

REPUBLIC OF KENYA



TWELFTH PARLIAMENT– (THIRD SESSION)

THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

_____ (No. 12 of 2019) _____

**ON MANDATE OF AUDIT COMMITTEES *VIS-À-VIS* THAT OF
DEPARTMENTAL COMMITTEES AND THE PLACE OF PROGRESS
REPORTS IN INQUIRY PROCESSES**

Honourable Members,

You will recall that on Thursday, 7th March, 2019, the Leader of the Majority Party rose on a *Point of Order* citing Standing Orders 83, 206, and 216 and sought the guidance of the Speaker on alleged conflict of mandate between the Public Investments Committee and those of the Departmental Committees. He also sought guidance on the role of the Auditor General in so far as special audits are concerned and the place of the progress report of the Public Investments Committee on *The Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, which was laid on the table of the House by the Chairperson on *Wednesday, February 27, 2019*. In particular, the Leader of the Majority Party invited the Speaker to pronounce himself on two key issues-

- (a) whether it would be procedurally in order for a Committee of the House to **order** stay of progress, or indeed to **recommend** stay of progress on an ongoing government-initiated policy or project **which is at infancy stage** citing ongoing inquiry by the House; and,

- (b) whether the Auditor General could carry out *ex-ante* or anticipatory investigations into a matter to establish adherence to the law and government policy.

Honourable Members, in his submission, the Leader of the Majority Party observed that the matter of the ongoing arrangements between the Kenya Airways and the Kenya Airports Authority (KAA) is a matter of Government policy that does not fall within the remit of the Public Investments Committee and by extension, the Auditor- General.

He further contended that the Constitution gives the functions of the Auditor-General, as amongst other things, the examination of the accounts of the national and county governments; the accounts of all funds and authorities; the accounts of all courts and the accounts of the National Assembly and the Senate. The Leader of the Majority Party and indeed a section of other Members who spoke, pointed out that, the nature of the work of the Auditor-General is to a great extent, **post-mortem**, that is, limited to expenditure already incurred and that the Auditor General should not audit a government policy, particularly at conceptualization stage.

Honourable Members, you will indeed recall that these very weighty procedural issues raised by the Leader of the Majority Party elicited reactions from the floor, with very valuable input from the Chairperson of Public Investments Committee (the Hon. Abdulsamad Sharriff Nassir); the Chairperson of the Departmental Committee on Transport, Public Works and Housing (the Hon. David Pkosing); the Majority Party Whip (the Hon. Benjamin Washiali); the Minority Party Whip (the Hon. Junet Mohamed), amongst others, who advanced varying positions on the matter.

The Minority Party Whip expressed concern that formulation and implementation of public policy is a function of the executive arm of Government and the House has no role, nor does it participate in the formulation and implementation of Government policy. In his view, the involvement of the House at this stage would amount to pre-emption, interference and abuse of the doctrine of separation of powers. A section of the House supported the need for the House and its Committees to get to the bottom of the matter, irrespective of the stage at which the policy is.

Honourable Members, may I also, at this point, inform the House that the Chairpersons of the Departmental Committee on Transport, Public Works and Housing and the Departmental Committee on Finance and National Planning had also separately written to the Speaker on February 20, 2019 and February 21, 2019, respectively, claiming **exclusive** jurisdiction of their respective Committees to examine the same matter. In this regard, my Office did respond to the letter from the Chairperson of the Departmental Committee on Transport, Public Works and Housing, outlining broadly the issues in question which I will similarly address shortly.

Honourable Members, having reviewed the content and substance of the submissions by the Leader of the Majority Party and the procedural arguments by other Members who spoke to the *Point of Order* on 7th March, 2019, I have identified the following as the primary issues to address myself to in providing guidance to the House-

- (i) what is the nature of and at what stage is the arrangement between Kenya Airports Authority (KAA) and Kenya Airways (KQ) regarding the management of the Jomo Kenyatta International Airport, and what is the applicable legal framework to the proposed management of the Airport by Kenya Airways?

- (ii) whether the proposed commercial arrangement between Kenya Airports Authority and Kenya Airways regarding the management of the Jomo Kenyatta International Airport is a matter falling under the mandate of the Public Investments Committee or the relevant Departmental Committee;
- (iii) whether the Auditor General can audit the merits or demerits of a Government policy;
- (iv) the procedure for requesting a special Audit of a Government project; and,
- (v) whether the Committee could submit a progress report to the House and, if so, what the House is expected to do with such a report;
- (vi) in view of the motion for adoption of the *Progress Report of the Public Investments Committee on the Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport by Kenya Airways, laid on the Table of the House on Wednesday, February 27, 2019*, whether it would be procedurally in order for a motion on an interim report to be moved in the House and for the House to proceed to debate it.

Honourable Members, the first issue that calls for my determination is the question of **what is the nature of and at what stage is the arrangement between Kenya Airports Authority and Kenya Airways regarding the management of the Jomo Kenyatta International Airport, and what is the applicable legal framework to the proposed management of Jomo Kenyatta International Airport by Kenya Airways?** To address this question, it is important to first determine whether the House is properly seized of the said Policy or issues. Obviously, the actual Policy itself is not before the House or its Committees. Indeed, it is clear that the House is seized of the matter only in so far as the parallel inquiries of the Public Investments Committee and the Departmental Committee on Transport, Public Works and

Housing are concerned. You will note that the two Committees, separately and rightly under the authority vested in them by the law and the Standing Orders, instituted inquiries on their own motion, which inquiries I will be addressing later.

Honourable Members, as your Speaker, if I am called upon to answer the question of "what is the nature of the commercial arrangement between the Kenya Airports Authority and Kenya Airways?", I may not be able to respond appropriately. This is because I am not privy to contents of the commercial arrangement between the two entities. However, based on information presented in my chambers by the Chairperson of the Departmental Committee on Transport, Public Works and Housing and the Chairperson of the Public Investment Committee and having read the Special Audit Report of the Auditor-General on the matter, which I will be speaking to at a later stage in this communication, I am guided that the commercial arrangement between the Kenya Airports Authority and Kenya Airways is a proposed Privately Initiated Investment Proposal (PIIP) within the ambit of the Public Private Partnership Act, 2013.

Honourable Members, a clear reading of section 2 of the Public Private Partnership Act, 2013 defines a "**privately initiated investment proposal**" as "*a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid.*"

This definition in itself demonstrates the inappropriateness of the application of the term "take over" as used by the two Committees and indeed by a section of Members who spoke in the House on the matter. Consequently, Committees and indeed this House should restrict themselves to terms used in the evidence adduced so far and the expressions used in the relevant laws.

This is in keeping with our Standing Order 91 on responsibility for statement of facts, which behooves all Members to speak with accuracy based on facts.

Honourable Members, Permit me at this point to refresh your memory on the Policy making process and the nexus between the Executive and the Legislature in this process. By practice, a policy of this magnitude and importance, like many others before or after it, would have to obtain Cabinet consideration. The relevant Cabinet Secretary would then undertake other preliminary processes with the relevant bodies and, at the appropriate stage, submit to the House a *Sessional Paper*. It then follows that, the people's elected representatives would at this point exercise their oversight function by giving their views in considering the particular *Sessional Paper*. In noting the *Paper*, the House may make reservations, comments or acquiesce to it unconditionally.

Honourable Members, As regards the legal framework that underlies the proposed management of JKIA operations by the Kenya Airways, the question that now begs is- "*Is the proposed commercial arrangement an arrangement under the Public Private Partnerships Act, No. 15 of 2013, or the Privatization Act, No. 2 of 2005?*"

Honourable Members, If the proposed commercial arrangement is to be governed by the Public Private Partnerships Act, No. 15 of 2013, the Act provides for the procedure for entering into a public private partnership agreement. It contemplates for an elaborate process, including preparation of a the privately initiated investment proposal, consideration by the target public entity, submission of the initiative to the public private partnership unit established in the National Treasury and approval for the parties to enter into negotiations. The law also contemplates that the said unit shall submit a project report, a financial risk assessment report and its recommendations to the Public Private Partnership Committee for consideration.

Section 54(3) of the Act provides that the Cabinet Secretary for Finance and the Cabinet Secretary in the State department responsible for the implementation of the project shall prepare a joint cabinet memorandum based on the recommendations of the Public Private Partnership Committee and submit the memorandum to the Cabinet for approval before any execution.

Honourable Members, Section 55 of the Act provides for the only instance in which Parliamentary approval may be sought in respect of public private partnerships, and that is where the partnership is for the exploitation of natural resources under Article 71 of the Constitution, and this approval would be made through a ratification process. Parliament in its wisdom, during the legislative process leading up to the enactment of the Public Private Partnerships Act, No. 15 of 2013, removed itself from the requirement of parliamentary approval of public private partnerships.

Honourable Members, Irrespective of the absence of the requirement of parliamentary approval in the Act, as your Speaker I ask myself- *"is it possible for the Kenya Airways Privately Initiated Investment Proposal to be complete without Parliament's knowledge?"* In my view, the realistic implementation of the proposal, if and when approved by the Cabinet, would require various legislative interventions, including amendments to various statutes. Ultimately, there may be need to amend different statutes including the Kenya Airports Authority Act (No. 3 of 1991) , the Labour Relations Act (No. 14 of 2007), the Air Passenger Service Charge Act (Cap. 475) and possibly taxation related laws amongst others. As you are all aware, an amendment to any of these statutes is a matter which squarely falls within the legislative mandate of Parliament.

Honourable Members, It is important to note that Article 95(2) of the Constitution provides that one of the roles of the National Assembly is to deliberate on and resolve issues of concern to the people.

Whereas the Kenya Airports Authority is a state corporation fully owned by the government, the Kenya Airways is a company in which the government has a 48.9% stake in terms of shareholding. Kenya Airways is therefore a company in which the government has substantial shareholding both for strategic and national interest.

Honourable Members, You will also agree with me that, Kenya Airways being a listed company at the Nairobi Securities Exchange cannot be devoid of public scrutiny in as far as its operations are concerned. Any major restructuring or reorganization of the Kenya Airways will therefore attract deserved attention of the people of Kenya. On the other hand, **Honourable Members**, should the Kenya Airways proposal fall under the purview of the Privatization Act, No. 2 of 2005, section 23(3) of the Act provides-

(3) The Cabinet Secretary shall submit a report in form of a Sessional Paper on a privatization proposal approved by the Cabinet to the National Assembly for consideration.

(4) Upon laying before the National Assembly, a report under subsection (3) shall stand referred to the relevant committee.

Honourable Members, it is clear from the foregoing that Parliament's involvement in the conclusion of the Kenya Airways proposal cannot be overlooked, irrespective of the nature of the commercial arrangement. It is therefore not a matter of "if Parliament will be involved", rather it is **when** is the right stage for Parliament to be involved. It is inconceivable, in parliamentary parlance, that the House or its Committees would become part of **policy execution**, as that may prejudice the oversight function of the House as enshrined in Article 95(5)(b) of our Constitution. It is for this reason that I found it inappropriate for the Departmental Committee on Transport, Housing and Public Works to attempt to undertake what it termed as "public participation" of the Privately Initiated Investment Proposal between KQ and KAA **at this infancy stage.**

At this stage, that exercise is obligation of the Kenya Airports Authority and/or the relevant state department, which are expected to thereafter apprise the House on the progress of the initiative through the said Departmental Committee.

Honourable Members, Let me now turn my focus to the second issue requiring my determination, namely, ***whether or not the proposed PIIP between the Kenya Airports Authority and Kenya Airways is a matter under the purview of Public Investments Committee or Departmental Committees.*** In doing so, permit me to refer the House to the ruling made by the Speaker on 5th December, 2013. Then, as now, the question arose, in similar framing, as to the delineation of the mandates of the watchdog committees of the House, namely the Public Investments and the Public Accounts Committees on the one hand, and Departmental Committees on the other. In sum, the Speaker then guided that indeed the mandates of Departmental Committees were clearly distinct from those of the Public Accounts Committee (PAC) and the Public Investments Committee (PIC). That, as a matter of fact, PAC or PIC ought not delve into such matters as review of legislation, vetting of appointments or matters of administration of ministries or State corporations. This finding, **Honourable Members,** was on the basis of Standing Orders 205 and 206, which preclude the Public Investments Committee from examining matters of day-to-day administration of state corporations. In the same vein, the Speaker did then caution Departmental Committees from veering into the province of the Public Accounts Committee and the Public Investments Committee, save for the manner contemplated under Standing Order 216.

For avoidance of doubt, **Honourable Members,** the said Standing Order 216 under paragraph (5) provides that the functions of a Departmental Committee shall be to-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;***
- (b) study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;***
- (c) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;***

On the other hand, Standing Order 206(2) provides that “*the Public Investments Committee shall be responsible for the examination of the working of the public investments on the basis of their audited reports and accounts.*”

Honourable Members, additional functions of the Public Investments Committee as highlighted under Standing Order 206(6), include –

- (a) to examine the reports and accounts of the public investments;*
- (b) to examine the reports, if any, of the Auditor General on the public investments; and*
- (c) to examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.***

Under Standing Order 206 (7), the Public Investments Committee is prohibited from examining any of the following—

- (a) matters of major Government policy as distinct from business or commercial functions of the public investments;*
- (b) matters of day-to-day administration; and,*

(c) *matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.*

In this regard, **Honourable Members**, I find that, when examined in totality, the matter in question at this point falls into two categories. On one hand, the Kenya Airports Authority is a state corporation, 100% percent owned by the Government. The Public Investments Committee is therefore at liberty to **procedurally** invoke the provisions of Standing Order 206(6)(c) and examine whether the ***affairs of the public investments made or being made by the KAA, are being managed in accordance with sound financial or business principles and prudent commercial practices.*** However, in doing so, the Committee ought to follow the usual procedure, particularly as guided in my *Communication of 5th December 2013*. In that Communication, I did guide that, and I quote- "*Should the Committee intend to examine matters of procurement, I would expect them to order a special audit by the Auditor General after being satisfied that the matter requires a special audit*" This means that, whenever the Committee requests for a special audit, the examination of the matters before the Committee is discontinued, until the special audit is undertaken and tabled in the House. This is informed by the universal dictum that, when a party asks another party to carry out forensic inspection or any other specialized task, then the work of the first party becomes *functus officio*. This means that, any further examination or even debate in the Committee on the same matters for which a special audit has been requested may vitiate or injure the process of the special audit. In addition, it would be important to note that the Public Investments Committee may also examine this matter if it was an audit issue or query arising from the examination of audited reports and accounts of the Kenya Airports Authority or a special audit.

The second aspect of this matter regards the contention that, the **policy** aspects of the inquiry fall within the mandate of the Departmental Committee on Transport, Public Works and Housing. In view of the provisions of Standing Order 216(5) as enumerated earlier, the Departmental Committee on Transport, Public Works and Housing is at liberty to proceed and inquire into the policy aspects of the commercial arrangement between KAA and KQ.

Honourable Members, May I, at this juncture inform the House that, the Auditor General has since submitted to me a report titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) Between Kenya Airports Authority (KAA) and Kenya Airways (KQ)*". The particular report was received in my office on 14th March, 2019 and I will be asking the Leader of the Majority Party to lay that Report on the Table of the House, later during this sitting in keeping with the requirements of sections 39 and 49 of the Public Audit Act, 2015. Having perused the Report, it is evident that this matter is still at infancy. However, the Auditor General has raised several operational and policy audit issues as well as two financial audit issues. Upon tabling of the Report, the Public Investments Committee will be at liberty to resume its inquiry on the matter, but the Committee **must confine itself** to the financial and expenditure aspects of the reservations of the Auditor General as well as omissions and/or commissions on the part of the Kenya Airports Authority. As for the Departmental Committee on Transport, Public Works and Housing, the Committee is also at liberty to proceed with its inquiry. The Departmental Committee must confine itself to matters of policy, human resource, compliance with due process of law and generally addressing any issues of concern to the people as contemplated under Article 95 of the Constitution.

Honourable Members, the third matter requiring my determination is ***whether the Auditor General can audit the merits of policy issues of Government.*** Those who were in the 11th Parliament may recall that, this matter was a subject of heated debate during consideration of the Public Audit Bill, 2014 in both Houses, which is today the Public Audit Act (No. 34 of 2015). Indeed, when passing the Bill, Parliament did include section 42, which provided that, and I quote:-

s.42. "Notwithstanding the provisions of this Act, in an examination under this Act, the Auditor-General shall not question the merits of a policy objective of the National Government or county government or any other public entity."

The foregoing was the prevailing position in law until 16th February, 2018, when the High Court did make a pronouncement in so far as the application of that section was concerned.

Honourable Members, in Petition No. 388 of 2016 (*Transparency International Kenya vs The Attorney General and Two others*¹) the learned Judge, Hon. E. Chacha Mwita, in his judgment held that, a statute could not impose conditions on the performance of the Auditor General's functions where the Constitution did not impose them. Section 42 of the Public Audit Act, 2015 was therefore declared a violation of Article 10 of the Constitution which provides for national values and principles of governance which include integrity, transparency and accountability and also Article 201 of the Constitution which provides for financial openness. This decision has implication on the business of the House and its Committees, in so far as the scope of requests for special audit is concerned.

¹ High Court at Nairobi (Petition No 388 of 2016), *Transparency International (TI Kenya) v Attorney General & 2 others* [2018] eKLR.

In this regard, based on this finding by the Hon. Judge, I need not dwell on the question as to "*whether the Auditor General is excluded by law from examining a government policy*" any further. I nonetheless remind the House that, in the last two years, the Auditor General has submitted several audit reports to this House touching on performance and policy issues. These reports include the following-

- (a) Performance Audit Report from the Office of the Auditor General on the provision of Mental Healthcare Services in Kenya for the period December, 2017;
- (b) Performance Audit Report on the implementation of the National School Upgrading Programme by the Ministry of Education, Science and Technology for the period, March, 2018;
- (c) Performance Audit Report on Effectiveness of Measures put in place by Kenya Wildlife Services in Protecting Wildlife by the Ministry of Tourism and Wildlife for the period, June, 2018; and,
- (d) Performance Audit Report on Provision of Housing to Prison Officers in Kenya.

These reports, having been tabled are now before the respective Departmental Committees for examination and consideration by the House. This implies that the Auditor General is **NOT** precluded by any law from auditing matters of government policy.

Honourable Members, I will now turn to the fourth issue of my consideration, which regards the *procedure for requesting for a special audit from the Auditor General*. **Honourable Members,** to address this issue, it is important that we revisit the core mandate of the Public Investments Committee, as enumerated under Standing Order 206(6)(b), which is to *examine the reports, if any, of the Auditor General on the public investments*.

As we all know, the Auditor General invariably submits audit reports on an annual basis. These reports are mostly post mortem reports on a range of subject areas under which public funds have been spent. Nonetheless, Committees are not precluded from requesting the Auditor-General to undertake a special audit and submit a report thereof to the Committee, as and when need arises. Indeed, the Public Investments Committees of successive Parliaments have always been alive to this reality and have carefully navigated the path of getting seized of investigation into allegations of misuse of public funds before the release of the reports on audited accounts.

Honourable Members, the established practice of the House is that a Committee may resolve to request the Auditor General to carry out a special audit and furnish a report to the Committee before the said Committee carries out further examination. Indeed, I have had the benefit of perusing the confirmed minutes of the 6th sitting of the Public Investments Committee which was held on 19th February, 2019, during which the Committee resolved as that, and I quote-

"The Office of the Auditor General should conduct a special audit on the proposed concession arrangement with a view to establishing adherence to the relevant laws, the risks that KAA and the public face if the takeover is implemented and the procurement process for the services of the transaction advisor²".

It is evident from the foregoing, **Honourable Members**, that the Committee did fairly follow procedure in requesting for the special audit. However, whereas we applaud the Public Investments Committee for bringing this matter to the attention of the House by way of a progress report, it is important that I also address the basis of any future requests for special audits, going forward.

² Excerpt of the Minutes of the 6th sitting of the Public Investments Committee held on 19th February, 2019, page 4.

Honourable Members, As you are aware Article 229 of the Constitution establishes the office of the Auditor General as an independent office subject only to the Constitution and law and not subject to direction or control by any person or authority. In light of this Article as read together with Article 249(2) as well as the reasoning of the Court in declaring section 42 of the Public Audit Act, 2015 unconstitutional, whenever Committees desire to benefit from the specialized expertise of the Auditor General by way of **special audits**, they must be conscious that they cannot order or compel the Auditor General to do so. *What steps therefore should a committee follow to seek for a special audit from the Auditor General?* In absence of parameters in the Public Audit Act, 2015 and our Standings Orders, as your Speaker, I will resort to invoking provisions of Standing Order 1 which provides that, and I quote-

In cases for not provided for, the Speaker to decide

In all cases where matters are not expressly provided for by these Standing Orders or by other orders of the House, any procedural question shall be decided by the Speaker.

Honourable Members, I therefore give the following guidance with respect to the manner of requesting for special audits-

A committee wishing to request for special audits from the Auditor General shall-

- (a) *indicate **how** the matter came before the Committee. This is to be supported by, amongst others, the agenda and the minutes of the Committee;*
- (b) *indicate any preliminary information or evidence adduced before the Committee on the matter to justify the request and outline the **compelling** issues that have necessitated request for a special audit;*
- (c) *indicate whether the Committee has confirmed the **absence** of any other audit report on the same matter and absence of an ongoing one;*

- (d) state the **nature** of the audit requested, e.g. compliance audit, financial or value for money audit, operational audit, ordinary investigative audit;
- (e) state the **specific** matters to be covered in the audit. The Committee is to be specific and accurate where there are names of people, places, projects or programmes; and,
- (f) state the preferred **timeline** within which the report is required by the Committee.

Honourable Members, In keeping with the provisions of Standing Order 206(7)(c), a special audit shall not be sought on any matter for which machinery is established by any special statute. Similarly, the provisions of Standing Order 199(2) with respect to the special majority of members required to adopt a report of a Committee shall apply to a resolution of a Committee requesting for a Special Audit. Further, it is inconceivable that the attention of the Speaker on a special audit by a Committee would only be drawn at the point of tabling of its report. The Clerk is henceforth required to satisfy himself, without exception that any request for a special audit complies with these guidelines before conveying the request to the Auditor General. Thereafter, the particular Committee shall not be properly seized of the matter until the special audit is tabled before the House, unless the House is in recess, in which case the Speaker may refer the report to the Committee and inform the House upon resumption. May I hasten to add that, the nature of the final report of the Auditor General shall determine the Committee to which the report is to be referred, notwithstanding that a particular committee made the request. These guidelines take effect immediately.

Honourable Members, the fifth matter requiring my determination is **whether the Committee is at fault to make a progress report to the House and what is the House expected to do with such a report.** I will address this issue together with the last question requiring my attention, which is **whether it would be procedurally in order for the House to be moved on a motion to debate the particular Progress Report of the Public Investments Committee as laid on the Table of the House on Wednesday, February 27, 2019,** given that the report is interim.

Honourable Members, The progress report of the Public Investments Committee on *Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, which was laid on the Table of the House by the Chairperson on *Wednesday, February 27, 2019* was meant to inform the House that, amongst other issues, the Committee was seized of the matter and that it had requested for a special audit. The widely held meaning of a progress report is that "*an interim report on progress made to date on a job, project, etc*"³ Indeed, a progress report is an information report, usually prepared for several purposes, amongst them being to inform the House on salient issues awaiting completion of an inquiry and to keep the public updated on what is before a committee or schedule of activities so as to avoid speculations on a matter. ***Can we fault the Committee for informing the House at this stage?*** Certainly not. According to Rule 177 of The Rules of Procedure and Conduct of Business of the Legislative Assembly of National Capital Territory of Delhi, "*A Committee may, if it thinks fit, make a special report to the House on any matter that arises or comes to light in the course of its working which it may consider necessary to bring to the notice of the Speaker or the House, notwithstanding that such matter is not directly connected with, or does not fall within or is not incidental to, its terms of reference*"⁴." This authority is further amplified by David McGee in the Third Edition of the Parliamentary Practice in New Zealand, which provides that "*a committee has used a special report to the House; ...to announce that it had initiated a major inquiry*"⁵."

What is the House then supposed to do with such a progress report?

Honourable Members, in discussing interim or progress reports, the Fifth Edition of the Australia House of Representatives Practice notes the following-

³ Derived from the Advanced Oxford Dictionary

⁴ Rule 177 of Rules of Procedure and Conduct of Business of the Legislative Assembly of National Capital Territory of Delhi, 2009

⁵ Parliamentary Practice in New Zealand (Third Edition), page 293

"This procedure (of interim report) provides a cost and time- effective way for a committee's views to be placed before Parliament, but should be used with care, as the committee could leave itself open to criticism that some community, government, or interest group have been excluded from the process. In addition, the committee runs the risk that its conclusions and recommendations could be based on incomplete or incorrect information⁶."

Further, **Honourable Members**, Robert's Rules of Order, an authority in Parliamentary Procedure applied in State Assemblies of the United States of America states the following with respect to a report containing only information, which is essentially a progress report "Even *if a report contains only an account of work done or a statement of facts or opinion for the assembly's information, it should be in writing*. Apart from filing such report, however, **no action on it is necessary** and usually none should be taken."⁷

In addition, **Honourable Members**, the Canadian House of Commons Procedure and Practice notes that, "*since the early 1990s, a number of take-note motions have been debated in the House or in Committee of the Whole. These debates solicit the views of Members on some aspect of government policy and allow Members to participate in policy development, making their views known before the government makes a decision*"⁸". In our case, take-note motions are similar to the usual motions for noting.

Honourable Members, you will indeed recall that last year on 5th July, 2018 I did allow the Departmental Committees on Trade, Industry and Co-operatives and that of Agriculture and Livestock to present a progress or interim report on their *Inquiry into the Alleged Importation of Illegal & Contaminated Sugar in the Country*.

⁶ House of Representatives Practice, (Fifth Edition), page 684

⁷ Robert's Rules of Order, (11th Edition), page 525

⁸ The House of Commons Procedure and Practice (Canada) (Third Edition 2017), Page 706

However, that particular progress report was made through a statement to the House- and rightly so. The progress report was not debated by the House. Nonetheless, I did allow a few Members to make comments on it and thereafter allowed the Committee to resume its work, with an extended deadline. In the same vein, the Public Investments Committee will automatically be granted leave to resume its sittings and consideration of the subject matter, once the special audit report of the Auditor General is Tabled in the House as I will later direct.

Honourable Members, as cited from the three legislative authorities, a progress report is seldom discussed and if so it has to be debated without calling the House to make a resolution, give orders or directions. A resolution based on an interim report may certainly prejudice the outcome of the actual inquiry. Moreover, it should not be lost to the House that, a motion governed by Part XII of our Standing Orders and which seeks a resolution of the House ultimately **ends with a question being put**, the result of which may be that "Ayes" or the "Nays" have it. This begs the question; *what would be the procedural implication if the "Nays" had it (for instance), meaning that the progress report is rejected?* Obviously, such a decision, which is probable in a parliamentary set up, would render worthless the incomplete work of the Committee and any related special audit. It is for these reasons that most commonwealth legislatures have resorted to only allowing comments on progress reports or statements, instead of debate upon a motion. Allowing comments is meant to accord the Committee an opportunity to inform the House on the progress of the inquiry before it, while cushioning the remaining work from possible criticism, prejudices and binding directive that would arise if the House was to debate the report by way of an ordinary Motion.

In summary, **Honourable Members**, I wish to guide the House as follows-

- 1. THAT**, I have established that the commercial arrangement between the Kenya Airports Authority and Kenya Airways regarding the Jomo Kenya International Airport is a Privately Initiated Investment Proposal under the Public Private Partnership Act, 2013 **which is still at initiation stage**. This is evidenced from the information provided by the Chairpersons of the Public Investments Committee and the Departmental Committee on Transport, Public Works and Housing and the Report of the Auditor General submitted to my office on 14th March, 2019;

- 2. THAT**, the Leader of the Majority Party or another Member designated by the House Business Committee may hereupon proceed to lay the Report of the Auditor General titled "*Special Audit Report on the Proposed Privately Initiated Proposal (PIIP) Between Kenya Airports Authority (KAA) and Kenya Airways (KQ)*", which was submitted to my office on 14th March, 2019. Upon tabling, the Report will stand referred to the Public Investments Committee, which shall, in its examination of the matters contained therein, confine itself to the financial and expenditure aspects of the reservations of the Auditor General as well as omissions and/or commissions on the part of the Kenya Airports Authority;

- 3. THAT**, as for the Departmental Committee on Transport, Public Works and Housing, it is also at liberty to proceed with its inquiry. However, the Departmental Committee is to confine itself to matters of policy, human resource, compliance with due process and the law, benefits to the society and the nation and generally addressing any issues of concern to the people as contemplated under Article 95(2) of the Constitution.

The Committee is expected to offer oversight on the stages of implementation contemplated to complete the process and be apprising the House on the progress of the matter, should it proceed as initiated. This is also in tandem with my letter of 21st February, 2019 to the Chairperson of the Committee;

- 4. THAT,** since the Investment Proposal is at its infancy, it may in due course, become inevitable for Parliament to be involved, particularly if there are any legislative interventions required as part of the process. In this regard, the House ought to exercise **restraint** at the current initial stages so as not to become prejudiced should the legislative intervention stage become inevitable;
- 5. THAT,** henceforth, any Committee of the House which is desirous of benefiting from the specialized expertise of the Office of the Auditor General by way of requests for **special audits** must comply with the parameters contained in this Communication. The Auditor General, in considering the request may accede to the request, based on his reasoned judgment and inform the Committee through the established channels;
- 6. THAT,** notwithstanding my earlier approval of the notice of Motion in respect of the adoption of the Progress Report of the Public Investments Committee on *The Inquiry into the Proposed Takeover of Jomo Kenyatta International Airport (JKIA) by Kenya Airways (KQ)*, laid on the table of the House by the Chairperson on *Wednesday, February 27, 2019*, I am constrained **NOT** to allow the motion to proceed. This is because, by doing so, the House will be offending its own established practice and

indeed the practice in many other comparative jurisdictions regarding treatment of progress reports. I will however allow the Chairperson of the Committee to present his report to the House by way of a statement as contemplated under Standing Order 44. In so doing, he is expected to speak to the progress of the matter before the Committee, which is essentially the substance of the said Report;

- 7. THAT,** following the statement of the Chairperson of the Public Investments Committee, I will allow other Members of the House to make comments on the Progress Report. This is in keeping with the precedent set by the House on Thursday, July 5th, 2018, when the Chairperson of the Departmental Committee on Agriculture & Livestock and the Chairperson of the Departmental Committee on Trade, Industry & Cooperatives presented a joint progress report on the *Inquiry into Alleged Importation of Illegal and Contaminated Sugar in the Country*, which was an active matter before the joint Committee. This practice is however distinct from the procedure contemplated under Standing Order 200 providing for *half-yearly progress reports* which are to be submitted to the Liaison Committee and thereafter tabled in the House; and,
- 8. THAT,** since a progress report is intended for information and to elicit comments without resolution, and may **not** be amended, the proposed amendment by the Chairperson of the Departmental Committee on Transport, Public Works and Housing to the subject progress report is also inadmissible.

Finally, Honourable Members, as I conclude, I wish to laud the Public Investments Committee for bringing this matter to the attention of the House. **Nevertheless, even as the two Committees resume their examination and the House makes comments on the progress report, may I caution the two committees and indeed the House that, in examining this investment proposal, we must be conscious that it is at its infancy. All of us must uphold high standards, be mindful of the strategic interests of the nation and the welfare of the present and future generations. This behoves all of us to exercise sobriety, patriotism and reasonable confidentiality as servants who "have been called to the performance of important trusts in this Republic."⁹**

The House is accordingly guided.

I thank you!



THE HON. JUSTIN B. MUTURI, E.G.H., MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, March 21, 2019

⁹ Derived from the prayer contained in the National Assembly Standing Orders, Fourth Edition, page xxiii