



**REPUBLIC OF KENYA**

**TWELFTH PARLIAMENT – SECOND SESSION**

**THE NATIONAL ASSEMBLY**

**VOTES AND PROCEEDINGS**

**TUESDAY, SEPTEMBER 18, 2018 – (SPECIAL SITTING)**

1. The House assembled at thirty minutes past Two O'clock
2. The Proceedings were opened with Prayer
3. **Presiding** – the Honourable Speaker

4. **MESSAGES**

The Speaker conveyed the following Messages –

**(i) Referral by H.E. the President of the Finance Bill, 2018**

“Honourable Members,

Standing Order 29(1) states that “whenever during a Session the House stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Leader of the Majority Party or the Leader of the Minority Party, appoint a day for a special sitting of the House.” In this regard, I received and acceded to a request from the Leader of the Majority Party to hold special sittings. Pursuant to the provisions of Standing Order No. 29(2) and (3) of the National Assembly, by *Gazette Notice* No. 9380 which was published in the *Kenya Gazette* of 13<sup>th</sup> September, 2018, I gave Notice of this Special Sitting and that of Thursday, 20<sup>th</sup> September 2018, to the Members of the National Assembly. In addition, I also published notices in the local dailies notifying Members of the said sittings and the business to be transacted. Accordingly, Honourable Members, this Special Sitting is properly convened.

Honourable Members, you may recall that on August 30, 2018, the National Assembly passed the Finance Bill, 2018. Thereafter, the Bill was presented for Assent to H.E. the President in accordance with the provisions of the Constitution and our Standing Orders. However, H.E. the President, by way of a Memorandum, has since referred the Bill back to the National Assembly for reconsideration, pursuant to the provisions of Article 115(1)(b) of the Constitution. H.E. the President has expressed reservations on—

- a) Clause 2 of the Bill on the definition of the term “winnings” for purposes of taxation;
- b) Clause 18 of the Bill on deferral of the commencement date for the Value Added Tax on petroleum products;
- c) Clause 31 of the Bill on Excise Duty proposed to be levied on sugar confectionery and fees charged for money transfer services;

- d) Amendments to the Betting, Lotteries and Gaming Act on the rates of taxation for betting, gaming, lotteries and prize competitions;
- e) Clause 68 of the original Bill on the proposed contributory scheme to National Housing Development Fund to enable access to affordable housing;
- f) Amendments to PART VII of the Bill relating to the Miscellaneous Fees and Levies Act on an anti-adulteration levy to be charged on kerosene imported into the country for home use; and,
- g) Recommendation for consequential amendments to the Appropriations Act, 2018 required to bridge the financing gap in accordance with section 40(5) of the Public Finance Management Act, 2012.

Consequently, the President recommends amendments to the said clauses and the Bill. Honourable Members, You may recall that section 41 of the Public Finance Management Act and Standing Order 245 provide that the Finance Bill shall be considered and approved not later than ninety (90) days after the passage of the Appropriation Bill. The Appropriation Bill, 2018 having been passed on June 26<sup>th</sup>, 2018, that period expires before the ordinary resumption of the House on October 2<sup>nd</sup>, 2018, thereby necessitating the special sittings that you have been asked to attend this week.

Honourable Members, before I commit the Memorandum to the relevant Committee for consideration and reporting to the House, I wish to inform the House that my Office is in receipt of a letter from the Member for Mathare Constituency, the Hon. Anthony Tom Oluoch, touching on the Memorandum. In his letter, the Hon. Oluoch raises three matters on which he seeks direction before consideration of the Memorandum. These are—

- (i) Whether where Parliament cannot raise the two-thirds threshold required under Article 115(4)(a) of the Constitution as read together with Standing Order No. 62 of the National Assembly Standing Orders, the effect of the failure results into the President's reservations becoming law which in effect makes the President a legislator contrary to the doctrine of separation of powers;
- (ii) Whether the reservations of the President which have not been subjected to public participation in terms of Standing Order 127 can stand the test of law; and,
- (iii) Whether the reservations of the President touching on specific parts of the Finance Bill, and not the entire Bill, are constitutional.

Honourable Members, you will recall that I did give guidance on a similar query raised in the last Parliament in a Communication delivered on July 28, 2015 concerning Consideration of Presidential Memoranda and amendments thereto. In that instance, the then Member for Rarieda Constituency, the Hon. Nicolas Gumbo, had sought guidance from the Speaker on the following matters relating to Presidential referral of Bills to Parliament for reconsideration-

- (i) whether, in expressing his reservations and sending a Bill back to Parliament for reconsideration upon refusal to assent under Article 115 of the Constitution, the President can make specific proposals for amendment to the particular Bill;
- (ii) whether the specific proposals for amendment made by the President should go through the entire law-making process of consideration by the relevant committee, including pre-publication scrutiny, public hearings, and First, Second and Third Readings;
- (iii) whether accepting of the text proposed by the President and which has not been subjected to the ordinary law-making process as outlined in (b) above should require a two-thirds majority; and,

- (iv) whether the House would be properly constituted if, at the time of putting the question on the President's reservations or recommendations, there are less than two-thirds of all the Members present in the House.

Honourable Members, the summary of my Communication then, which is now substantively codified in Standing Order 154, was as follows—

- (i) That, in submitting his reservations on a Bill to the House, the President is not prohibited from including his preferred text of the particular clause, section, subsection or paragraph of the Bill;
- (ii) That, just like amendments to Bills, the text proposed by the President on a Bill need NOT be subjected to the other stages subjected to a Bill upon publication, - that is, publication, First Reading, Second Reading and Third Reading;
- (iii) That, any committee or member of the House is free to propose further amendments to the Presidential recommendations. So long as such amendments have the effect of fully accommodating the Presidents reservations, the voting threshold for the passage of such amendment or, indeed the proposals made by the President, is a simple majority as contemplated by Article 122 (1) of the Constitution. Any other proposed amendment, that does not fully accommodate the reservations, or indeed a total override of the Presidents reservation, including his proposed text, would attract the two-third requirement;
- (iv) That, pursuant to the provisions of Standing Order 1(2), the determination of whether a proposed amendment by a Member or a Committee to the President's reservations would have the effect of "fully accommodating" those reservations shall be made by the Speaker on case by case basis; and,
- (v) That, the absence of at least two-thirds majority at the time of putting the question does not in any way imply that the House is improperly constituted.

Honourable Members, in that particular Communication I did interrogate at length the issues raised by the Hon. Oluoch with regard to the participation of the President in law-making as allowed by Article 115 of the Constitution. In answer to the first issue raised by Hon. Oluoch, Members will note that the two-thirds voting threshold only becomes applicable to the House if it intends to negate or amend the proposed text in respect of the reservations made on the Finance Bill in a manner that does not fully accommodate the President's reservations. It is not a requirement that affects the quorum of the House at the commencement or consideration of the reservations.

In terms of the procedure to be adopted in considering the reservations, the procedures of the House are quite clear. As Members are aware, all questions for decision in the House are put in the positive. That is to say, with regard to the President's reservation, the question to be put in the Committee of the whole House will, for example, be—

***"THAT Clause \_\_\_\_ of the Bill be amended as proposed in the reservations by H. E. The President"***

At that point, the provisions of Article 122(1) of the Constitution requiring a **simple majority** of Members on a vote shall apply (I put emphasis on the words "**simple majority**"). In terms of procedure, this is exercised by way of collection of voices of "AYES" and "NOES" as provided for in Standing Order 69 regarding voting in the House. The Chairperson of the Committee of the whole House will thereupon announce the result of the voice vote. It is expected that any Member intending to **reject, (that is, to totally**

**oppose)** the proposed text of the reservation or a Member intending to amend the Clause **in a manner that does not fully accommodate the President's reservations** would, rise and cause a Division as contemplated by Standing Order 72(1)(b) as read together with Standing Order 72 on electronic voting. If thirty or more Members rise to claim a Division, I shall forthwith order that the Division Bell be rung as usual. If after ten (10) minutes or such further period as I may direct there are two-hundred and thirty-three (233) Members in the House, being two-thirds of all Members of the National Assembly, the House shall proceed to an electronic vote in order to vote and confirm the claim to negative the recommended text of the reservations or amend the Clause in question in a manner that does not fully accommodate the President's reservations. Where there are less than two-hundred and thirty-three Members in the House despite the ringing of the Division Bell, the Members claiming a Division will have failed to garner the numbers required under Article 115(4)(a) of the Constitution and therefore uphold the earlier decision made by way of a voice vote.

Honourable Members, indeed, even our Courts have made pronouncements on the questions raised with regard to the participation of the President in the law-making process. This was the case with regard to the passage, referral and assent of the Kenya Information and Communications (Amendment) Act, 2013, the Public Audit Act, 2015, and the Finance Act, 2017 where the Courts, in separate suits affirmed the constitutional role of the President as outlined at Article 115 of the Constitution *vis-à-vis* the role of the House in the consideration of the President's reservations.

Honourable Members, for the benefit of the House, I will cite some of these cases. With regard to the enactment of the Kenya Information and Communication (Amendment) Act, 2013 it was argued in Court that the manner in which the Bill was referred back to the National Assembly with recommendations on various clauses *amounted to the President assigning himself a legislative role not contemplated or provided for in the Constitution in violation of the doctrine of separation of powers. It was further contended that the referral of the Bill to the National Assembly with explicit reservations and suggested alternative clauses, and the acceptance of the recommendations by the National Assembly amounted to a usurpation of legislative authority and a surrender of constitutionally vested power by the National Assembly (Nairobi High Court Constitutional Petition No.30 of 2014 (consolidated with Petition No.31 of 2014 and judicial review Misc.Appl. No.30 of 2014).*

In a decision rendered by a three-judge bench, the Court noted that the petitioners had assigned a narrow meaning to the term "reservations" that was not in accord with the Constitution. It was the Court's holding that it does not expect the President to simply state "I have reservations about this Bill", since without more information in the memorandum, there would be nothing for the legislature to consider, accommodate, or reject. This led to the determination that the President properly exercised his constitutional mandate as is vested in his office under Article 115.

Further, Hon. Members, with regard to the enactment of the Public Audit Act, 2015, the Court was faced with the question of *whether the President actively participated in the legislative process in the manner he noted his reservations and whether that violated the law-making process.* In answer, the Court agreed with the decision of the three-judge bench in the Kenya Information and Communications (Amendment) Act, 2013 judgment, noting that it was unable to find fault with the procedure adopted by the President in making his reservations, **which included recommended text that both Houses passed**, when returning it to Parliament. Similarly, Hon. Members, the Court was recently invited to declare that the President as having overstepped his mandate under Article 115 of the Constitution by referring back the Finance Bill, 2017 with reservations, including a

recommendation on the reduction of the rates of taxation applicable to betting, lotteries and gaming activities as proposed by the House in its amendments to the Betting, Lotteries and Gaming Act. In affirming the role of the President in the law-making process, the Court categorically stated, and I quote:

*“The constitutional power of the President to state what is wrong with the Bill can be done without making recommendations or proposals to Parliament to avoid the danger of being perceived to be descending to the legislative arena which is a function of Parliament. However, to the extent that Members of Parliament have the Constitutional safeguard and freedom of rejecting the recommendations, I find that it would be unsafe to conclude that they were influenced by the President’s proposal.” (Nairobi High Court Constitutional Petition No.353 of 2017).*

Honourable Members, from the precedence set by this House and affirmed in view taken by Courts, it is therefore apparent that the claim by the Member for Mathare constituency and his apprehension that “the consideration of the President’s reservation is, in effect, an unconstitutional *fait accompli* which leaves them with no option”, is misplaced. Indeed, Article 115 of the Constitution clearly allows the President to participate in the law-making process through suggestions made to this House in his reservations. The reservations by the President will be presented as a proposal to the House for agreement and the House may vote to either include it in the Bill, negative it or amend it, subject to the applicable voting thresholds prescribed under Article 115 of the Constitution. The obligation to raise the voting threshold is left to those wishing to negative the proposed text or amend the text in a manner that does not fully accommodate the President’s reservations. With regard to the implication of this higher voting requirement on the legislative authority of Parliament, allow me to quote the finding of the learned judge of the High Court in the case of the Public Audit Act, 2015 –

*“The President’s reservations were expressed in his memorandum to Parliament in the form of several recommendations and suggestions that Parliament eventually approved and passed without amendments. The drafters of our Constitution must have intended that the President’s reservations should almost prevail when they imposed a higher threshold of two thirds of members in order to reject or amend the reservations”. (Nairobi High Court Constitutional Petition No.388 of 2016).*

Honourable Members, the Second issue raised by the Hon. Oluoch relates to the issue of public participation on the President’s reservations. On this question, I will reiterate my ruling delivered on July 28, 2015 on the reservations not being subjected to the normal Bill procedure under the Standing Orders since the President is availing himself to an opportunity similar to that enjoyed by Members of this House when proposing amendments during Committee Stage. Committee Stage amendments are only considered during that stage and are not subjected to other processes that a Bill goes through prior to that stage. As a matter of fact, in the case of the Finance Act, 2017, the learned judge of the High Court did find that, and I quote “*On the alleged non-compliance with the standing orders, the earlier communication from the Speaker on the National Assembly is instructive.*

*It will suffice to state that just like amendments to Bills, the text proposed by the President on a Bill need not be subjected to other stages subjected to a bill upon publication that is, publication, first reading, second reading and third reading. Consequently, I find that there was no breach of the procedural requirements. (Nairobi High Court Constitutional Petition No.353 of 2017).*

In any event, Hon. Members, a perusal of the reservations and the various recommendations contained in the Memorandum **DOES NOT** reveal any matter not covered either under the Bill as published, or covered in the totality of the amendments initially proposed on August 29 and 30, 2018 in the Committee of the whole House by the Departmental Committee on Finance & National Planning, the Leader of the Majority Party, the Minority Party Whip or indeed the other Members who had amendments in the Order Paper during those particular sittings. Indeed, these amendments were said to be a product of public participation.

Honourable Members, You will note that the reservations relating to the Betting, Lotteries and Gaming Act with regard to definitions and applicable rates of tax relate to an Act that the House sought to amend through the Finance Bill, 2018. Further, Hon. Members the reservations with regard to the Value Added Tax on petroleum products relate to an amendment made by this House to the Bill moved by the Minority Party Whip, the Hon. Junet Mohamed. The other reservations with regard to the amendments to the Excise Duty Act and the Employment Act on the proposed contributions to the National Housing Development Fund relate to amendments made by this House to provisions that were originally in the Bill. Indeed, the reservation and recommendation on the National Housing Development Fund is nearly word for word similar to the amendment proposed by the Chairperson of the Departmental Committee on Finance and National Planning and the Leader of the Majority Party during the Committee Stage of the Bill which was said to have been initiated as a result of public participation. The query with regard to the need for public participation is therefore disingenuous and unnecessary.

Honourable Members, the Hon. Oluoch raised a third issue of whether the President's reservation with regard to the Finance Bill, 2018 amounts to a "line-item veto", and if it does whether the same is constitutional. In Parliamentary parlance, a "veto" is a constitutional right to reject a decision or proposal made by a lawmaking body. A "line-item veto", on the other hand is a rejection of a specific portion of a legislation passed by the legislature. In classical use, a president exercises a right to reject a legislation forwarded for assent in totality. In the event a legislature proposes to proceed and pass the legislation without reference to the President's objections, it would ordinarily require a super-majority to do so. This is the case in the United States of America as dictated by its Constitution where the President is only mandated to reject a Bill and refer it back with a list of objections. The Congress thereafter can only pass the Bill by a super-majority, in both Houses. The wording of, Section 7 of Article I of the Constitution of the United States of America on the consideration, passage and assent of legislation only contemplates the classic use of a veto, hence a President is not at liberty to reject portions of a legislation passed by congress. This practice is well explained by *William McKay and Charles W. Johnson, in their Book titled Parliament & Congress, Representation & Scrutiny in the Twenty-First Century*. Indeed, far from the claim by the Member for Mathare, the practice in Kenya is, however, quite different as evidenced by Article 115 of the Constitution and, for those who mind the history of this Article, Section 46 of the repealed Constitution.

Both provisions do allow a President to refer a Bill back to the legislature with reservations. Similarly, both provisions, allow the legislature to amend a Bill to accommodate the reservations of the President therefore leading to the conclusion that a President may refer a Bill back with reservation on all or specific clauses of a Bill. The only departure between the two provisions, as I noted in the Communication delivered on July 28, 2015 was that, whereas section 46 of the repealed Constitution contained express provision empowering the President to return a Bill back to the National Assembly by submitting a **memorandum** to the Speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered by the National Assembly including his

recommendation for amendments, Article 115 of the current Constitution omits this express requirement for submission of recommendations. In that Communication, I did indeed direct that despite the lack of an express provision in Article 115 requiring the President to submit his recommendations on a Bill, the Constitution does not **prohibit** this practice either, in line with the **cardinal principle of interpretation of law that whatever is not prohibited by the Constitution or any law is presumed to be allowed.** **Honourable Members,** The President is therefore within his constitutional right to present a Memorandum touching on specific Clauses of the Finance Bill, 2018. Indeed, Article 115 gives the House an option of either amending the Bill to agree with the President or disregarding the President's wishes by raising a two-thirds majority.

Honourable Members, the Memorandum from the President concludes by requesting the House to consider amendments to the Appropriation Act, 2018 in light of the passage of the proposals in the Finance Bill, 2018 which create a financing gap. This does not constitute a new proposal for introduction into the Finance Bill, 2018. As Members are fully aware, Section 40(5) of the Public Finance Management Act, 2012 requires the House, in adopting the Finance Bill, to ensure that the revenue raising measures passed are consistent with the approved fiscal framework and the Division of Revenue Act, including consideration of the impact of proposed changes on the composition of the tax revenue, among other principles. The President notes that in the event the House agrees with the measures outlined in the Memorandum, the financing gap will remain in the region of Kshs. 55 Billion. Consequently, the House shall have to amend the Appropriations Act, 2018 as required by law to eliminate this gap or such other amount as may result from any amendments made to the Finance Bill, 2018. That process will be referred to the Budget and Appropriations Committee as contemplated by the Public Finance Management Act, 2012 and our Standing Orders.

Honourable Members, as I conclude, I thank the Member for Mathare Constituency for bringing forth these issues that have necessitated me to consolidate the Message from the President with this Communication as a guide to the House. The President's Memorandum stands now committed to the Departmental Committee on Finance and National Planning for consideration. The Committee should table its report in the morning of Thursday, 20th September, 2018. I wish to reiterate to the House and the said Committee that only the clauses of the Bill that have reservations ought to be considered. The Committee may, subject to new Standing Order 195 relating to attendance by non-members of select committee, admit the Member for Mathare to participate and/or present any views he has on the Memorandum, together with any other Member or other persons who may show interest in the process. I also direct the Clerk to now circulate the memorandum from H.E. the President to all Members so that you can familiarize yourselves with its contents. The Clerk is further directed to avail this Communication to Members together with my Communication of 28th July, 2018 regarding *Consideration and Scope of Presidential Reservations*. May I also add that my Communications and indeed of those of my predecessor have since been codified into a booklet titled "*Speaker's Considered Rulings and Guidelines*".

I thank you".

(ii) **Approval for appointment of a Member to the Parliamentary Service Commission**

"Honourable Members,

Pursuant to the provisions of Standing Order 41, I wish to report to the House that I have received a Message from the Senate regarding *its decision on the approval of a Member for appointment to the Parliamentary Service Commission.*

Honourable Members, The Messages reads in part, and I quote,

*“...in accordance with the provisions of Article 127(2)(d) of the Constitution, by a resolution passed on Thursday, September 13, 2018, the Senate also approved the appointment of Hon. Samuel Kiprono Chepkong’a as a Member to the Parliamentary Service Commission.”*

Honourable Members, you will recall that this House by a resolution passed on Thursday, August 2, 2018, the National Assembly, approved the said Member for appointment to the Parliamentary Service Commission.

Honourable Members, this therefore concludes the bicameral approval of the appointment process, and paves the way for the Commissioner to take oath of office as required under Article 74 of the Constitution before he commences his duties.

I thank you”.

5. **PAPERS LAID**

The following Papers were laid on the Table –

- (i) 2018/19 Supplementary Estimates I Programme Based Budget of the National Government of Kenya for the year ending 30<sup>th</sup> June, 2019; and
- (ii) Statement on the FY 2018/19 Supplementary Estimates No.1 by the Cabinet Secretary for National Treasury

*(The Leader of the Majority Party)*

6. **THE URBAN AREAS AND CITIES (AMENDMENT) BILL (SENATE BILL NO. 4 OF 2017)**

Order for Second Reading read;

Order deferred to another day.

7. **THE WAREHOUSE RECEIPT SYSTEM BILL (SENATE BILL NO. 10 OF 2017)**

Order for Second Reading read;

Order deferred to another day.

8. **THE HEALTH LAWS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 14 OF 2018)**

Order for Second Reading read;

Order deferred to another day.

9. THE COUNTY GOVERNMENTS (AMENDMENT) (No.2) BILL (SENATE BILL NO. 7 OF 2017)

Order for Second Reading read;

Order deferred to another day

And there being no other business and the time being twenty-six minutes to Four O'clock, the Speaker adjourned the House without Question put pursuant to the Standing Orders.

10. HOUSE ROSE - at twenty-six minutes to Four O'clock

M E M O R A N D U M

The Speaker will take the Chair on  
Thursday, September 20, 2018 at 9.30 a.m.

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