



REPUBLIC OF KENYA
TWELFTH PARLIAMENT – (THIRD SESSION)
THE SENATE
VOTES AND PROCEEDINGS
WEDNESDAY, DECEMBER 04, 2019 AT 2.30 P.M.

1. The Senate assembled at thirty minutes past Two O'clock.
2. The Proceedings were opened with Prayer said by the Speaker.
3. **COMMUNICATIONS FROM THE CHAIR**

The Speaker conveyed the following Communications from the chair:-

a) **Visiting Delegation from the Kilifi County Assembly**

“Honourable Senators,

I would like to acknowledge the presence of a delegation from the Kilifi County Assembly, who are seated in the Speaker’s Gallery. The delegation consists of Members of the Joint Sectoral Committee on Administration, Labour and Social Services, and Culture, Public Entertainment and Amenities.

The delegation is undertaking an exposure visit on the mandate and operations of the Standing Committee on Labour and Social Welfare and the general functions of parliamentary committees.

I request each Member of the delegation to stand when called out so that they may be acknowledged in the Senate tradition. They are: -

- 1) Hon. David Kadenge Dadu – Chairperson;
- 2) Hon. Dickson Shaban - Vice Chairperson;
- 3) Hon. Pascal Thuva;
- 4) Hon. Humphrey Mwarandu;
- 5) Hon. Margaret Dama;
- 6) Hon. Radhia Omar;
- 7) Hon. Benson Chengo;
- 8) Hon. Humphrey Mkadi;

- 9) Hon. Yasin Noordin; and
- 10) Hon. George Baya.

The delegation is accompanied by the following officers from the County Assembly -

- 1) Mr. Alburham Chuba;
- 2) Ms. Charity Mwarumba;
- 3) Mr. Erick Linendi;
- 4) Ms. Peris Kache;
- 5) Ms. Salome Kasichana; and
- 6) Mr. Samson Kasichana

On behalf of the Senate, and on my own behalf, I welcome the delegation to the Senate and wish them well for the remainder of the visit.

I thank you.”

b) **Exercise by Deputy County Governors of the powers and functions vested in the Office of the County Governor in the absence of the substantive holder of the office by reason of ill health or court order**

1. “Honourable Senators, On 12th November 2019, the Senator for Narok County, the Hon. Ledama Ole Kina, MP, moved a motion in this House directing certain Government Offices, officials and institutions at the National and County levels to work with Deputy County Governors who exercise the functions of the County Governor due to the absence of the substantive County Governor occasioned by ill-health, incapacity or court orders barring the substantive County Governor from accessing office.
2. The text of the motion relies on and cites the roles of County Governors and the Deputies laid out in Articles 179(4), 179(5) and 180(6) of the Constitution as well as Section 32(4) of the County Governments Act, the last cited provision being on limitation of the powers a Deputy County Governor can exercise whilst performing the roles and functions of the County Governor in the latter’s absence.

A: PRELIMINARY ISSUES

The Motion

3. The Motion moved in *amended* form read as follows:

“THAT CONGNIZANT THAT, Article 179(4) of the Constitution designates the County Governor and the County Deputy Governor as the chief executive and deputy chief executive of the county, respectively;

FURTHER COGNIZANT THAT, pursuant to Article 180(6) of the Constitution, a County Governor and Deputy County Governor are elected on a joint ticket, with Article 179(5) providing that, whenever the County Governor is absent, the Deputy County Governor shall act as the County Governor;

AWARE THAT, in several Counties, Deputy County Governors have had to serve as County Governors due to the absence of the substantive County Governors arising from ill health, incapacity or orders emanating from the courts barring the substantive Governor from accessing office;

ACKNOWLEDGING THAT, section 32(4) of the County Governments Act, places limitations on the exercise, by the Deputy County Governor while acting as Governor, any powers of the Governor to nominate, appoint, or dismiss that are assigned to the Governor under the Constitution or other written law;

NOTING THAT, other than the said limitations under section 32(4) of the County Governments Act, no other restraints are placed in law on the exercise, by the Deputy County Governor, of the powers and functions of the Governor whenever the Governor is absent;

AWARE THAT, in exercise of powers and functions of County Governor pursuant to Article 179(5) of the Constitution, Deputy County Governors face a myriad of legal, operational and administrative challenges, which hinder the effective functioning of County Governments and the efficient delivery of services to the public;

NOW THEREFORE, the Senate directs the National Treasury, the Controller of Budget, the Auditor General and the respective County Assemblies and County Executive Committee Members, to work directly with the Deputy County Governor, while exercising the functions of the County Governor, in order to facilitate the effective functioning of County Governments and the efficient delivery of services to the public”.

4. In his remarks while moving the Motion, Sen. Ole Kina informed the House that the Motion was aimed at addressing the challenges faced by Deputy County Governors in their role as Acting Governors in cases where the substantive Governors had been barred by courts from accessing office or otherwise constrained by infirmity.
5. Sen. Ole Kina said that at the moment, there is confusion in the affected Counties of Kiambu and Samburu and residents in those counties are not effectively getting services as they should. He argued that the only powers of the Governor that such Deputy Governors cannot exercise are those on nomination, appointment or dismissal of the Governor’s appointees, as laid out in section 32(4) of the County Governments Act.

6. The Secunder of the Motion Sen. Stewart Madzayo (Kilifi), was brief, his view being that though it is plausible to argue that a County Governor in respect of whom there is a court order against him/her accessing the County office can actually exercise the powers and perform the functions of his office from outside the physical premises of the office -thanks to technology, it is also true that the legal and Constitutional responsibilities of Deputy Governors ought to be recognized, respected and enforced to avoid making Deputy Governors mere flower boys or flower girls.

The Points of Order

7. After the Motion was seconded and the question proposed, it was now time for debate. The Senator for Nandi County, the Hon. Samson Cherarkey rose immediately on a point of order seeking a ruling from the Speaker on whether the Motion was consistent with the Constitution and the law and, therefore, if the motion is admissible for contravening several provisions in the Constitution which he cited with significant emphasis.
8. Sen. Cherarkey's views that this motion was inadmissible generated further points of order from the Senate Majority Leader and Senator for Elgeyo Marakwet County, the Hon. Kipchumba Murkomen as well as the Hon. Senators Moses Kajwang' (Homa Bay) and Kimani Wamatangi (Kiambu).
9. Other than the Mover, none of the Senators who spoke on this point of order was categorical that the Motion was constitutionally sound and should, therefore, be admissible: an understandable situation because the legal issues raised are somewhat weighty and the gaps in the applicable law aggravating.
10. I shall not regurgitate all the legal issues raised in challenging admissibility of the Motion as the entire proceedings of the sitting of the Senate that afternoon of 12th November 2019 are publicly available from the Hansard. Suffice to say, the Senators contesting the admissibility of this Motion argued in so many words that the motion:
 - a) Has the effect of endorsing the "erroneous" view that a County Governor can be removed from office outside the provisions of Articles 180, 181 and 182 of the Constitution, read cumulatively;
 - b) Goes against the Constitutional principle of presumption of innocence to the detriment of County Governors charged before Courts of Law;
 - c) Will enable Deputy County Governors to unconstitutionally and illegally claim/demand performance of the roles and functions of County Governors as well as exercise of functions reserved in law for County Governors, through the backdoor;
 - d) In material part reveals that it is aimed at enabling Deputy County Governors of Kiambu and Samburu Counties who were charged with

criminal offences and subsequently barred from accessing their offices, to perform some or all of the roles of the County Governors, yet the question of if the said Deputy County Governors can do so is legally contested and is pending judicial determination; and

- e) Erroneously assumes that a Court by ordering that a County Governor shall not access their office during the pendency of the criminal suit against them, effectively suspends such County Governor and that Governor is deemed “absent” within the meaning and context of Article 179(5) of the Constitution thereby automatically triggering the immediate assumption of the roles, functions and powers of the County Governor by the Deputy County Governor until the criminal suit is heard and determined or until the court order is lifted, whichever is earlier.
11. In defence of the Constitutionality and, therefore, admissibility of the Motion, Sen. Ole Kina argued that the Motion:
- a) Aims at addressing current, live challenges in some Counties where court orders bar certain County Governors from accessing their offices following arraignment of those County Governors before Courts for criminal prosecution;
 - b) Seeks to enable Deputy County Governors who assume the functions of the office of the County Governor following court orders as described in the foregoing paragraph, to perform those functions without any constraints, hindrances or challenges whatsoever, with the only limitations being those specified in section 32(4) of the County Governments Act, specifically on nomination, appointment and dismissal;
 - c) Considers that the limitations on the powers a Deputy County Governor can exercise provided for under the aforesaid section 32(4) of the County Governments Act do not include power to reshuffle County Executive Committee Members, Chief Officers, or other appointees of the County Governor;
 - d) Is inspired by the reality that in cases where Deputy County Governors are acting the roles and functions of the County Governor after the County Governor has been barred by Court from accessing office, the said Deputy County Governors have been rendered powerless and are being frustrated by the appointees of the Governor in the respective County Government or by other agencies; and
 - e) Is not unconstitutional because Deputy County Governors who are acting in the absence of the substantive County Governor can exercise all the powers and perform all the functions of the County Governor by a proper reading of Articles 179(4), 179(5) and 180(6) of the Constitution, and the only limitation is that contained in section 32(4) of the County Governments Act.

12. Before I determine the issues canvassed in favour or against Sen. Cherakey's point of order, it is important to highlight what our Standing Orders say about admissibility of motions. Standing Order 55(3)(b) provides as follows:

"If the Speaker is of the opinion that any proposed Motion is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament; the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve".

B: DETERMINATION

13. Having carefully reviewed the text of the Motion as well as the contesting arguments made on the admissibility of the Motion, I have examined the Constitution, the County Governments Act as well as the materials forming the *travaux preparatoires* (background documents forming the negotiation and drafting history) of the enactment of the constitutional provisions on the roles of County Governors and their Deputies, as well as provisions of the County Governments Act on the same subject.

The Powers of Governor/Deputy Governor

14. Article 176(1) creates a County Government in each of Kenya's 47 Counties. The County Government consists of a County Assembly and a County Executive. Regarding the County Executive, article 179(1) and (2) of the Constitution provides that the executive authority of the County is vested in, and exercised by, the County Executive Committee comprising of the County Governor, the Deputy County Governor and County Executive Committee Members. In exercise of executive authority, the Governor and Deputy Governor are designated as the Chief Executive Officer and Deputy Chief Executive Officer of the County, respectively, by Article 179(4) of the Constitution.
15. Pursuant to Article 183 of the Constitution as read with Section 36 of the County Governments Act, the functions of the County Governor as the Chief Executive Officer is to lead the County Executive Committee in:
- a) *Implementing County legislation;*
 - b) *Implementing, within the County, National legislation, to the extent that the legislation so requires;*
 - c) *Managing and coordinating the functions of the County administration and its departments;*
 - d) *Supervising the administration and delivery of services in the County and all decentralized units of the County; and*

- e) *Performing any other functions conferred on the County Executive Committee by the Constitution or National legislation, including functions incidental thereto.*

16. More functions specifically allocated to the Governor as an officer (as opposed to those assigned to the County Executive Committee by the Constitution in Article 183 cited above), are found in sections 30, 44 and 45 of the County Governments Act, and are to:

- a) *Represent the County in National and international fora and events;*
- b) *Nominate, appoint, with the approval of the County Assembly, members of the County Executive Committee, the County Secretary and Chief Officers;*
- c) *Submit County plans and policies to the County Assembly for approval;*
- d) *Assent to Bills passed by the County Assembly;*
- e) *Chair meetings of the County Executive Committee;*
- f) *Submit to the County Assembly annual reports on the implementation of status of County policies and plans;*
- g) *Sign and cause to be published in the County Gazette, notice of all important formal decisions made by the Governor or by the County Executive Committee;*
- h) *By a decision notified in the County Gazette, assign responsibility to each member of the County Executive Committee;*
- i) *Deliver an annual State of the County address containing such matters as may be specified in County legislation;*
- j) *Provide leadership in the County's governance and development;*
- k) *Provide leadership to the County Executive Committee and administration based on the County policies and plans;*
- l) *Promote democracy, good governance, unity and cohesion within the County;*
- m) *Promote peace and order within the County;*
- n) *Promote the competitiveness of the County;*
- o) *Be accountable for the management and use of County resources;*

- p) *Promote and facilitate citizen participation in the development of policies and plans and delivery of services in the County; and*
 - q) *Exercise such other powers as may be necessary for the execution of the duties of the office of the Governor.*
17. Other than stating in general terms in Article 179(4) that he is the Deputy Chief Executive Officer of the County, the Constitution provides no specific functions or roles for the Deputy County Governor.
18. The County Governments Act extends this Constitutional ambiguity by describing the functions and roles of the Deputy County Governor in section 32(2) as simply to deputize the Governor in the execution of the Governor's functions. However, the same section 32 empowers the Governor to assign his/her Deputy any other responsibility or portfolio as a County Executive Committee Member but in so doing, the Governor cannot assign or delegate functions of the Governor relating to nomination, appointment or dismissal conferred by the Constitution or any other written law.

Vacancy in the Office of Governor /Absence of Governor

19. There is a clear legal distinction between "occurrence of a vacancy in the office of the Governor" *versus* "the absence of the Governor".
20. The Constitution in Article 182 provides for the circumstances under which the office of the Governor shall be deemed to be vacant, namely, when the Governor:
- a) *Dies;*
 - b) *Resigns in writing, addressed to the Speaker of the County Assembly;*
 - c) *Ceases to be **eligible** to be elected a County Governor [which eligibility is according to Article 180(2) of the Constitution, identical to that for election as a Member of County Assembly listed in Article 193 of the Constitution];*
 - d) *Is subsequent to election, convicted of an offence punishable by imprisonment for at least 12 months; or*
 - e) *Is removed from office under the Constitution (which is, removal from office by way of impeachment).*
21. There is clear guidance from the Constitution as to what shall happen once a vacancy arises/exists in the office of the County Governor. According to Article 182(2) of the Constitution, if a vacancy occurs in the office of County Governor, the Deputy County Governor shall assume office as County Governor for the remainder of the term of the County Governor. If such remainder of term is more than two and half years to the date of the next scheduled election, the Deputy Governor assuming the office of the

Governor shall be deemed to have served a full term for purposes of applying the two-term limit for Governors provided for in Article 180(7) of the Constitution. The Deputy Governor so assuming the office of the Governor shall perform all the functions and exercise all the powers of the office as a substantive Governor, without any legal constraints, restrictions or limitations whatsoever.

22. There are hardly any ambiguities when it comes to a vacancy arising in the Office of the Governor. For that reason, we have had seamless assumption of Deputy Governors to the office of the Governor in event of death (in Nyeri –twice in 2015 and 2017- and in Bomet in 2019), and I suspect the process would equally suffer no be legal hitches in event of resignation, impeachment or other grounds listed in Articles 181 and 182 of the Constitution as supplemented by Section 33 of the County Governments Act and the Standing Orders of the Senate, and further by Article 144 of the Constitution on the removal of the President of Kenya from office on grounds of mental or physical infirmity, which Article applies to County Governors *mutatis mutandis* (with necessary modifications).
23. Thus, no law suggests that where a Governor is facing criminal charges as is currently the case with the respective Governors of Kiambu and Samburu Counties, that such a Governor ceases to hold office thereby giving rise to a vacancy. The only instances that give rise to a vacancy in the office of the Governor are those set out in article 181 and 182 of the Constitution, and a court of law barring a Governor who is undergoing criminal trial from accessing the County office does not give rise to a vacancy in the office of the Governor. Such a Governor would continue to hold office and to discharge his/her functions and to exercise his/her powers under the Constitution, the County Governments Act and any other relevant law.
24. In sharp contrast, the law is not very direct or clear on the powers and functions of a Deputy Governor who is acting in the absence of the Governor, neither is the concept of “absence” defined in any law. Article 179(5) of the Constitution simply states that “when the County Governor is absent, the Deputy County Governor shall act as the County Governor”. It doesn’t say absent from office, county or country. However, it is my view that what was intended was to allow a Deputy Governor to act when the Governor is at least outside the County or out of Kenya for a significant period, to enable seamless flow of services to citizens.
25. The legal provisions in the foregoing paragraph are not elaborated any further, except for the limits placed on the Deputy Governor who is acting as Governor in the absence of the Governor in section 32(4) and (5) of the County Governments Act, whereby the Acting Governor is prohibited to perform, and the substantive Governor prohibited from delegating, the functions or powers of the substantive Governor relating to nominations, appointments and dismissal.

26. What, then, is the meaning of the word “absence” as used in Article 179(5) of the Constitution and how does that meaning apply to the situation of a Governor against whom there is an un-vacated court order barring him/her from setting foot in the office until his/her criminal trial is heard and determined? Does barring of the Governor from accessing the County office render the Governor “absent” within the meaning and context of Article 179(5) of the Constitution?
27. Neither the Constitution nor the County Governments Act or any other national legislation I am aware of defines or otherwise elaborates what constitutes “absence” of the Governor. The Black’s Law Dictionary defines the word “absent” as *“being away from; at a distance from; not in company with”*. The Oxford English Dictionary on its part defines the word “absent” as an adjective, to mean, *“not present in a place, at an occasion, or as part of something”*, and as a verb to mean *“go away or remain away”*.
28. The word “absence” is used in Article 179(5) of the Constitution as an adjective, describing the noun County Governor as being not in a certain place at a given time, not present or missing from such a place. To my mind, although there has been no further clarification by the Constitution, the County Governments Act or any other law of what constitutes “absence”, a contextual interpretation of the term as used in Article 179(5) of the Constitution supports a conclusion that the provision refers to physical absence such as the Governor being physically away from the County office, or away from the County which he/she heads or is out of the territory of Kenya.
29. According to these definitions, there appears to be no basis for interpreting the adjective “absence” as used in Article 179(5) of the Constitution to refer to a situation where a Governor is unable to access the County office as a result of a Court order as is currently the case with the respective Governors of Kiambu and Samburu Counties who are undergoing criminal prosecution.
30. If a Governor facing criminal charges is barred by Court to access the County office, it is because the office has become a scene of crime which is made out of bounds to suspects to preserve evidence and to protect the scene of crime from interference from a suspect of the crime in question. The Governor has not ceased to hold office because none of the instances provided for under Articles 181 and 182 of the Constitution have occurred to give rise to vacancy in the office of such Governor.
31. Section 6A of the County Governments Act provides that each of the 47 County Governments in Kenya shall be located in the respective physical location set out in the Third Schedule to the County Governments Act. Accordingly, the County Government of Kiambu is located at the physical location of Kiambu Urban Area while that of Samburu is domiciled at

Maralal Urban Areas. These provisions notwithstanding, there is no law providing that a Governor can only perform the functions or exercise the powers of office only when at the County Government office.

32. By the courts prohibiting the respective Governors from accessing the respective County Government offices, the respective Governors have been asked not to go to the physical locations of their respective offices, in Kiambu and Maralal towns respectively. When not in the office, the Governor may be deemed absent from the office but is not necessarily absent from the County. They still hold office of the Governor and they may be present anywhere in the County and perform the functions and exercise the powers of their office from anywhere within the county, as long as they do not access the physical location of the County Government offices. A Governor need not be at the physical location of the County office to perform the functions, or exercise the powers, of the office of the Governor.
33. Where, however, such Governors face practical constraints in performing any of their official functions or exercising any of their powers, they may voluntarily delegate to the Deputy Governor the functions and powers that the law allows to be delegated to the Deputy Governor, but no law compels a Governor against whom there is a court order not to access the County Office to delegate or to cease holding office.
34. The Motion by Sen. Ole Kina erroneously assumes that a court order barring a Governor from accessing the County Office means that such a Governor is technically absent and, therefore, the Deputy Governor automatically becomes the Acting Governor pursuant to Article 179(5) of the Constitution. That kind of interpretation would imply that the Governors in such situations are technically suspended by operation of the Court order, a legal impossibility.
35. Assumption by a Deputy Governor to the office of the Governor or such Deputy Governor purportedly performing any of the functions, or exercising any of the powers of the Governor simply because the substantive Governor has been charged in Court and slapped with a court order not to access the County office, is unconstitutional, illegal, null, void and of no legal consequence unless and until the substantive Governor legitimizes such performance of functions or exercise of powers in writing by appointing the Deputy Governor to act as Governor.
36. I have read the much relied on but recent decision of Ngugi, J. in *Criminal Revision No. 25 of 2019, Moses Kasaine Lenolkulal Vs Director of Public Prosecutions (2019) eKLR 2019* relating to the Governor of Samburu County whom the Judge went on in remarks *obiter dicta* (not part of main judgment) to bar from accessing the County office during the pendency of the trial. I observe that the Judge did allow the Governor to access the County office but with the permission and concurrence of the investigating agency, the Ethics and Anti-Corruption Commission (EACC), and its Chief

Executive Officer (CEO). She upheld the order dated 15th May 2019 given by the Magistrate in the Anti-corruption Court, to the following effect:

“The Governor of Samburu County is barred from accessing the Samburu County Government Offices without the prior written authorization from the investigating agency (EACC), who shall put measures, if any, in place so as to ensure that there is no contact between [the Governor] with the prosecution witnesses and preserve the evidence until further orders of this Court”.

37. The learned Judge appreciated that such permission would hypothetically have to be sought and given on a daily basis, presenting practical difficulties; but the Deputy Governor could fill the gap by assuming the functions where the Governor could not access the County office. However, nowhere has the learned Judge said that the Governor of Samburu County should not henceforth perform his official functions. In fact, she emphasizes that the Governor is “not being removed from office”, meaning no vacancy in the office of the Governor has been created by the Judgment.
38. Neither does the learned Judge expressly pronounce that failure by the Governor to access the office by operation of the conditions in her Order would constitute absence from office and, therefore, by operation of Article 179(5) of the Constitution, enable the Deputy Governor act automatically. She simply states that the Governor may go to the County office with the permission and supervision of the EACC and the EACC CEO, and should there be any practical challenges at any time in seeking and/or obtaining the permission for supervised access to the office, the Deputy Governor should be able to fill the gap by performing the functions, and exercising the powers, of the Governor in an acting capacity.
39. From the logic in the Judgment, it is clear to me that the learned Judge does not see the Governor’s lack of access to the County office as constituting absence contemplated in Article 179(5) of the Constitution to trigger the Deputy Governor’s right to be the Acting Governor automatically. If the Judge’s intention was to apply and bring into effect Article 179(5), nothing would have been easier than to say so.
40. The Governor slapped with such a Court order not to access the County Government office is in full compliance by avoiding unauthorized and unsupervised access to the County Government office. However, such a Governor may make decisions from elsewhere other than the office, sign documents from anywhere other than the office, hold meetings with County Executive Committee Members from anywhere so long as it is not in the County Government office, hold meetings with other officials of the County Government, visitors or citizens anywhere within the County but outside the County Government office, inspect projects, co-ordinate, superintend or preside over events outside the office and so forth. He/ She may make telephone calls, use social media accounts to communicate, correspond via

electronic mails, ensure procurement, human resources and other critical departments are running well etc., on condition that he/she does not tamper with evidence touching on matters being investigated or contact witnesses- which matters and witnesses would have been disclosed anyway by the time of commencement of the Governor's criminal trial.

41. Therefore, the order according to the learned Judge, neither creates a vacancy by removing the Governor from office, nor does it deem the Governor's bar from accessing the County office to constitute an absence and thus trigger into operation Article 179(5) of the Constitution. To do so would run afoul to the Constitutional principle of presumption of innocence. The Order simply designates the County Government offices in Maralal town a scene of crime and therefore out of bounds for the Governor as a suspect, allowing him only supervised access to the office to ensure the Governor has no contact with any prosecution witnesses working there and generally to prevent the Governor from interfering with evidence at the office.
42. Instead, the learned Judge appear to technically suspend the Governor from office without having the courage to say so, and finds subsection 62(6) of the Anti-Corruption and Economic crimes Act which exempts Governors, among certain other State officers from suspension, unconstitutional for perpetuating discrimination.
43. The learned Judge is of the view that sub- section 62(6) of this Act is unconstitutional for discrimination and for going against the national values and principles of governance listed in Article 10 of the Constitution, particularly good governance and integrity; and for violating the spirit of Chapter six of the Constitution, in so far as the said subsection 62(6) provides that state or public officers who are charged under the Act shall be suspended until completion of their trial, except for State or public officers for which there is a Constitutional mechanism for their removal.
44. While Ngugi J.'s judicial activism and purposive interpretation of the Constitution is laudable if not admirable, I respectfully disagree with her views on section 62(6) of the Anti-Corruption and Economic Crimes Act. It is noteworthy that a full application of her views on this section would mean that State/Public officer including Members of County Assembly (MCAs), Members of Parliament (MPs) including Senators, Governors, Judges, and Members of Independent Constitutional Commissions once charged under with corruption or economic crimes shall be suspended from office until when the criminal process abates or the charges are otherwise terminated.
45. The learned Judge is, respectfully, wrong. Subsection 6 of Section 62 exempts from suspension during a criminal trial, State Officers or Public Officers in respect of whom the Constitution has provided an alternative mechanism for their removal. Particularly exempted from suspension- and

for good reason- are Judges and Members of Independent Constitutional Commissions who may be removed through tribunals established under the Constitution. This mechanism for removal from office of Judges is not applicable to, for example, Cabinet Secretaries, Principal Secretaries or officers in the civil service, yet there is nothing Unconstitutional or discriminatory about it.

46. MPs may be removed either by recall under article 104 of the Constitution or by being found to have violated Chapter six of the Constitution (per Article 99(2) (h) of the Constitution, while Governors who are charged in Court may be removed from office through an alternative mechanism of impeachment, as provided for by Article 181(1) (c), as being charged constitutes “*serious reasons for believing that a County Governor has committed a crime under national or international law*”.
47. I consider allowing the suspension of elected leaders from office who are facing criminal charges susceptible to abuse whereby the criminal justice system may be misused by political rivals to have a political leader charged and subsequently suspended from office. For Governors, I find suspending them a frontal attack on the distinct nature of County Governments and their independence from the whims of the National Government which exclusively somewhat controls the appointments to, funding, and to some extent operations of, State investigative and prosecutorial agencies, thereby emasculating and weakening devolved Governments.
48. The threat - however hypothetical or remote - of a rogue, centralist leaning National Government misusing National criminal justice institutions within the Executive must be warded off by ensuring that Governors who are charged can only be removed from office, if need be, through the mechanism provided for in the Constitution, of impeachment. The national values of *good governance, integrity and non-discrimination* relied on by Justice Mumbi Ngugi in her judgment, *supra*, cannot be applied in isolation: they ought to be balanced with the equally important national values of *sharing and devolution of power*, the latter being the basis for protecting, respecting County Governments and keeping them independent from whimsical attacks by the National Government.
49. The emerging habit, therefore, of Deputy Governors declaring themselves as the “Governors” or “Acting Governors” when the respective substantive Governors are charged and barred from accessing the County offices is *prima facie* unconstitutional, illegal, null and void. A Governor who cannot access the County office due to a Court order has the liberty and discretion to appoint the Deputy Governor as the Acting Governor, but such appointment cannot not be forced on such a Governor.
50. I hasten to caution, though, that it appears from a reading of Article 179(5) that if “absence” of the Governor is *objectively* established, the assumption of the Deputy Governor to the office of Governor on acting basis is

automatic, and does not depend on the Governor's action of appointing the Deputy Governor to act. The use of the word "shall" in that provision triggers the action *suo moto/sua sponte* (automatically).

51. Indeed, the mandatory phrase "shall act" in Article 179(5) relating to the Deputy Governor becoming the Acting Governor is similar in meaning and implication to the phrase used in Article 182(2) in relation to a vacancy occurring in the office of the Governor, whereby the provision is to the effect that "the Deputy County Governor shall assume office as County Governor...", automatically and without being prompted by anyone or anything whatsoever.
52. It follows that as was specifically raised by Sen. Kajwang' in reference to the Governor of Homa Bay County who for a long time was absent from office and perhaps from the County due to physical infirmity in the form of temporary blindness, the Deputy Governor of that County could act as Governor with or without the substantive Governor's appointment, for the full duration of the Governor's "absence" from the County or from Kenya, but not while the substantive Governor remained out of office but within the territory of Homa Bay County. This situation in respect of the Homa Bay County Governor could also trigger his impeachment on grounds of physical incapacity occasioned by infirmity as anticipated in Article 181(1) (d) as read together with Section 33 of the County Governments Act and Article 144 of the Constitution.
53. Similarly, as again cited by Sen. Kajwang', where as was the case in 2018 when the Governor of Migori County was barred by the Criminal Court from "setting foot" anywhere within 20 kilometres from the border of Migori and Homa Bay Counties, that would not denote "absence" of the Governor. However, if the Court order had required the said Governor not to set foot anywhere in Migori County, the Governor's "absence" could be established objectively and trigger the automatic assumption of the Deputy Governor to act as Governor as long as the Court order remained active.
54. The material part of the Motion by Sen. Ole Kina is the third Paragraph, that reads as follows:

"AWARE THAT, in several Counties, Deputy County Governors have had to serve as County Governors due to the absence of the substantive County Governors arising from ill health, incapacity or orders emanating from the courts barring the substantive Governor from accessing office;"
55. The Motion is unconstitutional to the extent of its disclosed intention, namely, to legitimize and formalize the "Acting" status of Deputy County Governors who may have erroneously assumed office as a result of Court orders barring the substantive Governor from accessing the County office, in the mistaken belief that:

- (a) A vacancy has arisen in the office of the Governor as contemplated by Articles 181 and 182 of the Constitution, or
 - (b) The Governor has been rendered technically “absent” merely by being barred by Court from accessing the County office even if such Governor is still within the territory of the County in which they serve, thereby automatically triggering the operation of Article 179(5) of the Constitution; or
 - (c) The Court order has essentially “suspended” the Governor from office and rendered him absent, a notion inapplicable to County Governors, including those facing criminal charges.
56. Additionally I find the last paragraph of the Motion, which contains the resolution that the House shall be making superfluous, unless the aim of the Motion as I have said is to empower Deputy Governors to assume the roles of an Acting Governor outside the law. It states that THE SENATE DIRECTS:
- “The National Treasury, the Controller of Budget, the Auditor General and the respective County Assemblies and County Executive Committees Members, to work directly with the Deputy County Governor, while exercising the functions of the County Governor, in order to facilitate the effective functioning of county Governments and the efficient delivery of services to the public”.*
57. The wording of this Resolution betrays the existence of a problem; that Deputy Governors who are acting as result of the substantive Governors being barred from accessing the County Offices are not getting full co-operation of the National Government or County Government agencies, or at all. Why should the Senate be directing or ordering National Government and County Government agencies to extend co-operation to a Deputy Governor who is acting as County Governor lawfully? Wouldn't the legal consequences be the same if the co-operation was being denied a substantive Governor?
58. Besides, the use of the term “direct” in the resolution paragraph leads me to ask if, assuming this Motion was not unconstitutional, the Senate has the wherewithal to ensure that the agencies named in the Motion comply with the directives of the House Resolution. While the Senate may give directives to the said Agencies when the House is exercising its Parliamentary oversight responsibilities over resources allocated to Counties under Article 96(3) of the Constitution, the House has no such powers to direct the listed Agencies to execute their respective routine, day to day functions.

59. To say the Senate can so direct would amount to subversion of the doctrine of separation of powers, which this House proudly waves at the Judiciary or the Executive whenever any of them tries to encroach on our functional realm. The Senate must not just invoke the doctrine of separation of powers to defend its turf as part of the Legislature, it must also vigorously comply with it by restraining from venturing into the functional turf of the Executive or the Judiciary. What is good for the goose must be good for the gander. Thus, assuming the Motion was Constitutional, which it is not, it should have at best “recommended” or “urged” the listed agencies but not to “direct” them.

60. In consideration of all what I have determined herein, the Motion sponsored by Sen. Ole Kina is unconstitutional and *ab initio* inadmissible within the meaning and context of Standing Order 55(3) (b) for being contrary to the Constitution, “without expressly proposing appropriate amendment to the Constitution”. Accordingly, no decision shall be made on it. The Mover, or any other Senator is, however, at liberty to re-draft the Motion to conform to this Ruling and submit it for consideration afresh at any time. Standing Order 58(1) shall not apply to this Motion because although the Motion had been debated, the House had not, and shall not; make a decision thereon, either in the affirmative or in the negative.

4. **PAPERS**

The following Papers were laid on the Table of the Senate:-

- a) Report of the Standing Committee on Roads and Transportation on the visit to the Malaba International Border Point (OSBP).
- b) Report of the Standing Committee on Roads and Transportation on the inspection visit and familiarization of the Kibwezi-Athi-Mutomo-Kitui Road Project in Kitui County.

(Chairperson, Standing Committee on Roads and Transportation)

5. **NOTICE OF MOTION** – (Chairperson, Standing Committee on Roads and Transportation)

THAT, the Senate adopts the reports of the Standing Committee on Roads and Transportation on the visit to the Malaba International Border Point (OSBP) and the inspection visit and familiarization of the Kibwezi-Athi-Mutomo-Kitui Road Project in Kitui County laid on the Table of the Senate on Wednesday, 4th December, 2019.

6. **STATEMENT PURSUANT TO STANDING ORDER 48(1)**

The Senator for Nandi County (Sen. Samson Cherargei, MP) sought a Statement from the Standing Committee on Roads and Transportation on stalled roads projects in Nandi County.

8. **THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL (NATIONAL ASSEMBLY BILLS NO. 13 OF 2018)**

Order for Second Reading read;

Motion made and Question proposed;

THAT, the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) be now read a Second time.

(The Senate Majority Leader – 03.12.2019)

Debate interrupted on Tuesday, 3rd December, 2019 resumed;

And there being no other Senator wishing to contribute;

The Senator for Nakuru County (Sen. Susan Kihika, MP) replied on behalf of the Mover;

Raising a point of order pursuant to Standing Order 61(3), the Senator for Nakuru County (Sen. Susan Kihika, MP), requested for the deferment of the putting of the Question to a later date;

And the Deputy Speaker, acceding to the request, deferred the putting of the Question to a later date, pursuant to the Standing Orders.

9. **THE ELECTIONS (AMENDMENT) BILL (SENATE BILLS NO. 18 OF 2019)**

Order for Second Reading read;

Motion made and Question proposed;

THAT, the Elections (Amendment) Bill (Senate Bills No. 18 of 2019) be now read a Second Time.

(Sen. Ephraim Maina, MP)

Debate arising;

And there being no other Senator wishing to contribute;

Mover replied;

Raising a point of order pursuant to Standing Order 61(3), the Senator for Nyeri County (Sen. Ephraim Maina, MP) requested for the deferment of the putting of the Question to a later date;

And the Deputy Speaker, acceding to the request, nominated Thursday, 5th December, 2019 as the day when the Question shall be put.

Pursuant to Standing Order 31(2), the Deputy Speaker adjourned the Senate at twenty-six minutes past six o'clock, without Question put.

10. SENATE ROSE – at twenty six minutes past six O'clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Thursday, December 5, 2019 at 2.30 p.m.*

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