

# PARLIAMENT OF KENYA

## THE SENATE

## THE HANSARD

Thursday, 11<sup>th</sup> November, 2021

*The House met at the Senate Chamber,  
Parliament Buildings, at 2.30 p.m.*

*[The Speaker (Hon. Lusaka) in the Chair]*

### PRAYER

### COMMUNICATION FROM THE CHAIR

#### THE 7<sup>TH</sup> ANNUAL DEVOLUTION CONFERENCE

**The Speaker** (Hon. Lusaka): Order, take your seats. Hon. Senators, I have a communication on the 7<sup>th</sup> Annual Devolution Conference.

Hon. Senators, as you may recall, the 7<sup>th</sup> Annual Devolution Conference had been scheduled to take place from 23<sup>rd</sup> to 26<sup>th</sup> August, 2021, in Wote, Makueni County. The Conference was postponed following a Presidential directive issued on 18<sup>th</sup> August, 2021, *vide* Public Order No. 5 of 2021, suspending all public gatherings and in-person meetings, as a measure to mitigate against the spread of the pandemic.

Following consultations between the National Executive, the Council of Governors, the Senate and other devolution players, the Devolution Conference Steering Committee, at its meeting held on 18<sup>th</sup> October, 2021, resolved that the 7<sup>th</sup> Annual Devolution Conference be held from 23<sup>rd</sup> to 26<sup>th</sup> November, 2021 at Makueni Boys High School in Wote, Makueni County.

Hon. Senators, the theme of the Conference is “*Multi – level Governance for Climate Action,*” and the sub-theme is, “*Sub-national Mobilization in Unlocking the Full Potential of Climate Action*”. A number of Senators have been identified to represent the Senate in the Conference programme as either Session Chairs or Panelists and correspondence to this effect has been made in writing. I urge the identified Senators to cooperate with the Steering Committee and to closely work with the Secretariat to ensure the effective participation of the Senate.

Hon. Senators, The Senate, on Wednesday, 10<sup>th</sup> November, 2021, resolved to alter its Calendar for Part VI of the Fifth Session in order to allow the Senate to participate in the event. Senators may give their confirmation by signing a register, to be circulated from today, until Thursday, 18<sup>th</sup> November, 2021.

I urge all Hon. Senators to save these dates and plan to participate in this important event in our devolution calendar.

I thank you.

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Next Order.

### PAPERS LAID

#### REPORTS ON THE FINANCIAL STATEMENTS OF VARIOUS COUNTY FUNDS

**Sen. Mutula Kilonzo Jnr:** Mr. Speaker Sir, I beg to lay the following papers on the Table of the Senate today, 11<sup>th</sup> November 2021-

Report of the Auditor General on the Kajiado County Assembly Car Loan and Mortgage Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Turkana County Education and Skills Development Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Turkana County Biashara Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Turkana County Assembly Staff Car Loan and Mortgage Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Vihiga County Trade and Enterprise Fund for the six months' period ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Kericho County Emergency Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Elgeyo Marakwet County Assembly Car and Mortgage Revolving Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Elgeyo Marakwet County Executive Education Fund for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Kapsabet - Nandi Water and Sanitation Company Limited for the year ended 30<sup>th</sup> June 2019.

Report of the Auditor General on the Nandi County Assembly Car Loan and Mortgage Scheme Fund for the year ended 30<sup>th</sup> June 2019.

Last but not least,

Report of the Auditor General on the Uasin Gishu County Alcoholic Drinks Control Fund for the year ended 30<sup>th</sup> June 2019.

Thank you, Mr. Speaker Sir.

*(Sen. Mutula Kilonzo Jnr. laid the documents on the Table)*

**The Speaker** (Hon. Lusaka): Next order.

### STATEMENTS

**The Speaker** (Hon. Lusaka): Let us start with Sen. Kwamboka. Sen. Kwamboka and Sen. Omanga are missing. They are away. So, those Statements are deferred.

#### STATE OF POLICE STATIONS IN THE COUNTRY

#### STATUS OF AN INQUEST INTO THE MURDER OF MS. AGNES WANJIRU

IRREGULAR OWNERSHIP AND USE OF LAND NO. LR 336/64, ORIGINALLY LAND  
NO. LR 336/12 IN BABADOGO.

*(Statements deferred)*

The next Statement is from the Senate Majority Leader.

BUSINESS FOR THE WEEK COMMENCING  
TUESDAY, 16TH NOVEMBER, 2021.

**The Senate Majority Leader** (Sen. Poghiso): Mr. Speaker Sir, pursuant to Standing Order 52(1) I hereby present to the Senate, the business of the House for the week commencing Tuesday 16<sup>th</sup> November, 2021.

Mr. Speaker Sir, on Tuesday, 16<sup>th</sup> November, 2021, the Senate Business Committee will consider and approve the business for Tuesday, 16<sup>th</sup> November, 2021 which is projected to also contain business that will not be concluded in today's Order Paper.

The Senate Business Committee will further consider Bills at the Second Reading and Committee of the Whole stages, as well as Motions, as contained in the Programme of Senate Business.

On Wednesday, 17th November, 2021, the Senate will continue with business that will not be concluded on Tuesday, 16th November, 2021 and any other business scheduled by the Senate Business Committee, while on Thursday, 18th November, 2021, the Senate will continue with business that will not be concluded on Tuesday, 16th and on Wednesday, 17th November, 2021, and any other business that is scheduled by the Senate Business Committee.

With respect to the status of legislative business before the Senate, there are 10 Bills at the Committee of the Whole Stage; 22 Bills at the Second Reading Stage, three of which are pending in Division as indicated in today's Order Paper at Orders No. 8, 9 and 10 respectively.

Additionally, there are 23 Bills undergoing the concurrence process pursuant to Article 110(3) of the Constitution, and will be introduced in the Senate upon completion of the process.

Other business before the Senate includes 15 Motions, 51 Petitions, and Statements pursuant to Standing Orders 47 and 48.

The fifth session is fast coming to an end. However, there are key matters relating to finance which require to be dealt with. As per National Treasury Circular No. 8 of 2021, the timelines for processing of the budget for Financial Year 2022/23 will be altered in view of the upcoming General Elections. As such, the Budget Policy Statement, the draft Division of Revenue Bill and the draft County Annual of Revenue Bill for the next financial year are projected to be submitted to Parliament by 30th November, 2021, for consideration and approval.

This will certainly affect the schedule of Senate Business. For this reason, the Senate Business Committee will meet and give direction for reconfiguration of the schedule of business and if necessary, alteration of the Senate Calendar for the Fifth

Session, to accommodate approval of the Budget Policy Statement and the Finance Bills within the required period.

I urge respective Committees to expedite consideration of pending business before them and to table reports pursuant to the Standing Orders. I also use this opportunity to urge all Senators to avail themselves this afternoon for the divisions on the three Bills scheduled in the Order Paper.

Senators who have business listed are encouraged to be in the Chamber to prosecute the same, including committee chairpersons and Senators proposing amendments to Bills listed for the Committee of the Whole.

Mr. Speaker Sir, I thank you and hereby lay the Statement on the Table of the Senate.

*(Sen. Poghio laid the document on the Table)*

**The Speaker** (Hon. Lusaka): Thank you, Leader of Majority. We have a Statement by Sen. Wambua

DELAY IN ALLOCATION OF A SUB-COUNTY CODE TO THE  
THARAKA/THAGICHU SUB-COUNTY IN KITUI COUNTY

**Sen. Wambua:** Mr. Speaker, Sir, I rise, pursuant to Standing Order 48 (1), to seek a Statement from the Standing Committee on National Security, Defence and Foreign Relations regarding the continued delay in allocation of a Sub-County Code to the Tharaka/Thagichu Sub-County in Kitui County.

In the Statement, the Committee should -

(1) State the number of sub-counties in the country that were created in 2017 alongside the Tharaka/Thagichu and how many of these sub-counties have since been allocated Sub-County codes;

(2) Explain reasons for the delay in allocation of a code to Tharaka/Thagichu Sub-County, a delay that has meant that the residents, who have suffered marginalization since Independence, continue to beg for services and to compete for opportunities with the neighbouring Mumoni Sub-County; and

(3) Elucidate on the plans, if any, that the relevant Ministry has put in place to ensure that Tharaka/Thagichu Sub-County is issued with a code in order to enable the residents have access to exercises such as Teachers Service Commission (TSC) recruitment, Military and National Police Service (NPS) recruitment, distribution of relief support among other National Government services.

**The Speaker** (Hon Lusaka): the next statement is by Sen. Cheruiyot.

LAND TRANSACTIONS BY MULTINATIONALS WITHOUT INVOLVEMENT  
OF NATIONAL OR COUNTY GOVERNMENTS

**Sen. Cheruiyot:** Mr. Speaker Sir, I rise, pursuant to Standing order no. 48 (1), to seek a Statement from the Standing Committee on Land, Environment and Natural Resources regarding Land Transactions by Multinationals without the involvement of the National or County Governments.

In the Statement, the Committee should:

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(1) Explain the reasons behind the sale of the expansive Lemotit Flower Farm in Londiani, Kericho County by a Multinational firm; James Finlay Kenya Company Ltd. stating whether the County Government of Kericho was consulted during the disposal of the land which is on a 99-year leasehold.

(2) Give the name of the individual or the company that has bought the said farm and state the use the land that is intended to be put into.

(3) Inform the Senate whether there is an intended sale of Unilever Tea Kenya Limited (UTKL) businesses in Kericho and Bomet Counties.

(4) State the compensation the two farms will grant their employees who will be rendered jobless by the sale of the said farms.

(5) Cause the Ministry of Lands to re-survey land held by Multinationals in Kericho and Bomet Counties in order to establish the actual acreage of land hosting all multinationals in the two counties.

(6) State the policy and mitigative measures, if any, to be put in place to curb the sale of land under the custody of multinationals without the involvement of the National or County Governments.

I thank you.

**Sen. Cherargei:** Thank you, Mr. Speaker, Sir, for this opportunity. I would like to congratulate and thank Sen. Cheruiyot for bringing this Statement on the issues of multinationals. Kericho, Nandi and Bomet are largely affected by these issues of multinationals, tea leases and other forms of leases. Since the Constitution 2010, the National Land Commission, the county government and national governments have been silent and they have not been telling Kenyans what happened with 999-years leases that were committed to 99 years lease as per the 2010 promulgation Constitution.

This is very important and I would like to request the committee of Lands and Natural Resources and Environment to expand and tell Kenyans especially those in Kericho, Nandi and Bomet on the issue of leases. This is because there is a lot of secrecy and non-clarity.

Mr. Speaker, Sir, we are aware that these multinationals have very huge control of tracts of land and one day they can wake up and change ownership without informing the employees of the county government and without the role of National Lands Commission as Sen. Cheruiyot has said.

A few months ago, I requested for a similar Statement that we need to know the leases because when you come to Nandi, most of the tea farms are owned by individuals or multinational companies.

I hope that these issues of leases will be looked at, whether it is sisal leasing, the flower farms, the change of ownership. Who will really own them? That should be the question. Even across the county, who are these leasing land? If this issue of land ownership and land leasing is not well coordinated I can assure you that it will be a problem in this country.

I therefore support the Statement and say that the issue affects us in Nandi. I know that the Committee of Lands, Natural Resources and Environment has also a lot of issues to deal with but we hope it will give this particular issue priority and each and every one of us will know what happened to the 999-years leases that have been committed to 99-years lease and what is the role of the National Land Commission.

We would also like to know the role of the National Land Commission (NLC) and what the national Government is doing.

Finally, as I conclude, most of these multinationals can only be dealt with by the national Government, because most owners of multinationals are either based in Europe or America. Therefore, the national Government must be at the forefront in fighting for us. When it comes to renewal, change or expiry of leases, the lessor and the lessee must be known. Some people in the leadership have been saying that the leases expired in 2014. Now they are saying that they will expire in 2023. I we knew when leases expire, so that we address the issue of land historical injustices.

I thank you.

**The Speaker** (Hon. Lusaka): Let us now listen to Sen: (Dr.) Langat.

**Sen. (Dr.) Langat:** Mr. Speaker, Sir, I would also like to congratulate Sen. Cheruiyot for almost reading our mind because the issue of land leasing which has affected Kericho, Bomet and Nandi has become a thorn in the flesh of the residents from those areas.

There are rumours and people would like to get clarification on the same matter. We normally hear that the land has been leased for many years, yet we know that it used to belong to the people living in those particular areas. When they were displaced during the colonial period, most of them became landless. Now they live in the Mau Region. When their land is leased again for another 99 years, it becomes a problem to all of us. The worst part is that the leasing was not done after revaluation of the land and the rates they used are not even known to the community.

We demand to know those who leased that particular land without public participation by the communities surrounding those particular places. After leasing that land to different landlords, they came with a different agenda. Most of them started planting flowers instead of the usual crops like tea which used to employ many people and it has rendered so many people jobless. Those of us living around those places are feeling bad.

To make matters worse, the assumption of the people from outside, including well-wishers who would have wished to come and help our communities, is that we are the owners of those particular farms and we are very rich yet the contrary is true, that people from those areas are poor. The assumption is that we are very rich but no one is ready to help us.

There are no proper Corporate Social Responsibility (CSR) activities to help the communities living in those particular places. We do not agree with leasing of that particular land once again without involving our communities.

The committee that will handle this Statement should do robust work, so that we know where the problem lies, so that our people are assisted.

Mr. Speaker, Sir, I support this Statement fully. I thank you.

**The Speaker** (Hon. Lusaka): Let us now listen to Sen. Omanga's Statement. She is joining us virtually.

**Sen. Omanga:** Thank you, Mr. Speaker, Sir.

**The Speaker** (Hon. Lusaka): We cannot see you.

**Sen. Omanga:** I am on, Mr. Speaker, Sir.

**The Speaker** (Hon. Lusaka): We want to see you.

**Sen. Omanga:** My video is on.

**The Speaker** (Hon. Lusaka): We can see you now. Please proceed.

IRREGULAR OWNERSHIP AND USE OF LAND NO. LR.336/64  
IN BABADOGO, NAIROBI CITY COUNTY

**Sen. Omanga:** Mr. Speaker, Sir, I rise pursuant to Standing Order No.48(1) to seek a Statement from the Standing Committee on Land, Environment and Natural Resources on the alleged irregular ownership and use of Land No. LR. 336/64, originally land No. LR.336/12, in Babadogo, Nairobi City County. In the Statement, the committee should-

- (1) State the current ownership of the land.
- (2) Provide the current survey and deed plans of the piece of land under consideration.
- (3) Investigate claims that the said parcel of land which is public has currently been leased to a private individual entity.
- (4) State plans put in place by Nairobi City County Government to ensure all county owned land parcels are secured and proper ownership documents acquired.

I thank you.

**The Speaker** (Hon. Lusaka): Thank you Sen. Omanga. Let us now listen to Sen. Kanga'ta.

COMPENSATION OF KAGAA KILIFI LAND  
OWNERS GROUP, KILIFI COUNTY

**Sen. Kanga'ta:** Mr. Speaker, Sir, I rise pursuant to Standing Order No.48 (1) to seek for a Statement from the Standing Committee on Land, Environment and Natural Resources on the progress in compensating Kagaa Kilifi Land Owners Group with reference to LR. NO. 2859 and 1427 of Kilifi County. In the Statement, the Committee should-

- (1) Apprise the Senate on the progress made by the Ministry of Lands in compensating Kagaa Kilifi Land Owners Group for land repossessed by the Government for distribution to squatters.
- (2) State reasons for the delay in finalizing the matter, taking into account that this land was owned by people of Murang'a County, in particular Kandara Area, and squatters went there and our people from Murang'a have been unable to realize the economic benefits of the said piece of land.
- (3) Give timelines within which this process will be completed, tabling progress report and evaluation of the status of land settlement.
- (4) Outline measures that have been put in place, if any, to ensure that land disputes between land owners and squatters on land ownership are swiftly dealt with.

Mr. Speaker Sir, there was a presidential directive. When Charles Rubia was being buried in Murang'a, I requested the President to help the people of Kandara to expedite the process. That is why we are inquiring about the status.

**The Speaker** (Hon. Lusaka): Sen. Kang'ata, you have two Statements.

APPOINTMENT OF PRIVATE LAW FIRMS TO  
REPRESENT THE GOVERNMENT IN BBI CASE

**Sen. Kang'ata:** Mr. Speaker, Sir, I rise pursuant to Standing Order No.48(1) to seek a Statement from the Standing Committee on Justice, Legal Affairs and Human Rights regarding the appointment of private law firms to represent the Government in the Building Bridges Initiative (BBI) case and payments made to them for the services rendered. In the response, the committee should-

(1) Explain the reasons for the Attorney-General to appoint private law firms in the appeal seeking to overturn the judgement rendered in the High Court over the BBI case that is in the High Court. That is Civil Appeal No. E291 of 2021; Independent Electoral and Boundaries Commission versus David Ndi and 82 others.

(2) Confirm to the Senate whether the appointment of advocates met the required provisions of the Public Procurement and Disposal Act, 2015.

(3) Provide information on the payment made to them for the services rendered.

**The Speaker** (Hon. Lusaka): Finally, Sen. Nyamunga.

CLASSIFICATION OF PATIENTS SUFFERING  
FROM SCD AS PWDS

**Sen. Nyamunga:** Mr. Speaker, Sir, I rise pursuant to Standing Order No.47 (1) to make a Statement on an issue of general topical concern, namely, the need to classify patients suffering from Sickle Cell Disease (SCD) as Persons with Disability (PWDs).

Allow me to start by defining disability as restrictions in the types of activities and social participation that an individual can perform as a result of physical or mental impairment or conditions of longstanding duration within an environment that does not provide sufficient accommodation to facilitate participation.

The social model of disability focuses on the social context in which disablement occurs and identifies disability as the product of social disadvantage and exclusion. The purpose of this narrative is to highlight the malfunction nature of disability among people with SCD, which includes physical, psychological and social dimensions.

Mr. Speaker, Sir, SCD is caused by a disorder in the hemoglobin component of blood, leading to abnormal sickle hemoglobin. Individuals with SCD exhibit significant morbidity and mortality rates.

About 240,000 children in Africa are born each year with SCD, while here in Kenya, it is estimated that 6,000 children are born with the disease, which is a great threat to their physical and cognitive development.

In Sub-Saharan Africa, an estimated 50 to 90 per cent of those born with the condition die undiagnosed before their fifth birthday. The recurrent pain and complications caused by the disease can interfere with many aspects of a patient's life, including education, employment and psychosocial development.

The disease is common across Kenya with high disease burden pockets in Western, Nyanza and Coastal regions. In the Western Region, it is estimated that as high as 18 per cent of children are born with a Sickle Cell Trait and 4.5 per cent end up developing SCD.



In the Lake Region, it is estimated that about 17 per cent of the children are carriers of the trait, with 0.6 per cent having SCD, while in the Coastal Region, using inpatient data, almost 1 per cent of in-patient children have SCD and are almost 20 times likely to die compared to admissions of other morbidities.

Sickle cell anemia requires treatment, medication and hospital stays. By the time SCD gets to a high level of severity to the extent of preventing the individual from working, it often leads to financial strain for both the individual and the family. Since sickle cell anemia is a disease that results in some form of physical disability, persons suffering from it should be considered for benefits entitled to PWDs.

Due to the chronic pain in the bones and/or joints associated with SCD, an individual often suffers from deficiency in mental and cognitive abilities, thus making it difficult to maintain concentration throughout tasks. Crises, which are common in many people with SCD, can cause significant fluctuations in an individuals' ability to function in the workplace.

Further, depression from reoccurring and/or chronic pain is common with SCD, which can lead to problems with performance, including concentrating, keeping pace, remembering instructions and interacting with others appropriately. SCD patients incur other additional indirect expenses, including uncompensated care, premature mortality, low productivity and reduced quality of life, which are much higher than the financial figures.

Having said the above, I wish to implore the Ministry responsible to consider classifying persons suffering from SCD as PWDs.

**The Speaker** (Hon. Lusaka): Proceed, Sen. (Dr.) Musuruve.

**Sen. (Dr.) Musuruve:** Thank you, Mr. Speaker, Sir, for giving me this opportunity to support the Statement by Sen. Nyamunga on classification of SCD as a disability. One thing that must be clear is that PWDs have many challenges. Many times, they cannot manage on their own without the support of others.

People with sickle cell anemia have a lot of problems. They cannot manage to do some things on their own. Some of the ways through which they are affected is that--- By the way, it is also called SCD and it has no cure at all. Sometimes it leads to blindness and sometimes it affects the spleen or the liver. Sometimes it even affects the oxygen in the blood and leads to visual impairment. So, I support that this group of people should be considered as PWDs.

If you allow me to mention this, it took time for people to accept that albinism is a type of a disability because it comes with very many disadvantages. It can even lead to cancer, visual impairment and all that. In the same breath, sickle cell can lead to visual impairment. Sometimes, people with SCD have developmental issues. Therefore, SCD is a physical disability that should be considered just like other disabilities.

In the first world countries, people with SCD are even entitled to social security just like any other disability. Kenya is one of the countries that signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD). Therefore, we are obligated by the international laws and SCD ought to be considered as one of the physical disabilities that affect individuals. They should also have access to services being given by the National Council for Persons with Disabilities (NCPWD).

Mr. Speaker, Sir, people with SCD go through a lot of discrimination. When it comes to marriage and socialization, you will find that most of them are not able to get

married because of the social perception of their disability and all that. There is need to ensure that this category of people is embraced, just like anybody else, from a human rights perspective approach.

I support this Statement.

**Sen. Omogeni:** Thank you, Mr. Speaker, Sir, for also giving me an opportunity to make a contribution to this Statement by Sen. Nyamunga. At times, we cannot fail to acknowledge how some of us can pick issues that many of us do not think about.

I have known friends who have children suffering from SCD but I had never imagined a Senator would elevate this to the level of it being a disability. It has taken me sitting here and listening to the Statement by Sen. Nyamunga and I think she has convinced me that people suffering from SCD in the society deserve to be considered as PWDs.

Leadership is about addressing the concerns of the vulnerable in the society and those who needs to be affirmed so that they can live lifestyle that is comfortable over and above the condition that is afflicting them.

Mr. Speaker, Sir, having known families that have people who are suffering with this disease, I have no doubt that, Sen. Nyamunga, has this afternoon took forth a very strong case for this country to consider uplifting these people to the level of people with disability.

Of course, Madam Temporary Speaker, anybody who is suffering from a condition that is lifetime--

**The Speaker** (Hon. Lusaka): I know you are referring to the Statement by Sen. Nyamunga but I am the Speaker not Madam Temporary Speaker.

*(Laughter)*

**Sen. Omogeni:** Sorry, Mr. Speaker, Sir. This is the problem when you stay away for too long and you leave the sit in the hands of Madam Speaker.

*(Laughter)*

Mr. Speaker, Sir, I apologize. Anybody who is suffering from a condition that is life long, not curable, causes pain, discomfort and makes them to behave in a manner that is not in tandem with a normal person, qualifies to be called a person who is suffering from some disability.

That is the medical condition that afflicts people suffering from sickle cell. These are people who to be maintained in certain lifestyle in society, they need to be affirmed to compete with people in certain clusters of employment.

Therefore, I fully support the Statement that has been sought by the Sen. Nyamunga. Let us replace these class of people in the list of people recognized as to persons with disability so that the society can affirm them and treat them with some favorable condition than the way we treat some of us who are blessed to live a normal lifestyle.

I support the Statement by Sen. Nyamunga. I thank her for bringing this matter to the attention of the Senate.

**The Speaker** (Hon. Lusaka): Finally, Sen. Cherargei.

**Sen. Cherargei:** Mr. Speaker, Sir, I rise to support the Statement by my neighbour Sen. Rose Nyamunga. Anything that makes it unable for a body to function properly or optimally should be considered a disability.

As a country we have come a long way since 2003 when the Disability Act was passed by Parliament. We need to know that we should go beyond the tradition disability that all of us have known like being unable to use your legs, ears or eyes.

The world has moved on. People living with sickle cell disease should be considered as part of people living with a disability. This is because these are people who have diseases that make them not to function optimally as normal as they should be. So, we should expand an issue the necessary waiver or support, the way we do to people living with disabilities.

Mr. Speaker, Sir, the law is already there. We now need to look at the policy directions and the relevant Ministries need to come up with proper guiding legislative interventions.

It is expensive to live with the sickle cell disease. The mortality rate of most of the patients is very high as Sen. Nyamunga has indicated.

Therefore, we need to realign the policy, the legislative intervention and also to call out the Government to include and ensure the people living with sickle cell disease are part of it.

When that is achieved, it will be easy for them to receive medication which is very expensive and so it affects them in one way or the other.

Mr. Speaker, Sir, sometimes, it is not because of genetics, it can happen to anybody. Any parent who unfortunately has a child who suffers from sickle cell disease will tell you that it is very expensive in terms of resources, time and medication.

It is not a disease that anyone would wish for anybody. That is why the only human thing that we can do is to ensure they become part of people living with disability so that they can get the waivers and support from the Government and all agencies both in private and public sector.

Therefore, I support and agree that this is part of the right to health which everyone is entitled to

I thank Sen. Nyamunga for bringing this issue up. I know many Kenyans who have lived with this disease appreciate this.

I have heard Sen. (Dr.) Musuruve who is one of the representative of people living with disability. She will work closely with this House and Sen. Nyamunga to ensure that relevant agencies take this matter with the seriousness it deserves.

Mr. Speaker, I support.

**The Speaker** (Hon. Lusaka): Proceed, Sen. Kavindu Muthama.

**Sen. Kavindu Muthama:** Thank you, Mr. Speaker, Sir, for giving me this opportunity to contribute to this important Bill by Sen. Nyamunga.

**The Speaker** (Hon. Lusaka): We need to see you.

**Sen. Kavindu Muthama:** Mr. Speaker, Sir, I concur with my fellow Senators that people living with sickle cell go through a lot of trouble, especially the parents who live with these children. They go through a lot of trauma and spend a lot of money because time and again these children lack blood. Every now and then, they are taken to hospital for blood infusion.

(Technical hitch)

**The Speaker** (Hon. Lusaka): We have challenges with the system. In the meantime, Proceed, Sen. Cheruiyot.

**Sen. Cheruiyot:** Thank you, Mr. Speaker, Sir, for this chance. Sometimes I wonder how difficult will it be for those of us in leadership, be it the Legislature or in the Executive to decide to have a general attitude and simply focus on the needs that are most pressing on the citizenry? For example, things to do with health and specifically focus on diseases that ordinarily pick on people who do not have the ability. If they do not meet the cost of medication then, it is a difference between life and death.

Two or three weeks ago, I brought a Petition to this House from citizens living with autoimmune diseases which are almost similar to these challenges of sickle cell.

The simple request which the Petitioners are making which is close to what Sen. Nyamunga has requested and wants know from the Committee is, can we not use our National Hospital Insurance Fund (NHIF) cover to ensure that we put parents of these young people, or even those who have gone to adulthood with it, under Universal Healthcare Coverage (UHC)? So, that on every occasion when they visit hospitals and they have these institutions that accept NHIF as a means of payment, they are treated and they go back home peacefully.

Mr. Speaker, Sir, on many occasions, you will find all these people come back and plead to us. I know out of personal experience that, at least, each one of us in this House knows one, two or more parents who are faced by this challenge and cannot meet the cost of this medication. Therefore, they result to calling upon us once in a while, saying their child has had an attack so please see what you can raise.

Of course, out of human nature, you will mobilize a little resource for them. I believe we can properly organize NHIF. It is good because that Act is before this House.

This should be part of the reason for the Committee on Health to expedite and ensure that we do not go on the long recess in the month on December before concluding business on the NHIF Act so that it addresses some of these issues like the auto-immunity diseases and the sickle cell disease so that we expand the base.

I have read through the economic model that is being proposed by the Deputy President, Dr. William Ruto about the bottom up approach. It makes absolutely no sense for Sen. Okong'o Omogeni, who earns Kshs1 million to pay Kshs1700 just like any other ordinary citizen who is below Kshs40,000 per month. It is not fair.

I believe those of us who earn more should pay something not so exorbitant but at least slightly better that will ensure that NHIF has more resources to take care of needy Kenyans such as the ones that are sending this Statement *via* our colleague Sen. Nyamunga.

Therefore, I hope as a way of answering this Statement, the Committee will also find in its place to expedite the conclusion of the National Hospital Insurance Fund (Amendment) Act that is before this House so that we can appropriately reform NHIF and ensure that we cover as many Kenyans as possible.

Mr. Speaker Sir, look at the miracle that happened when they started to pay for patients of renal failure. Many of them are able to access dialysis services in our county referral hospitals and it has been a big change to them. It is the difference between life and death to many of them who would have, otherwise, never meet the cost of treatment

or the dialysis in private institutions. However, because of what was done to NHIF, they are able to take care of it. Perhaps, there are challenges here and there in our counties but it is not as bad as was the case before.

Therefore, I plead with the Committee on Health to expedite that business because it means a lot to our sister.

**The Speaker** (Hon. Lusaka) Proceed, Sen. (Dr.) Zani.

**Sen. (Dr.) Zani:** Thank you, Mr. Speaker Sir. I wish to support the Statement from Sen. Nyamunga. She has touched a very important category of people who already, by the nature of their disease, have been disadvantaged.

We have many people with sickle cell anemia and they cannot be 100 per cent productive. It is a struggle. It is very expensive as well.

So, if there is a way they can be covered so that they can be taken care of and lighten their burden, then this is definitely the way to go. The way to see it, is that we save in terms of economic development for our country, educational development and all sorts of development which are very critical.

It is important that the Committee that will be handling this looks at all the parameters that make it difficult for various people to join such programmes.

I know that we are not yet at a place where we have a safety net for all Kenyans in terms of their specificities of the diseases or the disadvantages that they have. Indeed, our social protection program has not been as developed as other countries. This is the direction to go and this is one step in that direction.

**The Speaker** (Hon. Lusaka): Proceed, Sen. (Rev.) Waqo. You are the last one on Statements.

**Sen. (Rev.) Waqo:** Thank you, Mr. Speaker Sir, for allowing me to add my voice to this very important Statement by Sen. Nyamunga. I also congratulate her for bringing up this important Statement. This is because many Kenyans are affected by sickle cell disease.

I support this Statement because of the challenges that those who are affected by this sickle cell disease go through. As a country, there is need for us to take care of every Kenyan. Therefore, the proposal made by Sen. Nyamunga is quite important and relevant. This is because patient suffering from sickle cell disease need a lot of support from the Government.

When both a parent and a child are suffering from this disease, they need a lot of care, protection and care givers around them. Most of the time, the medical care is quite expensive. So, unless we come up with a programme that takes care of them, they will be vulnerable in our society.

I, therefore, stand to support the Statement and pray that one day they will be considered as people living with that.

**The Speaker** (Hon. Lusaka): Hon. Senators, that brings us to the end of Statements hour.

For the convenience of the House, I want to rearrange the Order Paper and skip all the way from Order No. 8 up to Order No. 20.

Sen. Omogeni was moving the Motion. I will tell him how much time he has.

**BILLS***Second Reading*

THE HERITAGE AND MUSEUMS BILL  
(SENATE BILLS NO. 22 OF 2021)

*(Bill deferred)*

*Second Reading*

THE COUNTY OVERSIGHT AND ACCOUNTABILITY BILL  
(SENATE BILLS NO. 17 OF 2021)

*(Bill deferred)*

*Second Reading*

THE INTERGOVERNMENTAL RELATIONS  
(AMENDMENT) BILL, (SENATE BILLS NO. 37 OF 2021)

*(Bill deferred)*

*Second Reading*

THE ALTERNATIVE DISPUTE RESOLUTION BILL  
(SENATE BILLS NO. 34 OF 2021)

*(Bill deferred)*

*Second Reading*

THE COUNTY HALL OF FAME BILL  
(SENATE BILLS NO. 9 OF 2021)

*(Bill deferred)*

*Second Reading*

THE COUNTY GOVERNMENTS (AMENDMENT) BILL,  
(SENATE BILLS NO. 38 OF 2021)

*(Bill deferred)*

*Second Reading*

THE NATIONAL COHESION AND PEACE BUILDING BILL  
(SENATE BILLS NO. 19 OF 2021)

*(Bill deferred)*

### COMMITTEE OF THE WHOLE

THE NATURAL RESOURCES (BENEFIT SHARING) BILL  
(SENATE BILLS NO. 25 OF 2020)

*(Committee of the Whole deferred)*

THE CO-OPERATIVE SOCIETIES (AMENDMENT) BILL  
(SENATE BILLS NO. 11 OF 2020)

*(Committee of the Whole deferred)*

THE COUNTY VOCATIONAL EDUCATION AND  
TRAINING BILL (SENATE BILLS NO. 6 OF 2021)

*(Committee of the Whole deferred)*

THE PROMPT PAYMENT BILL  
(SENATE BILLS NO. 16 OF 2021)

*(Committee of the Whole deferred)*

THE START-UP BILL  
(SENATE BILLS NO. 1 OF 2021)

*(Committee of the Whole deferred)*

### MOTION

ADOPTION OF REPORT ON DELAY IN APPOINTMENT OF 41 JUDGES  
FOR THE HIGH COURT AND THE COURT OF APPEAL

THAT, the Senate adopts the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on a Statement sought by Sen. Mutula Kilonzo Jr. MP, regarding delays in the appointment of Judges of the High Court and the Court of Appeal laid on the Table of the Senate on Tuesday, 19th October, 2021.

*(Sen. Omogeni on 10.09.2021)*

*(Resumption of debate interrupted on 10.11. 2021)*

**The Speaker** (Hon. Lusaka): Sen. Omogeni, you have 39 minutes.

**Sen. Omogeni:** Thank you, Mr. Speaker, yesterday when we adjourned, I was trying to finish giving historical background on the history of this country on this matter of appointment of judges.

I was about to go into the current legal framework governing the appointment of judges.

Mr. Speaker Sir, Chapter 10 of our Constitution comprehensively addresses the mechanisms through which judges are appointed. What is being considered in this Statement, is whether the recommendations of JSC are binding to the President or whether he has a discretion to disregard the recommendations of the JSC. I started by disclosing to this House that the JSC is one of the most important bodies or constitutional commissions in our Constitution.

Mr. Speaker, Sir, if you look at the representation, it has men and women of high caliber and credibility who hold senior positions in the country. The membership is eleven. When Kenyans were enacting their Constitution in the year 2010, they were keen to place the responsibility of nominating judges to hon. Kenyans who are up to task in exercising this responsibility.

The Chairperson is none other than the Chief Justice (CJ) of the Republic of Kenya. Then there is a judge of the Supreme Court and the Court of Appeal who are Members. There is also one judge of the high Court who is a member. There is also one magistrate who is a member.

What should capture the attention of Kenyans is that because people wanted this process to be as credible and as independent as possible, all these representatives of the Judiciary are elected. So, they are picked in a democratic manner through an election that is conducted by the judges of the various branches of the Judiciary.

The Supreme Court, the Court of Appeal, the High Court and the Magistrates Court do their own elections. The process is in the hands of people who have an independent mind. They are not an appointee of anybody. However, so that the interests of the President are taken care of. There are also some appointees who are members of the JSC.

The first one is the Hon. Attorney-General. He is supposed to take care of the interests of the President in the JSC. However, because Kenyans never intended that the President becomes a puppet in this process, the Constitution has also given him a leeway.

Article 171(2)(h) of the Constitution allows the President to appoint two Kenyans. He does that single handedly without placing any advertisement in the newspapers. He picks two Kenyans to represent the public in the Judicial Service Commission (JSC). That gives him three members. He is also allowed to pick one other appointee from the Public Service Commission (PSC) to sit in the JSC. In total, the President has four representatives who can adequately represent his interests.

To give this process more credibility, the legal profession in this country is allowed to pick two nominees. Those nominees are picked through a democratic electoral process. The lawyers know that those elections are normally conducted by the Independent Electoral and Boundaries Commission (IEBC). That is how serious the process of picking commissioners is. Those commissioners are the ones who interview and make recommendations of persons who should be appointed judges. I have said all these so as to demonstrate to this House that the JSC is not just any other body. It is a



body that has wide representation in society; the Judiciary, Executive, legal profession and members of the public.

Further, the procedure of appointing or recommending persons to be appointed as judges is also regulated in the Constitution. Article 172(2)(a) of the Constitution states that the process of sending those nominees to the President must be done in a competitive and transparent process. Therefore, the JSC is obligated to place advertisements in the newspapers and conduct interviews before they forward the names of the nominees to the President. Article 166 of the Constitution binds the President to appoint the Chief Justice and other judges in accordance with the recommendation of the JSC. What one can infer from the clear reading of the Constitution is that the President has been given very little leeway when it comes to picking names of judges who have been recommended by the JSC. It simply means that if there are 10 slots, the JSC will recommend 10 persons from whom the president must appoint judges.

*[The Speaker (Hon. Lusaka) left the Chair]*

*[The Temporary Speaker (Sen. Nyamunga) in the Chair]*

We also looked at the courts' interpretation of those Articles of the Constitution. We realized that this matter has been a subject of litigation in a number of instances. The first case was when the JSC only forwarded the name of retired Chief Justice Maraga as their nominee for the position of Chief Justice to the President. There was a proposal that the JSC ought to have sent three names from whom the President should have picked one. That matter was heard in the High Court. A three bench judge made a finding that the Constitution obligates the JSC to only send one name. That matter was litigated all through to the Court of Appeal which affirmed that position.

This particular matter has been a subject of litigation in our courts of law. There are so many cases pending before the court, but I will just cite one case where the High Court constituted a court of three judges and the judgement was issued on 6<sup>th</sup> February, 2020. This is what it ruled-

(1) The High Court made a declaration that the President is constitutionally bound in accordance with Article 166(1) and Article 172(1)(a) of the Constitution to appoint all persons recommended for appointment by the JSC.

(2) The High Court made a declaration that failure by the President to appoint the persons recommended by the JSC is a violation of the Constitution and the Judicial Service Act.

(3) The High Court ruled that any continued delay to appoint persons recommended as judges to their respective courts is a violation of Article 2(1), Article 3(1), Article 10, Article 73(1)(a), Article 132(2)(a), Article 166(1), Article 172(1)(a) and Article 249(2).

This judgement is subject of an appeal that is pending before the Court of Appeal and I will not say much other than state the findings that I have read to this House. In our report, we have taken issue with the fact that the Court of Appeal has left this matter pending for a long time yet it is a matter of serious public concern. This report has made an appeal to Her Excellency the Hon. Chief Justice to move with speed and constitute a Court of Appeal bench that should expeditiously hear and finalize the appeal that has been filed by the Hon. Attorney-General.

We made a comparison with the situation that prevails in one of our democracies in Africa; South Africa. We drew a distinction with what prevails there. Section 174 of the South African Constitution obligates the South African JSC to forward three names to the President for each vacant position. This is unlike what prevails in Kenya where the Constitution does not give room to the President to pick from three. The argument that we should send three names to the President has a very clear distinction when you compare the South African and the Kenyan constitutions. In Kenya, it tells the JSC to make a recommendation to the President then the President appoints.

We also drew distinction with what prevails in India. In India, the Prime Minister has a discretion to reject, with reasons, a nominee that has been forwarded to him by the Chief Justice. The appointment in India is that the Chief Justice, with four senior most judges, sits down and makes recommendations to the Prime Minister. The Prime Minister by the provisions of the Indian Constitution can reject a nominee with reasons and return the name back to the Chief Justice to nominate another person.

It seems that when Kenyans were enacting their new Constitution, 2010, they were very clear of what they wanted. The historical background could have contributed to that. The Kriegler Commission, Koffi Annan Report, Bomas Draft Constitution and the Committee of Experts had also made recommendation that we should have a Judiciary that is independent of the Executive. That is what informed Chapter 10 of the Constitution.

Madam Temporary Speaker, having looked at all these issues, there are a number of problems we have identified. The first one is when we wrote to the Judicial Service Commission (JSC), they brought a letter to us to the effect that when they were in the process of conducting interviews, they received a letter from the National Intelligence Service (NIS) to the effect that a number of candidates had some integrity issues.

When the JSC wrote back for details, they were never given. Therefore, they formed an opinion that it would be in violation of the Constitution, more so Article 47 on a Fair Administrative Action, to condemn the candidates who had applied to be appointed judges on allegations that had not been disclosed to the JSC and to the candidate, so that they are given an opportunity to respond to those allegations. They said that was contrary to the Bill of Rights which obligates every Kenyan to be given a fair hearing when faced with any accusations.

Madam Temporary Speaker, this Committee recommends that the best practice should be that if there are any allegations facing any candidate, the most decent position should be that the office of the Attorney-General should have those allegations reduced into writing with specificity. The candidates are then confronted with those specific allegations and given an opportunity to respond.

Since that was not done in this particular case, it is the conclusion of this Committee that it will be a violation of Article 47 to condemn candidates who had applied for this position without being confronted with those specific allegations and given an opportunity to respond. In fact, there is even a bigger problem. Four of these candidates are continuing to serve as members of the High Court of Kenya. The other two candidates are serving as magistrates in the Republic of Kenya. All these four candidates have not been confronted with any allegations warranting their removal before the JSC. We have made an observation that this is a fairly untidy situation because these members

continue to dispense justice as judges of the High Court of Kenya with this kind of blanket condemnation facing them.

The other observation we made was that it is inhuman to continue condemning these judges unheard, while they continue serving as judicial officers. The judges risk suffering serious reputation risk on account of their continued non-appointment. What do you think is in the minds of litigants who appear before these judges as they continue reading these reports in the newspapers, that these judges and the two magistrates have never been appointed because they have some integrity issues?

Remember this matter has been pending for the last two years. We have made an observation that to the judges who have not been appointed, what we are subjecting them to is tantamount to psychological torture which is against our Constitution. This is more so taking to account the period that this matter has been pending. We are appealing to the President to look for a solution out of this impasse.

If there are any credible allegations against these judicial officers, then the most decent thing to do is to forward those allegations to the JSC so that the process of removing these judges, if at all, can be commenced. This is because there is no any other way you can deal with a judge who is in office other than making a complaint before the JSC.

The process of initiating a removal is captured under Article 168(3), of our Constitution. It says -

“A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, and must set out the alleged facts constituting the grounds for the Judges removal.”

That is what we are saying in our report. Anybody who wants these judges investigated, for whatever reasons must set out these facts in writing so that these judges are confronted with these allegations and given an opportunity to respond.

Article 4 says it is the JSC that has the final say. Even if anybody was to file a complaint to the JSC, again the JSC must sit, consider the merit of the allegations and them make a decision, whether it warrants the setting up of a tribunal. This is captured in Article 168(4) -

“The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.”

It must be satisfied. You can have allegations or think that particular judges ought to be removed. However, it is up to JSC to be satisfied that the grounds being presented warrant the setting up of a tribunal to remove a judge. Unless these processes have been invoked, these judges will continue to enjoy security of tenure.

Another thing we have observed is that when Kenyans enacted their Constitution in 2010, they expected that anybody who is given a task, an obligation to perform a certain task, will perform that task within a reasonable period. This is captured in Article 259(8) and it says -

“If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.”

The matter that is under inquiry relates to a process that was concluded in July 2019. The first bunch of judges were appointed in June, 2021. That is close to almost two years after their names were forwarded to the President for appointment.

This Committee is saying is that it seems that Article 259(8) can be abused. Somebody can say “reasonable time” is one year, two years or whatever. That is why we have made a recommendation that this House considers amending the Judicial Service Act so that a period is prescribed within which the President should appoint judges once a recommendation has been forwarded by the JSC.

Madam Temporary Speaker, sometimes events happen and they trigger constitutional amendments or amendments to statutes. I remember the 16<sup>th</sup> amendment – if I am not wrong – to the Constitution of the United States of America (USA) in 1912 was triggered to allow for direct election of Senators. This arose because of the corruption that was happening within the State Parliament, where business people were buying positions of Senators. Before 1912, the position was that the State Parliament was the one that used to appoint a Senator. That process was abused until the Americans decided to do their 17<sup>th</sup> amendment and allow for direct elections of Senators.

I think even for us, maybe a time has come when we should consider whether we should amend the Judicial Service Act, so that we have a clear timeline. Whether we want to say it is 60 or 90 days or whatever period, this Committee is recommending to the House that the Judicial Service Act should be amended. That way, there will be a prescribed timeline within which the President should take action.

I think another time when the Americans responded to address a problem was in 1951. It was the 22<sup>nd</sup> amendment. When George Washington was elected the First President of the USA, he put in place this precedence that the President should serve for two terms. That became the practice for so many years until in the 1930s, when President Franklin Roosevelt decided to seek a third term and was actually elected President for a third term.

In response in 1951, America had to pass the 22<sup>nd</sup> amendment to put a term limit on presidential tenure and say no president will be elected for more than two terms. So, it is nothing wrong. At times experience can lead us, as a country, to start reflecting whether a time has come when we should do some of these amendments.

Madam Temporary Speaker, having made those observations, my Committee made some recommendations, which we seek that this House adopts. The first one is that H.E. the President, without any further delay, should proceed to gazette the appointment of six persons nominated by the Judicial Service Commission (JSC) for appointment as judges of the High Court of Kenya and whose names were omitted from the Kenya Gazette of 3<sup>rd</sup> June, 2021. That is Gazette No.124.

We looked at all the academic qualifications of these judges and we have no doubt they meet the professional qualifications. The JSC complied with the Constitution; advertisements were placed in the newspapers; Kenyans were invited to make comments and views on the non-suitability of these judges; and, the judges were interviewed in a competitive exercise. As allowed by Constitution and by law, the JSC recommended the people they deemed to have been best qualified to be appointed as judges.

Madam Temporary Speaker, in the process, we made an observation that the person conducting litigation on behalf of the Government, that is the Office of the Attorney-General, was actually a member. He participated in the interview and the final

decision that was arrived at by the JSC. Therefore, this Committee made an observation that is bound by the decision that was made by the JSC.

In the event that he wants to continue litigating in court, this Committee proposes that the Attorney-General invokes the provisions of Article 156(7) of the Constitution and designates some officers independent of him, to exercise some of the roles. These roles include conducting the litigations in court, so that he does not find himself in a very awkward position before the JSC.

It is the hope of this Committee that the son of Kapkatet, Kericho County – Justice Weldon Korir; the son of Emalindi Village, Khwisero, Kakamega County, Justice Muchelule Aggrey Otsyula; the native of Kisumu County, Hon. Justice Odunga George Vincent; the native of Kajiado County, Hon. Justice Joel Mwaura Ngugi; the son of Kisii County, Ibacho Village, Nyaribari, Hon. Justice Evans Kiago; and, the daughter of Kisumu County, Hon. Lady Justice Judith Elizabeth Omange should be appointed by the President of the Republic of Kenya as judges of the High Court.

Madam Temporary Speaker, as a Committee, we also appeal to the President to reduce the tension that is prevailing between the Judiciary and the Executive. By the time we were compiling this report, we had not received the latest decision from the High Court. However, we now have a decision that has been issued by the High Court to the effect that the Chief Justice (CJ) should proceed to assign these judges their duties and process their salaries and benefits, as judges of Courts of Appeal and judges of the High Court respectively. Although this matter has now found its way to the Court of Appeal and a stay has been issued, we think that the President should find a way of getting an amicable solution in these battles. At times people can disagree.

In the American history, John Adams and Thomas Jefferson were very good friends. These two gentlemen participated in writing the American Constitution and they are known as the founding fathers of the USA. In the course of time, they joined different parties. I think John Adams became a Federalist while Thomas Jefferson remained a Democrat. They became serious adversaries and could not talk to each other. One served as the second President, but was succeeded after one term by Thomas Jefferson.

With time, they found out that it serves no purpose to have these disagreements and they became the best of friends. In fact, they died on the same day, on the 5<sup>th</sup> Anniversary of American Independence, having become great friends.

Madam Temporary Speaker, even in this particular situation, the President has led the way in uniting the country by having a handshake with the Rt. Hon. Prime Minister, Raila Amollo Odinga. We really hope that even in this particular situation, we can find a way of having a sitting with the CJ, so that some framework on bringing this debacle to an end is found. It is not very health for the country to see the kind of disagreement between these two branches of Government. We want the Executive and the Judiciary to be independent but continue serving the interests of the country.

Madam Temporary Speaker, in conclusion, this report by my Committee is founded on the fact that this Committee believes it is very healthy if we promote the rule of law, respect our Constitution and our statutes. Therefore, we appeal to the Head of the Executive to put in place steps of bring these disagreements between these institutions to an end.

We thank the Parliamentary staff and the office of the Clerk of the Senate, who assisted us with research in compiling this report. We also appreciate the time they spent to compile this report. I also thank all the Members of my Committee, who were useful in compiling this report.

Madam Temporary Speaker, with those many remarks, I beg to move and kindly ask Sen. Orengo to second the report.

**The Temporary Speaker** (Sen. Nyamunga): Thank you, Senator. Sen. Orengo, proceed.

**The Senate Minority Leader** (Sen. Orengo): Thank you, Madam Temporary Speaker. I support this. It may later on occur that probably this report and the subject we are dealing with is a very important issue that defines what Kenya is at the moment, what Kenya should be and the direction we are headed. It is critical and I will give my reasons.

In 1787 when Benjamin Franklin was very well known – he is in the popular culture – while he was walking out of the Independence Hall, out of the Constitutional Convention in 1787 in USA, as he walked out, somebody asked him; “Doctor, what have we got; a Republic or a Monarchy?” Benjamin Franklin retorted; “A Republic, if you may keep it.”

This remark by Benjamin Franklin has been cited many times. More importantly, in the last one and a half years when they have gone through experiences, that even an old modern Republic like the USA, have wondered whether they were moving in the right direction.

The Speaker of the USA House of Representatives, the well-renowned Madam Pelosi, has used this remark by Benjamin Franklin. This is particularly after the 2020 elections, when the American Republic was suffering from so many challenges. A Republic is a Government by the people through its elected representatives. It is not just through the elected representatives as portrayed in Article One of the Constitution of Republic of Kenya, it is actually a Government based on sovereignty of the people.

Therefore, Madam Temporary Speaker, all of us in public offices heading important institutions must be guided by the law and the Constitution. There is this great debate in the Greek democracy of whether we have a Government of men or laws. Constantly, in modern democracies, it has been found that you are better off with a Government of laws as opposed to a Government of men.

If you look at the context in which our Constitution was drafted and enacted, it was through a period when the Executive and even the Judiciary was amassing power. In Parliament, we made statements. I personally kept on quoting a British judge who kept on saying that the Judiciary and judges should not be more executive than the Executive. This the context in which our Constitution was founded.

In the last 40 years, our experience has not been very different from the colonial days, that, the Judiciary was becoming more and more a tool of the Executive. The provisions my Chairman has referred to on how you appoint judges and particularly the CJ, was born out of this context. Before, the President used to appoint the CJ and judges. In fact, what would have probably mirrored what we should have in Kenya today is that we should have had an American system where the President appoints and the House approves. If the House does not approve, it goes back to the President.

Madam Temporary Speaker, because of the experience we have had in Kenya over the years, where the Judiciary was becoming more executive than the Executive –

because they owed it to the Executive to get those appointments – it was found necessary to put certain provisions in the Constitution. In those provisions, the manner in which the CJ was being nominated and appointed did not require a decision of the President in determining who becomes the CJ.

Instead, it was the JSC which would determine who would become the CJ and the matter would be brought to Parliament. After Parliament approves, then the responsibility of the President was to exercise authority of being an instrument of appointment. The President does not make that decision. The President is an instrument for appointing the CJ.

I for one would have wanted it to be like USA. Really, if a President has a programme to fight corruption or to bring in new laws that measure up to his vision and go to the people and be elected on the basis of that vision, probably, it would be better for the President to appoint and then Parliament would approve.

Unfortunately for Kenya, there were fears that if this responsibility is left to the Executive – and sometimes the Executive can be controlling Parliament – in order to have a strong Judiciary--- The experience is that a strong Judiciary is very important for a democratic nation to grow, for it to observe the rule of law and protect the Bill of Rights and freedoms that may be enunciated in its Constitution.

Therefore, Madam Temporary Speaker, I would plead with the President of the Republic of Kenya, that there is no way we can circumvent the Constitution. Literally, there is no way. Senior counsel, Sen. Omogeni is here and I wish Sen. Wako was here because he was there when they were debating this. This is not a matter where we can circumvent the law. There is no other way.

There is no other possibility and the Attorney-General should advise the President sufficiently. He should tell him that once the Judicial Service Commission (JSC) has made recommendations and nominated people for appointment, the duty of the President is to appoint them. Nobody should be afraid to do so because the Executive's representation in the JSC is top heading. It is led by no other person of decision other than the Attorney-General, who is the advisor to the President as an advisor to Government. When a matter goes through the JSC and the country or the Executive has concerns, the Executive has people within the JSC who can raise those issues.

There are two presidential appointees in the JSC; the Attorney-General and the representative of the Public Service Commission (PSC). These are bodies and persons who can put the fears of the Executive on appointment of judges before the JSC. The JSC is a constitutional organ. The only judges who are appointed by the approval of the Parliament are the Chief Justice and the Deputy Chief Justice. The other judges are appointed by the JSC and the president's role is to appoint those who have been nominated by the JSC.

This matter did not arise with this Constitution. Under the old Constitution, the President was required to appoint 12 nominated Members of Parliament (MPs) who were to be Members of the National Assembly. The 12 Members were supposed to reflect gender balance. Those nominations were made by political parties. At one time, the matter on appointment of nominated MPs was taken to court and I represented the Federation of Women Lawyers-Kenya (FIDA-K). FIDA-K was complaining that they were not getting a fair representation out of those 12 nominated Members of the National Assembly. The debate at that time was not on whether the President was ready and

willing to appoint or whether he was not to appoint those who had been nominated by the political parties. It was a question of whether we were to have six men and six women or whether the words gender equality gave some discretion. We never had an issue as to whether the President could replace or refuse to appoint those who had been nominated by the political parties.

This particular issue defines us, as a nation. Can we make appointments in accordance with the Constitution? If I am elected as a Member of the Senate for Siaya County and the Independent Electoral and Boundaries Commission (IEBC) is given discretion to nominate me or not, the only place where my election can be challenged is in court. Once somebody is elected, the duty of the IEBC is to gazette them. Anyone who does not agree with the results can go to court and challenge them.

Going to court does not mean then there is a preliminary stay or injunction against that person assuming the seat. Therefore, I do not understand this. This is one of the things that is defining us. We might be taking it lightly, but it is defining whether we have persuaded ourselves that we are a Government that is guided by the Constitution and the law. It defines if we are a democratic Government based on justice, values and principles in Article 10 of the Constitution or we still want to cut corners.

My views are very strong about this especially when you look at the judges concerned. I may be accused, but some of the judges who were nominated to go to the Court of Appeal are brilliant jurists. Sen. Omogeni will agree with me that Justice Odunga is one of the best judges. He is hard working and brilliant. I know that he has been accused of so many things. I have also been associated with him. Some people even say that I am related to him. God forbid. I have never stepped in justice Odunga's house though he comes from Ugenya. The legal community will tell you that Justice Odunga is one of the most brilliant jurists that we have in this country. Those sentiments are shared with people who used to say things about him including Hon. Duale.

I may disagree with Justice Ngugi on his decisions, as a lawyer, and this is normal, but I cannot run away from the fact that he is one of the most brilliant jurists that we have in this country. He is a Harvard trained lawyer. He is not just carrying the flag that he is Harvard trained, he is a brilliant judge. We also have Justice Korir. If those judges do not qualify, then I do not know the other judges who can qualify.

The worst thing is when you are told that there is something in your life that disqualifies you from being a judge or assuming a public office and you are not told what it is. Article 47 of the Constitution requires that if you are going to make a decision that is adversely going to affect any person, then that person is entitled to know why that decision is being made. Some people may think that we are saying these things to undermine whatever we are going through this transition, but that is not the case. People sometimes bring arguments that are stupid and silly when we are dealing with an important issue like this one.

Madam Temporary Speaker, I want you to look at what Miguna Miguna says about me every day. He does not say nice things about me yet I have no war with him. I know why he must say it though. I may disagree with him, but there were decisions that were made by the courts, including the Court of Appeal and our Government has failed to comply with those decisions. The Executive knows that some of its senior officials were fined by a court of law. They appealed against that fine in the Court of Appeal, but they had to pay the fines for disobeying court orders.



I would plead with the Executive that if we want to move forward in the vision of this Constitution that we have, we need obedience of court orders. We may disagree with court orders and people do disagree, but there is a process of disagreeing.

The worst thing is if the Executive is disobeying court orders. If the Executive is disobeying court orders, why should ordinary people obey court orders? They should not be obeying court orders if the Government, which is supposed to be obeying court orders, is not doing so.

Madam Temporary Speaker, I remember once when we went before the High Court under the leadership of Jaramogi Oginga Odinga, Muliro and Shikuku when he wanted to go to Kamukunji. We were seeking a decision from the High Court challenging the directive by the police that we could not hold a meeting. We decided to withdraw the case because we knew that if the court made the decision, then we would be required to comply with that decision of the court.

We were trying to tell Kenyans that we want to build a new Kenya based on democracy and the rule of law. We could not see ourselves, that if the judges made a ruling that we could not go to Kamukunji, then we would be disobeying the court order. What we did was to withdraw the case and then went to Kamukunji and the rest of it is history.

I would like to tell my Chairman that this is one of the issues he should not run away from. I think he should continue to pursue this matter. I did not sign the report because I was away when it was being signed, but it speaks volumes that the Attorney-General *Emeritus* also signed this Report.

I am sure if he was available today, he would be making a great speech why Kenya will go down the drain if we do not find it as part of our judicial system, based on the rule of law that the highest powers in the land can disobey court orders without a consequence. Then there is no need; we should not have the courts at all. I think we should abolish the courts if court orders will not be respected.

The other bad thing which the Chairman emphasized is that once we find that a Judge cannot qualify to go to the Court of Appeal on grounds of integrity, then that Judge should not even sit in the High Court or hold any judicial office.

Why is the Government comfortable standing in the way for these Judges to move to the Court of Appeal or to those judicial offices, but the Government is not doing anything for their stay in the offices they occupy now as judicial officers? We should be having petitions for their removal if indeed there is concrete evidence against these particular Judges. I plead that the foundation of a democratic society, the guarantor of a democratic society is our courts and the judicial system.

I have been reading and following quite a lot of what has been happening in the United States of America, where there was an insurrection on 6<sup>th</sup> January, this year. Even judges that were appointed by President Donald Trump going against the wishes of their appointing authority or the person responsible for appointing them, believe in the rule of law.

This is a matter that generates a lot of emotion from me. I appeared before a Judge called Justice Dugdale, who was just an instrument of the Executive. I was addressing the court and he wanted to put me to arrest for what I was saying in court as a judicial officer. He was very comfortable saying that because he knew he was an instrument of the Executive.

There was my friend, who was the Chairman of the Law Society of Kenya, Mr. Kamau Kuria. He was one of the people who fought for this new Constitution. Mr. Kamau Kuria's name should be in the top 10.

A Judge took a file relating to a matter that Mr. Kamau Kuria had filed in court. I think it was in relation to the Bill of Rights. Since the Judge knew that the Executive wanted that matter to be decided in a certain direction and he could not deal with it the way he should, he decided to hide the file.

Eventually, when the file was released, he said that the Bill of Rights could not apply because rules under the Bill of Rights have not been made and, therefore, there was no basis to approach the court under the Bill of Rights. That is not the kind of society we want to build and Kenya should be at the top in this region in advancing the rule of law and constitutionalism.

I would join my Chairman in pleading to the President, the people involved and the Attorney-General that this is an embarrassing matter. The fact that we are going before the same courts and Judges to try and plead on a matter, which in the truest sense of the word, there is no legal basis for challenging that decision, makes ridicule of what we are trying to do and what we fought for to have this Constitution.

Everywhere you go people talk about this Constitution as one of the most important documents to come out of this part of the world. We do not want a document that is respectable because of what it says, but one that can change our lives. It is a transformative legal document. It is creating a new society, a new man in Kenya.

That is why at the time this Constitution was being proclaimed by President Mwai Kibaki at Uhuru Park, we were talking about a second Republic. This is because we had a new constitutional of order after the old Constitution was retired. Without going beyond what I have said, I think I have made my point.

Madam Temporary Speaker, I second and support.

*(Question proposed)*

**Sen. (Prof.) Kindiki:** Thank you, Madam Temporary Speaker. I cannot hide my tremendous admiration for the quality of this Report, which forms the basis of this Motion and at the leadership of Senior Counsel, Sen. Okong'o Omogeni, as well as the entire Committee on Justice, Legal Affairs and Human Rights of the Senate.

I was a delegate of the constitutional making process; the conference at the Bomas of Kenya in 2004 and 2005. It was a very lengthy process. At that time, I was representing the academia as a young legal scholar. I participated in the debates, especially the chapter on the Judiciary. Therefore, I want to completely associate myself with all the sentiments that have been made by the Mover and Seconder of the Motion, Senior Counsel Sen. James Orengo, whom I respect a lot. He has highlighted the historical context of the quagmire we find ourselves in today.

Madam Temporary Speaker, the recommendations of the Judicial Service Commission to the President are binding on the President. He has no room to manoeuvre or wriggle out of the names that have been given to him. The authority for that is in Article 166 of the Constitution.

Article 166 (b) says:

“The President shall appoint-

All other judges, in accordance with the recommendation of the Judicial Service Commission.”

Madam Temporary Speaker, it is not in accordance with the recommendations of the National Intelligence Service (NIS). The role of the President is appointive and ceremonial. It is not functional. The recruitment agency for Judges is the Judicial Service Commission. It pains me, therefore, as an officer of the Court, to see some of the brightest and greatest Judicial minds that this country has ever produced; My Lords, Justice Odunga, Justice (Prof) Ngugi, Justice Muchelule and Justice Korir, being dragged through a protracted name-soiling, simply because of a presidency and an Executive that thinks they can rampage around the country and take over or seize the functions of each and every Constitution.

They take over the Judiciary and Parliament, and are now increasingly going to county governments. They have taken over Nairobi and I am sure they would be interested in taking over the other 46 counties, if they had the opportunity.

Madam Temporary Speaker, we are coming from a very dark past. There were days and times when the Judiciary was completely immobilized. Criminal charges of great Kenyans, like Sen. Orenge and other second liberation fighters, who would be dragged to court at 6 p.m., taken through a *kangaroo* process; sentenced the same night or detained without trial.

In 1988, Kenya changed its Constitution to remove the security of tenure of judges. In the aftermath, we witnessed a very dark situation, where it was rumoured that some judges who were handling sensitive cases would carry draft judgments to State House for approval before reading those judgments in court the following day. That is the background against which we put in place the very strict measures in Chapter 9 of the Judiciary in the current Constitution.

This Constitution has made the wielders of power extremely uncomfortable. However, we are not out of the woods yet, even with the new Constitution. Recently, we saw My Lords, Justice Muchelule and Justice Chitembwe, arrested in their chambers, yet we know that the chambers of a judge are invaluable. If there is any suspicion of commission of crime, there are ways in which the same can be handled without violating the sanctity of the courtroom, because a judge's chamber is also a courtroom.

Madam Temporary Speaker, some of the decisions, motions and applications are heard in chambers. A judge's chamber or office is actually a courtroom. It is like entering a courtroom when a judge is proceeding and arresting the judge.

Madam Temporary Speaker, I believe that the President can be forced to do what he has refused to do by an order of *mandamus*. I say so because an order of *mandamus* is normally given to a public officer who has refused to perform a public duty. I believe in the appointment of judges. The President is actually duty-bound to do so because Article 166 says that the President shall appoint in accordance with the recommendations of the Judicial Service Commission.

An order of *mandamus* could force the President to do so. If he does not do so, then other measures can set in, as I am going to show shortly. Sen. Orenge has just mentioned about a time when you could not enforce human rights in this country simply because the old Section 82 of the retired Constitution provided that the Chief Justice was supposed to make rules of enforcement of the Chapter on fundamental rights and freedoms.

The Chief Justice never published those rules. Courts could not enforce human rights simply because the Chief Justice had refused to do a public duty, which was merely administrative and not decisional. It was not judicial. Similarly, for the Judiciary, there are certain acts they should be held liable for. This immunity of the Judiciary applies functionally, when they are performing judicial functions.

Madam Temporary Speaker, for example, if the Judicial Service Commission is hiring judges, that is a judicial function of that Commission and so forth. However, for example, in matters of procurement, the Judiciary should be held accountable if there are procurement anomalies in the usual standards that apply to other institutions.

I believe that the order of *mandamus* could apply in the case, and I am disturbed when I see a creeping notion not based on any law on the infallibility of the President. Recently, I participated in some proceedings in the Court of Appeal where I heard very weird arguments by very seasoned lawyers about certain levels of infallibilities of the President on a different matter of immunity of the President.

Madam Temporary Speaker, time has come for us to stand firm and I thank this Committee for coming up with such a robust report. I maintain that the President's role is ceremonial. If he does not appoint those judges, what should happen is what the High Court has already decided. Since this is a ceremonial function, the most important part for these judges is the swearing in. They can be sworn in before the Chief Justice and automatically become appointed. I associate myself with that judgment, although now it is pending appeal in the Court of Appeal and the reasoning is quite solid. Most likely, the Court of Appeal or even the Supreme Court will uphold that logic.

The same case applies to legislation. If the President refuses to assent to a legislation passed by either the National Assembly, the Senate or Parliament, within 30 days that law is presumed to have been assented to. This is already in the Constitution and we do not have to do anything about it. This is the logic that is applying in this issue of appointments. We cannot hold this country backwards and delay justice simply because of an administrative function, which can be dispensed with.

Madam Temporary Speaker, I would like to say two or three quick points, so that I give other Members an opportunity to contribute. On the issue of the report of the National Intelligence Service (NIS), Sen. Omogeni has told this House that the Judicial Service Commission (JSC) told the Committee that the NIS had objected to the appointment of certain judges, but when they were asked for particulars, they were unable to provide them. They made the allegations blanketly without giving the particulars. I submit that such an action is egregious and an affront to the old canon of natural justice, which presumes that nobody should be condemned unheard. It is not only against natural justice, but also against the direct provision of Article 47 of the Constitution, which provides for fair administrative action before a decision is made.

In conclusion, going forward, it is not our argument or submission that judges are infallible, cannot be questioned or held criminally liable. It is also not our argument that whatever judges say or do is always right. What we are arguing is that the chapter on Judiciary in the Constitution gives strong protection on the Judiciary, to enable them deliver on their functions.

Any person who has an issue of a criminal or adverse nature against a judge, the procedure is not to arrest a judge inside his or her chamber or courtroom. The procedure is to, first, initiate the process of removal of that judge and a tribunal is established. Once

it is established, the the judge is suspended. Once he is suspended, you can drag them to court, charge them and if found guilty, face the consequences of the law. If they are acquitted, they can be reinstated to office.

It is, therefore, a pity to watch, for example, My Lady, Justice Mwilu, the Deputy Chief Justice and Vice President of the Supreme Court of our country, being dragged through the humiliation of facing a magistrate court on criminal charges relating to what appears to be a purely civil matter. How on earth do you walk into the chambers of the Deputy Chief Justice, drag that person screaming and take them to court before a magistrate? How do you expect that magistrate to behave? The procedure should be that if Justices Mwilu, Muchelule or Chitembwe have committed an offence or are suspected to have committed offences, they must be reported to the JSC, which will recommend a tribunal that is set up and charges brought. During the proceedings, that person will stand suspended so that we do not in-dignify the hallowed corridors of justice.

This is a timely report that I support fully. I hope we will see many more of these kinds of products. Once again, congratulations Committee on Justice, Legal Affairs and Human Rights, Sen. Omogeni, Sen. Orenge, Sen. Wako and all great lawyers and colleagues serving in this Committee.

I support.

**The Temporary Speaker** (Sen. Nyamunga): Thank you, Sen. (Prof.) Kindiki Kithure.

Sen. (Dr.) Ochillo-Ayacko, Senator for Migori, you have the Floor.

**Sen. (Dr.) Ochillo-Ayacko:** Thank you, Madam Temporary Speaker for giving me an opportunity to remark and support this Report.

In terms of longevity and time, Kenya is a young nation. When we look at the lives of our institutions we have, by international standards, a young Judiciary, a young Presidency, recent jurisprudence, we need to get it extremely right from the beginning and throughout. If we get it wrong, then we do not seem to benefit. From precedence, we do not seem to benefit or desire to benefit from practices from jurisdictions that are similar to ours. This seems to be the case.

Any person anywhere and anytime, who exercises authority and holds an office, must understand that the holding of that office, the exercise of that authority and everything related to it, derives its legitimacy from law. You cannot just emerge from somewhere and purport to exercise authority or do something that is not founded in law. This is what is described as the 'rule of law'.

We have a Presidency, the Judiciary, and we are in a legislative body. The authority that is exercised by these three Arms of Government must be only that which is granted, permitted and limited by the law. Anything outside may be wishful or arbitrary and should not be countenanced in any decent society. The issue that is germane in this Report is whether the rule of law is being followed.

For those who politic and love to cheer on leadership even when the exercise of power attributable or associated to such leadership are advised to ensure that the power and everything done by such leadership is founded in law. If it is not founded in law and is arbitrary, it becomes abuse of office.

Let us look at the issue, which is the Presidency and the authority or role of the President in appointing judges. The Constitution is clear when you look at it plainly. The President purports to be acting pursuant to the same Constitution, but his action is not

founded in any law that can be pointed out, but on an interpretation that is by himself and that does not enjoy the agreement or support of the Judiciary.

Madam Temporary Speaker, it is the work of the President to appoint judges. He reckons that some Judges that he is supposed to declare appointed, because his work is to declare that they are appointed, are unsuitable for office. That information has emerged from an entity whose mandate in law does not include commenting on such matters.

This is extremely strange because if such actions are allowed, you will find that any entity purporting to advise the President can be granted by the same President. Even though, the law does not envisage some imaginary powers to purport to advise the President to violate the law.

Madam Temporary Speaker, there may be sound, but not lawful thinking on the part of the President that it is important to check the backgrounds of Judges. However, until legislative institutions and the citizens of this country are persuaded to amend the law through a referendum and grant the President the powers that he purports to exercise now, the desire of the President to have authority to reject recommendations of the Judicial Service Commission (JSC) on the appointment of Judges is purely a fertile dream.

It can only become a reality if the law, as enacted by Parliament or the people of Kenya through a referendum, is passed and authorized in the manner that is supposed to be authorized. Until that is done, this is an illegality. It cannot be any other thing. This Act is unlawful, even if the presidency, which is such a monumental institution, continues to do so. It remains unlawful and all of us who are charged with the responsibility to defend the Constitution, the rule of law and ensure that right overrides mind, will always stand in this House and say no to such impunity.

Madam Temporary Speaker, on that note, I once more give accolade to my friend, neighbour and colleague, Senior Counsel Sen. Omogeni, and his Committee, which comprises some of the best brains in legal matters that we have in this House. I think that this is a piece of work that this House should be proud of.

Without fear of contradiction, I wish to say that the voters may have their thinking out there. However, if they were to deny this House the knowledge, dedication and experience of our colleague, Sen. Omogeni together with Sen. Orengo, Sen. Wako and all the participants in this Committee, this Parliament would be poorer.

Madam Temporary Speaker, Kenya will be poorer in terms of institutional staffing and capacity. I, therefore, appeal to and persuade the voters to, please, return these persons to this House unopposed. Unless they decide to serve Kenya in other offices, and that would be voluntary, but if they offered themselves as candidates for re-election, I would ask God to do something to the electorate to ensure that they are returned. It is really right and courageous to stand firm and tell the presidency that it is wrong, and that this thinking is backed by law and the statutes that are mentioned within the Report.

Having said that, I would also like to say that we are a young democracy with young institutions. If you look at what is happening in courts, you will find that most of the judgements that are delivered in court regarding the other co-equal arms of Government are judgements that appear to be vengeful and a pushback.

Yesterday, we discussed what the Judiciary was trying to visit on the Senate when a dispute emerged between the Senate and the Council of Governors (CoG). It appeared

to be a pushback and a slap on the Senate. If you look at some of these judgements that the Judiciary is delivering on matters presidency, they appear to be a slap on the face of the Executive.

Madam Temporary Speaker, such things arise when there is a clear indication that the Executive has an agenda against the Judiciary. There is a clear indication from the Executive that some matters will be revisited. When you unsheathe your dagger at the beginning of your term and tell the Judiciary that you will met the sharpness of that dagger against them right into their hearts and twist it---

The Judiciary is being occupied by human beings who live in Kenya and comes from a history where judges were arbitrarily arrested and detained. Previously, their tenure was taken from them and they served at the whims of the Executive. They are bound to hit and push back.

Being a young democracy, we need leadership that will act beyond emotion and vengeance. When institutions are young and being established, they need to run their matters in a clearly objective and focused environment, where there are no attempts at pushback. When such things happen, you will find that those who suffer most are the innocent and helpless interests of our nation and nationals.

Madam Temporary Speaker, the presidency should actually think about the impact of this fight against the Judiciary. The Judiciary should, similarly, think about anything that might be perceived as a pushback. This kind of situation where there is a standoff among the Arms of Government may render Government dysfunctional.

It is presupposed that although all the Arms of Government are independent from the other, they must cooperate and work together, so that the nation becomes functional. This fragrant violation of law in the appointment of Judges may occasion a reaction or undesired consequence, where the Judiciary may take a measure that may be in some grey areas. I do not want to give specific examples.

Madam Temporary Speaker, what happens then? As a result of such an impasse, this nation will grind to a halt. As a result of such quarrels, this nation may be rendered dysfunctional. You can see it right it this House. We describe the Majority side as also the ruling party, and that is what Jubilee Party is to all of us.

Right across the aisle, we have Sen. Linturi. You will find him claiming that he is not a Member of the Jubilee Party. The undesired consequence is that Jubilee Party, which is the majority side, is dysfunctional because of its internal quarrels. That can also give an indication that we may have institutions that are legally there, but because of shadowboxing or fights that are coming up---

This one has clearly been initiated by the President and the Judiciary for its own survival. We may also do something that causes paralysis and end up suffering. One of the sufferings I suspect we are undergoing now is the insufficient funding and delayed Exchequer releases that are given to the Judiciary.

The people of Migori, where I come from, have so many pending cases. In Migori County, for instance, they do not have a court that deals with labour related matters. We have to travel all the way to Kisumu and queue on the benches. People from Kakamega, Vihiga, Busia and, perhaps Trans Nzoia counties, have to travel all the way to Kisumu. It is the same case for people from Kisii and Nyamira. You may discover that there are two judges there.

One single case that is of limited pecuniary value may be a dispute over Kshs10,000, but could take as much time as a dispute of millions or billions of shillings. You can see the suffering that we, Kenyans, experience because of this standoff.

Assuming the Judiciary and the Executive are bulls, how I pray that the bulls that are fighting understood that it is the grass they eat that makes them function. In other words, the citizens of this nation are the taxpayers and donors of the mandate and sovereignty they enjoy. Therefore, they must start thinking about the welfare of the citizens and do something that will not occasion endless suffering among us, as the citizens of this country.

I know that those in authority, like us, desire something called judicial accountability. Until we put it in law, this remains the law and nobody should imagine that they have some better reasons to create their own laws, precedents and authority and try to apply something else that is unknown to law.

Until we establish how we legally want to carry out judicial accountability, this count of behaviour by the Executive, and specifically by the President, should not be tolerated. If we tolerate this, then there is no way of standardizing what is called judicial accountability.

I hope that someday after “Tinga,” somebody from Mt. Kenya will become the president and it should be Sen. Linturi. Next time he comes up with his own methodology of judicial accountability, then this nation will be uncertain as the number of presidents or executives that we have.

In conclusion, I appeal to the Executive to put the interest of Kenyans and the nation first and ensure that the law that put them in office is adhered to strictly without trying to create some imaginary authority or method of accountability and subject our Judiciary to such imaginary or whimsical manner of accountability.

I also want to appeal to our Committee to start thinking of how to introduce judicial accountability legally, by debating it and involving everybody, including the Judiciary and all Kenyans. When it is agreed to by all of us, and it is the law, we should all follow it.

For now, we must condemn in the strongest terms firmly and swiftly what the President is doing against the Judiciary and ask the Judiciary to be measured and restrained when it comes to pushback.

Thank you very much Madam Temporary Speaker, I beg to support this Report.

**The Temporary Speaker** (Sen. Nyamunga): Sen. Linturi Francis Mithika.

**Sen. Linturi:** Madam Temporary Speaker, I before I move further, let me correct you. I am not Francis. My name is Franklin Mithika Linturi. It is important to have that corrected in the HANSARD. Franklin Mithika Linturi is my name.

Madam Temporary Speaker, let me take this opportunity to first thank the Committee on Justice, Legal Affairs and Human Rights for its bravery and explicitness in coming up with the recommendations that they have made in this Report.

Considering the circumstances, the country is in, it takes great men of courage and strength to come out forcefully with great, but kind words, to differ or disagree with a position by the Executive and stand strongly in defence of the Constitution and the rule of law for good order in a country like Kenya.



I say this because the people who sit in this House; the 47 elected and the nominated Senators, will remember going by our mandate. I think we have a clear mandate, which is to protect the interests of our people in the counties.

I believe that when the framers of our current Constitution and Kenyans decided on 27<sup>th</sup> August, 2010, to give themselves this Constitution, it was from a background and history of bad governance. Kenyans wanted a new order in the country because before then, the independence of the Judiciary was not there.

Abuse of the law was rampant in the country. Since we wanted to get away from that history, Kenyans decided to give themselves this Constitution, which we all swore to protect, defend and uphold.

Madam Temporary Speaker, you will realize that we have an obligation as leaders and citizens to defend this Constitution. We have our rights in this Constitution. Under this Constitution, nobody is above the law.

Parliament, the Executive and the Judiciary have a clearly defined mandate in the Constitution.

*[The Temporary Speaker (Sen. Nyamunga) left the Chair]*

*[The Temporary Speaker (Sen. Kinyua) in the Chair]*

Any State officer who has sworn to defend this Constitution has the greatest responsibility to live and abide by the law because of the office that they hold.

The expected standards of behaviour and conduct of a Member of County Assembly (MCA) are different from what the public expects from a Member of Parliament (MP) both in the National Assembly and the Senate or the President.

Mr. Temporary Speaker, Sir, the report from the Committee on Justice, Legal Affairs and Human Rights relates to a breach of our constitutional duty by the President to appoint judges that have gone through a rigorous selection exercise by a constitutional body, the Judicial Service Commission (JSC), whose part of its mandate is to recruit judges and make recommendations to the President for appointment.

It is important to mention and note that in the membership of JSC, the Executive is represented. This is because the Attorney-General sits as a Member in that Commission.

When people apply for appointment as judges either of the superior of the High Court or the Court of Appeal, there is a notice that is published so that any Kenyan who has information that may disqualify any applicant from appointment in that particular office, shares it with the recruiting body, the JSC. This happened.

The reason why this is done is so that the people that are of questionable character and have a history of not standing by the rule of law and cannot defend it do not find themselves seated in that particular office.

Mr. Temporary Speaker, Sir, elaborate mechanisms are in place. The President as the Head of the Executive is represented in that body by the Attorney-General. He participates in that recruitment and he agrees that certain judges must be appointed, but then the President refuses to do so.

The President has a constitutional duty to obey the law. He has no basis or business of not appointing judges once the JSC recommends their appointment.

The Judiciary should have its independence so as to avoid manipulation by the Executive. That is why I personally think that he must appoint judges once they are recommended by the JSC.

Mr. Temporary Speaker, Sir, the idea, explanation and excuse given that some of these judges are of questionable character is unpalatable and it cannot fly. This is because this country has the National Intelligence Service (NIS) that should have told the President that there is an issue before the names were submitted. So, that information should have come before the JSC.

Once the names have been published, there is the aspect of legitimate expectations from the judges that they have done well and the JSC has accepted them. For that reason, they will ascend to a higher officer, for example, in the case of a High Court judge, a practicing advocate or anybody else.

The kind of impunity that we are seeing in this country and carelessness of not obeying court orders by the Executive and the President is something that we must stand up against.

I reiterate the fact that there is nobody who is above the law in this country. I hope that he is listening. When one has a constitutional duty to fulfil, they must do it.

Mr. Temporary Speaker, Sir, if you were to look at the grounds for impeachment of a President, you realize that one is gross misconduct and failure to live and abide by the law.

If you critically look at what his actions have been and what he has done, for example, failure to appoint judges and to obey other court orders, in my view, constitutes gross misconduct, abuse of office which are impeachable offences. However, because we have a weak Parliament, people are afraid. They have been intimidated and this is almost turning this country into a dictatorship. So, nobody is willing to take up that responsibility.

I am grateful and happy. Even if it does not serve any purpose, there is proper records in this Senate that in 2021, there was a Committee on Justice, Legal Affairs and Human Rights that found the President to have broken the law---

**The Temporary Speaker** (Sen. Kinyua): Sen. Linturi, are you saying that this is a weak House?

**Sen. Linturi:** Mr. Temporary Speaker, Sir, I have said that we have a weak Parliament. With all due respect, I can substantiate what I am saying. Let me also remind you that the impeachment process of a President does not start in this House; it starts in the 'lower' House, which I am saying is weak. It has no muscle and cannot do anything. That is one of the major problems.

If we were in other developed democracies, this should have commenced or happened. My good friend suggested that---

**Sen. (Dr.) Ochillo-Ayacko:** On a point of order, Mr. Temporary Speaker, Sir.

**The Temporary Speaker** (Sen. Kinyua): What is it, Sen. (Dr.) Ochillo-Ayacko?

**Sen. (Dr.) Ochillo-Ayacko:** Thank you, Mr. Temporary Speaker, Sir. We are all Members of this august House. You have heard our brother mention that we are a weak House and that the other House is also weak. These things are recorded and history will remember that it has not been challenged.

I ask our good friend that in the absence of substantiation that we are a weak house, which he needs to do, he should withdraw those remarks because the record will bear it out that we are acquiescing to his assertions that we are a weak House.

The report that has been brought by our Committee is powerful. It cannot be made by a weak House.

I am a very powerful Senator and you are a very powerful Speaker. How dare he claim that you and your colleague the Madam Temporary Speaker are weak when you are sitted there? He has to explain that so that my daughters, now and in future will know that their father was not in a weak House.

**Sen. Linturi:** Mr. Temporary Speaker, Sir, how I wish my good friend Sen. (Dr.) Ochillo-Ayacko was listening. I said we have a weak Parliament. I further went on to mention the National Assembly because the impeachment process of a President does not start in the Senate. Until that process has started and has come here, we cannot know if our mandate would be properly executed depending on the matter before us until such a Motion is here.

For avoidance of doubt and making you understand it better, you need to understand the context in which I was saying that we have a weak Parliament or National Assembly. If that were not, then whatever action the President has committed constitutes an impeachable offence for which we should have commenced impeachment proceedings if we were strong.

So that I do not lose my thought processes, Sen. (Dr.) Ochillo-Ayacko mentioned the fact that we do not have judicial accountability. I reiterate that I think the Judiciary is fully accountable. Remember the Judiciary is insulated by our own Constitution to the extent that we have a system where on judicial judgements or findings they make, we can check errant judges through the normal judicial appeal processes.

**Sen. (Dr.) Ochillo-Ayacko:** On a point of order, Mr. Temporary Speaker, Sir.

**The Temporary Speaker** (Sen. Kinyua): What is it, Sen. (Dr.) Ochillo- Ayacko?

**Sen. (Dr.) Ochillo-Ayacko:** Mr. Temporary Speaker, Sir, my colleague is misquoting me. I said that what the President attempts to be doing is to introduce judicial accountability outside the law. If there is need to have that judicial accountability, this Committee should think about it, process it and make it lawful. It should be recorded that I am attacking the Judiciary.

On a point of order, I asked Sen. Linturi to have the record reflect that so that nobody quotes me there as being part of the mercenaries attacking the Judiciary.

**Sen. Linturi:** Mr. Temporary Speaker, Sir, I came in when he was at the middle of his speech. I may not have heard or may have misquoted him. I would not mind to withdraw that.

**The Temporary Speaker** (Sen. Kinyua): Sen. Linturi, even though you explained very well and talked about the weak Parliament, Standing Order No.96(5) says

—

“It shall be out of order for a Senator to criticize or call to question, the proceedings in the National Assembly, a County Assembly or the Speaker’s Ruling in the National Assembly but any debate may be allowed on the structures and roles of County Assemblies or the National Assembly.”

I hope you are dealing with the matter to do with the structures and their roles.

**Sen. Linturi:** Mr. Temporary Speaker, Sir, that is exactly what I am doing. There are no proceedings on this matter on the impeachment of the President in the National Assembly. I am discussing the manner in which we are structured. Probably there could be structural weaknesses, which I am trying to address while debating this report. There is nobody who is not accountable. To the extent that judicial decisions have a process under which you may differ with them. In my view, that is proper accountability.

Judicial officers are accountable for the money given to them by Parliament because they have an accounting officer who presents his budget before the Budget and Appropriation Committee.

**The Temporary Speaker** (Sen. Kinyua): Sen. Linturi, how many minutes would you wish to be added since you have been interrupted, so that you can finish?

**Sen. Linturi:** I think I lost around five minutes.

**The Temporary Speaker** (Sen. Kinyua): Okay. I give you three minutes.

**Sen. Linturi:** This is a very important report. I commend Sen. Omogeni for coming up with it. Let it go on record that the defense of our Judiciary is paramount we cannot loosen the guard. If we were to do so, then we would get back to the era where instructions were being given and people taken to court at night. Pronouncements were made and people put in Kamiti Maximum Security Prison at night.

For whatever it takes, we must defend the independence of the Judiciary. One of the reasons I believe we need to do so is because we cannot allow competent and very intelligent men and women in this country who are supposed to serve in the Judiciary end up losing their positions of serving *wananchi* in this country because of the perceptions of how they are taken to be inclined.

Finally, let this report be a guide towards the necessary legal reforms that probably we may require to make so that, that ambiguity – if there is any in the Constitution and law - is addressed in future. We cannot be sure who our next President will be tomorrow or in the next 20 years. The institution of the Judiciary is what we must jealously guard.

**The Temporary Speaker** (Sen. Kinyua): There being no any other request, I call upon the Mover to Reply.

**Sen. Omogeni:** Thank you, Mr. Temporary Speaker, Sir. I thank all the contributors to this Motion. They include Senior Counsel Sen. Orengo, Sen. (Prof.) Kindiki, my learned friend Sen.(Dr.) Ochillo- Ayacko and Sen. Linturi.

I appreciate the kind words from my colleague Senators. I reiterate that as a lawyer I have been privileged to rise and serve my country as the President of the Law Society of Kenya (LSK). Therefore, there is not title that I wear more proudly than being a defender of the rule of law.

In a situation such as the one at hand, I have no choice other than to put my country and the Constitution of the Republic first. I have no choice other than to bear true and undivided allegiance to the Constitution of the Republic of Kenya which I swore on the Floor of this House to defend.

Mr. Temporary Speaker, Sir, on a matter that is touching on the independence of a key institution like the Judiciary, I cannot afford to have divided allegiance to the Constitution of the Republic of Kenya.

On a day like this, 11<sup>th</sup> November, 2021, having been privileged to be elected the Senator for Nyamira County, I will want my grandchildren to know that when I was

confronted with a choice between ignoring the rule of law, or standing on the side of the rule of law, I chose to stand on the side of the rule of law. When confronted with a situation where I could have chosen to have divided allegiance to the Constitution, I chose to bear true allegiance to the Constitution of the Republic of Kenya.

Mr. Temporary Speaker, Sir, I thank the contributors who spoke in support of this Motion. As lawyers serving in this House, we must continue to remind the Executive to respect and uphold the Constitution of the Republic of Kenya, which we have all sworn to bear allegiance to and respect.

I cannot agree more with what my learned colleague, Sen. Orengo, has said this afternoon, about the brilliance of some of the names of the people who have been proposed to be judges. I want to disclose that some of these proposed judges were with me at the University of Nairobi (UoN).

The proposed Justice, Evans Kiago Makori, a native of Ibacho Village in Kisii County, was my classmate. He is one of the few students that won our admiration in the class of 1990 to 1993. Mr. Makori is an inspiration from his village back home. From Form One all through to Form Six, he attended a Harambee School called Ibacho Secondary School.

In fact, we used to crack jokes in campus those days, asking him why he chose to go to somebody's home and call it a school because nobody knew Ibacho Secondary School. That is how hard he has fought to reach where he is.

Mr. Temporary Speaker, Sir, if you read the website of the Judiciary, you will see that Magistrate Evans Makori has been a force behind many of the reforms that have been witnessed in the Judiciary. He is the one who was behind e-hearing of cases. He is the one who started digital hearing of cases while serving as a Chief Magistrate in Mombasa County.

Magistrate Judy Omange was two years behind me in campus. We used to crack jokes that she hailed from a district where professors are counted per square kilometre. She is from Seme. I know there are some people who are serving in the Legal Department in this House who were our classmates. I want to affirm that native of Seme is a brilliant lawyer. She was a very active member of the Law Club at the UoN.

Mr. Temporary Speaker, Sir, I believe Justice Odunga was a classmate of Sen. (Dr.) Ochillo-Ayacko.

**Sen. (Dr.) Ochillo-Ayacko:** On a point of order, Mr. Temporary Chairman, Sir.

**The Temporary Speaker** (Sen. Kinyua): What is it, Sen. (Dr.) Ochillo-Ayacko?

**Sen. (Dr.) Ochillo-Ayacko:** Mr. Temporary Chairman, Sir, just a point of information. It is true, Sen. Omogeni and I were in the university at the same time. Justice Odunga and I were in the same class and he is a person of impeccable integrity. He is the kind of person that even if you look at his wealth, it is something he has truly earned. He is also a person of courage. He will say that thing is red and means so. He is not a person who calls a toothpick a comb or a comb something else.

**Sen. Omogeni:** Mr. Temporary Speaker, Sir, you can hear that confirmation from Sen. (Dr.) Ochillo-Ayacko, that we are talking about lawyers of high integrity; people who enjoy a lot of respect among their peers.

Justice Odunga was one class ahead of me and he led a very simple life. He struggled to find his way to university. He is one of those few Kenyans who maybe would not have made it to university if there was no Higher Education Loans Board

(HELB), to assist Kenyan students from poor backgrounds to go through higher education. If you talk to lawyers, just as it was submitted on this Floor by Sen. Orengo, Justice Odunga has written one of the most brilliant judgments you can ever find in the High Court. Well-reasoned and written judgments comparable to a leading judge, Judge Odenyo in the legal profession.

The same can be said of the other judges. Judge Weldon Korir was a pioneer in the judicial review and constitutional division. I have appeared before Justice Korir and lost some cases. It was not because he had any biasness against me, but because I did not have a good case. I cannot have anything personal against him.

Mr. Temporary Speaker, Sir, I feel the pain the way Sen. Orengo said. If you have unknown allegations hanging over your head and you are a judge dispensing justice for a period of over two years, it is the kind of torture you do not want to subject any human being to.

Let me state on the Floor of this House that we will one day in our lifetime, need a Judiciary that is fair and ready to dispense justice in a fair manner. That is what some of us are trying to fight for today. Long after we have left this House; long after those who are serving in the Cabinet have left; long after even H.E. the President has left office, he still needs an independent Judiciary that is guided by not any other consideration, but by the need to dispense justice in a fair manner.

I am proud that the Senators who spoke today are unanimous that they want to defend the independence of the Judiciary. We have examples that we can learn from. In the USA in 1804, President Thomas Jefferson was elected through a very popular mandate. He had 162 Electoral Colleges out of a possible 176. That is one of the highest ever. However, when he went into office, he had a bone to pick with the Judiciary.

President Thomas Jefferson thought that because he had control of the House of Representatives and the Senate, he could engineer an impeachment of some of the judges in the Supreme Court of America whose opinions he did not like. He tried with a District Judge and that worked. Then he moved to the Supreme Court, where he wanted Justice Samuel Chase to be impeached. He had the numbers from his Democratic Party. He wanted to remove Justice Chase because he was appointed by President George Washington because he thought the President did not make a wise choice.

Mr. Temporary Speaker, Sir, on many of the evenings when the impeachment was going on, he would call members of his Democratic Party for dinner and tea at the White House, so as to influence them in voting for impeachment of Hon. Chase. Since the Senators were mindful of how important it was to have an independent Judiciary, they disagreed with their party boss and voted to reject the impeachment of Justice Samuel Chase. That went a long way in maintaining the independence of the Supreme Court and the entire judiciary in the United States of America.

Mr. Temporary Speaker, Sir, in 1933, President Franklin Roosevelt had a commanding majority. In fact, out of 435 Members of the House of Representatives, the Republic Party had only 89. The rest – 333- were Democrats. In the Senate, out of 100, the President had 76 Senators from the Democratic Party.

The sitting arrangement could not fit one side of the House, and so, the democrats had to sit on the other side of the Republicans. President Roosevelt was annoyed by some of the decisions the Supreme Court was making because it was nullifying some of the New Deal decisions and legislations the President had proposed to address the issue of

depression that had hit America hard at that time. However, some of them were declared unconstitutional by the Supreme Court.

To deal with that “big-headedness” from the Supreme Court, President Roosevelt proposed to amend the Constitution by increasing the number of Supreme Court judges to six more, so that he could pick his own judges to dilute the independence of that court and stop declaring his legislations unconstitutional.

Mr. Temporary Speaker, Sir, if you read history, you will confirm that despite that commanding majority of 76 Senators that President Roosevelt had and him going out to campaign to influence the decision of the Senate, the Senate refused to go by that proposal of the President and rejected it. In fact, it ended tragically because the Leader of Majority, Senator Robinson, who was pushing that agenda on behalf of the President, was so shocked that one evening when he retreated to his apartment died of a heart attack. It was a tragic end to that campaign. However, the Senate still stood on the side of protecting the independence of the Judiciary.

That is why - this afternoon - I am speak with passion and conviction that this country is safer with a Judiciary that is independent and free of political manipulation. I agree with what Sen. (Dr.) Ochillo-Ayacko has said that it is in the best interest of this country that there should be some level of accountability from the Judiciary. We all agree that they are human beings. They can make mistakes and can be removed.

Since we enacted our Constitution, 2010, we have had a Deputy Chief Justice removed through a Tribunal because of some transgression she committed. We have had a High Court Judge removed. On the other hand, we have had accusations that have gone for tribunal hearing, but the tribunal found the allegations unfounded and cleared the Judge to continue serving.

My former teacher, Rtd. Justice Prof. Ojwang' went through a tribunal and was found not to have committed any ground that warranted his removal. That is how it should be. Any level of accountability against judges should not be whimsical, but based on the law.

Sen. (Dr.) Ochillo-Ayacko, as we stand today, under Article 168, any Kenyan can file a petition before the JSC and seek the removal of any judge of either the High Court, the Court of Appeal or the Supreme Court on account of any misconduct. That is the accountability we are talking about because it is in the Constitution.

What the Constitution says is that judges should enjoy security of tenure and for any Kenyan to want to remove them, there must be a basis and grounds. How do you have a situation where judges listen to cases daily, trying to enforce fair hearing in court, but themselves are not subjected to fair hearing? It is an untidy situation.

Mr. Temporary Speaker, Sir, as I gear towards conclusion, I want to make a very strong appeal to the President. This long drawn fight with the Judiciary is very unhealthy. Sen. (Dr.) Ochillo-Ayacko has put it ably that there is some jurisprudence we should be reluctant to see come up because we respect the presidency.

It is an act of honour, privilege and patriotism. Even if it is me and I am invited to go State House to be sworn in as a Judge, I want to see the President exercising that mandate because he is the President. However, if we allow this matter to escalate all the way to the Supreme Court and the Court finds that his role can be ceremonial; that if he does not appoint, then the Chief Justice can swear those judges, we would have done a big watering down of the Office of the President.

So honourable is the office of a judge that in the USA, one of the serving presidents, President William Taft, served as a President and when he left office, he was appointed a Supreme Court Judge. That is how prestigious a position of a Judge is. That is why when lawyers appear before court, they address judges as 'My Lords' because it is a prestigious position.

Mr. Temporary Speaker, Sir, we want that prestige of our judges to be maintained and remain intact. I would not mind seeing Sen. (Dr.) Ochillo-Ayacko after his retirement, if he has more years to serve the country, he becomes Justice Ochillo-Ayacko. It would be an act of honour in his professional career.

We had Lady Justice Njoki Ndung'u, who is a former Member of Parliament. She was a Nominated Member of Parliament, and we all know. She has now moved on and is serving this country as a Judge of the Supreme Court. So, you can move from this side to the other side.

One of the best and most distinguished Chief Justices of the USA Chief Justice John Marshall who is the author of the *Power of Judicial Review for Courts in USA* served as the Secretary of State for President John Adams. President John Adams appointed him after his election, but before Thomas Jefferson had taken office.

He moved from being somebody in the Executive to being the head of Judiciary. If you go to America today, one of the most respected Chief Justices to have ever served the USA is John Marshall. He served many Presidents.

He served during the tenure of John Adams for less than two months who left and Thomas Jefferson took over and served under his tenure. When Thomas Jefferson was trying to remove Samuel Chase, he was testing the waters. He wanted to see if he had succeeded in removing Samuel Chase he would go after John Marshall who was serving as Chief Justice. When the Senate applied breaks on President Thomas Jefferson, he abandoned the whole idea and John Marshall served as Chief Justice for the entire duration of his tenure.

With all these remarks and as a true son of Kenya, a patriotic Kenyan, a lawyer and somebody who believes in the rule of law, I really want to make a strong appeal to His Excellency the President to respect the Constitution as it is today. Articles 166 and 172 and appoints these five industrious sons of Kenya and one daughter of this great country to their respective positions of Judge of Court of Appeal and Judge of the High Court so that we bring this matter to an end. At the end of it all, this country, the rule of law and the Constitution will be the winner and we will all be happy as a country.

With those remarks, I beg to reply.

**The Temporary Speaker** (Sen. Kinyua): Thank you, Sen. Omogeni.

Hon. Senators, pursuant to Standing Order No.79(1), I determine that the Motion before the Senate does not affect counties.

*(Question put and agreed to)*

## BILLS

### *Second Reading*

#### THE HERITAGE AND MUSEUM BILL (SENATE BILLS NO. 22 OF 2021)

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*(Bill deferred)*

*Second Reading*

THE COUNTY OVERSIGHT AND ACCOUNTABILITY BILL  
(SENATE BILLS NO. 17 OF 2021)

*(Bill deferred)*

*Second Reading*

THE INTERGOVERNMENTAL RELATIONS (AMENDMENT) BILL  
(SENATE BILLS NO. 37 OF 2021)

*(Bill deferred)*

*Second Reading*

THE ALTERNATIVE DISPUTE RESOLUTION BILL  
(SENATE BILLS NO. 34 OF 2021)

*(Bill deferred)*

*Second Reading*

THE COUNTY HALL OF FAME BILL  
(SENATE BILLS NO. 9 OF 2021)

*(Bill deferred)*

*Second Reading*

THE COUNTY GOVERNMENTS (AMENDMENT) BILL  
(SENATE BILLS NO. 38 OF 2021)

*(Bill deferred)*

*Second Reading*

THE NATIONAL COHESION AND PEACE BUILDING BILL  
(SENATE BILLS NO. 19 OF 2021)

*(Bill deferred)*

**COMMITTEE OF THE WHOLE**

THE NATURAL RESOURCES (BENEFIT SHARING) BILL  
(SENATE BILLS NO. 25 OF 2020)

*(Committee of the Whole deferred)*

THE CO-OPERATIVE SOCIETIES (AMENDMENT) BILL  
(SENATE BILLS NO. 11 OF 2020)

*(Committee of the Whole deferred)*

THE COUNTY VOCATIONAL EDUCATION AND TRAINING BILL  
(SENATE BILLS NO. 6 OF 2021)

*(Committee of the Whole deferred)*

THE PROMPT PAYMENT BILL  
(SENATE BILLS NO. 16 OF 2021)

*(Committee of the Whole deferred)*

THE START-UP BILL  
(SENATE BILLS NO. 1 OF 2021)

*(Committee of the Whole deferred)*

**The Temporary Speaker** (Sen. Kinyua): Next order.

**MOTIONS**

## FAST TRACKING CULTURAL DEVELOPMENTS IN COUNTIES

THAT, WHEREAS Kenya is a multi-ethnic and multi-racial country with rich and diverse cultural resources such as traditional medicine and foods, arts, craft, music, dances, dress among others;

AWARE THAT, the Constitution, in its preamble acknowledges the cultural diversity of the Kenyan people who are determined to live in peace and unity as one indivisible sovereign nation whilst, Article 11 of the Kenyan Constitution recognizes culture as the foundation of the nation;

NOTING that, while the Department of Culture under the Ministry of Sports, Culture and Heritage has been playing some of the key roles in promotion of cultural integration, formulation of policies and standards that will guide the development of culture, little information has been available to the Kenyan public;

ACKNOWLEDGING, that culture performs a significant role in the life of a child, the cultural background in which a child is brought up affects the totality of his or her life's activities;

CONCERNED, that our children are losing their sense of identity due to the negative influences due to inadequate cultural identity catalysed by globalization which has led to catastrophic consequences to the next generation as experienced in our country where a majority of young people are showing symptoms of feeling suicidal, anxious, feeling of hopelessness, anger, violence, feeling isolated, and paranoia;

NOW THEREFORE, the Senate urges the Cabinet Secretary, Ministry of Sports, Culture and Heritage to –

(a) Formulate cultural development policies and initiatives to inculcate stronger community values, safeguard Kenya's heritage, recognize local heroes and promote socio-cultural opportunities in the counties; and

(b) Formulate strategies to create an enabling environment for protection and promotion of diversity of cultural expressions in all counties.

**The Temporary Speaker** (Sen. Kinyua): The Mover for Order No. 21 is not here. Therefore, the Motion is deferred.

*(Motion deferred)*

RECOGNIZING AND APPRECIATING THE ELDERLY  
BY COUNTY GOVERNMENTS

THAT, AWARE that in 2006, the National Government initiated the Older Persons Cash Transfer (OPCT) Programme, popularly known as Pesa ya Wazee, which is an unconditional cash transfer programme to destitute elderly persons above the age of 65 years to cater for their subsistence needs;

NOTING THAT the beneficiaries receive a monthly stipend of Kshs2,000, delivered every two months through appointed payment agents, and also entitled to medical insurance through the National Health Insurance Fund (NHIF);

CONCERNED HOWEVER THAT the programme's credibility is marred by issues of delayed payments to beneficiaries, difficulties in processing of payments through the stipulated agents and payments to unregistered persons;

NOW THEREFORE, the Senate recommends that the County Governments complement the efforts of the National Government and assist in resolving these challenges by-

(1) Developing legislation and policies to protect the elderly including ensuring all elderly persons in their counties are registered in the OPCT programme; and

(2) Organise value addition mechanisms such as financial training to help the beneficiaries of the programme to efficiently utilise this allowance.

*(Motion deferred)*

ADOPTION OF REPORT ON INQUIRY INTO ALLEGATIONS REGARDING IRREGULARITIES  
IN THE PROCUREMENT OF VARIOUS PHARMACEUTICAL  
EQUIPMENT AND PRODUCTS BY KEMSA

THAT, the Senate adopts the Report of the Standing Committee on Health on inquiry into allegations regarding irregularities in the procurement of various pharmaceutical equipment and products by the Kenya Medical Supplies Authority (KEMSA), laid on the Table of the Senate on Tuesday, 30<sup>th</sup> March, 2021.

*(Motion deferred)*

ADOPTION OF THE REPORT ON THE COVID-19  
PANDEMIC SITUATION IN KENYA

THAT, the Senate adopts the First Progress Report of the Standing Committee on Health on the COVID-19 pandemic situation in Kenya, laid on the Table of the Senate on Tuesday, 30<sup>th</sup> March, 2021.

*(Motion deferred)*

ADOPTION OF THE SECOND PROGRESS REPORT ON THE COVID-19 SITUATION IN KENYA  
AND PRELIMINARY FINDINGS ON THE SPECIAL AUDIT REPORT ON THE UTILIZATION  
OF COVID - 19 FUNDS BY COUNTY GOVERNMENTS

THAT, the Senate adopts the Second Progress Report of the Standing Committee on Health on the COVID-19 situation in Kenya and preliminary findings of the Committee, on the Special Audit Report on the Utilization of COVID-19 funds by County Governments, laid on the table of the Senate on Tuesday, 30<sup>th</sup> March, 2021.

*(Motion deferred)*

ADOPTION OF THIRD PROGRESS REPORT ON THE COVID-19 SITUATION IN KENYA AND  
PRELIMINARY FINDINGS ON THE NATION WIDE COVID-19 VACCINE ROLL OUT

THAT, the Senate adopts the Third Progress Report of the Standing Committee on Health on the COVID-19 situation in Kenya and preliminary findings on the nationwide COVID-19 vaccine roll out, laid on the Table of the Senate on Tuesday, 21<sup>st</sup> September, 2021.

*(Motion deferred)*

### ADJOURNMENT

**The Temporary Speaker** (Sen. Kinyua): Hon. Senators, there being no other business, it is now time to adjourn the House. The House, therefore, stands adjourned until Tuesday, 16<sup>th</sup> November, 2021, at 2.30 p.m.

The Senate rose at 5.58 p.m.