

COUNTY GOVERNMENT OF NAIREOBI



SECOND ASSEMBLY

THE NAIROBI CITY COUNTY ASSEMBLY – (SECOND SESSION)

COMMUNICATION FROM THE CHAIR

No. 09 of 2018

ON THE MATTER OF REMOVAL OF THE LEADER OF THE MINORITY PARTY OR COALITION OF PARTIES AND THE MINORITY WHIP OF THE MINORITY PARTY OR COALITION OF PARTIES AND APPOINTMENTS TO THE POSITIONS

Honourable Members,

My office is in receipt of several letters, relating to changes in the leadership of the Minority party in the Assembly. The first letter, of 25th October, 2018, is from the Hon. John Mbadi, CBS, M.P., Chairperson of the Orange Democratic Movement (ODM) Party, whose net effect is to effect changes to the Minority Party or Coalition of Party's Leadership at the County Assembly pursuant to the provisions of Standing Order 21. This letter from the ODM Party Chairman was conveying to my Office a decision of the ODM Party to remove the earlier designated Minority Leader, Hon. Elias Otieno Okumu, MCA and the Minority Whip, Hon. Peter A. Imwatok, MCA and appointing the Hon. Kennedy Odhiambo Oyugi, MCA as Minority Leader and Hon. Nicholas Okumu, MCA as Minority Whip, as stipulated in the County Assembly's Standing Order 21(7). For the benefit of the Assembly, I did respond to Hon. Mbadi's first letter on the same day, regretting that I was constrained from effecting the communicated changes on various grounds that I will set out later in this communication.

The **second** letter, dated 30th October, 2018, also emanated from the Hon. Mbadi, CBS, M.P., acting consequent to my response to his earlier letter. In this second letter, the Hon. Mbadi reiterated the Party's position as communicated *vide* his first letter and also detailed the basis for his actions, which he clarified was based on the ODM Party's Constitution and the provisions relating to the appointment and removal of its designated leaderships at the Assembly.

Honourable Members, the third letter on this matter is dated 30th October, 2018 and originated from one Oduor Ong'wen, the Executive Director, ODM, asking the Speaker to stay implementation of decisions communicated to my Office by the ODM Party Chairman, Hon. John Mbadi, CBS, M.P.

The foregoing letter was followed by a Fourth letter, from the Hon. Mbadi, CBS, M.P., dated 5th November, 2018, informing my office that the Party is currently engaged in resolving the matter, but that in the meantime, my office to ignore any other correspondences from any other quarters within the party, and move to effect the Changes he had communicated in his first letter.

Honourable Members, the fifth and final letter, from one Edwin Sifuna, the Secretary General of the ODM Party, arrived in my office today 6th November, 2018, communicating that the ODM party has invited its Membership in the Assembly for a meeting to resolve the matters for which I have received the listed correspondences, and further communicating that accordingly, no changes are to be effected until such time as he shall communicate, noting that he is the Authorized Principal Officer, and the person mandated by the Constitution of the ODM Party to issue correspondences on behalf of the Party and all its organs.

Honourable Members, I would ordinarily have responded to the second and subsequent letters from the Chairman of ODM Party and that from the Party's Executive Director and Secretary General through letters from my Chambers. But due to the weighty nature of the issues raised in those correspondences and the public notoriety the matter has gained, I found it prudent, as your Speaker, to address the issues on the very floor of this Assembly from which the authority vested in me is derived.

But, before I address the matters at hand, first, I have reflected on the issues and isolated the following facts in issue which need addressing, summed up as follows.

1. *Whether the removal of the leaderships of the Minority in the House will be by individual party or a coalition of parties;*
2. *Who is the lawful authority to make and communicate the decision of the minority removing its leadership?*
3. *Whether the provisions of Constitution, the law and the Standing Orders have been complied with by the minority coalition as regards the filing of its leadership positions.*

Honourable Members, to begin with, the matters for which I am about to give directions are not unique to this Assembly. Indeed, a precedent was already set in the Senate, and the National Assembly, and indeed across various jurisdictions in the commonwealth. I therefore find it prudent to make reference to the precedents so set elsewhere and draw on a full range of procedural information available to determine how the Standing Orders have been applied and interpreted in the past with relation to the matter at hand. In that sense, I have looked at directions provided by the Speaker of the Senate, Sen. Kenneth Lusaka, M.P., on 15th March, 2018 when a similar question of the recent removal of the Leader of the Minority Party was brought before him;, Considered Rulings by the Speaker of the National Assembly, the Hon. Justin Muturi, EGH, M.P., rendered on Thursday, October 12, 2017 and Thursday, 15th March, 2018 respectively; and indeed Communications by Speaker Francis Ole Kaparo, EGH, M.P., amongst other Speakers of Parliament.

Honourable Members, in the said Communications, similar facts, both on appointment and removal of Minority leaderships at the National Assembly and Senate, were presented to the Hon. Speakers for directions, which directions, in summary, they issued as follows.

On whether the Party represented at the National Assembly by Minority Leader is a Minority party or coalition of parties - Speaker Muturi found in the affirmative, and on the strength of a letter from the Registrar of Political Parties, that there indeed existed a pre-election Coalition agreement in terms section 10 of the Political Parties Act, 2011 amongst the *Orange Democratic Party, Wiper Democratic - Movement Party, FORD Kenya, Amani National Congress and Chama Cha Mashinani*

under the umbrella of the National Super Alliance (NASA) Coalition in terms of Section 10 of the Political Parties Act, 2011. Hence, all the aforementioned political parties constituted a coalition within the meaning of Article 108(3) of the Constitution as read together with Standing Order 20 of the National Assembly Standing Orders for purposes of election of the Leader of the Minority Party, the Deputy Leader of the Minority Party, the Minority Whip and the Deputy Minority Whip.

On the question of who is the lawful authority to make and communicate the decision of the minority appointing its leadership - Speaker. Muturi observed that Article 108 of the Constitution does not provide for the manner of election or removal of the Leader of the Minority Party for the National Assembly. The Speaker further noted that matters relating to political parties and coalitions are governed by the Political Parties Act, 2011, which has its own mechanisms for resolving disputes that may arise under the Act. Accordingly, the Speaker refrained from commenting on matters that fall under the purview of that Act and restricted himself to the requirements of the Standing Orders of the House. In this regard, the Speaker was persuaded that the National Assembly Standing Orders as read together with the Political Parties Act contemplate that a decision appointing or removing the minority leadership in the House ought to be made by the decision-making organ of the coalition of parties forming the minority coalition. Further, a decision made thereof is expected to be conveyed to the Speaker's office ***in writing by the whip of the minority party or coalition of parties who is also obliged to attach the minutes of the meeting at which the decision was made.***

On whether the provisions of the Constitution, the law and the Standing Orders have been complied with by the minority coalition as regards the filing of its leadership positions - Speaker Muturi made a determination that the Minority Party fell short of the prescribed procedure outlined in National Assembly Standing Order 20(4), which requires such communication to be made by the Whip and the minutes of the meeting in which the decision was made attached.

Honourable Members, a similar scenario was replicated in the Senate, with regard to the removal of the Hon. Sen. Moses Wetangula, M.P., as the Leader of the Minority Party in the Senate and his replacement thereof with Sen. James

Orengo, MP, SC, pursuant to Standing Order No. 20, (4) (5) and (6) of the Senate Standing Orders. Unlike the route taken in the National Assembly, the decision to effect changes on the Senate Minority Party Leadership was communicated through a letter from the Senate Minority Party Whip, Sen. Mutula Kilonzo Jnr. on 15th March, 2018. This letter was premised on a letter from the ODM Party, with minutes of the resolution attached, as signed by 16 out of the 27 Senators affiliated to the NASA Coalition, confirming the said resolution. Strikingly, all the 16 Senators were drawn from only one affiliate party out of the five political parties that constitute the NASA Coalition. Nevertheless, Speaker Kenneth Lusaka pended the removal until when the appointment of a new Senate Minority Party Leader was done and communicated by the Coalition in strict compliance with the Standing Orders of the Senate.

Honourable Members, I will now turn to the facts in issue in the instant case of the County Assembly Minority Leadership, which I had earlier identified as follows.

Whether the appointment or removal of the leaderships of the Minority in the House will be by individual party or a coalition of parties

Honourable Members, I am inclined to follow the precedence from the Houses of the National Parliament, so far as settling the question of *whether the appointment or removal of the leaderships of the Minority in the House will be by individual party or a coalition of parties*, with regard to the processes by which decisions to alter party leadership is concerned. Just to jog your mind, permit me to refer the House to the provisions of section 10 of the County Governments Act, 2012, which provides for the County Assembly party leadership as follows: -

County Assembly Party leaders

10 (1) There shall be in each county assembly a leader of the majority party and a leader of the minority party.

(2) The leader of the majority party shall be the person who is the leader of the largest party or coalition of parties in the county assembly.

(3) The leader of the minority party shall be the person who is the leader of the second largest party or coalition of parties in the county assembly.

Whereas section 10 of the quoted Act establishes offices of party leadership within the Assembly, it is silent on the manner of the removal of the said leaderships. There is however no void on the matter, as the said lacuna is addressed through the Standing Orders, made pursuant to section 14 of the County Governments Act, 2012 that bestows power to a county assembly to provide for its own procedures and rules for the proper conduct of proceedings.

Honourable Members, the provisions relating to the matter in question are domiciled in Standing Order 21(7), (8) and (9) of the Nairobi City County Assembly Standing Orders. The said specific Standing Orders provide thus -

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(7) A member designated under paragraph (1) may be removed by the party or coalition of parties that designated him or her by two thirds of votes of all members of the second largest party or coalition of parties in the County Assembly;

(8) The whip of the second largest party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this standing order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made; and

(9) The removal of a member from office under paragraph (7) shall be followed by the designation of such member in his place in the manner provided for under paragraph 1 of this Standing Order within 48 hours.

The question that arises is whether the Assembly could proceed and effect changes on Minority Party Leadership on the basis of a communication from the ODM Party in its singular entity or as part of the Coalition within the meaning of section 10 of the Political Parties Act, 2011 and Standing Order 2?

Honourable Members, to answer the foregoing, the Chair is in possession of information from the Office of the Registrar of Political Parties (ORPP), on the Coalition agreements deposited with the ORPP prior to the 8th August, 2017 General Election. Amongst these agreements, is the agreement deposited on 22nd February, 2017 by the National Super Alliance (NASA) Coalition, comprising of the *Orange Democratic Movement Party, Wiper Democratic - Movement Party, FORD Kenya, Amani National Congress and Chama Cha Mashinani.*

For our purposes, Standing Order 2 provides for a County Assembly Party, thus, a County Assembly Party means *a party or a coalition of parties consisting of not less than five percent of the membership of the County Assembly*. Additionally, and in the instant case, the said Standing Order 2 provides for the Minority Party as *the second largest party or coalition of parties in the County Assembly*. You will note that party arrangements as established outside of these precincts are not the purview of the Speaker. The Chair merely concerns himself with how the Assembly under its own rules and the enabling law recognizes a Party or Parties or Coalition of Parties for purposes of dispensing with our business.

Clearly, **Honourable Members**, I find that the Minority Party in the Assembly is a coalition of parties on the basis of a pre-election agreement entered by the aforementioned parties within the meaning of section 10 of the Political Parties Act, 2011, Section 10(3) of the County Governments Act, 2012 and Standing Order 21 for purposes of election of the Leader of the Minority Party and the Minority Party Whip. It follows, then, that the removal and replacement of the said leaders ought to comply with the manner prescribed in paragraphs (7), (8) and (9) of the said Standing Order 21.

Honourable Members, *the second question is, who is the lawful authority to make and communicate the decision on the removal and replacement of the leadership of the minority party leadership?*

As earlier noted in this communication, which I now reiterate, section 10 of the County Governments Act, 2012, does not provide for the manner of election or removal of the Leader of the Minority Party. I have indeed demonstrated that these matters are provided for in the Standing Orders as the basis for the same. I will therefore limit myself to dispensing with the question of *who is the lawful authority to make and communicate the decision of the minority removing or changing its leadership* on the basis of Standing Order 21(8). For clarity, the Standing Order 21(8) provides thus -

21(8)...*The whip of the second largest party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this standing order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made.*

Honourable Members, paragraph 3 of the Third Schedule to the Political Parties Act, 2011, prescribes what must be provided for in a coalition agreement, amongst which is the criteria or formula for sharing of positions in the coalition structure, roles and responsibilities *and the decision making structure, rules and procedures of the coalition*. My reading of the coalition agreement establishing the Minority Party (*NASA Coalition*) in the County Assembly, specifically under Article 7 of the coalition agreement, leads me to the considered finding that the decision-making organ of the minority coalition is its Summit. Indeed, we must note that the enabling law, whose provisions I have restated repeatedly, makes no distinctions between the operations of parties as far as their interplay with the Senate, the National Assembly or the County Assembly is concerned.

Honourable Members, in my mind, the work of the Speaker, were these matters not have been provided for, would have been to refer back to Standing Order 1, which gives the Chair the power to settle such procedural questions based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, procedures and traditions of Parliament and of County Assemblies of Kenya and other jurisdictions to the extent that these are applicable to Kenya.

In the instant case, however, **Honourable Members**, I am constrained, and therefore I can only proceed on the basis of the express provisions contained in the County Assembly's Standing Orders on these matters, for which I am bound to enforce without fear or favour.

Honourable Members, the threshold as so established by the law, and by the precedence set by the Hon. Justin Muturi, EGH, M.P., Speaker of the National Assembly, in his Communication suffice, and I am inclined to agree with that position. Even so, I am alive to the disputes around the matters for which the Chair is providing direction and the fact that the Chair can only go so far as the Standing Orders and the rules of the Assembly permit. I have had to carefully navigate the path of the Chair with great restraint, keeping in mind that there are dispute resolution mechanisms outside of this House's purview provided for in law for settling the said disputes under the Political Parties Act, 2011.

Honourable Members, this much was noted in 2002, by the Hon. Jonathan Lucas Hunt, M.P., then Speaker of the New Zealand House of Representatives. While giving direction on the nexus between Parties and the House, and how their affairs in as far as the House is concerned, are to be given life by the House, Speaker Hunt averred, and I quote –

*... that whether under the Standing Orders or the Electoral Act, the Speaker is not concerned with what persons outside the House do, but only with what members of the House do by way of giving formal advice of changes to party arrangements through the mechanisms provided for in the Standing orders (**the emphasis is mine**). That the Speaker only acts on formal advice and does not take the initiative. How members conduct themselves politically is a matter for them to determine.*

Be that as it may, I am persuaded to make a similar finding by the precedence so referenced that the Assembly Standing Orders, though taking a different path, contemplate a decision removing the minority leadership in the House to be made by a vote by two thirds of the membership of the a Party or Coalition of Parties forming the minority coalition and further that the decision be conveyed to the Speaker's office, **in writing by the whip of the minority party or coalition of parties who is also obliged to attach the minutes of the meeting at which the decision was made.**

On whether the provisions of Constitution, the law and the Standing Orders have been complied with by the minority coalition as regards the filing of its leadership positions.

Honourable Members,

On the question of whether the provisions of Constitution, the law and the Standing Orders have been complied with by the minority coalition as regards the removal and filling of its leadership positions, I wish to refer you to the provisions of Standing Order 21, which provides as follows, here now reproduced in its entirety -

- 21. (1) The second largest party or coalition of parties in the County Assembly shall designate a member of the County Assembly belonging to the party or coalition of parties to be the Leader of the Minority Party;*
- (2) The second largest party or coalition of parties in the Assembly shall designate a member of the County Assembly belonging to the party or coalition of parties to be the Assembly Deputy Minority Leader;*

(3) *The second largest party or coalition of parties in the Assembly shall designate a member of the County Assembly belonging to the party or coalition of parties to be the Minority Whip;*

(4) *The second largest party or coalition of parties in the Assembly shall designate a member of the County Assembly belonging to the party or coalition of parties to be the Deputy Minority Whip;*

(5) *In the absence of both the Assembly Minority Leader and the Deputy Assembly Minority Leader, the Assembly Minority Whip shall perform the functions of the office of the Assembly Minority Leader;* (6) *Whenever the Assembly Minority Leader is absent or unable to perform his or her functions, the Deputy Assembly Minority Leader shall perform the functions of the office of the Assembly Minority Leader;*

(7) *A member designated under paragraph (1) may be removed by the party or coalition of parties that designated him or her by two thirds of votes of all members of the second largest party or coalition of parties in the County Assembly;*

(8) *The whip of the second largest party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this standing order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made; and*

(9) *The removal of a member from office under paragraph (7) shall be followed by the designation of such member in his place in the manner provided for under paragraph 1 of this Standing Order within 48 hours.*

Honorable Members, Standing Order 21(8) requires the ***whip of the second largest party or coalition of parties*** in the County Assembly to forthwith, upon a decision being made under this standing order, to ***communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made.***

Indeed my office received a letter dated 25th October 2018 from the Hon. John Mbadi, M.P., communicating the ODM Party's decision to recall its earlier letter appointing the Hon. Elias Otieno, MCA, as Leader of the Minority and the Hon. Peter Imwatok, MCA as the Minority Whip and in their respective places, appointing the Hon. Kennedy Oyugi, MCA as Leader of the Minority and Hon. Nicholas Okumu Ouma, MCA as Minority Whip.

Honourable Members, I did respond to the said letter, on the same day, being the 25th October, 2018, highlighting the relevant areas of our Standing Orders in

so far as the powers conferred on me by the Standing Orders allow, for which my office felt the letter fell short of the compliance test, *ab initio*.

Accordingly, firstly, and in similar vein, it is my considered finding, that in terms of compliance with the requirements of Standing Order 21(7), the ODM Party is a Party within the NASA Coalition and therefore cannot speak for the Summit in appointing leadership of the minority party, which is the rightfully recognized decision making organ of the Coalition per the Coalition's agreement deposited with the Registrar of Political parties, this being a matter of public notoriety.

Were we to rely on precedence from the Senate, and for a minute focus purely on the numbers, and whether the end might be the same were the Minority Coalition's Whip to write to my Office, seeing as a majority of the Members of the Minority Party in the Assembly are from the ODM Party, the Standing Orders would still demand evidence of a resolution supported by a two-thirds majority as contained in Minutes of the said meeting at which the resolution was made.

Secondly, the said communication emanated from the Office of Hon. John Mbadi, M.P., being the Chairperson of the ODM Party and the Minority Party Leader in the National Assembly, and other subsequent letters from the Party. This contradicts the provisions of Standing Order 21(8), which domiciles the authority to communicate such party decisions in the ambit of the minority party whip. It need not be emphasized that the Hon. John Mbadi, CBS, M.P., is not, and indeed cannot purport to be, the Minority Party Whip for an Assembly to which he does not belong! Further, the said Communication, supposing we were to entertain it as it were, was not accompanied by minutes as earlier noted, and therefore falls afoul of Standing Order 21(8).

To that extent, I am afraid that the Hon. Mbadi has no jurisdiction on the matters at hand as their transmission to the Office of the Speaker rests entirely within the purview of the party leadership within the county assembly. Attempting to dispose of those matters in a manner and procedure other than the one set out in Standing Order 21 is tantamount to sidestepping the clearly laid down procedures, which, as your Speaker, I swore to safeguard with utmost fidelity.

Honourable Members, when faced with similar matters, the venerable Hon. Francis Ole Kaparo, M.P., made a finding I am inclined to share. My interest was especially piqued by the Communication issued by the Hon. Ole Kaparo, M.P., on the question of internal changes to the then official opposition Party, KANU, and who then was the Leader of Opposition for purposes of recognition for the said party in the National Assembly.

In summary, the then Speaker of Parliament, like Hon. Hunt in New Zealand at the time, noted that party proceedings are foreign to the House unless properly and formally introduced through established mechanisms, surmising, and I quote, that the “.... *registration of political party officials.... is extraneous, foreign and inconsequential to the conduct of Parliamentary business or proceedings in this House. The constitutional responsibilities of conducting, managing, regulating and guiding Parliamentary business lies nowhere else on earth, but on the shoulders of the Chair.*”

In the absence of communication notifying the Speaker of whatever changes in the leadership of the then Opposition Party through formal procedural mechanisms as established in the Standing Orders, the Chair ruled that the Leadership of the Opposition Party in the House remains as was.

Honourable Members, having carefully set out and analyzed the issues for determination as I had identified, it is evident, that –

1. the communications I have received from the Minority Party relating to the filling of its leadership positions have all fallen short of fulfilling the requirements of Standing Order 21(8) in terms of who should communicate and how the communication ought to be done to the extent that they originated from a source foreign to the Assembly and its Standing Orders;
2. the perceived appointment of Hon. Kennedy Oyugi, MCA as the Minority Leader and Hon. Nicholas Okumu, MCA as Minority Party Whip by the Chairman of the ODM Party through his letter, dated 25th October, 2018 falls afoul of the Standing Orders, which contemplate such decision ought to have been made by the decision making organ of NASA Coalition; and
3. the perceived removal of Hon. Elias Otieno, MCA as the Minority Leader by the Chairman of the ODM Party through his letter, dated 25th October, 2018 falls afoul of the Standing Orders, which contemplate such decision carrying

evidence of a two thirds vote by the membership of a Party or Coalition of Parties in the Assembly, as evidenced by Minutes of such Resolution and as Communicated by the Whip of the Minority party or Coalition of Parties; and therefore,

4. In view of the foregoing, I am unable to act on the correspondences from the Chairman of the ODM Party and cannot effect the desired changes in the form so presented, until such a time when the Minority Party acts in strict fulfillment of the laid down procedures including those governing the Coalitions of parties.

Finally, **Honourable Members**, as the Speaker of the Assembly, I am bound to apply the rules of the Assembly without fear or favour, especially in cases where the Standing Orders have expressly provided for the matter in question. To ensure the orderly flow of business, and the maintenance of stability, this Assembly observes parliamentary rules and traditions, both written and unwritten. It is the Speaker's duty to interpret these rules impartially, to maintain order, and to defend the rights and privileges of all Members regardless of their positions.

The House and indeed all parties interested in the matter are accordingly guided.

I Thank You.

THE HON. CHEGE MWAURA, MCA
AG. SPEAKER OF THE NAIROBI CITY COUNTY ASSEMBLY

Tuesday, November 6th, 2018