

KatibaNews

Towards a new constitutional dispensation in Kenya

MAY 2009

Issue NO. 5.09



Can the Mungiki dragon be slain?

- * Migingo Island dispute
- * Interview with Nzamba Kitonga
- * Katiba briefs
- * Losing the plot!

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ABOUT THE MEDIA DEVELOPMENT ASSOCIATION

The Media Development Association (MDA) is an alumnus of graduates of University of Nairobi's School of Journalism. It was formed in 1994 to provide journalists with a forum for exchanging ideas on how best to safeguard the integrity of their profession and to facilitate the training of media practitioners who play an increasingly crucial role in shaping the destiny of the country.

The MDA is dedicated to helping communicators come to terms with the issues that affect their profession and to respond to them as a group. The members believe in their ability to positively influence the conduct and thinking of their colleagues.

The MDA aims at:

- Bringing together journalists to entrench friendship and increase professional cohesion; Providing a forum through which journalists can discuss the problems they face in their world and find ways of solving them;
- Organising exhibitions in journalism-related areas such as photography;
- Organising seminars, workshops, lectures and other activities to

discuss development issues and their link to journalism;

- Carrying out research on issues relevant to journalism;
- Organizing tours and excursions in and outside Kenya to widen journalists' knowledge of their operating environment;
- Publishing magazines for journalists, and any other publications that are relevant to the promotion of quality journalism;
- Encouraging and assist members to join journalists' associations locally and internationally;
- Creating a forum through which visiting journalists from other countries can interact with their Kenyan counterparts;
- Helping to promote journalism in rural areas particularly through the training of rural-based correspondents;
- Advancing the training of journalists in specialised areas of communication;
- Create a resource

centre for use by journalists;

- Reinforcing the values of peace, democracy and freedom in society through the press;
- Upholding the ideals of a free press.

Activities of MDA include:

- Advocacy and lobbying;
- Promoting journalism exchange programmes;
- Hosting dinner talks;
- Lobbying for support of journalism training institutions;
- Initiating the setting up of a Media Centre which will host research and recreation facilities;
- Working for the development of a news network;
- Providing incentives in terms of awards to outstanding journalists and journalism students;
- Inviting renowned journalists and other speakers to Kenya;
- Networking and liking up with other journalists' organisations locally and abroad.

This newsletter is meant to:

- 1 Give critical analysis of democracy and governance issues in Kenya.
- 2 Inform and educate readers on the ongoing Constitution Review Process.

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Managing Editor
Stephen Ndegwa

Associate Editors
Susan Kasera
Patrick Mwangi
Henry Owuor

Office Assistant
Monica Muthoni

Photography
Carnelian Pictures

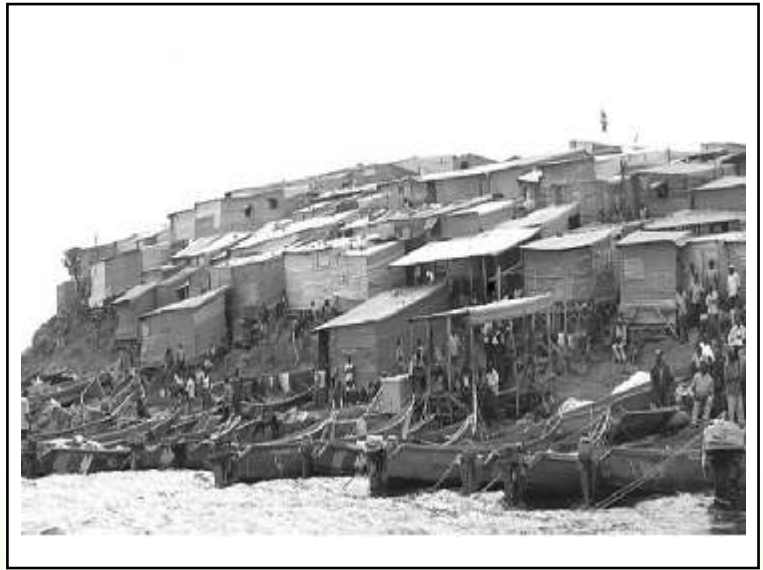
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All Correspondence to:
The Editor
Katiba News
P.O. Box 64254-00620
Tel. 2712309
Nairobi, Kenya
Email: mediakenya@yahoo.co.uk

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Can the Mungiki dragon be slain?

For over ten years now, the proscribed Mungiki sect has spread both its reach and terror in equal measure across the country. But, pray, where did this monster come from and what really does it intend to achieve? This article takes a comprehensive view of this growing organisation.

By Dorothy Momanyi

In Kenya, many urban areas in the slums of Nairobi remain ungoverned by formal state institutions. The police presence is thin and social services are rarely provided. Security has been neglected by the state and is therefore privately run by vigilante movements and militia. This situation has been described as fragile and failing but functioning in its own way. This situation has been festered by the misuse by Government officials of limited human and financial resources available and the exponential growth of parallel organisations which are increasingly violent.

It is estimated that more than one third of the Nairobi population lives in slums. Nairobi has experienced rapid and substantial growth paralleled with massive increase in crime. The growth in population has not been matched with provision of basic

services to the populace. The security situation has been worsened by the availability of small arms from war torn neighbours which are trafficked across porous borders.

Nairobi harbours a diverse mix of urban gangs and other social organisations that have monopolised the use of force and provision of security. These gangs operate in the slum areas and include Geri ya Urush, Geri ya Ngei, Baghdad Boys, the Albania, the Harare, Taliban, Mungiki and

Jeshi La Mzee. These vigilante groups and militias were declared illegal by the government in 2002. The names relate to a location, ethnic group, national or international political event or a political party. The Mungiki are the most notorious, long established and controversial of all. The group is located in various parts of urban slums such as Kariobangi, Embakasi, Mathare Valley and Kibera. The Mungiki's activities vary from resolving landlord-tenant disputes, providing vigilante justice, providing security and control of public and social services such as transport, garbage collection, public toilets and electricity and water supply. State related functions are thus part of the new power configurations, where alternate groups assume control with uncontrolled consequences.



Mungiki adherents sniffing tobacco.

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The Mungiki has a long cultural history. It is a semi religious and cultural ethnic protest movement which originated from rural areas of the Rift Valley in the early 1990s. The founding members were Kikuyu victims of the 1992 and 1997 ethnic violence soon after the reintroduction of multi-partism in Kenya. The Mungiki was essentially a revolt against land eviction and oppression by the political elite. The Mungiki has become a large and decentralised movement in Nairobi and adjacent urban areas.

Mungiki is a Kikuyu word meaning masses or the people. The group has a strong ethnic character, reviving a new form of ethnic chauvinism and fundamentalism among the poor Kikuyu. Members of the group express a feeling of community and sharing and reflect a desire for recognition despite a history of marginalisation. This cultural and ethnic sentiment has been utilised by the Mungiki to mobilise victims of political violence, the unemployed and landless slum youth. The Mungiki is sponsored by key figures in the Kikuyu business and political elite. The group claims ideological links with the Mau Mau. The group has adopted Mau Mau tactics of causing terror through macabre killings such as beheadings or burning persons alive. The group holds trials for people who violate its behaviour and punishes through detention maiming or even killing persons found guilty.

The group has developed into an influential non state actor, monopolising security and other

Nairobi harbours a diverse mix of urban gangs and other social organisations that have monopolised the use of force and provision of security. These gangs operate in the slum areas and include Geri ya Urush, Geri ya Ngei, Baghdad Boys, the Albania, the Harare, Taliban, Mungiki and Jeshi La Mzee. These vigilante groups and militias were declared illegal by the government in 2002. The names relate to a location, ethnic group, national or international political event or a political party.

essential services, predominantly in the urban low income areas by creating parallel governance structure, including an elaborate tax collection and judicial system. The Mungiki have taken over the provision of security, water electricity, management of transport services and replaced the Chiefs in arbitration of family disputes. The gang exploits a law and order vacuum in the slums. After the Mungiki attacked other tribes whose gangs were killing Kikuyus during the post election violence in 2007, the Mungiki gained some legitimacy and were hailed as protectors.

The purchase, supply and use of small arms by vigilantes and militias have not been fully investigated. However, weapons are not a prerequisite for the urban violence as pangas and

knives are frequently used. The rise of the militia has been further contributed to by lack of government and police control and wide spread corruption. The vigilantes, such as Mungiki, are the perpetrators of urban violence on one hand but they protect people in areas where the State has failed to do so because of mismanagement, corruption or lack of political will.

Recent upsurge of the organisation – the underlying cause

There are reports that Mungiki were deployed to ease violence in the Rift Valley during the post election violence. This was confirmed by the Commission of Inquiry into the Post Election Violence Report. In 2007, there was a police operation against the group which eased out towards the end of 2007. In 2006 and 2007, there are allegations of extra judicial killings of members of the group by the police. Informal gangs and militia were responsible for most of the post election violence deaths. The Mungiki was used as a counter weight to then communities who were expelling Kikuyus from the Rift Valley.

The objectives of the Mungiki have been variously described as political, religious, social and economic. In 2000, the group announced is short lived merger with the Muslims. The group has stated in the past that its intention is to mobilise its members and seek economic, political and social change in society. The Mungiki has insisted that it was formed due to

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oppression of its members by the Government.

The effect of the economic downturn has led to the resurgence of insecurity. Due to the inability of the Government to ensure equitable distribution of resources, especially to the rural areas and urban slums, the militias and the vigilantes have started to thrive again after a lull prior to 2007 elections. This has been exacerbated by increasing poverty in the rural areas, apparent economic inequalities, high poverty levels, and deprivation. The economic motives of Mungiki have transformed it into an economic crime syndicate.

This syndicate has not extended its operations to the rural areas hence the resentment. The operations of Mungiki in Kirinyaga district have been opposed by the residents who have formed vigilante groups and lynched fifteen suspected Mungiki adherents. To prevent further spread of vigilantism, Mungiki adherents are suspected to have killed twenty nine people in Nyeri District near the border with Kirinyaga district in April, 2009.

Vigilantism and *Mungiki* – two sides of the same coin

The public has been forced to resort to vigilantism due to the inaction of the police on Mungiki. It is feared that some police officers have been colluding with

Mungiki and are beneficiaries of the loot collected by the group. The police and provincial administration are deemed beneficiaries of the protection fees collected by the Mungiki hence their inaction. This has led to diminished faith among the public on Mungiki. Since January, 2009, there have been reports of vigilante groups lynching Mungiki adherents in Kirinyaga District. So far the police and the provincial administration seem to covertly support the vigilantes. No persons have been arrested for vigilante activity. The

protection scheme which has hindered the public from adducing evidence against Mungiki due to fear of revenge attacks. The Mungiki have in the past engaged in extortion schemes in the urban areas. The public is incensed due to their attempt to levy security and other charges in the rural areas, where most inhabitants are poor.

The Government must adhere to the rule of law in dealing with Mungiki and other criminal gangs. The principle of presumption of innocence until proven guilty must be upheld for suspected Mungiki adherents. Members of the public in Mungiki prevalent areas are living between a rock and a hard place whereby they are either conscripted to Mungiki or to vigilante groups.



It is total war between the Government and Mungiki

prevalence of Mungiki adherents and the demonstrated inability of the police to deal with the group have led to a general state of increased insecurity in Central Province.

In April 2009, the Mungiki adherents conducted revenge attacks due to increased vigilantism by the public. The police have been deemed incapable of ensuring the security of the citizens hence the rise in vigilantism. This is further worsened by the lack of a witness

The danger with the vigilante is the ability for the groups to transform into groups similar to Mungiki where they will levy fees to protect the public. It is therefore important to reform and equip public institutions such as the police so that they are able to effectively protect the public and deter vigilantism as a means of ensuring long term security.

Tackling the *Mungiki*- Rule of law options

The Government through the Police, Criminal Investigations

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Migingo Island dispute

Political ploy or genuine boundary dispute?

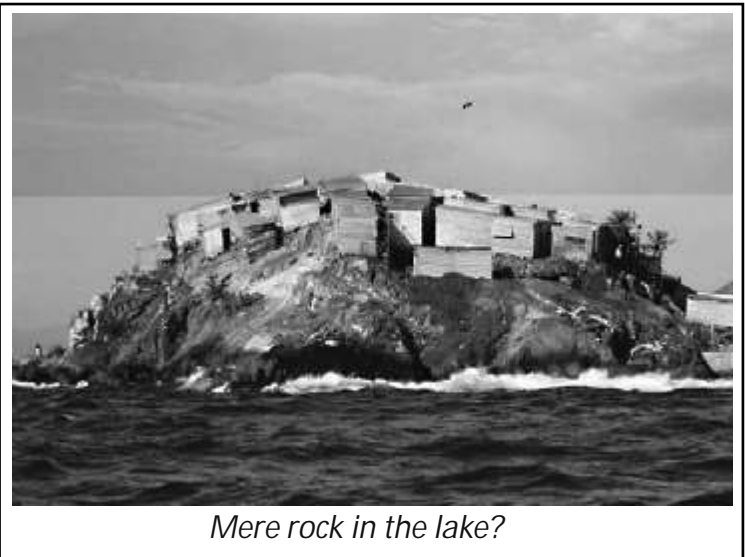
Very few of us had heard of this tiny island tucked somewhere in Lake Victoria near Kisumu. But all of sudden the word "Migingo" has spawned all manner of stories, theories and conspiracies. Our writer looks at different scenarios of the unfolding saga.

By Mark Othello

Kenya and Uganda are embroiled in a dispute over a rocky island in Lake Victoria for the past five months. The island's dispute is about one acre in size, inhabited by a fishing community of approximately 1000 persons drawn from across East Africa. The island is located 10 kilometres from Kenyan mainland. The dispute flared when Kenyans living in Migingo were required to purchase special permits from the Ugandan Government.

The significance of maritime boundaries in international relations has grown with the expansion of national limits of maritime jurisdiction and the availability of natural and fishing resources in the sea. Many countries do not view boundary making as a priority in the absence of any incidents or natural resources. The causes of boundary disputes include disputed sovereignty over land and overlapping entitlements to maritime rights and jurisdictions. Two countries can claim sovereignty over the same island or area of the mainland. The resolution of the dispute involves examination of rules on acquisition of sovereignty including the occupation and administration of territory. Where there is overlapping claim to maritime rights, the rules applicable relate to delimitation of maritime boundaries as provided in the UN Convention of the Law of the Sea which was adopted in 1982, state practice and jurisprudence.

The UN Charter provides for peaceful settlement of disputes by means of parties own choice, including negotiation. In case of failure of such negotiations, the dispute may be referred to the United Nations Secretary



Mere rock in the lake?

General for conciliation, referred to arbitration or to judicial settlement by the International Court of Justice. Maritime boundary disputes are settled by resolving sovereignty differences, establishing the complete boundary between the disputants, establishing a partial boundary or a combination of the solutions. The dispute on the sovereignty is resolved by identifying which state can demonstrate having carried out more activity on the disputed territory.

The potential political and security risks of boundary disputes are high. Unresolved boundaries chill economic activity because of fear of action by the other State. They inadvertently cause disputes, for example if fishermen are arrested for fishing in a border area. This has frequently happened in Lake Victoria where Ugandan and Tanzanian security forces have arrested Kenyan fishermen for fishing in their territory.

States may agree on a provisional boundary. This may include creation of

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special areas and joint development agreements. The joint development agreement must create and define the extent of the area, provide that the arrangement is interim pending the final resolution of the boundary dispute, have a long duration and provide for a system of agreed division of production revenue.

Out of the three Migingo Islands, Uganda laid claim to one island in February 2009. Uganda had put up its national flag and posted armed police and army officers to provide security. The flag was lowered in April, 2009 amidst a diplomatic row between Kenya and Uganda. The Presidents of Kenya and Uganda met at the sidelines of the COMESA Summit in Lusaka, Zambia where they agreed that the dispute should be resolved diplomatically. The two states have agreed to resurvey the boundaries of the island and the Uganda- Kenya boundary in Lake Victoria according to the 1926 Order in Council.

The President of Uganda has escalated the diplomatic spat by declaring that whereas the island was in Kenya, the waters surrounding it were indeed in Uganda and thus Kenya fishermen would not be permitted to fish in Ugandan territory. The comments by politicians have further aggravated the dispute. While Kenyan politicians insist that the island belongs to Kenya, the Ugandans insist that it is their territory. This posturing has occurred even before the land has been surveyed to establish the correct boundaries. This declaration has been made before the completion of the resurvey of the boundary.

There has been anger from the public in Kenya over the Uganda's occupation of the island which has led to acts of sabotage like the uprooting of the railway in Kibera due to the delayed resolution of the dispute. The public has not been updated on the progress of the diplomatic efforts to resolve the dispute. A close look at the dispute reveals that the bone of contention is not about the island but fish harvesting in Lake Victoria. Whereas Kenya has 6% of the lake, Uganda has more than 43% of the lake while Tanzania possesses 51% of the lake. The fish resources in the lake have been declining in the recent past and the dispute has been triggered by the declining fish stocks in the lake.

Available resolution mechanisms

A number of dispute resolution mechanisms have been identified and utilised by different countries to resolve boundary disputes. These are:

a) Diplomacy and negotiation. States involved in a boundary dispute can resolve the dispute through diplomacy and negotiations. In the pre-negotiation

stage, the negotiators are required to study the geography of the boundary, the interests of parties, the maritime legislation applicable and the diplomatic history of the parties. The negotiators will then identify the applicable law including whether to apply customary international law or treaty law.

- b) Conciliation. If the efforts at negotiations fail, the States can submit the dispute to conciliation. States may utilise good offices such as the UN Secretary General to conciliate the State and resolve a boundary dispute. Other bodies that may be involved include continental bodies like the African Union and regional economic communities.
- c) International Court of Justice and the Permanent Court of Arbitration. Recourse to arbitration and judicial settlement can be considered. States may refer a dispute to the International Court of Justice for arbitration and judicial settlement. The adjudicating authority seeks to settle any claims on sovereignty prior to fixing the boundaries. This approach was adopted in the case of *Eritrea versus Yemen*. The two issues may be taken together like in Cameroon Versus Nigeria. Sovereignty disputes play a role only in the minority of cases. The ICJ adopted a consistent approach in first drawing equidistant line between all valid base points and then considering equitableness and taking the geographical features into account.
- d) Military intervention. Boundary disputes may result in military deployment and use of force. There was a war between Ethiopia and Eritrea between 1998 and 2000 over a disputed boundary.

Given that Kenya and Uganda are members of the East African Community and the Common Market for Eastern and

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Southern Africa, it is imperative that the two states attempt to resolve the dispute over the island amicably. This will save both countries the necessity of protracted settlement to the dispute. Already surveying work is being done to establish the boundaries between the two countries in Lake Victoria.

The dispute over Migingo highlights the challenges of integrating the East African States. The borders among the five East African countries lack definition, demarcation and maintenance. The ownership of the island can be established by reviewing and recognising the boundaries that the two countries inherited from Britain at independence. The boundary had been established under the Kenya Colony and Protectorate (Boundaries) Order in Council of 1926. The States should negotiate and resolve the dispute in the interest of East African Community. If efforts at negotiation fail, then the States may refer the dispute for conciliation by the UN Secretary General or such other appropriate good office including the Heads of State of EAC partner countries.

The International Court of Justice (ICC)

The key principle is that ICC only has jurisdiction on the basis of consent. The court has no true compulsory jurisdiction. Jurisdiction is often a key question for the Court, because it is often challenged by the respondent. The ICC deals with contentious cases between States whereby the court issues binding rulings. The states must have agreed to submit to the ruling of the court. The ICC also issued advisory opinions which provide reasoned non

binding rulings on questions of international law at the request of the UN General Assembly. The opinions do not have to concern questions between states.

The States may refer cases to the ICC based on special agreement. The agreement is an explicit consent and the States express a desire for the dispute to be resolved by the Court and are likely to comply with the findings of the Court. The Court may have jurisdiction to determine matters specifically provided for in treaties and conventions in force. However, States may refuse to comply with judgements on cases founded on this compromised jurisdiction. States may make declarations accepting the jurisdiction of the Court as compulsory. Finally, the ICJ may acquire jurisdiction as a result of declarations made under the Permanent International Court on Justice Statute.

The UN Charter provides that obligations under the Charter take precedence over other treaty obligations. There is therefore potential conflict between the resolutions of the UN Security Council

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Maybe there is more than meets the eye.

Department and the National Security Intelligence Service should intensify intelligence gathering, especially in the rural areas and urban slums where the Mungiki are most prevalent. The intelligence will assist the Government to penetrate the Mungiki cells. At present, the Mungiki seems to have an upper hand as the Government seems to lack intelligence on their activities or the police have been ignoring intelligence on Mungiki.

The Mungiki are organised in a cell structure rather than vertical or hierarchical structure. This fragmentation is a cause of major social danger and provides incredible resilience over time. The group seeks a degree of invisibility to enable continued links with political and established business patrons. In the absence of a strong central government, the gangs have claimed territory, population, security and judicial services, a taxation system and a monopoly of violence.

The Government must devise and implement long term reforms to ensure jobs for the youth. This will address the root causes contributing to the emergence of the groups. The community policy initiatives seem to have collapsed. The public is disillusioned as suspects arrested by the community are routinely released without charges by the police. The programmes must offer economic empowerment at the community level. In the rural areas and urban slums, the Mungiki has thrived due to the absence of state agencies. This means there should be increased presence of police by building more police posts and posting more officers.

Long term unemployment and social exclusion leave youth with fewer options other than to resort in violence and crime. The youth joins the gangs because they cannot attend school or find employment. The increasing levels of poverty heighten the motivation for criminal behaviour and violence. The availability of small arms has created a multiplier effect on violence especially at the community level. Violence has been accepted as a legitimate method for settling disputes.

The Government must demand that politicians and business elite who have in the past been associated with Mungiki either condemn the group or they are prosecuted. The perceived official acquiescence of Mungiki has contributed to the thriving of the

The operations of Mungiki in Kirinyaga district have been opposed by the residents who have formed vigilante groups and lynched fifteen suspected Mungiki adherents. To prevent further spread of vigilantism, Mungiki adherents are suspected to have killed twenty nine people in Nyeri District near the border with Kirinyaga district in April, 2009.

group and the impunity of its members.

Policy and community based solutions must be formulated to deal with the gangs. The Government must conduct wide public consultations on the Security Policy. The Organised Crimes Bill, 2007 must be fast tracked to deal with vigilante and militia groups in the country. The Police should invest in crime detection and conviction of criminal rather than killing suspects. The South African Police when faced with similar criminal gangs have been able to successfully prosecute warring taxi bosses in Johannesburg and Cape Town.

The certainty of arrest and conviction, not ferocity of punishment, will assist in combating rising crime. The police should ensure visible policing of back streets and slum areas to reduce the dependence of the public on the gangs to resolve their legal problems. The Government should enhance access to justice mechanisms in slum areas and rural areas by recognising community dispute resolution mechanisms and building more courts to ensure use of formal dispute resolution mechanisms rather than the public turning to Mungiki. The Government must allocate adequate resources to the police and security agencies given that securing the right to life and liberty forms the cornerstone to the necessity and legitimacy of any Government. **KN**

The writer is a freelance journalist.

Interview with Nzamba Kitonga

Retired President Daniel arap Moi often stated that the best way to get a new Constitution for Kenya was to engage constitutional experts who would be well versed with the intricacies of such an exercise. That may seem the realisation of the Government at last. But is it? *Katiba News Correspondent* spoke with Nzamba Kitonga, Chairman of the Committee of Experts on Constitutional Review, on what he hopes to achieve in addition to other pertinent issues.

KN: What is the mandate of the Committee of Experts on Constitutional Review?

Nzamba: Our mandate is inter-alia to study the different previous constitutional texts, that is, the Prof Yash Pal Ghai draft, the Bomas draft and the Wako draft so as to come up with a harmonised new draft Constitution.

KN: Who are your major stakeholders and what do they bring to the process? Who are the other interest groups in the process as a whole?

Nzamba: The major stakeholders are the people of Kenya and they bring their views on a people's constitution. Others are the political class, civil society, professionals, religious groups, marginalized groups and many others

KN: Are you satisfied with

the Constitution of Kenya (Review) Bill 2008? If not, what amendments would you recommend?

Nzamba: We are not satisfied. We have already recommended amendments. Some of our proposed amendments have been accepted and are contained in the recent publication of the Statute Law (Miscellaneous Amendments) Bill 2009.

KN: Do you think Kenyans are sufficiently informed on the kind of Constitution best suited for the country?

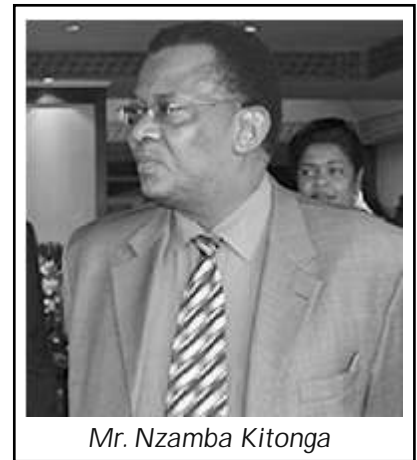
Nzamba: Yes they are informed in terms of ideas. It is for us as experts to translate them into law.

KN: Is the Constitution really the panacea for Kenya's governance crisis or should we think of instituting extra legal interventions?

Nzamba: A good constitution is only a starting point as a panacea for Kenya's governance crises. The next step will be for us as Kenyans to resolve the leadership question. A good constitution is only a means and not an end in itself.

KN: How will your work complement that of MPs (Parliament) and the PSC on the Constitution in the review process? Is there not a high risk of duplication and conflict?

Nzamba: We are by statute



Mr. Nzamba Kitonga

required to give the final draft to parliament which has its own role of passing it. Before that members of parliament including members of the P.S.C. have the same right as other citizens – i.e. to submit their views either individually or as members of political parties. The question of conflict and duplication does not therefore arise.

KN: Could we say that formation of your Committee finally vindicates former President Daniel arap Moi oft repeated stand that constitutional experts were the most competent people to review our Constitution?

Nzamba: No! With the greatest respect to the retired President the Bomas and pre-Bomas processes were essential prerequisites to any constitution making agenda because the people had to be consulted for their input so that they could own the process. In themselves these processes could have completed the constitutional review process if political

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Katiba briefs

March 3 - Kenyans will have to wait longer as hopes of having a new Constitution before the end of the year as promised by the Government are dashed yesterday. Former Justice Minister Martha Karua and Attorney General Amos Wako said the committee of expert on the review process has until March 2, 2010 to deliver a draft Constitution.

The search for Kenya's new Constitution has started following the swearing-in of a new team of experts, with Nzamba Kitonga as Chairman and Atsango Chesoni as Vice Chairman. The two were elected by consensus at former Justice Minister Martha Karua's office in what she said was based on gender parity.

March 14 - Former Justice Minister Martha Karua says the Constitution of Kenya Review Act will be amended to reinstate provisions of the Reference Group (RG) in order to stop grumbling by the civil society.

March 16 - Prime Minister Raila Odinga wants a federal system of government (*Majimbo*) adopted after the Constitution review process. Raila told a rally at Bukembe market in Bungoma that "a federal system was the best for us".

March 19 - A legal tussle looms between the civil society and the Committee of Experts on Constitutional Review. The altercation stems from uncertainty on which lobbies qualify for the exercise as reference groups.

March 20 - The Constitution of Kenya Review Act, 2008 will be amended to allow input from more parties. According to former Justice, National Cohesion and Constitutional Affairs, Minister Martha Karua, the changes will be effected through the Statute Law Miscellaneous (Amendment) Bill.

March 21 - Former Justice Minister Martha Karua urges political parties to support constitutional review initiatives. Speaking after a meeting with representatives of political parties at a Nairobi hotel the previous day, Karua urges all stakeholders to support the review process.

March 24 - The new Constitution will be a negotiated document without contentious issues, former Justice Minister Martha Karua said. Unlike the controversial Wako and Bomas drafts in 2005, Karua assured Kenyans the new Constitution making process would be a consensus building exercise.

March 31 - The Committee of Experts on Constitution Review has expressed confidence it can deliver a new Constitution if vested political interests do not bog down the process. The Committee says it will focus on contentious issues to build consensus before the document is presented at a referendum.

April 19 - Parliamentary select committees are expected to expedite the formation and approval of both the Constitution

review and Electoral commissions by Parliament in a move to speed up reforms. The Parliamentary Select committee on Constitutional Review has already adopted a report that may finally fill a four-month electoral vacuum.

April 20 - Reconstitution of the 27 parliamentary committees, adoption of the Interim Independent Electoral Commission members and the constitutional review process will be Parliament's priority, Vice-president Kalonzo Musyoka said.

May 6 - The new Justice and Constitutional Affairs Minister, Mr Mutula Kilonzo, has committed himself to deliver a draft Constitution by the end of the year.

Also on the list of things Mutula pledged to deliver while taking over office were a push for a Supreme Court and radical police reforms.

May 10 - Political leaders promise to honour the memory of the late Professor Okoth Ogendo (former Commissioner of the defunct Constitution of Kenya Review Commission) by enacting a new Constitution within a year.

May 11 - Former President Daniel arap Moi urges the country's leadership to consult widely on the new Constitution before it is enacted. He said leaders should stop taking the issue casually.

May 15 - The Law Society of Kenya (LSK) has protested at

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disputes had not arisen before the Referendum. We are a tailend extension to those two processes. Our purpose is largely to build consensus on disputed areas.

KN: What are the contentious issues in our Constitution and how do they relate to our politicians' vested interests?

Nzamba: It would be pre-emptive and presumptuous for me to identify and comment on the contentious issues at this point because we have asked Kenyans to give us their views on the same. I will comment on these at a later stage.

KN: How do you plan to get consensus on these issues? Don't you think the referendum will polarise the country again?

Nzamba: We propose to build consensus through dialogue

among the various interest groups by encouraging them in the spirit of give and take to accommodate each other. The message has to be preached that there can never be a constitution which is acceptable to all. A Constitution is by its very nature a negotiated compromise document.

As Convenor of the Law Society of Kenya sub-committee on the Constitution we advised parliament against a referendum because of our fears that a referendum may polarize the country. Our objections were, however, overruled. Nevertheless, the current Review Act allows the country to postpone or embargo decisions on issues which are not agreed upon. In addition, there is optimism arising from the lessons of the post election violence that the political class will this time round act responsibly by not poisoning the national mood. It may therefore be possible to hold

a "positive" referendum. The rest we must leave to God and country.

KN: In your own view, what system of government would you propose for the country, that is, Parliamentary versus Presidential?

Nzamba: Again, I cannot purport to be prescriptive at this nascent stage of the Constitutional Review Process. I am, however, encouraged that the enactment of National Accord has allowed Kenyans to have a glimpse of the workings of a Presidential, Parliamentary and a Hybrid system of government. This will assist them to positively engage each other when evaluating the desirability and efficacy of each system of government. We expect to receive their informed input without prejudicing their choice. **KN**

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what it terms a well-calculated move by Parliament to sideline *wananchi* in the constitutional review exercise. The LSK chairman, Mr Okeng'o O'mogeni, said Parliament has taken control of the process leaving no room for the people's input.

May 16 - Prime Minister Raila Odinga and Vice-president, Kalonzo Musyoka, assure Kenyans of a new Constitution by June 2009.

May 18 - A fresh initiative by the Party of National Unity (PNU) for a deal on minimum reforms as a way of fast-tracking the Constitution review triggers a

new battle between the wrangling Grand Coalition partners.

May 20 - The Orange Democratic Movement (ODM) forms a team to prepare its views on the new Constitution. The move comes a few days before the May 22 deadline of presenting its report to the committee of experts on the process.

May 22 - United States Ambassador Michael Ranneberger is on a collision course with Members of Parliament over his grassroots campaigns to turn up the pressure for reforms. His enthusiastic push for reforms involving the youth

and ignoring MPs has earned him the legislators wrath, many of who accuse him of overstepping his diplomatic mandate.

A dispute between coalition rivals PNU and ODM on the setting up of the agenda for constitutional review is adding to fatigue and doubts among Kenyans on the possibility of having a new document by mid next year. Each of the parties is keen to be at the steering wheel on the reform journey with their major focus being the 2012 elections. **KN**

Courtesy the East African Standard

Briefs

and the ICC. The Security Council may be called upon to make recommendations or decide upon measures of implementing the decisions of the ICC. The judgment of the court is final, binding and without appeal. Among the boundary disputes the court has arbitrated are the delimitation of the continental shelf between Libya and Tunisia and the dispute on the maritime boundary between United States and Canada. The court has no means to enforce its rulings and its survival is dependent of political legitimacy and acceptability.

Comparative conflicts

Cameroon and Nigeria

Cameroon and Nigeria were involved in a boundary dispute relating to the Bakassi Peninsula. The dispute was submitted to the International Court of Justice for resolution in accordance with international law in 1994. The dispute was resolved by the ICC in favour of Cameroon. The states had to negotiate a further agreement on the implementation of the verdict of the ICC. The UN Secretary General at the time, H.E. Kofi Annan, mediated between the two states who reached an all inclusive agreement in 2006. The agreement led to withdrawal of troops from the region and the establishment of a UN backed Cameroon - Nigeria Mixed Commission. The Commission was mandated to resolve all issues in the dispute including demarcation of the land boundary between the two countries and making recommendations for confidence building measures such as troop withdrawal and demilitarisation of the peninsula.

The origin of the dispute was colonial borders established by Britain and Germany in the 20th Century. The Peninsula had been subject of intense and violent disputes between the two states. In 2002, the ICC gave a binding decision awarding the area to Cameroon citing a 1913 agreement between Germany and Britain. The agreement was hailed as an achievement in conflict prevention and a model for resolution of similar conflicts in Africa. The UN noted the hand over process and the operations of the Mixed Commission were cost effective. The dispute was therefore finally resolved by the ICC. The States had undertaken to respect the verdict of the Court.

Ethiopia and Eritrea

Eritrea was formerly a province of Ethiopia until it gained its independence in 1993. The boundary between the new state and Ethiopia was not fixed with maps and survey markers. Boundary dispute degenerated into a war in May 1998 about the exact location of the border between the

two states. The war ended in a stalemate but was extremely bloody with more than 100, 000 persons feared dead in the intermittent but savage fighting. The war lasted for two years. More than 300, 000 troops remain at the 800 kilometre border between the two countries. The war origin can be traced to differences between the Ethiopian and Eritrean leadership in the 1980s. The Eritrean legitimised their independence in a 1993 referendum. In 1997, Eritrea launched its own currency which has severely disrupted trade between the two countries. In the dispute with Ethiopia, Eritrea has appeared arrogant, assertive and uncooperative to the neighbouring states. In February, 1999, the Ethiopians made a push for the border town of Badme, which is now at the centre of the dispute.

The Organisation of African Unity negotiated a peace deal between the two countries which has not been honoured. Up to 400, 000 Eritrean-origin Ethiopians left Ethiopia for Eritrea with many of them being deported. The war has caused devastation to the economies of the two countries. As of early 1998, 67% of Eritrea's external trade was with Ethiopia. The war has generated high numbers of refugees in both countries.

A peace agreement was signed in December 2000 putting an end to the two year border war. The OAU proposals provided for a 25 kilometre wide security zone to facilitate withdrawal from the previous border by Eritrea, the deployment of a UN force and the demarcation of the border. In 1997, a border commission was established and met only once before the conflict erupted. Under the Algiers Agreement, the case was referred to the Permanent Court of Arbitration for determination. The Court is expected to demarcate the border based on colonial agreements and international law and is yet to make a final determination on the dispute. **KN**

Losing the plot

Reform agenda in disarray



President Mwai Kibaki

The question in Kenyans minds is whether members of the coalition are still reading from the same script or some of them have decided to kick off their campaigns for 2012.

By Macharia Nderitu

Since the formation of the Grand Coalition Government formed in the aftermath of post election violence, the two coalition partners, Orange Democratic Movement (ODM) and Party of National Unity (PNU) do

not seem to have formed an appropriate working formula. The President still wields and exercises most of the executive power contrary to the expectations of ODM that executive power would be shared equally between the partners. This state of affairs has adversely affected smooth operations of the Government, causing complete paralysis at times.

According to the ODM, the National Accord and the Agreement on Principles of Partnership should be read as part of the Constitution. The Accord was sign between President Kibaki and Raila Odinga on the February 28, 2008 was the culmination of mediation efforts by H.E Kofi Annan. According to the argument, the executive authority is shared equally between the President and the Prime Minister. Section 15A(6) of the Constitution states that

nothing contained in or done under the authority of an Act of Parliament made pursuant to Subsection (3) immediately following this section shall be held to be inconsistent with or in contravention of any provision of this Constitution.

The argument by the PNU is that the Constitutional Amendment and National Accord and Reconciliation Act 2008 Act was an amendment to the Constitution which did not redistribute or affect the executive authority which is vested in the President. Full executive authority is therefore still vested in the president and the PM being a Minister as defined in section 17 of the Constitution is therefore a delegate of the President.

The dispute to the office in which the ultimate executive authority is vested in Kenya and how that power is it to be exercised. Section 23(1) of the Constitution states that the executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him. Section

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23(2) provides that Parliament may confer functions or authorities on persons other than the President. The role of the PM is to coordinate and supervise the functions and affairs of the Government, including Ministries and to perform such other duties assigned to him by the President.

Section 4(3) of the National Accord and Reconciliation Act provides that the composition of the Coalition Government shall at all times reflect the relative parliamentary strength of respective parties and shall at all times take into account the principles of portfolio balance. Section 4(2) and (3) of the Accord provides that power sharing and portfolio balance ministers. Whereas the PNU has argued that portfolio balance relates to the sharing of Cabinet posts, the ODM has insisted on all public appointments including ambassadorial and senior civil service positions.

According to the argument by ODM, the President and the PM are the principals in the Grand Coalition Government. The parties are equal partners who must equally share all executive or political appointments including the public service and security forces. The Constitution confers upon the President the role of head of State and head of Government. The National Accord did not amend the Constitution to alter this structure. The PM is appointed

by the President as a Minister whose duty under section 17 of the Constitution is to aid and advise the President.

Standing Orders provide that the Leader of Government Business shall be nominated by the Government. The reference to the Government in this context has been



Prime Minister Raila Odinga

interpreted to mean the Grand Coalition Government. The Leader of Government Business served as the Chairman of the House Business Committee.

The National Accord was meant to disperse and share the powers of the President thereby dismantling an authoritarian presidency. The ODM has argued that by appointing the PM the Leader of Government Business, the Grand Coalition will create a link between the office of the PM and Parliament while executing his duties of coordinating government functions.

The PM is the leader of the majority party in Parliament and he should therefore spearhead government business. The Government must always ensure it has the majority to get its business done in the National Assembly. The executive power conferred on the President by the Constitution should be exercised in consultation with the PM. The Grand Coalition Government is a transitional experience to transform the nation from an authoritarian presidency to a parliamentary democracy.

The Kalonzo factor and the balance of power in the coalition

Hierarchy in Government especially between the Prime Minister and the Vice President was not clearly established in the Constitution during establishment of the office of the Prime Minister. This has occasioned protocol challenges whereby it is unclear as to who has more executive powers than the other. The relationship between the offices of the PM and the Vice President has been a major clog in smooth operations of the Coalition Government since the conflict was not contemplated during the negotiations for the Accord. Under the Constitution, the Vice President remains the principal assistant to the President. The antagonism between the PM and the Vice President is further deepened by the fact that the Vice President was a

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candidate in the 2007 General Election where he emerged third. The Vice President joined the Government after the elections but before the National Accord was negotiated and signed by the parties.

Executive authority and the National Accord

In a Communication from the Chair delivered by the Speaker of the National Assembly on April 28, 2009, the Speaker identified two possible scenarios in regard to exercise of executive authority after the signing of the National Accord.

1. The Executive authority remains vested in the President and nothing has changed with the signing of the National Accord and the subsequent enactment of the enabling statute. This interpretation is derived from the plain meaning of sections 23, 24 and 52 of the Constitution.
2. The new constitutional arrangements have changed with the creation of the office of the PM in the Constitution and the formation of the Grand Coalition Government. This interpretation is derived from the Constitution, the National Accord and Reconciliation Act, 2008 and the Agreement on

Principles of Partnership signed between the President and the PM. Whereas the National Accord could have intended equal sharing of power between the partners, the Constitution was not amended to reflect this intention and to create the modalities for exercise of this power. It was therefore left to the good faith and intentions of the parties to implement the Accord.

The National Accord has been interpreted to be part of the Constitution as it was exempted from section 3 of the Constitution which states that in case of any inconsistency between any legislation and the Constitution, the Constitution is supreme. The Accord has therefore been read into the constitution. The Accord should be implemented with good faith between the partners given its history and the fact that the priority for the Government should be completion of the reform agenda to prevent the distillation of further political crises after future elections.

Parliament and the Grand Coalition

Parliament is at the centre of the reform process. The reform initiatives involve enactment of laws and constitutional amendments and approval of policy

proposals in which the role of Parliament is paramount. There is a dispute over the appointment of the Leader of Government Business which is stemming from the definition of Government in the Grand Coalition. Whereas ODM has insisted the PM should be the Leader of Government Business and accordingly the chair of the House Business Committee, the President has appointed the Vice President to be the Leader of Government Business hence the stand off. The PM wrote to the Speaker appointing himself the Leader of Government Business.

In a Communication from the Chair delivered by the Speaker of the National Assembly, he intimated that the power to appoint the Leader rested in the Executive. Having received two appointees from the Government, the Speaker referred the matter back to the Executive to enable them appoint one Minister as the Leader of Government Business. However, due to the apparent divergent views on the matter, the Speaker who is an *ex officio* Member of the House Business Committee offered to chair the Committee pending the appointment of a Leader of Government Business. In his role, the Speaker stated that he would not have an original or a casting vote in the Committee. He further observed that the Speakers of the respective parliaments were the chairs of

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House Business Committee in Germany, Uganda, New Zealand and India. The chairing of the Committee by the Leader of Government Business, though desirable was not a requirement under the Standing Orders.

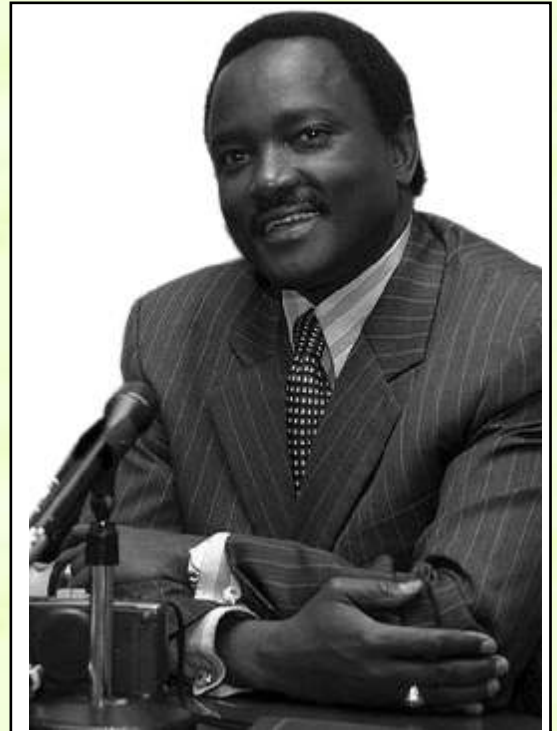
The House Business Committee sets the legislative agenda and prioritises important government agenda in Parliament. The Speaker of the National Assembly has ruled that he will chair the Committee until the Government chooses the substantive Leader of Government Business and hence the Chair of the Committee. The Speaker is an *ex officio* member of the Committee under the Standing Orders. The dispute on the leader of Government Business derailed parliamentary operations for three days until the Speaker delivered his ruling.

Whereas the Speaker chose to avoid interfering with the decisions of the Executive, to date the principals are yet to decide on who is the Leader of Government Business. It is contradictory for the Speaker to chair the Committee as well as act as an independent arbiter when there is dispute in the House.

Future elections and their impact on the functioning of Government
Intense competition among the coalition partners has stifled reforms. Every Minister seems concerned about his or her fate after the next general election

and the obligation to deliver to Kenyans seems to have been shelved. The competition among the coalition partners has contributed to the non delivery of reforms, with each coalition partner blaming the other for the failure. Failure to deliver on the reform agenda has led to disenchantment of the public with the Government.

Can the reform agenda be salvaged? The President has appointed Hon Mutula Kilonzo as the new Minister for Justice and Constitutional Affairs. The reforms suggested under Agenda Four of the Serena Talks Agreement hinge on the realisation of a new Constitutional framework. Parliament has approved and the President appointed the Committee of Experts which has embarked on identification of the Contentious issues in the Proposed Draft Constitution and the Bomas Draft. The final reports submitted by the Committee will jumpstart the reform process in earnest. Further reforms include setting up the Interim Independent Electoral Commission and the Interim Independent Boundaries Review Commission, both of which have been set up. The Parliamentary Select Committee on the Constitutional Review Process is yet to approve the Members of the Interim Electoral Court



Vice President Kalonzo Musyoka

The Government must fast track and avail the requisite resources to the constitutional review process. Important reforms identified include land tenure reforms, Police reforms, and electoral reforms which must all be anchored in the Constitution. Parliament must support the reform agenda and fast track the enactment of the necessary legal framework to drive the agenda forward. The two Principals must demonstrate commitment to institutional reforms and lobby their respective coalitions to support the agenda. The creation of the Special Tribunal to try suspected perpetrators of the post election violence still ranks high on the necessary reforms to combat the culture of impunity in Kenya. **KN**

The writer is an advocate of the High Court of Kenya.

THE KONRAD ADENAUER FOUNDATION IN KENYA

Konrad-Adenauer-Stiftung is a German political Foundation which was founded in 1955. The Foundation is named after the first Federal Chancellor, Prime Minister and Head of Federal Government of the then West Germany after World War II. Konrad Adenauer set the pace for peace, economic and social welfare and democratic development in Germany.

The ideals that guided its formation are also closely linked to our work in Germany as well as abroad. For 50 years, the Foundation has followed the principles of democracy, rule of law, human rights, sustainable development and social market economy.

In Kenya, the Foundation has been operating since 1974. The Foundation's work in this country is guided by the understanding that democracy and good governance should not only be viewed from a national level, but also the participation of people in political decisions as well as political progress from the grass roots level.

Our aims

Our main focus is to build and strengthen the institutions that are instrumental in sustaining democracy. This includes:

- Securing of the constitutional state and of free and fair elections;
- Protection of human rights;
- Supporting the development of stable and democratic political parties of the Centre;
- Decentralisation and delegation of power to lower levels;
- Further integration both inside (marginalised regions in the North/North Eastern parts) and outside the country (EAC, NEPAD); and

Development of an active civil society participating in the political, social and economic development of the country.

Our programmes

Among other activities we currently support:

Working with political parties to identify their aims and chart their development so that democratic institutions, including fair political competition and a parliamentary system, are regarded as the cornerstones for the future development in Kenya.

Dialogue and capacity building for young leaders for the development of the country. Therefore, we organise and arrange workshops and seminars in which we help young leaders to clarify their aims and strategies.

Reform of local governance and strengthening the activities of residents' associations. These voluntary associations of citizens seek to educate their members on their political rights and of opportunities for participation in local politics. They provide a bridge between the ordinary citizen and local authorities, and monitor the latter's activities with special focus on the utilisation of devolved funds.

Introduction of civic education to schools and colleges. We train teachers of history and government in civic education. In addition, we participate in the composition of a new curriculum on civic education.

Our principle is: Dialogue and Partnership for Freedom, Democracy and Justice.

Contact address

Konrad-Adenauer-Stiftung
Mbaruk Road No. 27
P.O. Box 66471
Nairobi 00800, Kenya.

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