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Your Ref:

Our Ref:

Date:

C/4303/13

19th April 2013

The Hon. Attorney General
Attorney General's Chambers
Sheria House
Harambee Avenue
NAIROBI

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NATIONAL ASSEMBLY
RECEIVED
22 APR 2013
SPEAKER'S OFFICE
P. O. Box 41842, NAIROBI

ATTENTION: PROF. GITHU MUIGAI

Dear Sir

**RE: REQUEST FOR YOUR INTERVENTION IN PROVIDING APPROPRIATE ADVISE TO THE
SPEAKER OF THE NATIONAL ASSEMBLY IN CONNECTION WITH A PETITION FILED
BY HON. MITHIKA LINTURI, MEMBER OF PARLIAMENT FOR IGEMBE SOUTH**

We have been instructed by Salaries and Remuneration Commission (hereinafter referred to as "SRC") who are sued as the first respondents in petition no. 193 of 2013 (**Justus K. Mate vs. SRC and yourself**) (hereinafter referred to as the said proceedings), to request your intervention, as the legal advisor to the government, in safeguarding the integrity of the said proceedings.

The said proceedings were filed on 15th April 2013. The Petitioner, who described himself as the speaker of Embu County Assembly, seeks *inter alia* orders declaring the remuneration and benefits of state officers, which were set by SRC in the Kenya Gazette Vol. CXV-No. 33 dated 1st March 2013, null and void by reason of alleged breaches of various provisions of the Constitution and several other statutes. This matter remains pending in court and the only issue that arises therein is the question whether, in setting the remuneration and benefits of state officers pursuant to Article 230 (4) (a) of the Constitution as aforesaid, SRC breached various constitutional as well as statutory provisions. The judiciary, as the organ established by the constitution to determine such issues is properly seized of the matter and is in the process of having the matter set down for hearing and finally determined.

In the meantime a petition was yesterday presented to the speaker of the National assembly by Hon. Mithika Linturi, the member of parliament for Igembe South, pursuant to the standing order No. 222 seeking *inter alia* the removal of the chairperson and members of SRC on grounds that, in setting the remuneration and benefits of state officers pursuant to Article 230(4)(a) of the constitution as aforesaid, SRC breached various constitutional as well as statutory provisions.

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ABSENCE

From the foregoing, it is clear that both the courts as well as parliament are contemporaneously determining the same question, to wit, whether in setting the remuneration and benefits of state officers as aforesaid, SRC breached constitutional and statutory provisions.

It is obvious that such an unfortunate situation should not be tolerated at all in a civilized society given its implications on the integrity of both judicial as well as parliamentary processes.

As you are no doubt aware, it is an inveterate principle of law, otherwise known as **sub judice** rule that matters pending for determination in courts of law should be treated as sacrosanct and should accordingly not be made the subject of comments or deliberation by any person or body of persons. To this fundamental rule, an exception has been developed in the context of parliaments according to which parliaments or National Assemblies are, in recognition of their role within a democracy, allowed to debate a matter which is pending before a court of law as long as the primary issue to be determined by the court is left untouched and the responsibility of ensuring that this is achieved is with the speaker of the National Assembly. In an Article by A. Zvoma, Clerk of the Zimbabwean parliament entitled "**The sub-judice Rule: Parliaments and the Courts, implications for the Doctrine of Separation of Powers**", which was presented at the meeting of the Association of Secretaries General of Parliaments, held in Kampala last year, this point was put succinctly thus:

"Thus, in essence.... It is permissible for parliament to investigate a matter pending before the court to the extent that parliamentary investigations are limited to aspects of the matter that are not for determination by the courts. Aspects of a matter that are not for determination by the courts are not sub judice since they are not in issue (in the pending case)".

Informed, no doubt, by the above position, Standing Order No. 289 gives the speaker of the National Assembly the discretion to determine whether or not to allow debate on a matter which is pending before a court of law. It is contemplated that the speaker shall, before allowing debate to proceed on a matter which is pending before a court of law, consider whether the aspects of the matter that are sought to be debated in the house will be similar or different from those that are pending determination by the Court, and where he forms the opinion that the matters sought to be debated will be similar to the matters pending for determination by the court, then he ought to disallow debate in Parliament on the matter. As we have illustrated above, the matters pending determination by the court in the said proceedings are exactly the same matters to be debated in Parliament vide Hon. Mithika Linturi's petition. Accordingly, we hold the respectful view that Hon. Mithika Linturi's petition should be put on hold until the said proceedings are heard and determined, notwithstanding the provisions of the Standing Order No. 289.

Other factors that, we opine, should inform the exercise by the speaker of his discretion to disallow debate on Hon. Mithika Linturi's petition aforesaid pending the hearing and determination of the said proceedings, include the following:

- (a) The fact that parliamentarians are personally interested in the subject matter of the said proceedings (which is also the subject matter of the said petition) makes it impossible for them to objectively and impartially debate the relevant issues as required by the constitution. Article 73 of

the constitution enjoins state officers to avoid conflicts of interests between personal interests and public or official duties

- (b) The fact that Article 165 (3)(d) of the Constitution vests the jurisdiction to hear any question respecting the interpretation of the constitution on the High Court implies that whenever a competition arises between the High Court and any other body as to who should make a final determination as to whether the constitution has been breached or not, the matter should always be resolved in favour of the court

It is for the above reasons that we are requesting you to kindly advise the Speaker of the National Assembly in your capacity as the official legal adviser of the Government to disallow any debate on Hon. Mithika Linturi's petition aforesaid until the said proceedings is heard and determined

Yours Faithfully

RACHIER & AMOLLO ADVOCATES

J.O. ARWA

Cc: The Hon. Justin Muturi
Speaker of the National Assembly
Parliament Building
Nairobi

Cc: The Hon. Willy Mutunga
Chief Justice and President of the Supreme Court of Kenya
Nairobi

Cc: The Secretary,
Salaries & Remuneration Commission
6th Floor, Williamson House
4th Ngong Avenue
Nairobi

Noted. CNA to advice.
BW
SNA
22/4/13