The committee also inquired into the potential of this matter raising conflict of interest, especially in the event that the pending civil litigation is concluded against the nominee. It was the considered opinion of the committee that this matter did not raise any question of integrity on the character of Ms Mumma for the following reasons:

1. The issue in question was never whether she had made any false or fraudulent claim, rather it was the misunderstanding between the National Aids Control Council (NACC) and the Directorate of Personnel Management (DPM) as to whether Ms Mumma and the other officers should have been paid a daily or a sitting allowance. The officers had been aware from the onset that they were to be paid a daily allowance, and the misunderstanding between the two agencies is a matter that

arose after the fact and which the officers, including Ms Mumma, were not party to;

2. The pending litigation is a civil matter and not criminal proceedings, seeking to recover perceived payments made in excess of what is alleged to have been due (Kshs 903,000). However, the allegations are based not on the conduct of the nominee but on the administrative incompetence between NACC and DPM, including inconclusive record keeping of schedules and memos. A similar suit filed against the then Chairman of NACC has since been dismissed, in favor of the defendant.
3. The nominee was emphatic that her character was beyond reproach and that she should not be held accountable for confusion and actions others. She held that she had served for the 180 days paid for, and would have been ready to refund the funds if there had been any irregularity, which she maintained there was none. She however did indicate that should the civil suit find that she should refund the monies, she would so, but was firm in her conviction that this would not, by any stretch of imagination amount to *“conflict of interest”* or a *“question of integrity”*.

The on the balance of the information availed to it and the subsequent deliberations against the foregoing background, the committee was satisfied that this matter did not in any material way call into question the integrity and credibility of Ms Catherine Mumma.

- vii) **Mr. Kamotho Waiganjo:** Mr. Waiganjo holds of Master of Laws (LLM) degree in International Trade and Investment Law from the University of Nairobi. Currently a part-time lecture at the Kenya of Law and a Partner in the law firm of Kamotho, Maiyo and Mbatia Advocates, he has been involved in human rights work and also runs a weekly column for a

national daily newspaper. The Committee found the nominee qualified on the basic evaluation grounds of academic and professional competence, moral probity political non-partisanship.

- viii) **Mr. Philemon Mwaisaka Wawaka:** The nominee holds a Bachelor of Arts (BA) degree in Government and Sociology from the University of Nairobi, and boasts of a long public service record, including as Permanent Secretary in the Ministries Agriculture, Health, Transport, Tourism, Supplies and Marketing, among others. The Committee found the nominee qualified on the basic evaluation grounds of academic and professional competence and moral probity. Although he contested a parliamentary seat in 2007, he appears capable of political balance.
- ix) **Mr. Kibaya Imaana Laibuta:** Mr. Laibuta holds a Master of Laws (LLM) degree from the London School of Economics, and is currently in private legal practice (Managing Partner, Laibuta, Kamau & Co. Advocates) as well as a law lecturer at the Kenya Polytechnic University College (UoN). He is a chartered arbitrator who has done work in the Human rights sector especially on matters of disability. Besides finding Mr. Laibuta qualified on the basic evaluation grounds of academic and professional competence, moral probity and political non-partisanship, the committee also took special note of this nominee's distinguished achievements notwithstanding that he is visually challenged.

## RECOMMENDATIONS

Subsequent to the foregoing, the Committee recommends:

i) **THAT**, pursuant to Section 8(6) of the *Commission for the Implementation of Constitution Act, 2010*, this House approves the following nine persons for appointment by H.E the President to the Commission for the Implementation of the Constitution to serve in the stated capacities:-

- |                                 |   |             |
|---------------------------------|---|-------------|
| a) Mr. Charles Nyachae          | - | Chairperson |
| b) Prof. Peter Wanyande         | - | Member      |
| c) Dr. Ibrahim M. Ali           | - | Member      |
| d) Dr. Elizabeth Muli           | - | Member      |
| e) Dr. Florence Omosa           | - | Member      |
| f) Ms Catherine Mumma           | - | Member      |
| g) Mr. Kamotho Waiganjo         | - | Member      |
| h) Mr. Philemon Mwaisaka Wawaka | - | Member      |
| i) Mr. Kibaya Imaana Laibuta    | - | Member      |

ii) **THAT**, in view of the deadline to have the Commission constituted by 25<sup>th</sup> November, 2010, H.E. the President is urged to expeditiously appoint the above-named persons to the Commission in strict adherence to the stated deadline.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

MINUTES OF THE 1<sup>ST</sup> SITTING OF THE DEPARTMENTAL COMMITTEE H – ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY NOVEMBER 25, 2010 IN THE MAIN CONFERENCE ROOM, 1<sup>ST</sup> FLOOR, COUNTY HALL, PARLIAMENT BUILDINGS AT 8.30A.M

PRESENT

Hon. Ababu Namwamba, M.P. - Chairperson  
Hon. Baiya Njoroge, M.P. - Vice-Chairperson  
Hon. Mutava Musyimi, M.P.  
Hon. Nyamweya George, M.B.S, M.P.  
Hon. Isaac Ruto, E.G.H., M.P.  
Hon. Amina Abdalla, M.P.  
Hon. Abdikadir Mohamed, M.P.  
Hon. Millie Odhiambo-Mabona, M.P.

ABSENT WITH APOLOGY

Hon. Olago Aluoch, M.P.  
Hon. Sophia Abdir Noor, M.P

ATTENDANCE BY NON-MEMBERS OF THE COMMITTEE

Hon. Beth Mugo, EGH, M.P.  
Hon. Rachael Shebesh, M.P  
Hon. Joyce Laboso, M.P  
Hon. David Ngugi, M.P.  
Hon. Alfred Khang'ati, MP

IN ATTENDANCE

Mrs. Lucy Wanjohi  
Mr. Zakayo Mogere  
Mr. George Otieno  
Ms. Wanjiru Ndindiri  
Ms. Annette Bosibori

NATIONAL ASSEMBLY

Clerk Assistant II  
Clerk Assistant II  
Clerk Assistant III  
Clerk Assistant III  
Parliamentary Intern

MIN NO. 1/2010

INTRODUCTORY REMARKS

The Chairman called the meeting to order and the Members agreed that anyone with any interests or connection to any candidate should declare in advance in accordance with Standing Order No. 81, and also not participate in the vetting of the related nominees.

The Committee was guided in the vetting process by the questionnaire provided in the Second Schedule of the Commission for the Implementation of the Constitution Act. The following were the main areas covered during the deliberations, among others:

1. The nominee's educational background and personal details
2. Participation in any pro-bono/charity works
3. The nominee's prior professional/Employment History
4. Honours and Awards
5. Sources of income/statement of Net worth/tax compliance status
6. Public office, political activities and affiliations
7. Potential conflicts of interest
8. Whether Charged in a court of law/adversely mentioned in any investigatory report of parliament or any other commission of inquiry

MR. CHARLES NYACHAE

The nominee assured the Committee that he would be non-partisan, objective and put the interests of the country forward. He assured the Committee that his political affiliations would not interfere with his role in the Commission. He also expressed his confidence in the Commissions ability to implement the Constitution within the stipulated timeframe or even earlier.

PROF. PETER WANYANDE

This nominee expressed his belief that implementation of the Fifth Schedule of the Constitution within the timelines given was possible. He stated that upon the setup of the Commission, its first task should be to draw up a workplan.

DR. IBRAHIM M. ALI

This nominee explained to the Committee that this Commission will provide an avenue for Kenyans to participate in matters of governance, and if confirmed to this post, he would do his best to implement the Constitution for the benefit of the country.

### DR. ELIZABETH WANYAMA MULI

The nominee informed that Committee that her background in consultancy for and participation in various governmental agencies and civil organizations, would be of great benefit to the Commission. She was also confident that the task of the Commission would be performed within the stipulated period or even earlier.

### DR. FLORENCE OMOSA

The nominee informed the Committee of her extensive experience and involvement in institutional strengthening and advisory programmes, both locally and internationally, and believes this will be of great benefit to the Commission, if her appointment is approved. She expressed confidence in the Commission's ability to remain objective and succeeding in the challenging task ahead.

### MRS. CATHERINE MUMMA

The nominee informed the Committee of her extensive background as a human rights lawyer, and of her participation in the drafting the new Constitution, and in the related civic education. She also mentioned her membership in the Orange Democratic Movement party, but highlighted that her membership has subsequently not been renewed.

### MR. KENNETH KAMOTHO WAIGANJO

The nominee told the Committee that he was a practising advocate with his own law firm and a part-time lecturer at the Kenya School of Law. He believes his participation in the Constitution-making process, and is prepared to continue in its implementation.

### MR. PHILEMON MWAISAKA

The nominee gave a summary of his long service in the Government as a District Officer, District Commissioner, and later as a Permanent Secretary, among other posts held. He expressed confidence that his vast experience in provincial administration and additional public service will add value to the Commission, in terms of experience, and a passion for reform in the country.

### MR. KIBAYA LAIBUTA

This nominee explained that he is a legal practitioner and teacher, sits on boards of various government agencies and is a chartered arbitrator as well. He believes that his legal background and participation in various civil societies will ensure inclusion of rights for persons with disabilities on the national platform.

The Committee deliberated on the nominees and resolved as follows:

1. MR. CHARLES NYACHAE

Approval for this nominee proposed by: Hon. Musyimi  
seconded by: Hon. Wamalwa

2. PROF. PETER WANYANDE

Approval for this nominee proposed by: Hon. Baiya  
seconded by: Hon. Abdalla

3. DR. IBRAHIM M. ALI

Approval for this nominee proposed by: Hon. Nyamweya  
seconded by: Hon. Namwamba

4. DR. ELIZABETH WANYAMA MULI

Approval for this nominee proposed by: Hon. Abdalla  
seconded by: Hon. Odhiambo-Mabona

5. DR. FLORENCE OMOSA

Approval for this nominee proposed by: Hon. Baiya  
seconded by: Hon. Musyimi

6. MRS. CATHERINE MUMMA

The Committee had concerns regarding the suitability of this nominee due to the presence of an ongoing civil suit against her. Consequently, the Committee resolved to recall this nominee for further deliberations and clarifications before finalizing their decision on her nomination to serve on the Commission.

7. MR. KENNETH KAMOTHO WAIGANJO

Approval for this nominee proposed by: Hon. Abdalla  
seconded by: Hon. Wamalwa

8. MR. PHILEMON MWAISAKA

Approval for this nominee proposed by: Hon. Musyimi  
seconded by: Hon. Odhiambo-Mabona

9. MR. KIBAYA LAIBUTA

Approval for this nominee proposed by: Hon. Baiya  
seconded by: Hon. Abdalla

MIN. NO. 4/2010

VETTING OF MRS CATHERINE MUMMA, NOMINEE  
TO THE COMMISSION FOR THE IMPLEMENTATION  
OF THE CONSTITUTION

Mrs. Muma appeared before the Committee for a second time to clarify issues relating to a case against her. The nominee explained in detail the background of the case which related to her tenure as a joint secretary of a legal taskforce to develop the HIV Bill at the National Aids Control Council. A report by the Efficiency Monitoring Unit alleges that she received money for days that she never worked. She explained that the matter to be determined was whether or not she was entitled to payment per day or per sitting, and does not touch on her integrity.

The Committee considered the matter and was satisfied that the matter was not material since it did not touch on the integrity of the nominee.

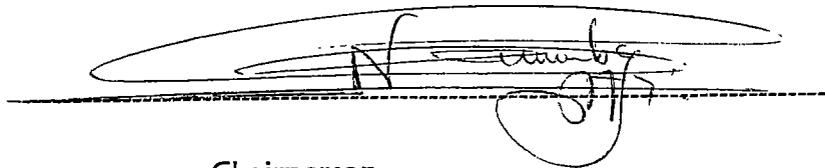
Consequently, the Committee recommended the appointment of Mrs. Catherine Mumma as a Commissioner to the Commission for the Implementation of the Constitution. The proposal was made by Hon. Millie Odhiambo-Mabona, MP and seconded by Hon. Isaac Ruto, MP.

MIN NO. 5/2010

ADJOURNMENT

And there being no other business the Chairperson adjourned the sitting at five minutes past two o'clock.

SIGNED



Chairperson

DATE

25/11/2010