



REPUBLIC OF KENYA

TWELFTH PARLIAMENT – FOURTH SESSION

THE SENATE

VOTES AND PROCEEDINGS

TUESDAY, NOVEMBER 03, 2020 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) **Resumption of Sittings from the recess period**

“Honourable Senators,

I take this opportunity to welcome you back from the three-week recess period. This last part of our Calendar will run for a period of one month from today, Tuesday, 3rd November, 2020 to Thursday, 3rd December, 2020. I hope you had time to reflect with your families and constituents.

Honourable Senators,

As we return from recess, let us remember that COVID-19 continues to pose serious health challenges to all of us. As you know, this scourge has affected and made an impact on each and every one of us in one way or another. During this recess period, it hit close to home where we lost one of our secretariat officers in the Directorate of Sergeant-At-Arms, the Late Philemon Okinda. Our secretariat has indeed gone above the call of duty to ensure that we are adequately facilitated to execute our constitutional mandate. I take this opportunity to commiserate with the Late Okinda's family and the larger Parliament fraternity and to appreciate our secretariat for the efforts and sacrifices that they make every day for us and this nation.

Data availed by the relevant Ministry and information in the public domain is that we are now in a second wave of the pandemic which is allegedly more lethal than the first one. I urge each and every one of us to religiously adhere to the Parliamentary Guidelines on keeping safe and preventing the spread of the

pandemic. Be your neighbors' keeper and wear your mask responsibly and at all times.

Honourable Senators,

We have resumed sittings for a very short period before the Senate proceeds on the long recess next month. This coupled with the implications of the High Court Ruling on Bills pending at various stages in the Senate, Motions, Petitions and Statements that are before Committees, not forgetting the imminent Constitution review processes, and a raft of expected legislative proposals as a result of the Building Bridges to a United Kenya Initiative, our work is clearly cut out for us.

I will say a little more on the High Court judgement shortly.

Honourable Senators,

I call upon all of us to dutifully attend and participate in Committee and Plenary Meetings. My Office and the Secretariat are at your disposal to facilitate you in your work.

I thank you.”

b) **Implication of the High Court judgement on Constitutional Petition No. 284 of 2019.**

“Honourable Senators,

On 20th June 2019, the Senate passed a motion and resolved to among other things to institute legal proceedings to –

- (a) challenge the laws that have been enacted unprocedurally in the 12th Parliament;
- (b) seek an interpretation of the term “money Bill”; and
- (c) seek a final determination of the procedure to be followed in respect of all the Bills that are pending before Parliament so as to ensure compliance with Article 110(3) of the Constitution and for the future.

In line with the resolution of the House, on 18th July, 2019 the Senate filed a Petition seeking for the following orders:

- (a) *A declaration be and is hereby issued that pursuant to Article 110 (3) of the Constitution, a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament as to whether a Bill is one that concerns counties, and if it is, whether it is a special or an ordinary Bill, before the Bill can be introduced for consideration in the originating House.*
- (b) *A declaration be and is hereby issued that it is mandatory and a condition precedent for any Bill that is published by either House to be subjected to a joint concurrence process to determine, in terms of Article 110(3) of the Constitution, whether the Bill is a special or an ordinary Bill and that such*

determination is not dependent on “a question arising” as to whether the Bill is one that concerns counties.

- (c) A declaration be and is hereby issued that the provisions of Article 110 (3) are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill.*
- (d) A declaration be and is hereby issued that pursuant to Article 110(3) of the Constitution, one Speaker cannot unilaterally make a decision as to whether a Bill does or does not concern counties or whether a question as to whether the Bill is one that concerns counties does or does not arise;*
- (e) This Honourable Court orders the immediate cessation of consideration of all Bills that are pending before either House, and for which joint concurrence by the Speakers of both Houses, as to whether the Bills concern counties, has not been demonstrated, to allow for such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110(3) of the Constitution;*
- (f) A declaration be and is hereby issued that any Bill or delegated legislation that provides for, or touches on, the mandate or powers of the Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate’s ability to undertake its constitutional mandate including its ability to consider Bills that affect counties;*
- (g) A declaration be and is hereby issued that the following Acts passed by the National Assembly are unconstitutional, null and void for violation of Articles 96, 109, 110, 111, 112 and 113 of the Constitution:*
 - 1. The Public Trustee (Amendment) Act, No. 6 of 2018*
 - 2. The Building Surveyors Act, 2018, No. 19 of 2018*
 - 3. Computer Misuse and Cybercrimes, Act, No. 5 of 2018*
 - 4. The Statute Law (Miscellaneous Amendments), No. 4 of 2018*
 - 5. The Kenya Coast Guard Service Act, No. 11 of 2018*
 - 6. The Tax Laws (Amendment) Act, No.9 of 2018*
 - 7. The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018*
 - 8. The Supplementary Appropriation Act, No. 2 of 2018*
 - 9. The Equalization Fund Appropriation Act, No. 3 of 2018*
 - 10. The Sacco Societies (Amendment), 2018, No. 16 of 2018*
 - 11. The Finance Act, No. 10 of 2018*
 - 12. The Appropriations Act, No. 7 of 2018*
 - 13. The Capital Markets (Amendment) Act, No. 15 of 2018*
 - 14. The National Youth Service Act, No. 17 of 2018*
 - 15. The Supplementary Appropriation Act, No. 13 of 2018*
 - 16. The Health Laws (Amendment) Act, No. 5 of 2019*
 - 17. The Sports (Amendment), Act, No. 7 of 2019*
 - 18. National Government Constituency Development Fund Act, 2015*
 - 19. The National Cohesion and Integration (Amendment) Act, 2019*
 - 20. The Statute Law (Miscellaneous Amendments) Act, 2019*
 - 21. The Supplementary Appropriation Act, No. 9 of 2019*
 - 22. The Appropriation Act, 2019*
 - 23. The Insurance (Amendment) Act, 2019*
 - 24. The National Government Constituency Development Fund Act, 2015*

(h) *In the alternative to prayer (g), and without prejudice to prayer (g), that this Honourable Court suspends the validity of the statutes below to enable Parliament comply with the procedures set out under Articles 96 to 113 of the Constitution within a period of six months and to report back to this Honourable Court on the action taken to comply with the legislative procedure as set out in the Constitution-*

1. *The Public Trustee (Amendment) Act, No. 6 of 2018*
2. *The Building Surveyors Act, 2018, No. 19 of 2018*
3. *Computer Misuse and Cybercrimes, Act, No. 5 of 2018*
4. *The Statute Law (Miscellaneous Amendments), No. 4 of 2018*
5. *The Kenya Coast Guard Service Act, No. 11 of 2018*
6. *The Tax Laws (Amendment) Act, No.9 of 2018*
7. *The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018*
8. *The Supplementary Appropriation Act, No. 2 of 2018*
9. *The Equalization Fund Appropriation Act, No. 3 of 2018*
10. *The Sacco Societies (Amendment), No. 16 of 2018*
11. *The Finance Act, No. 10 of 2018*
12. *The Appropriations Act, No. 7 of 2018*
13. *The Capital Markets (Amendment) Act, No. 15 of 2018*
14. *The National Youth Service Act, No. 17 of 2018*
15. *The Supplementary Appropriation Act, No. 13 of 2018*
16. *The Health Laws (Amendment) Act, No. 5 of 2019*
17. *The Sports (Amendment), Act, No. 7 of 2019*
18. *The National Cohesion and Integration (Amendment) Act, 2019*
19. *The Supplementary Appropriation Act, 2019*
20. *The Appropriation Act, 2019*
21. *The Statute Law (Miscellaneous Amendments) Act, 2019*
22. *The Insurance (Amendment) Act, 2019*
23. *The National Government Constituency Development Fund Act, 2015*

(i) *A declaration be issued that the Appropriation Act, 2019 is unconstitutional, null and void for violation of Articles 110 (3), 218 and 222 of the Constitution.*

(j) *A declaration be and is hereby issued that the Constitution requires that the Speakers of both Houses of Parliament adhere to the following binding and mandatory legislative path and procedure for every Bill that is published by either House-*

1. *That the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question?*

2. *That the two Speakers, in answering that question, must settle three sub-questions –*

- (a) *is this a Bill concerning county government? And if it is, is it a special or an ordinary bill?*

- (b) *is this a bill not concerning county government?*

- (c) *is this a money Bill?*

3. That any disagreement as to the nature of a Bill should be harmoniously settled through mediation and an obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism;
 4. That the two Speakers would each be required to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time or that the two Chambers may establish a standing mediation committee, to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.
- (k) A declaration be and is hereby issued that Articles 3, 115, 131 (2) and 259 of the Constitution impose a constitutional and legal obligation on both Speakers of Parliament, prior to submitting a Bill for assent to demonstrate compliance with the procedure set out under Articles 109 to 115 of the Constitution has been complied with.
- (l) A declaration be and is hereby issued that the provisions of Standing Order 121 (2) of the National Assembly Standing Orders that provide that “whenever any question arises as to whether a Bill is a Bill concerning county governments, the Speaker shall determine whether the Bill is a Bill concerning county governments and, if it is, whether it is a special or an ordinary Bill” is inconsistent with Article 110 (3) of the Constitution and therefore, pursuant to Article 2 (4) of the Constitution is null and void.
- (m) A declaration be and is hereby issued that Standing Order 143 (2) to (6) of the National Assembly Standing Orders which is set out below is inconsistent with the legislative process on Bills concerning counties as set out in Articles 109 (4), 110 to 113, 122 and 123 of the Constitution and therefore, pursuant to Article 2 (4) of the Constitution is null and void-
- “(2) Following First Reading, the Speaker shall, within reasonable time, pronounce his or her opinion contemplated under Article 114(2) of the Constitution.
- (3) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is not a money Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly after First Reading.
- (4) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is a money Bill in terms of Article 114 of the Constitution, the Bill shall stand referred to the Budget and Appropriations Committee.
- (5) The Budget and Appropriations Committee shall consider the Bill and report its recommendations to the House.
- (6) Where the Budget and Appropriations Committee recommends that the House—
- (a) proceeds with the Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly

after First Reading in the manner recommended by the Budget and Appropriations Committee;
(b) should not proceed with the Bill, that fact shall be recorded in the journals of the House.”

- (n) A declaration be and is hereby issued that where the Speakers of both Houses concur that a Bill is one that concerns counties, pursuant to Article 109 (4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution.*
- (o) A declaration be and is hereby issued that where the contents of a Bill affect the functions and finances of the counties, the bill is not a money bill within the meaning of 114 (3) of the Constitution.*
- (p) A declaration be and is hereby issued that where a Bill deals with financial matters and such matters affect the finances or functions of county governments, pursuant to Article 110 (1) (c), the Bill is a Bill concerning county governments and must be considered by the Senate.*
- (q) A declaration be and is hereby issued that an Act of Parliament constitutes an Act that has complied with the legislative process required of both Houses by participation of both Speakers as required under Article 110 (3) of the Constitution and where the bill concerns counties by consideration in the Senate as required in the Constitution.*
- (r) This Honourable Court be pleased to issue any other appropriate order or relief as it may deem fit and just.*
- (s) Costs of the Petition be awarded to the Petitioner in any event.*

The Senate's Petition was consolidated with a Petition filed by the Council of Governors in *HC Petition No 353 of 2019; Council of Governors vs The National Assembly & Others*. In that Petition, the Council of Governors was challenging section 4 of the Kenya Medical Supplies Authority Act as amended by the Health Law Amendment Act, 2019 on the following grounds that the:

- (a) legislative process of the Health Law Amendment Act, 2019 was tainted with illegality for failing to conduct public participation and making substantive amendments through an omnibus bill;*
- (b) Senate was not involved in the enactment of the Health Law Amendment Act, 2019;*
- (c) amendments will adversely interfere with health service delivery in the counties because KEMSA is unable to supply adequate drugs and medical supplies; and*
- (d) amendments interfere with the principles of distinctiveness under Article 6 of the Constitution.*

The Chief Justice appointed a bench of three judges comprising Justices J. Ngaah, A. Ndung'u and T. Matheka to hear this Petition. The Senate was represented by Senator James Orengo, SC, Senator Okong'o Mogeni, SC, Senator Mutula Kilonzo Junior, Ms Mercy Thanji, Directorate of Litigation and

Compliance (Senate Department) and Dr. Johnson Okello, Director Legal Services, Senate.

The Court subsequently, on 29th October, 2020, delivered its judgment and ruled as follows-

- (a) The concurrence process is mandatory and must be undertaken **BEFORE** a Bill can be introduced in the originating House. The Speakers of both Houses must first comply with the mechanism under Article 110 (3) of the Constitution to concur on whether or not a Bill concerns county, and whether it is a special or ordinary Bill. Where the Speakers are unable to agree on this question, the issue shall be referred to a mediation mechanism for resolution.
- (b) The two Speakers of the Houses of Parliament should expeditiously implement a mediation mechanism for resolving the issue of concurrence on whether or not a Bill is a Bill concerning counties where the Speakers are unable to concur.
- (c) The concurrence process is not dependent on “a question” arising as stated in the National Assembly, Standing Order 121. The High Court declared the procedure in Standing Order 121 of the National Assembly Standing Orders unconstitutional in so far as the same requires that “a question” must arise before concurrence is sought.
- (d) On Bills currently under consideration by either House of Parliament, the High Court ordered the immediate cessation of the consideration of such Bills pending before either House, where the joint concurrence by the Speakers of both Houses as to whether or not the Bills concern counties, has not been demonstrated. Both Houses of Parliament are therefore immediately required to refer such Bills to the mandatory joint resolution/concurrence process under Article 110 (3) of the Constitution before the Bills can go through the legislative process.
- (e) On matters touching on Parliamentary Service, the Court issued an order that any Bill or delegated legislation touching on the Parliamentary Service Commission must be referred to the Senate.
- (f) The procedure set out under standing order 143(2) to (6) of the National Assembly standing orders which the National Assembly applies to refer Bills originating from the Senate to the Budget and Appropriations Committee to determine whether or not the Bill is a Money Bill, was declared unconstitutional. On this question, the High Court ruled that —
 - i) The provisions of standing order 143 (2) to (6) of the National Assembly Standing Orders are unconstitutional; and
 - ii) A Bill concerning counties and a Money Bill are mutually exclusive. Accordingly, where the two Speakers have jointly resolved that a Bill is a Bill that concerns counties, then Article 114 does not apply and the Bill must be considered in line with the procedures set out under Articles 109(4), 110 to 113, 122 and 123 of the Constitution.

- (g) That twenty-three (23) of the Acts passed by the National Assembly and enacted into law in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution were declared unconstitutional, thus, null and void.

Honorable Senators,

This is a landmark ruling that not only reaffirms constitutionalism and the rule of law in Kenya, but also the role of the Senate in devolution. The judgment has far-reaching implications on the legislative business of the Senate as an order was also issued for a cessation of consideration of all Bills that are pending before either House for which joint resolution by the Speakers on whether they affected counties was not undertaken, in order to allow for such Bills to be subjected to the mandatory process contemplated under Article 110 (3) of the Constitution. Further, the Court has given the two Houses of Parliament a 9-month window in which the impugned Acts ought to be brought in line to comply with the provisions of Article 110 (3) of the Constitution and regularized.

The Senate Business Committee has considered this matter and through my Office and those of the House Leadership, further directions on the next course of action on the Bills will be communicated in due course. In the meantime, no Bill which does not meet the requirements of Article 110 (3) of the Constitution will be scheduled in the Order Paper at any stage before that exercise is completed and directions given.

Allow me to thank all of you for participating in and supporting this process of seeking court intervention on the role and mandate of the Senate. Special thanks and gratitude go to the Senators who led our legal team, led by Sen. Okong'o Mogeni, Senior Counsel, Sen. James Orengo and Sen. Mutula Kilonzo Jnr for prosecuting the case *pro bono* thereby saving us the use of public resources.

We are also aware that the National Assembly is contemplating appealing the High Court decision and we have asked our lawyers to be vigilant and deal with the matter, which we are confident that they will.

I thank you."

4. **PAPERS**

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

- i) The Annual County Governments Budget Implementation Review Report for the FY 2019/2020;
- ii) The 2020 Budget Review and Outlook Paper for the FY 2021/2022 and Medium-Term Budget;
- iii) Sessional Paper No. 2 of 2020 on the proposed Veterinary Policy; and
- iv) Sessional Paper No. 3 of 2020 on the proposed Livestock Policy.

(Sen. (Dr.) Alice Milgo on behalf of the Senate Majority Leader)

5. **NOTICE OF MOTION – PARKING CHARGES IN PUBLIC INSTITUTIONS OFFERING ESSENTIAL SERVICES**

(Sen. (Dr.) Abdullahi Ali, MP)

THAT, AWARE THAT, many urban areas and towns in Kenya lack designated car parking areas as a result of imbalance between parking supply and demand mainly due to ineffective land use planning and miscalculations of space requirements, thereby leading to exorbitant parking fees;

NOTING that, most essential services offered in hospitals, educational institutions and other public utilities are offered in urban centers, shopping malls and other designated areas that charge parking fees to access;

ACKNOWLEDGING, that whether they are delivered by public or private providers, essential services such as health, banking, education and other utilities are considered to be public services because they are public goods that sustain the well-being of every citizen and help in the development of the society as a whole;

CONCERNED, that access to hospitals, educational institutions and other places offering essential services might be hindered due to exorbitant parking fees levied on motorists accessing these services;

FURTHER CONCERNED, that charging entry fees amount to double taxation as the motorists who would have paid the parking fees will still pay for the services they seek;

NOW THEREFORE, the Senate urges the Cabinet Secretary for Lands, Housing and Physical Planning together with the Council of Governors to come up with a policy framework to create an enabling environment for protection of motorists accessing essential services from paying exorbitant fees for parking.

6. **STATEMENTS - PURSUANT TO STANDING ORDER 51 (1)(b)**

- a) The Chairperson, Standing Committee on Health (Sen. (Dr.) Michael Mbiti) issued a statement relating to the activities of the Committee.
- b) (Sen. (Dr.) Alice Milgo, MP) on behalf of the Chairperson, Standing Committee on Labour and Social Welfare issued a statement relating to the activities of the Committee.

7. **MOTION – ADOPTION OF THE NINTH PROGRESS REPORT OF THE AD-HOC COMMITTEE ON THE COVID-19 SITUATION IN KENYA**

Motion made and Question proposed;

THAT, the Senate adopts the Ninth Progress Report of the Ad-hoc Committee on the COVID-19 Situation in Kenya, laid on the table of the Senate on Tuesday, 29th September, 2020.

(Chairperson, Ad-hoc Committee on the COVID-Situation in Kenya)

Debate arising;

And the time being thirty Minutes past Six O'clock, the Temporary Speaker (Sen. (Dr.) Isaac Mwaura, MP) interrupted the proceedings and adjourned the Senate without Question put, pursuant to the Standing Orders.

8. **SENATE ROSE** - at thirty minutes past Six O'clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Wednesday, November 04, 2020 at 2.30 p.m.*

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