

**PARLIAMENT OF KENYA****THE SENATE****THE HANSARD****Tuesday, 28<sup>th</sup> October, 2014**

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

*[The Deputy Speaker (Sen. Kembi-Gitura) in the Chair]*

**PRAYERS****PAPERS LAID****REPORT OF THE STUDY VISIT OF THE  
SENATE LEADERSHIP TO GERMANY**

**Sen. Muthama:** Mr. Deputy Speaker, Sir, I beg to lay the following Paper on the Table of the Senate:-

A Report of the House Leadership delegation study visit to Germany.

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

**THE COUNCIL OF GOVERNORS STATUTORY  
ANNUAL REPORT 2013/2014**

**Sen. Elachi:** Mr. Deputy Speaker, Sir, I beg to lay the following Paper on the Table of the Senate:-

The Council of Governors Statutory Annual Report 2013/2014

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

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**COMMUNICATION FROM THE CHAIR**

## RE-ORGANIZATION OF BUSINESS ON THE ORDER PAPER

**The Deputy Speaker** (Sen. Kembi-Gitura): Hon. Members, on the Order Paper, you will notice that we have Order No.8 which is Committee of the Whole. As you are very well aware, for the Committee of the Whole to take place for the Public Finance Management (Amendment) Bill, (Senate Bill No.10 of 2014), we need to have more than 24 delegations in the House. There is a proposed amendment to this Bill.

I am directing that in view of the fact that we do not have a sufficient number of delegations, we reorganize the Order Paper so that we go to Order No.9 instead of Order No.8 and come back to it when it is convenient to do so.

**MOTION**ESTABLISHMENT OF AD HOC COMMITTEE TO  
MONITOR COURT CASES INVOLVING THE SENATE

**Sen. Mutula Kilonzo Jnr.:** Mr. Deputy Speaker, Sir, I beg to move the following Motion:-

THAT, aware that pursuant to Article 96 (1) of the Constitution of Kenya, the Senate represents the counties, and serves to protect the interests of the counties and their governments; further aware that several adverse orders restraining the Senate from executing its role have been issued by the courts; appreciating the need for the Senate to execute its constitutional mandate without interference; further appreciating the wealth of experience and knowledge possessed by Senators in various fields; the Senate resolves to establish an ad hoc Committee, with effect from 2nd September, 2014, comprising the following Senators to closely monitor court cases involving the Senate or which have an impact on the constitutional mandate of the Senate, and apprise the House from time to time and in any event report to the Senate within six months-

1. Sen. Amos Wako - Chairperson
2. Sen. Kembi-Gitura
3. Sen. (Prof.) Kithure Kindiki
4. Sen. Moses Wetangula
5. Sen. Kiraitu Murungi
6. Sen. Fatuma Dullo
7. Sen. Mutula Kilonzo Jr.
8. Sen. Stephen Sang'
9. Sen. (Dr.) Boni Khalwale
10. Sen. Hassan Omar

11. Sen. Judith Sijeny
12. Sen. Kipchumba Murkomen
13. Sen. James Orengo
14. Sen. Beatrice Elachi
15. Sen. (Dr.) Agnes Zani
16. Sen. Ekwere Ethuro; Speaker of the Senate (*Ex-officio*)

Mr. Deputy Speaker, Sir, it is now common knowledge that the Senate has been sued at every particular opportunity, except in the Division of Revenue and County Revenue Allocation Bills. We have waited to say that courts cannot injunct the mandate of the Senate under the Constitution. It has become apparent that we must re-invent the wheel in respect of the role of courts *vis-à-vis* that of the Senate.

It is common knowledge in the Commonwealth House of Commons that courts cannot injunct the mandate of the Senate or any parliament, but it surprises us that the courts have proceeded, not once, not twice or thrice, to injunct this Senate from exercising its constitutional mandate. Sometimes I sit and wonder whether one day we will be injuncted from sitting. I wonder sometimes whether one day we will be injuncted or the Speaker of this Senate will be injuncted from sitting because somebody somewhere out there does not like the Speaker of the Senate.

Mr. Deputy Speaker, Sir, the question that arises is that; although we have an elaborate legal support staff that are assisting the Senate, it is has now come to pass that that Committee or that support staff needs the expertise and experience that comes with the 16 Senators on this list. I say so, because while we are wondering what is happening to the Senate, this Senate houses the tyranny of legal brains and senior counsel in the Republic of Kenya. However, we are suffering out there, when courts are issuing these injunctions. We must go to the Supreme Court to seek an advisory opinion on whether or not these courts of this Republic acting under Article 165 have got superior jurisdiction to that of the Senate. Under Article 96, it is fair that this Committee comprising of the Senators as listed here, will be able to guide this Senate.

I am going to ask you, hon. Senators seated here, that as you debate this Motion in its amended form, just like any good client, you must be able to listen to legal advice. Otherwise, there is no purpose of setting up such a committee because all of us are politicians. We are bound to mix legal issues with political issues. I am going to tell you that this country will judge us harshly if we do no exorcise that demon of the independent Constitution where the Senate of this Republic was done away with because of what I call autocracy.

Mr. Deputy Speaker, Sir, while we are thinking like politicians, we must be able to give this Committee that you have set up to advise you legally like any good client and listen to the good legal advice so that as we make a decision, we stop being quoted like we are being quoted in the Press. For the last one week, the Senate of the Republic of Kenya is in a dilemma.

Why would the Senate of the Republic of Kenya be in a dilemma about what would be a legal issue and what would be a legal mandate? We are not deciding a matter that would be political. That has come to pass because we have found that we have a lacuna in our work. That is the reason I support the idea and move this Motion that we set up this Committee.

Mr. Deputy Speaker, Sir, it is fair for the Republic and the people who we serve to know that this Committee has been advising the Senate for the period that is mentioned in this Motion; 2<sup>nd</sup> September, 2014. However, we want to be able to come to this Floor or sit in one of our *Kamukunjis*, any of our meetings or retreats, and say that this is the position that the Senate must take. Everybody else, political affiliations notwithstanding, you will seek and say this is the way to go. I say so because many of you might not be aware that we have 16 pending court cases against the Senate. Several Committees in this Senate cannot function. I am waiting because one of these fine days, the Committee on National Security and Foreign Relations, the Committee on Information and Technology and the Committee on Education are going to be enjoined from performing their roles because we have not taken a strong position against the orders that are being issued against us. What we do is wait for the legal support staff to advise the Senate as to whether or not we should proceed, enter appearance or file any documents.

Mr. Deputy Speaker, Sir, one of the injunctions issued against the Senate was issued on the grounds that the Senate did not file a reply. I remember the injunction issued against the Senate in the impeachment of Wambora was issued because the Senate did not file a response. Sooner than later, we will be issued with more orders because the country is watching whether we will react to some of these injunctions. Although it appears that the leadership of this House has attempted to intervene informally with the Judiciary in so far as some of these things are concerned. However, it is now evident that those informal interactions are taking the Senate nowhere because, as I speak, there are several things that we have not done. Articles 96, 125, 181 and 182, have been violated. So, what is left? We have nothing else left in our mandate that has not been enjoined.

As I move this Motion, therefore, I want to strongly propose that we support the work of this committee so that one of the pending issues before the Senate today can be determined as quickly as possible. Kenyans have been watching carefully for the determination of the Senate on some of the matters that are pending before us, but we have shied away from making those determinations. That is not a legal position we have taken. It is a political position. That is what is going to be the genesis of the end of the second Senate of this Republic of Kenya as we watch. It is a sad day, but there is a small window.

Hon. Senators, you must agree to be advised legally by this Committee so that we can make decisions that are sound both legally and then deal with the political ramifications when we are not in this Chamber. Eventually, although we are politicians, we have been given a mandate to legislate as lawmakers. If we cannot speak and make

pronouncements of law, then we have no business sitting in this Senate and spending tax payers' money. We might as well look for something else to do.

Mr. Deputy Speaker, Sir, with those few remarks, I beg to move this Motion as amended under Standing Order No.49 and ask the Vice Chairperson of the Committee on Legal Affairs and Human Rights, Sen. Sang, to second the Motion.

Thank you.

**Sen. Sang:** Mr. Deputy Speaker, Sir, I rise to second this Motion. As mentioned by the Mover, Sen. Mutula Kilonzo Jnr. we have many cases affecting the functioning of this House. In accordance with the Constitution, we know that the function of the Senate and its responsibility is principally to protect the interest of counties through legislation, oversight and other key responsibilities, including impeachment. This House has participated in the process of enactment of some laws. It is sad that so far, one of them is a subject of a court case right now. That is the amendment to the County Government Act seeking the establishment of County Development Boards. We, as a House, did so by passing an amendment Bill in pursuant to our legislative function. That law is now before the courts for the purpose of establishing its constitutionality. That means that the legislative function of the Senate is under question.

The second responsibility given to the Senate is oversight. We are given that responsibility under the Constitution to oversight the utilization and management of resources allocated to county governments. Part of the process of oversighting county governments with regard to the utilization of those resources is being undertaken by one of our watchdog committees, that is, County Public Accounts and Investments Committee (CPAIC). The Committee has invited some county governors, who are the chief executive officers of counties. The Council of Governors has gone to court. As I speak, there is an injunction against the Senate Committee from summoning the governors to come and explain the utilisation of those resources. That particular function of oversight has been enjoined by the courts.

Mr. Speaker, Sir, the other responsibility given to us by the Constitution and the County Government Act is to participate in the process of impeachment of governors. This House has exercise that mandate with regard to the Embu Governor. I am aware that this is a matter pending before court. We dispensed with the issue of the Governor for Kericho County. We want to appreciate that in that process, the Governor, Prof. Paul Chepkwony did not go to court enabling this House to dispense with that matter without any interference.

Two weeks ago, this House was supposed to process the impeachment of Makueni Governor, Prof. Kivutha Kibwana.

We are aware that there is an injunction against the Senate proceeding on that particular matter. If we continue with the current trend of events, virtually, every function of this House will be enjoined by the courts. These are just a few of the cases affecting the Senate.

As mentioned, we have 16 cases in our courts relating to the Senate in one way or another. We are aware that we are limited in terms of the resources that are available for us to be present and participate in each and every case that is filed against us. These are only 16 cases within a short time. This means that as we progress to handle our issues, we will be faced with many more court cases. Therefore, we need to sit down, think and find an avenue. That is why it is important for us to have this *ad hoc* committee that will monitor and assess the impact of these cases. Where we think that it is important for the Senate to be represented, we do not lose that opportunity. However, where we think we may not strongly need that representation, we are able to monitor, assess and get sound advice to the Senate on how to participate in the cases.

Mr. Deputy Speaker, Sir, I am aware that most of the names given in this *ad hoc* Committee are Members of the Standing Committee on Legal Affairs and Human Rights. However, it is important to note that this is a specific engagement for six months. This is a period in which we shall look at all those cases and monitor the impact. We need key persons as included in this list. Sen. (Prof.) Kithure Kindiki is not a Member of the Legal Affairs Committee, but as the Senate Majority Leader and in his capacity as a distinguished lawyer, we need him there. The Senate Minority Leader, Sen. Wetangula, is not a Member of the Standing Committee on Legal Affairs and Human Rights, but we need his expertise in this committee. Sen. Orengo is not a Member of the Legal Affairs and Human Rights Committee, but his expertise is needed. The same applies to our Majority Whip, Sen. Elachi and Sen. (Dr.) Zani. Therefore, whereas we appreciate that some of the responsibilities of the *ad hoc* Committee could be undertaken by the Standing Committee on Legal Affairs and Human Rights, I want to persuade this House to look at the wisdom in having a little more of this Members, especially the Senate Majority Leader, the Senate Minority Leader, Sen. Orengo, Sen. Elachi, Sen. (Dr.) Zani and, most importantly, the Chairperson of CPAIC, Sen. (Dr.) Khalwale.

With the composition we are proposing, this task force will undertake monitoring some of these court cases and carry out activities that we have already engaged behind the curtains to try and reach out to the courts. The chairperson of this proposed committee, Sen. Wako, has been tasked on several occasions to reach out to the courts. I want to appreciate that this committee will explore other avenues. Those of us who sat in last weekend's meeting of the various chairpersons of committees and leaders of the House, we discussed and agreed that whereas we have the hard power and the law to pursue and the Constitution, sometimes pursuing through soft power reaching out to these institutions, discussing and having round table discussions, is crucial. This committee will help us undertake some of those responsibilities.

I want to persuade the House to see the wisdom of having an *ad hoc* committee over and above the Standing Committee of Legal Affairs and Human Rights.

Mr. Deputy Speaker, Sir, we give this committee a time limit of six months hoping that within this timeframe, we shall have concrete steps. It is also important for the *ad hoc* Committee to brief this House oftenly so that the House does not have to hold

a *Kamukunji* every other time there is a court order and an injunction being issued by the courts. We need this committee to engage constantly and brief this House on the engagements. They will also brief our legal counsels representing us in some of those cases. With this kind of approach, we shall be able to provide leadership and get out of the challenges facing us.

I want to persuade the House to look at the wisdom of having an *ad hoc* committee over and above the Standing Committee on Legal Affairs and Human Rights. The House should consider the wisdom of having the Speaker sitting with us in the committee as the *ex-officio* Member. With this committee, we should have a better understanding on the impact of the court cases facing us and provide a softer avenue for the Senate to approach and deal with these issues.

With those few remarks, I beg to second.

*(Question proposed)*

**Sen. Kagwe:** Mr. Deputy Speaker, Sir, I rise to oppose this Motion for very good reasons. Firstly, when you read the Motion, it says that this committee will take effect from the 2<sup>nd</sup> September, 2014 and yet on the 2<sup>nd</sup> of October, 2014, it was already one month later. In a few days, that is, on the 2<sup>nd</sup> November, 2014, it will be two months. Therefore, the lifetime we are giving this committee will elapse even before we have discussed it in the House.

Secondly, I have tremendous respect for both the Mover and the Seconder of this Motion. Everybody knows my friendship with both of them, particularly, my deputy chair in the Committee on Information and Technology, who is the Mover of the Motion. When you look at the list of the Members of this committee, you can imagine that you are reading a list of Members of the Legal Affairs and Human Rights Committee. I am wondering then why we are duplicating a committee unless we saying that the Committee on Legal Affairs and Human Rights is so unable to execute its responsibilities and that we should dissolve it and form another committee which we are calling *ad hoc* to carry out the responsibilities that the Committee on Legal Affairs and Human Rights is supposed to carry out.

Mr. Deputy Speaker, Sir, with all due respect to my colleagues, the proposed chairperson of this committee, Sen. Wako is the Chairperson of the Committee on Legal Affairs and Human Rights. I have heard my good friend, Sen. Sang, say that not all Members of this proposed committee are Members of the Committee on Legal Affairs and Human Rights. However, when I read it over, a half of them are Members.

We must not lose sight of Standing Order No.199 that says very clearly that:-

“A Senator may attend and participate in a meeting of any Select Committee of the Senate of which he or she is not a Member.”

There is nothing to stop, therefore, Sen. Orenge or Sen. Kagwe, from attending a meeting of the Committee on Legal Affairs and Human Rights which has been

specifically been called to discuss matters that are pending in our courts. There is nothing to stop us from doing so. Further, I am of the view that this is not a time to call for further committees. This is the time to have a select group within the Committee on Legal Affairs and Human Rights; two or three Members, who can deal with this issue because this is a matter that we should look at with a lot of gravity. However, as I speak, when we form another committee when even raising quorum within the existing committee, is a problem. What will happen is that this Committee will be called a couple of days within the next two months and the most likely scenario is that we will have quorum issues.

My proposal on this matter, therefore, would be that we discussed this matter in Mombasa in the leadership forum. We talked about getting the advisory opinion that Sen. Mutula Kilonzo Jnr. referred to. However, we do not need a committee to put together an advisory opinion. What we need is lawyers hired by this House, who will execute that responsibility with a matter of urgency. The one thing that we know committees do not do is act with urgency. My view is that this is not a matter for a committee, notwithstanding the greatest respect, experience and ability of the Members on the list.

Mr. Deputy Speaker, Sir, we have not exhausted matters to do with secondment of lawyers by the Attorney-General. The Committee on Legal Affairs and Human Rights called the Attorney-General in this House and we were of the view that they can do a lot more than they are doing. We know that the leadership of the House has engaged the Supreme Court on the matters we are talking about. With all due respect, the challenge here is not to form more committees, but implementation and leadership. We should give this matter to two or three people who will lead the process and work with lawyers hired by the House and implement what we are talking about. I respect Members who are on this list. However, with all seriousness, unless we are saying that there is no other committee to deal with this issue, I do not understand how we can come up with a list similar to the one that exists and pretend that it is a new committee.

Mr. Deputy Speaker, Sir, I want to request my colleagues to drop this committee. At the same time, I ask the Committee on Legal Affairs and Human Rights to form a sub-committee composed of Sen. Wako, Sen. Wetangula, Sen. Murungu, Sen. Dullo, Sen. Mutula Kilonzo Jnr. and Sen. Sang who, in any event, are already part of the Committee on Legal Affairs and Human Rights.

With those few remarks, I oppose the formation of this Committee.

*(Loud Consultations)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Order. What was that all about?

Sen. Haji, are you on a point of order?

**Sen. Haji:** I would like to contribute.

**The Deputy Speaker** (Sen. Kembi-Gitura): Then you are pressing the wrong button. Press the correct button.

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Sen. (Prof.) Anyang'-Nyong'o.

**Sen. (Prof.) Anyang'-Nyong'o:** Mr. Deputy Speaker, Sir, I rise to support the Motion and also record my appreciation of the points raised by my dear friend, Sen. Kagwe, which I agree with entirely, but the conclusion of which I am in doubt. I am in doubt precisely because if I were him, I would have amended the Motion rather than defeat the spirit the Motion by throwing it out entirely. I do believe that the Motion is seeking to deal with a certain mischief. According to Sen. Kagwe, that will not be dealt with by setting up an *ad hoc* committee, but by throwing the ball back to the court or the Committee on Legal Affairs and Human Rights. So, I would have wanted that the Motion be amended to meet that goal. That is why I am disagreeing with him, not because the substance of this speech is wrong. Having said that, I think Sen. Kagwe is right about that issue, because separation of powers is enshrined in the Constitution. However, it is not appreciated nor being implemented by the Government itself.

Mr. Deputy Speaker, Sir, in an earlier discussion today in our Committee chaired by Sen. (Dr.) Khalwale, I brought out a point which you, as a Member attending that Committee meeting today agreed to. I would like also to bring it to the attention of the Members. Our Committee talked about these two issues to some extent. If one reads Article 125 of the Constitution with regard to power to call for evidence--- This is in the Kenyan Constitution. Let us remember that the Constitution is the supreme law of this land. Therefore, any other Act passed by any other legislative body which is not in line with the Constitution is null and void. Therefore, any other Act which is in existence must be interpreted in the context of the Constitution. This Article reads very clearly and I quote:-

“Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.”

I do not think anybody can go to a court of law saying that “I have been summoned, but I cannot go. So, I seek the laws to tell me what to do.” If I was a judge, I would say “Have you read Article 125(1) because that is enough?” There is no need nor reason a judge can say “I have heard you; the *status quo* remains. Do not appear, we will hear this case in six months time.” Then, really, there is no respect for the separation of law or interpretation of the Constitution.

Further, Article 125(2) says:-

“For the purposes of clause 1, a House of Parliament and any of its committees has the same powers as the High Court-

“(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

(b) to compel the production of documents; and

(c) to issue a commission or request to examine witnesses abroad.

Mr. Deputy Speaker, Sir, this is in the Constitution and it regards separation of powers. I never understood how, when a Committee of the House summons

somebody to appear before it, a person runs to court to ask the court whether he should go. Then, the court says “We have heard you; you do not go; we shall hear this case in six months time”. It is as if they have not read the Constitution. If this is tolerated, it means that Parliament may begin discussing the Budget and then somebody runs to court and says: “Look, that issue before Parliament on this Budget is wrong and I would like to be heard.” Then, the court can say “Parliament will stop discussing the Budget. In six months time, we shall review this thing and then....” Of course, if we do that, this nation will never operate.

*(Sen. Boy Juma Boy spoke off record)*

You see, Mr. Deputy Speaker, Sir; so, these are grievous issues and the---

**The Deputy Speaker** (Sen. Kembi-Gitura): Order! Sen. Boy Juma Boy, I cannot see your name among those who want to contribute.

So, I am will not allow you to contribute through the back door. If you want to contribute, you should put down your name, just like everybody else. When your time comes, you can contribute. Let us respect the rules of the House. Are we in agreement?

*(Sen. Boy Juma Boy bowed to the Chair)*

Thank you, Senator.

**Sen. (Prof.) Anyang’Nyong’o:** Mr. Deputy Speaker, Sir, I cannot understand the excitement of Sen. Boy Juma Boy because this is a serious matter.

If this is allowed, where the three organs of the Government; Parliament, the Executive and the Judiciary, which are supposed to be working together do not work in harmony, then this country will never move forward in terms of development. If one branch of the Government has the powers to stop the other one from doing its work and says “Okay, we have stopped you and we shall hear this case in 10 months time”. What will happen? Obviously, it means that, that other branch of Government has the powers to stop another branch from working.

Parliament’s role in this Constitution is to make laws. Now, if a Kenyan is aggrieved about what Parliament is doing, that Kenyan can wait until Parliament has made that law – however foolish that law is – then that law can be taken to the Judiciary, which will then determine – as by powers given to it by the Constitution, to decide whether that law is foolish or not. But for the Judiciary to say “a law is just being made, but we think it is foolish and, so, we will stop Parliament from making it” is completely making separation of powers foolish. In the event that Parliament is implementing its role according to the Constitution and then somebody thinks that the process of implementing that role is wrong and before a decision is made, goes to court to stop that process, that is completely unconstitutional.

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Mr. Deputy Speaker, Sir, I would like to propose that we have a bigger issue at hand. The issue is: To what extent are we going to bring to the level of discussion or dialogue the Judiciary which is the branch of Government that has been doing this, to discuss whether they understand the Constitution or not; whether they are interested in implementing the Constitution and whether they are interested in making sure that the principle of separation of power works in Government? How long are we going to have *ad hoc* committee? I am not stopping it from working because any initiative can produce certain results. I believe they will have to realize that, that is the problem we are dealing with.

Mr. Deputy Speaker, Sir, another issue I want to raise here is this: The work of the Committees of this House is to make the work of the House easier. There are too many things that the House has to deal with and we cannot deal with them in plenary all the time. Which means that any Committee of the House which, in the process of doing its work, feels that they need the input of another Member of the House because of the knowledge or interest in a certain matter, then as it is provided for in the Constitution and in our Standing Orders, that committee can then invite that Member or bring it to his or her notice that “this meeting or discussion is important to you and we would like you to contribute.” In that regard, Sen. Kagwe is completely right and, indeed, that is what we have been doing in the Committee chaired by Sen. (Dr.) Khalwale and other committees, I belong to. If that process is working, then, indeed, Sen. Kagwe is right that setting up yet another committee to do similar work is over doing it.

Mr. Deputy Speaker, Sir, I am sorry that I was not here early enough to move an amendment to this Motion. My proposal would have amended the Motion to say that rather than all these names proposed here, this issue is so important that we would like to request the Legal Affairs and Human Rights Committee to focus on this, expedite discussions on this and bring a report to this House within a certain period of time. Let us say two or three months. This will ensure that the issue is focused on and a report is brought to the plenary so that we can discuss it. I dare propose that when that report is made, it should propose something like this. One, that this Legal Affairs and Human Rights Committee must focus on this issue.

That it is in our opinion and very carefully arrived at conclusion that the organs of the Legislature, the Judiciary and the Executive should meet under a neutral chairmanship because you cannot ask either the Speaker or the Chief Justice or the President to chair that meeting because they are the organs which are not working properly constitutionally. However, we may have to find a chairperson who is completely neutral from these three organs to sit us down and make sure that we understand the Constitution. Therefore, we shall proceed this way not to abrogate the Constitution.

Mr. Deputy Speaker, Sir, I was going to propose that we should have a renowned judge from the Commonwealth who has vast knowledge on constitutional matters to be the chairman of that meeting so that we can finally interpret the Constitution properly.

This is because these three organs of the Government are not working properly; they are not abiding by the separation of powers. A time has come that we need another Kofi Anan to come in and re-engineer the implementation of the Constitution of the Republic of Kenya, so that we do not get ourselves involved in this quagmire time and time again.

A very important institution has been set up called the Senate. It looks as if in the operations of the Kenyan Government, the Senate is not being given room to implement its functions as set out in this Constitution. Nobody can convince me that the Senate is failing because it does not have teeth. The Senate has teeth. I have seen the Senate using its teeth, chewing properly and not chewing the cud as cows do. So, this is the thing that should be focused on. Let us get another Kofi Anan or a judge from the Commonwealth to sit with the leadership of the three arms of Government and make a decision on the issue of separation of powers.

Mr. Deputy Speaker, Sir, I beg to support.

**Sen. (Dr.) Machage:** Mr. Deputy Speaker, Sir, I have been in this Parliament for a few years. I remember that in the Ninth Parliament, the former Attorney-General who served under those Parliaments had a major problem of saying “no” to the Government when an issue was worth saying “no” to. He would say it in very many words. I see the Chairperson of the Committee on Legal Affairs and Human Rights currently serving again having a similar problem of saying he has found the ability of some Members of his committee wanting. Therefore, he would in many words want a new committee.

*(Laughter)*

He is now coming up with a very interesting way of telling us the problem he has in the committee; by setting up this *ad hoc* committee whose nine Members are his Members. So, the question is: Who is being rejected? You already can see who the rejected Members are.

Mr. Deputy Speaker, Sir, to me, forming an *ad hoc* committee and actually back-dating its effect by two months is corruption. This is because the Chairperson and the Vice Chairperson will have to be remunerated by Parliament for those two months that they never worked. That is the truth; immediately you are chosen as a chairperson of a committee, you start earning a salary. Since this is being back-dated, they will earn that salary in retrospect. So, what is the mischief here? What is this so-called ‘wisdom’ of choosing an *ad hoc* committee which will have fewer powers than the substantive committee? It does not even have the legal capacity of summoning. Why make a weak committee to do the work that a stronger committee has been unable to do?

Maybe the message which is being passed here is that the Office of the Speaker has failed in its legal department. So, it is just a cry in the wilderness that, please, could you employ other legal officers? I believe Members of this Committee, if they so wished,

could serve this House *pro bono*. We are not limited by law to hire them if their expertise is important and what is missing in the existing system.

Mr. Deputy Speaker, Sir, why does a Chairperson of the Committee on Legal Affairs and Human Rights again have to be the Chairperson of this *ad hoc* committee? It makes no sense, really. If a different view and a different *modus operandi* had to be seen, then it would just have been fair for another person to Chair this Committee so that we can see the difference in operations. It is not acceptable. The important issue is: If we think the Committee on Legal Affairs and Human Rights does not have enough powers, then let us move an amendment to the Standing Orders to increase its powers. If we think there is an area they cannot serve, then let us give them those powers. If we think this committee has failed to work, then let us have a new Committee on Legal Affairs and Human Rights so that they can carry out their mandate instead of having this *ad hoc* committee.

Mr. Deputy Speaker, Sir, if you look at some Members of this committee that I know, there are some who now have membership in five committees. Most of them will averagely have four Committees to serve in. There is already a cry in this House, like Sen. Kagwe put it, we are even thinking of reducing or removing the new Committees that were increased so that we serve in the earlier Committees. It is not practical; getting quorum is a problem. I am told that the Committee on Legal Affairs and Human Rights is one of the committees which have a quorum problem.

Either way, we cannot sort out that problem by creating another problem. It is not mathematical that a negative multiplied by a negative will be a positive; it never works that way in law. It is only in mathematics and physics where it works. In any case, the Speaker, the Deputy Speaker and any other Member of this Committee can always attend the meetings of the Committee on Legal Affairs and Human Rights, like it has been ably stated here by Sen. Kagwe. Nobody denies anybody from attending any committee and deliberating in the matters they are interested in, if that is necessary. The Speaker already has enough work to do plus his Deputy and even Members of the Speaker's Panel; fortunately, who have not been included in this committee.

(Laughter)

Mr. Deputy Speaker, Sir, I want this House to use your wisdom to see that this is an unnecessary waste of time of this House to deliberate on this matter of the creation of this so-called *ad hoc* Committee. It is of no material benefit to this House and we reject it in total without any amendments.

(Applause)

Mr. Deputy Speaker, Sir, I beg to oppose.

**Sen. G.G. Kariuki:** Mr. Deputy Speaker, Sir, thank you very much. I want to start where a few other Senators have left, starting from what Sen. Kagwe, also the professor here and also my friend over there, so eloquently spoke. It is very important that this matter should not have been a matter to sit in a hall somewhere and decide a very serious matter like this one to be presented to the Senate assuming that the Senate will just rubber stamp whatever is being said. That is where we go wrong. There was no consultation. If there was, I am sure people with a wealth of experience like Sen. (Prof.) Anyang'-Nyong'o, our Speaker over there, Sen. (Dr.) Machage and a few others, ought to have been consulted to give advice. It is not just because one has become a lawyer that he has, therefore, acquired all the experience that is required under the sun.

Mr. Deputy Speaker, Sir, I think we are suffering from mistakes of our own. How did we get into this mistake of our own? It is because when we came as Senators here with the new dispensation, politics of the new dispensation arose. These politics will not be solved through confrontation. If you look at this committee, what are they expected to do? Is it to change the mentality of judges or the Judiciary? Is it to change the mentalities of the people in high offices who are not supporting the Senate? Is it going to give some life to the Senate?

This is a practice I have seen. We must separate issues. When we are discussing economic issues, we can get people who are qualified to discuss the economy of this nation and even internationally. They are here with us. If we are talking about the legal aspects, then we have very many lawyers here.

The list you are seeing here is composed of lawyers. Out of 13 Members, it is only three who are not lawyers. We need to understand how much a lawyer is expected to do and how much a politician is expected to do. Is this war legal or political? I would like to submit that these are not legal problems, but political.

If this is a political war, then there is nothing you can do to resolve political conflict apart from dialogue.

Mr. Deputy Speaker, Sir, the day we decide to speak with the lower House and speak in one voice, that will be the day. However, when we continue thinking that the Senate can survive on its own, we will continue to suffer. We know, for sure, that we do not have the numbers. However, the Constitution, no matter how few we are, gives us powers. However, have these powers been used properly to make sure that we achieve what we want? My advice is that we should not have this kind of a committee. We have a Committee on Legal Affairs and Human Rights. I do not want repeat what others have said. However, if Sen. Wako and his team fail or feel very strongly that they want to resign, we could replace them with other Members. Sometimes the problems we create are beyond expression.

Sometimes it is difficult to say "no" to this kind of a committee because all these are our colleagues. However, those who have independent minds need to ask themselves several questions. What will we achieve with this committee? Is it just like having the entire House? What will the 13 Members do? Will they summon the Chief Justice

because that is where the problem is? Will they summon the Head of State because that is another problem? What will they do to change the situation apart from going to Mombasa several times to seek wisdom? I wonder why it is only in Mombasa that one can call a meeting that people will attend.

My little knowledge about public affairs tells me that this committee will add nothing, but problems. They will bring a report here which will be emotionally debated and will die there. That is my vision. What do we do after all that? My colleagues may want to go and see how the House of Commons works and how it relates with other institutions. This is another gimmick.

My friend, hon. (Dr.) Machage, said that it is another form of corruption. This has also been back-dated. What kind of wisdom is this? Where are we going? Why should we corrupt and back date a report? Why can we not report tomorrow or the day after? There is no new knowledge that we will acquire from this committee that we do not have. There was an idea of bringing a Motion to state our problem. I would also have the same problem even if a Motion was brought. What would we be telling the world and the country? Are we telling them that they have given us the Constitution that is very poor and that we have come back to them to give us another Constitution at the same time opposing amendments of the Constitution? We are in a disarray and do not know what we are doing. Where are we? Once again, we need to look at this matter.

I want to propose to you that we need to have dialogue; whatever the price. The Members of the National Assembly are our brothers and sisters. The leadership here consists of all of us. We could still talk and sort out our problems. There are many things that we are not saying. Some laws have been passed by the National Assembly. The laws were supposed to come through the Senate. The laws are now active. We have problems which the Committee on Legal Affairs and Human Rights needs to deal with.

In fact, to cut a long story short, I would like to say that the politics of a new dispensation have problems. We must accept this and go by what we can and what we cannot do. We should dialogue with people who can help us achieve our goal. However, if we sit here and assume that if we have 14 lawyers, we will achieve something, then we are wrong.

I beg to oppose.

**Sen. Orengo:** Thank you, Mr. Deputy Speaker, Sir. I support this Motion. As I support it, I would like to remind some hon. Members that while they were away, there was a *Kamukunji* which was held which agreed that this committee be established. When it was established, it started work. I know that part of that work was used to prepare a legal brief that was given to the lawyers who are doing the case against the Sang Bill.

Mr. Deputy Speaker, Sir, at that time, I was not a Member. If you look at the brief that was prepared by this committee, not for internal consumption, but to be used in the courts, you will find it much better than what had been prepared by the legal department of the Senate which showed that Members were giving a lot more commitment to some of these problems that are confronting the Senate.

We are forgetting a very important point: When you form an *ad hoc* committee that does not mean that there is no other committee dealing with an issue. Formation of an *ad hoc* committee sends a political message that there is an issue that has arisen and which must be dealt with in a special way as opposed to using the normal committees.

This instrument of *ad hoc* committees has been used before. You will recall when JM Kariuki was assassinated. There was a committee dealing with security and yet Parliament, in its wisdom, formed an *ad hoc* committee of Members of Parliament to inquire into circumstances surrounding the disappearance and death of JM Kariuki. There was the Kiliku Committee. If you love the Senate and you are a Senator in this Senate and you do not believe that there are special circumstances requiring the formation of this committee, then I am very surprised.

I am surprised because it has been said that one of our important roles is oversight. How are we expected to play our oversight when we cannot summon governors? What is your responsibility or mandate if you cannot summon governors? That issue needs to be resolved. It is known that the impeachment process is a very special function of the Senate. In the constitutional design, this special function was conferred on the Senate. I have heard some legal experts saying that this function should go to the Judiciary. Not all the impeachment proceedings that have been mounted from various county assemblies are reaching here due to legal problems. If you do not believe that those circumstances we do not need intervening factors that require a special committee, then I do not know what my colleagues are talking about.

On the issue of legislation, there is a pending court case where some patriotic Kenyans are saying that the Senate needs to be involved in every single legislation. These are the laws that affect the Media Bills which were passed without coming to the Senate. That case is pending before the court. I remember when Sen. Murungi was talking about usurping the power even if some people think that you do not have the powers; that you should just proceed politically and then deal with the circumstances later on. The fact is that if you do it the *jua kali* way, then the court still stands on your way.

There is a point out there that if the Senate is well organized, for instance, if this committee can prepare a legal paper to influence the jurisprudence of the courts, then the committee can do it.

*(The Rt. Hon. Raila Odinga entered  
the Speaker's Gallery)*

*(Loud consultations)*

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Deputy Speaker, Sir. I wish to seek you indulgence. Many times, the Chair does not see and requires to be reminded.



**The Deputy Speaker** (Sen. Kembi-Gitura): Order! You should not talk about the sight of the Speaker. It is not in your place to talk about the sight of the Speaker. What is your point of order?

**Sen. (Dr.) Khalwale:** Mr. Deputy Speaker, Sir, as you may have noticed, there is a lot of excitement in the House. I thought I should bring to your attention the fact that Mr. Raila Odinga has now---

**The Deputy Speaker** (Sen. Kembi-Gitura): Are you rising on a point of order pursuant to Sen. Orenge's contribution or on your own Motion?

**Sen. (Dr.) Khalwale:** Mr. Deputy Speaker, Sir, this is pursuant to the order in the House or lack of it. The lack of order in the House was making it difficult for us to hear Sen. Orenge. I rose to draw your attention to the fact that the Rt. hon. Raila Odinga has now entered the Speaker's Gallery and it would help if you formally acknowledged his arrival so that businesses can be conducted in an orderly manner.

I thank you.

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Khalwale, the problem with you is that you want to preempt situations. You should leave it to the Speaker to deal with the situations. However, I thank you all the same.

Proceed, Sen. Orenge.

**Sen. Orenge:** Thank you, Mr. Deputy Speaker, Sir. I also appreciate the coincidence of my speech with the arrival of my party and coalition leader. This is for the good of all this Senate. I thank him.

My last point is this. There is an area that courts need to understand. That understanding, I am sure, we will eventually get there. The Senate is a constitutional body and is bound by Article 10 of the Constitution. When a matter is before the court on allegations of violation of fundamental rights or such other claims, I would expect the courts to advise those who go before courts before the Senate has completed the exercise of, for instance, going through an impeachment process. They should advise petitioners that these points can be raised before the Senate. What am I saying? I am saying that if somebody felt that he or she was not given justice before a county assembly, they can come before the committee of a full sitting of the Senate and say that they were not treated in a constitutional manner or given a fair hearing. They can use that as a ground before the Senate.

The Senate is also bound by the rules of natural justice. Sometimes, if we do not allow independent bodies and arms of Government to operate on their own in the context of the constitution, then there is likely to be a clash. This is the clash we are seeing. For example, if we were not working harmoniously and all arms of Government were in competition, I can imagine a situation where the court would have to make a ruling and the next day, Sen. Mutula Kilonzo Jnr. could come up with a Bill to amend the law to frustrate the courts.

In the old days, when Parliament was not behaving, the Executive would deny Members resources to run the affairs of the House. We need to have a degree of

understanding between the various arms of Government to ensure that each arm is given space and latitude to exercise its mandate under the Constitution. If that does not happen, then some people would earn tenures. For instance, if at the end of the day the Supreme Court finds that Governor Wambora was properly impeached, he has served a tenure that he does not deserve. How you rectify that under the law is difficult. One of the things that the courts are not doing and which we urge them to do is; when they are seized of a matter that involves various arms of Government, then it should be dealt with expeditiously so that both arms of Government can act in harmony with the other arms of Government.

I agree with the Senator for Nyeri County who tends to make a lot of sense most of the time, whether inside or outside the House. I am sure that we can talk about these issues after the sitting to see how this committee can work better. If we want to reduce the number, we can still reduce it. I want to be candid with Senators that up to about 1.00 pm, my name was not in this Committee. However, after some discussions in the Rules and Business Committee (RBC), it was felt that some names be added, including the names of the gracious ladies whose names are in the Order Paper that has been presented before the House.

Lastly, I want to appeal that we are going through a very difficult time in these early days. You can see that when we are confronted with a problem like this one, we tend to speak with one voice.

The problem that will frustrate the implementation of the Constitution is the most important arm of Government which is the driving force; Parliament, to see itself as part of the Executive. Under the framework of this Constitution, there is a principle of separation of powers. If the leadership and this Senate will be a component of the Executive, then we will not play a proper role in making laws and over sighting public bodies, including the counties.

I want to appreciate that victory and triumph is normally very important to our partners in Jubilee. However, if we want to have a better Kenya, then we must stand up as a Parliament at this time when institutions seem to be clashing; the Judiciary, the Executive and the Legislature. Parliament must speak in terms of its constitutional mandate. However, if we begin to speak as if we are a divided House on matters constitutional, then this Senate will die like the first Senate of the first Parliament. At one particular point in time, in 1966, people decided to see themselves in terms of parties and tribes instead of seeing each other as institutions. If we remain a strong institution, we will make Kenya better. But if we continue to look at this list and scrutinizing how many Senators are from the Jubilee Coalition and how many are from the CORD Coalition, that will be wrong. You should look at that list and make a determination. Is this a good committee for the Senate to drive its agenda in terms of the headache we are getting at the moment with the Judiciary?

With those remarks, I beg to support.

**The Deputy Speaker** (Sen. Kembi-Gitura): Thank you Sen. Orengo.

**COMMUNICATION FROM THE CHAIR****PRESENCE OF THE FORMER PRIME MINISTER  
IN THE SPEAKER'S GALLERY**

**The Deputy Speaker** (Sen. Kembi-Gitura): Hon. Members, I would like to take this opportunity to recognise the presence – on the front row of the Speaker's Gallery – of the former Prime Minister of the Republic of Kenya, hon. Raila Amolo Odinga, who I believe has come for the very first time to see the deliberations of the Senate under the new Constitution. I wish to welcome him on my own behalf and on behalf of all the Senators here present. I hope he will find our proceedings befitting of the House of Senate. Welcome. We are grateful that you have found the time to come to see how the Senate operates. *Karibu sana.*

*(Applause)*

**Sen. Murkomen:** Mr. Deputy Speaker, Sir, I appreciate your Statement of appreciation to the former Prime Minister. Have you noticed that this is a very unique occurrence; that a former Head of Government is in the House? Does it not call upon this House to start thinking about configurations and the sitting arrangement? It will not be right in future to see former heads of governments like the Prime Minister, the former presidents and others, sitting there. This may not have been anticipated, but we, as a House, need to designate places where former distinguished leaders are given an opportunity to sit in a place that can be recognised as fitting for those who have contributed immensely to the democracy and the development of our country.

Thank you, Mr. Deputy Speaker.

*(Applause)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Murkomen, I wait to see the Motion from you, which I will approve, so that we can discuss it in the House.

*(Laughter)*

Sen. Sang, what is your point of order?

**Sen. Sang:** On a point of order Mr. Deputy Speaker, Sir. In recognising the former Prime Minister, the Rt. hon. Raila Amolo Odinga, you specifically left out the title "Right Honourable." Was that by mistake or by design?

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**The Deputy Speaker** (Sen. Kembi-Gitura): Do you want to engage me in a debate? What is your point of order?

**Sen. Sang:** No, Mr. Deputy Speaker Sir. You left out the Rt. Honourable and I thought---

**The Deputy Speaker** (Sen. Kembi-Gitura): Why do you think I left it out?

**Sen. Sang:** That is why I am seeking your clarification.

**The Deputy Speaker** (Sen. Kembi-Gitura): I do not think it is in your place to do so. I am the one who recognised the presence of the former Prime Minister, hon. Raila Amollo Odinga into the House of Senate. So you want to go on record as having raised what point of order?

**Sen. Sang:** Mr. Deputy Speaker, Sir, titles are very important.

*(Applause)*

If the former President of this Republic came here and you introduced him as just “honourable” you will have missed a very important title. So my point of order is just seeking clarification that we use the right title “Former Prime Minister, Rt. hon. Raila Odinga.”

*(Applause)*

*(Sen. Sang stood up in his place)*

**The Deputy Speaker** (Sen. Kembi-Gitura): I am on my feet now, am I not?

*(Sen. Sang resumed his Seat)*

Sen. Sang, thank you for the observation. I wish to recognise the presence of the former Prime Minister, Rt. hon. Raila Odinga. Thank you very much.

That is very important particularly for HANSARD.

**Sen. (Dr.) Khalwale:** Mr. Deputy Speaker Sir, I rise to thank you for indulging me and, especially for allowing me to now apologise for anticipating what you were going to say. However, having said that, I think the tone of the conversation this afternoon suggests we are only remembering that the Rt. hon. Raila Odinga is a former Head of Government, forgetting that Rt. hon. Raila Odinga, as the Leader of the opposition, is indeed, a president in waiting in the near future.

*(Laughter)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Shall we proceed with the Business of the House?

Who is holding temporary card number four?

**Sen. Melly:** It is me, Mr. Deputy Speaker, Sir.

**The Deputy Speaker** (Sen. Kembi-Gitura): I did not invite you to speak. I just want to know who is holding temporary number four.

Proceed, Sen. Njoroge.

**Sen. Njoroge:** Asante, Bw. Naibu Spika. Kwanza, nasimama kupinga Hoja hii inayohusu majina ya Maseneta ambao yameorodhishwa katika Hoja hii iliyo mbele ya Seneti. Nashangaa ni nini hasa kilikuwa kibaya au ni dosari ipi imetokea katika Kamati ya Kikatiba na Haki za Binadamu inayoongozwa na Sen. Wako. Nikiangalia majina ya watu ambao wameongezwa katika hii Kamati tunayoipendekeza, tisa wamekuwa wanachama katika Kamati ya Sen. Wako. Kama hawakuweza na hawawezi kufuatilia yale mambo yote ambayo yanaendelea kule kortini au kushauri hii Seneti kuhusu maswala ya kikatiba, basi ningependekeza tuwe na mwenyekiti mwingine wa Kamati tunayoipendekeza. Si vyema mwenyekiti wa Kamati ya Maswala ya Kikatiba na Haki za Binadamu aendeleo kuwa mwenyekiti wa Kamati hii mpya.

Sen. Wako, kwa wakati huu, ni mwenyekiti wa Kamati hii. Kwa hivyo, sioni vile Kamati hii mpya itakavyojishughulisha na kusuluhisha shida ambazo tunazo kati ya Seneti na Idara ya Mahakama.

Bw. Naibu Spika, kuna Hoja nyingi ambazo huletwa mbele ya Seneti hii. Hii ni kwa sababu kumekuwa na kesi nyingi ambazo zimewasilishwa kortini. Inafaa tujiulize kama Hoja nyingi ambazo tunajadili katika Seneti hii zinamanufaa yoyote kwa nchi hii. Hoja inazungumzia maswala ambayo tayari inashughulikiwa na mawakili wetu ambao wanaheshimika sana. Nilishangaa kumsikia mmoja wao akisema kwamba Kamati hii ambayo tunayobuni leo itapambana maswala ya kisiasa ambayo inaendelea kati yetu na idara ya mahakama. Jambo la kushangaza ni kuwa wengi wa Maseneta ambao majina yao yako katika orodha hii ni kutoka mrengo wa wanasheria. Je, kwa nini hakuna wanasiasa wengi kutoka taaluma zingine ambao wamekuwa kuwa wanachama wa kamati hii?

**The Deputy Speaker** (Sen. Kembi-Gitura): What is your point of order Sen. Sang?

**Sen. Sang:** On a point of order, Mr. Deputy Speaker, Sir. Sen. Njoroge, in his contribution, keeps on making statements wondering why this list is like this. There was a *Kamukunji* in this House, where, we, as a House, constituted this committee. So, what this Motion is actually doing is to formalise the process of constituting an *ad hoc* Committee that was decided by this House. So, is he in order to suggest that the Motion is seeking to set up this committee afresh, knowing that there were consultations earlier? By the time we held the *Kamukunji*, we were aware that the Legal Affairs and Human Rights Committee existed, but this House, in that *Kamukunji*, saw the wisdom of creating this *ad hoc* committee. Is he in order to suggest that the names in this Committee have just been brought because of the Motion, yet we know that it actually existed?

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Njoroge, you have heard the point of order being raised and from hearing you – I would like to know this as a matter

of interest – are you against the names or against the Committee? I think there should be a distinction. From what I am hearing you say, I think you have an issue with the names that have been proposed, but not so much with the principle behind it.

Sen. Wangari, what is your point of order?

**Sen. Wangari:** On a point of order, Mr. Deputy Speaker, Sir. Is it in order for us, as a House, to assume that since a committee was deliberated in a *Kamukunji*, it was operationalized? The due process of operationalizing any committee in an informal sitting should be done in the plenary.

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Wangari, whether the Motion passes or fails is the reason we are here. So, there is no committee that has been operationalized through a *Kamukunji*; that would be a wrong notion. Otherwise, there would have been no need of bringing the Motion before the House.

**Sen. Murkomen:** On a point of order, Mr. Deputy Speaker, Sir. Is Sen. Njoroge in order to suggest that lawyers who are in this House are not politicians? He was drawing a dichotomy that if this is a political committee, it should include politicians. Is he suggesting that we are not politicians?

**Sen. Njoroge:** Bw. Naibu Spika, kwanza nitasema kwamba nimenukuu yale ambayo yalikuwa yamesemwa na Sen. Orengo kwamba, hili si jambo la kisheria peke yake, bali ni la kisiasa. Kwa hivyo, hawa ni watu ambao wana usemi mkubwa sana kisiasa. Licha ya haya yote, ikiwa kulikuwa na na *Kamukunji* wakati mmoja ningepaka kukumbushwa yaliyoajiri katika mkutano huo.

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Wangari, do you still have another point of order.

**Sen. Wangari:** On a point of order, Mr. Deputy Speaker, Sir. Maybe just for clarification and procedure, even Sen. Orengo had indicated that this Committee has already started work. Does a *Kamukunji* formally constitute and operationalize? To me, it is still not clear. The reason that this Motion is here is so that we can give the legal mandate to this Committee to actually start operations. Is it in order to refer to the Constitution in the informal set up of a *Kamukunji*?

**The Deputy Speaker** (Sen. Kembi-Gitura): The issues that you are raising as points of order are mainly points of argument. I am sure you will be able to raise them when I give you the chance to make your contribution to the debate.

Proceed, Sen. Njoroge.

**Sen. Njoroge:** Bw. Naibu Spika, ningetaka nikumbushwe yale mambo ambayo yalitajwa katika *Kamukunji* wakati mmoja na ambayo hayatakiwi kuhusishwa wakati huu ambao tunajadili Hoja hii.

Hapa Kamati hii inasemekana ilianza kazi kutoka 2.09.2014. Ikiwa tutaipitisha Hoja hii, itakuwa ni ufiisadi wa hali ya juu. Ningetaka kusema bila kutaja mambo yaliyojadiliwa katika *Kamukunji*---

**The Deputy Speaker** (Sen. Kembi-Gitura): Order, Sen. Njoroge! Did you use the word “*ufiisadi*”?

**Sen. Njoroge:** Mr. Deputy Speaker, Sir, I used the word “corruption”.

**The Deputy Speaker** (Sen. Kembi-Gitura): Against who?

**Sen. Njoroge:** Ninasema tukipitisha.

**The Deputy Speaker** (Sen. Kembi-Gitura): Can I follow your line of argument? What did you say exactly?

**Sen. Njoroge:** Bw. Naibu Spika, nimesema kwamba, tukiipitisha Hoja hii kama vile ilivyo, tutakuwa tukisema Kamati hii ilianza kazi tarehe 2.09.2014. Hii itakuwa ni kama tumefanya ufisadi.

**The Deputy Speaker** (Sen. Kembi-Gitura): Hukutumia neno “kama”. Ulisema kwamba, itakuwa ni ufisadi.

**Sen. Njoroge:** Bw. Naibu Spika, nimesema: “Utakuwa kama ni ufisadi”.

**The Deputy Speaker** (Sen. Kembi-Gitura): Did I hear you use the word *ufisadi*?

**Sen. Njoroge:** Yes, Mr. Deputy Speaker, Sir.

**The Deputy Speaker** (Sen. Kembi-Gitura): Did you say: “*itakuwa ufisadi*” or did you say “*itakuwa kama ufisadi*?”

**Sen. Njoroge:** Bw. Naibu Spika, nilisema kwamba itakuwa ni kama ufisadi.

**The Deputy Speaker** (Sen. Kembi-Gitura): Do we check the HANSARD?

**Sen. Njoroge:** Bw. Naibu Spika, na kama nilisema ni ufisadi, basi niliacha neno “kama”. Lakini nilikuwa ninamaanisha kwamba, tukiipitisha vile ilivyo, itakuwa ni kama ufisadi.

**The Deputy Speaker** (Sen. Kembi-Gitura): In plain language, what it means is that it will be like corruption.

**Sen. Njoroge:** Yes, Mr. Deputy Speaker, Sir. It will be like we are committing corruption.

**Sen. Ongera:** On a point of order, Mr. Deputy Speaker, Sir. I would like the Senator to elaborate on what he means that this will be like corruption or it is corruption. Is the Senator in order to allege corruption on a distinguished and honourable committee that is being constituted when we clearly know that a Committee can only be paid its dues after it has done its work?

Is it in order to allege that Members are corrupt in this House?

**Sen. Sang:** On a point of order, Mr. Deputy Speaker, Sir. Sen. Orengo and Sen. Mutula Kilonzo Jnr. and I, while seconding the Motion, clearly indicated that this House has already benefited from the services of that committee. The committee was constituted by this House and we know that there are formal processes of doing things in this House. There are informal processes as per the tradition of this House and we cannot dismiss agreements that we make within *Kamukunjis*. That is why we are just formalizing this process.

Is the Senator in order to impute improper motive on a committee that is already working and the House is already benefiting from the works of that Committee?

**Sen. (Dr.) Khalwale:** On a point of Order, Mr. Deputy Speaker, Sir. Is the Senator in order to suggest that the business we are transacting in this House is tantamount to promoting corruption when it is so clear that corruption is one of the parameters that the best international practices use to measure good or bad governance? If he means so, he should be forced to withdraw those words and apologize for suggesting that this institution of Senate transacts business that promotes corruption.

**Sen. Murkomen:** On a point of order, Mr. Deputy Speaker, Sir. I think with all due respect, every Senator has a right to hold a different opinion. However, when that opinion brings this House into disrepute or undermines the ability of this House to work, I am struggling to understand what it is in this Motion that can drive a man to the extent of using very strong words like corruption and so forth. Can we not be a little bit moderate and with some decorum in this debate even if we do not agree? After all, each one of us reserves a right to vote the way they want to vote, but let us be a bit more mature.

**Sen. G.G. Kariuki:** Mr. Deputy Speaker, Sir, mine is simple. We are now discussing something which we may not have been intended. First, the *Kamukunji* which we had here, with due respect, you were not the Chair of that *Kamukunji*. You are the Deputy Speaker of the Senate and the matter in front of us is for the Senate and not for *Kamukunji*. We cannot be guided by *Kamukunji* here unless we accept so, but our Standing Orders do not work with the *Kamukunji*. What my friend here is trying to say is that if we pass this Motion; it is like we are entertaining corruption. That is what he was saying. Therefore my point of order is this; is it in order for us to talk about *Kamukunji* instead of dealing with the matter ahead of us?

**The Deputy Speaker (Sen. Kembi-Gitura):** Now, several issues arise from that altercation. First and foremost, you have a Motion in front of you, right? It does not talk about a *Kamukunji*. It is a Motion duly passed, approved by the Speaker and which has gone through the RBC. If you want to bring in the issue of *Kamukunji*, that is your own way of debating. I cannot stop you from debating if you want to refer to historical parameters. However, the Motion we are discussing is in front of us and it is very clear, in black and white.

The point I want to understand is, in what way Sen. Njoroge can possibly accuse the Senate of corruption or acting in a manner that is leading to corruption in bringing a Motion that has been passed in the RBC and which is properly before the House? In what way can you possibly say that if the House passes it, it will be an act of corruption, or it will be like an act of corruption? *Itakuwa ni kama ufisadi ama* if you wish, *ni ufisadi?*

**Sen. Njoroge:** Bw. Naibu Spika, wakati nimesema naipinga Hoja hii pamoja na majina katika orodha hii hapa, pengine liwe ni jambo la ubaguzi, ambalo linaweza kuwa katika hii Seneti kwa sababu mimi si pekee yaka ambaye ametaja mambo ya ufisadi katika Hoja hii. Leo pia kuna Seneta ambaye pia ametaja jambo hilo la ufisadi. Sikusikia



wenzangu wakisimama kwa hoja ya nidhamu. Ikiwa mimi ninahisi na naona jambo tofauti, na ninafikiria Hoja hii imewasilishwa hapa ili tuijadili---

**The Deputy Speaker** (Sen. Kembi-Gitura): No! No! I am not going to go into argument with you. You said, and I heard you because I was here, that is why I raised the point. You said if we pass this Motion as it is, it will be like corruption. If I use your own words, "it will be corruption." That is what I heard. To use your own words, if I give you the benefit, you said that it will be like corruption. *Itakuwa kama ufisadi*, if we pass the Motion as a House. Am I correct? Did you use those words?

**Sen. Njoroge:** Mr. Deputy Speaker, Sir, I used those words. But I think I used the words trying to stress the point why I do not support the Motion.

**The Deputy Speaker** (Sen. Kembi-Gitura): It is okay. It is your right to support or not support the Motion. However, if you want to cast aspersions against your colleagues, either through the Motion or in whatever other way, that is not acceptable. Therefore, because I believe that you have used the word corruption in your contribution in the Swahili language "*Ufisadi*," I would like you to apologise. If it is allowed to pass, it would be against the House, your colleagues and the Senate that we are bringing in a Motion that amounts either to corruption or to promoting corruption. What is it that you have to say? I am not going to preside over the House when those kinds of allegations are made against this House because that is bringing the House to disrepute. You are either going to withdraw and apologise to the House or take the consequences of your own words.

**Sen. Njoroge:** Mr. Deputy Speaker, Sir, at that point, I withdraw the word "corruption." I think I mentioned the word "corruption," in a light tone. I never said that this House---

**The Deputy Speaker** (Sen. Kembi-Gitura): Sorry, you used the word corruption in what?

**Sen. Njoroge:** I used the word in light tone and I never---

**The Deputy Speaker** (Sen. Kembi-Gitura): The word "corruption" can never be in a light tone. I would like you to withdraw and apologise so that we can move on to the next point.

**Sen. Njoroge:** I withdraw and apologise Mr. Deputy Speaker, Sir.

**The Deputy Speaker** (Sen. Kembi-Gitura): Thank you. Now, you can proceed.

Sen. Lesuuda, do you have a point of order?

**Sen. Lesuuda:** Mr. Deputy Speaker, Sir, my point of order has actually been pre-empted. I wanted to ask whether we could ask the Member to withdraw so that we can move on with the discussion this afternoon.

**The Deputy Speaker** (Sen. Kembi-Gitura): So you thought I was taking too long?

(Laughter)

Sen. Obure, do you have a point of order?

**Sen. Obure:** On a point of order Mr. Speaker, Sir, when the contributor started speaking, he was speaking in Kiswahili. However, somewhere in the middle, he reverted into the English Language. Now, even the withdrawal and apology has been made in English Language. Is that in keeping with our Standing Orders? Is he in order?

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Njoroge, do the right thing. You know the Standing Orders.

**Sen. Njoroge:** Bw. Naibu Spika, naomba msamaha na natupilia mbali hayo matamshi ambayo niliyoyatamka.

*(Laughter)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Now, you can proceed.

**Sen. Njoroge:** Bw. Naibu Spika, nilikuwa ninasema ninapinga kuundwa kwa kamati hii. Hii ni kwa sababu itakuwa ikifanya kazi kama ile inayofanywa na kamati ya Maswala ya Kikatiba na Haki za Binadamu. Ni Maseneta wachache ambao wameongezewa katika orodha hii. Ikiwezekana ni vyema kubadilisha mwenyekiti wa kamati hii tunayoipendekeza. Kamati ya Sen. Wako inawajumuisha wanasheria wengi kama vile Sen. Mutula Kilonzo Jnr. Sen. Kiraitu Murungi na wengine ambao wanaweza kuongoza kamati kama hii. Kwa hivyo, hata kama Seneti itapitisha Hoja hii, naona kuwa kamati hiyo haitakuwa na manufaa yoyote wala haitaongeza lolote katika Seneti hii. Kama ingewezekana, kamati hii ingekuwa na nyuso geni kabisa ili tuweze kubadilisha yale ambayo tunafikiria yamekuwa yakikwama katika mambo ya kisheria.

Kwa hivyo machache, ninapinga Hoja hii. Pia ninapinga mwenyekiti anayependekezwa hapa.

Asante sana, Bw. Naibu Spika.

**Sen. (Dr.) Zani:** Thank you, Mr. Deputy Speaker, Sir. Let me start by acknowledging the presence of the Rt. Honourable Raila Amolo Odinga. For him to have come to the Senate, especially at such a time when we are---

*(A Senator spoke off record)*

Yes, but presence is both present and past. Presence means that he was there, but he is not here; it is all inclusive. So, presence means he is still here and I acknowledge that.

*(Applause)*

Mr. Deputy Speaker, Sir, even as the Senate tries to assert itself - let me not even use the word "tries to." As the Senate asserts itself, we must do this in a very orderly way and look at the roles that are played by the other organs; that is, the Legislative, the

Executive and the Judiciary. Article 1(3) of the Constitution is very clear. It says sovereign power is delegated to the State organs, Parliament and the legislative assemblies; the national Executive and Executive structures in county governments because of devolution; and the Judiciary and independent tribunals. There was a reason for the separation of power. All these are very powerful organs and each will try to get and amass more power, then it, probably, should be able to.

I think the constitutional insight about having this separation of these organs is that each, then, will separate in an independent and thoughtful manner so that we do not have the confusion that we have currently. In fact, as a Senate for the last several times that we have been talking, we have been surprised by the way the Judiciary has conducted its business by issuing court orders and injunctions to the Senate to the point that we cannot really execute our duties.

For example, on 25<sup>th</sup> September, 2014, the High Court gave orders stopping us from summoning governors to appear before the County Public Accounts and Investments Committee (CPAIC). The oversight role of the Senate is key and critical. I know that oversight is never easy. I know many people do not want to be oversighted. Everybody does not want to have to be accountable. However, we have that critical role to play. Therefore, we must be brave about the way we play it. We must really defend that role and play it very well.

Mr. Deputy Speaker, Sir, Article 2 says that the Constitution is the supreme law and it binds all persons and, indeed, all institutions. It is very surprising that we have a very clear institution, but we have an interpretation of the Constitution that is at variance. We need to begin asking ourselves why this is so. Are people following the law? Are people following their own self interests? What is the problem and how do we get to address it? This is the reason we want this committee in place so that we begin to engage the Judiciary. We would have different approaches to this. We could have decided that we are moving on. Indeed, initially, that was the feeling of certain Members; that we should move on despite the court injunction. We already had an experience in the Wambora case, where we actually moved forward. We continued despite the court injunction and the court order. As a result, Wambora is still there as a Governor for Embu County. As a Senate, this is something that we are really sad about. We do not want to go that route. In fact, we have decided to go another route. We are trying to find other options and alternatives.

I think when this Committee was set up - I do not think it was set up with any sort of malice. I think we were actually trying to find a way forward. We asked ourselves: Which is the best way forward? It was clear that we want to come up with a way of engaging with the Judiciary. Definitely, the legal minds were going to be very critical here.

In fact, I think what has happened is that we have just had an extension of that Committee and the addition of more Members, especially female Members. However, I do not think the initial idea of coming up with the committee was that it was a critique on the existing

Committee on Legal Affairs and Human Rights; that they were not doing their work well, because we would have heard complaints in this House. We have not heard such complaints.

So, I think it was a quick reaction and a way in which we responded by saying “let us come up, probably, with a more energized and more focused Committee that is going to address a specific issue even as the Committee on Legal Affairs and Human Rights continues with its day to day work.

Let us have a Committee that is going to be specifically looking into the issues of how do we engage with the Judiciary.” If we are going to proceed with actually trying to find legal opinion on the way forward for this Senate, then this Committee would lead us along that particular way. Therefore, that was the whole idea of coming up with that Committee, giving it a specific agenda, mandate and need to energize this Senate.

Mr. Deputy Speaker, Sir, we, as a Senate, need now to stand together more than ever. We should not look at the formation of this Committee as an ill motive that was not going to take us where we needed to go. We needed to go to a specific place. If we have over 16 cases, as Sen. Mutula Kilonzo Jnr. and Sen. Sang have said, then there is something somewhere going very wrong. I think it was with that good faith that, this committee was constituted. It is with that good faith that we are debating constitution of this committee. It is with that good faith that we are hoping that this committee will engage and look for a way forward for this particular Senate.

Mr. Deputy Speaker, Sir, I beg to support.

**Sen. Murkomen:** Thank you, Mr. Deputy Speaker, Sir, for giving me the opportunity to contribute. This House has a serious responsibility provided for under Articles 94 and 96 of the Constitution and also under Chapter 12 of the Constitution on Public Finance; and many other provisions of law. There is a systematic and well coordinated attack on this House. This is an attack that has perturbed me, particularly when I realized that the attack this House is facing is in relation to its responsibility to protect counties and the people who live in those counties.

Mr. Deputy Speaker, Sir, I would not fault any judge for, perhaps, giving an injunction on matters related to personal rights or rights of one individual. However, Article 27 of the Constitution is very clear that you must measure individual rights with the rights of many people. It is also clear that people must appreciate that this House has never faulted the courts for reaching a final determination on well reasoned, well presented case and arguments. However, what we, as a House, have a problem with is the use and misuse of injunctions; what the Senate Minority Leader called the “dishing of injunctions like *mandazis*.” It should worry this House that a court, even a judge in his right mind, would say that a county assembly cannot summon a County Executive Member. To just say in a blanket manner that the county executive committee members cannot be invited to come and answer questions related to matters of accountability about the county and their performance; that they cannot be removed or they cannot be questioned. To say that the Senate cannot invite a Governor to come and make his case in

relation to use or misuse of public funds in the county should really worry anyone in this country. Injunctions are being used as if they are permanent orders against any possibility of anyone questioning any governor.

As I have said, without casting aspersions on the institution of the Judiciary, I want to make it very clear here that, that Judiciary has a number of judges, some of who taught me, like my dean, Prof. Jackton Ojwang.

The Judiciary has great people in the Court of Appeal; it has great people in the Supreme Court who taught me; some of them we taught together both at Moi University, Catholic University and at the University of Nairobi. Speaking to them privately, most of those judges are also frustrated by their colleagues who cannot appreciate the basic requirements of the law. So, it is not true to say that all judges are against the Senate. It is also not true to say that all judges are dishing orders the way they are. Even judges themselves are wondering how to drive some of their colleagues to appreciate the sense of separation of powers and to appreciate that the other institutions of Government require each other.

Mr. Deputy Speaker, Sir, there is a sense of which I think that the attack on the Senate is related to the fact that the Senate does not control any resources. There is a correlation, because you know that all the counties are donating Kshs22 million to the Council of Governors (CoGs). All the 47 counties are giving the CoGs Kshs22 million while the Treasury has also allocated a colossal amount of money to the CoGs as required by law to run their affairs. So, the CoGs kitty is full; it is overflowing. It is looking for another cup which it can fill. There is a possibility, therefore, that there is a correlation from the fact that---

*(Sen. Sang stood up in his place)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Sang, are you on a point of order?

**Sen. Sang:** Mr. Deputy Speaker, Sir, I am on a point of information.

**The Deputy Speaker** (Sen. Kembi-Gitura): If it is a point of information, you can only ask it from your colleagues.

**Sen. Murkomen:** I am ready to be informed, but I---

**The Deputy Speaker** (Sen. Kembi-Gitura): Incidentally, our screens do not have that kind of intervention.

*(Laughter)*

Is it a point of order or a request for the Floor?

Now, Sen. Murkomen, do you want to be informed?

**Sen. Murkomen:** Yes, Mr. Deputy Speaker, Sir.

**Sen. Sang:** Mr. Deputy Speaker, Sir, I wish to inform Sen. Kipchumba Murkomen that Kshs22 million being given to the CoGs by every county government can sink more than 50 boreholes. Therefore, it is really imprudent use of resources to sink resources---

**The Deputy Speaker** (Sen. Kembi-Gitura): Order, Sen. Sang! We are not discussing boreholes now. Are we?

*(Laughter)*

I thought you had information which was pertinent to the nature of contributions.

Sen. Murkomen, I hope you have benefitted from that information.

**Sen. Murkomen:** Mr. Deputy Speaker, Sir, Kshs22 million multiplied by almost 50 counties translates to over Kshs1 billion. A billion shillings is more than the development expenditure of Elgeyo-Marakwet County and Lamu County combined in a whole year. Those resources are available for the CoGs to use the way they want. That is why they are able to get the right lawyer who will get them the right judge for them to make the right decision.

This House has been accused of being unable to be represented in court, but to hire a lawyer to go to court requires money. This Senate alone, we have been informed that there are over 100 cases in various courts in the Republic of Kenya where Parliament has been served and where this Senate requires representation. Shall this Senate perform the function given in Article 96 and 217, Chapter Six of the Constitution or shall we be a Senate working to be represented in court?

Therefore, this issue must not be cheapened. The seriousness of the attack on the Senate is something closer to the first Senate of the Republic of Kenya from 1963 to 1969. First of all, it is said that the Senate is useless and has no responsibility. Today, we have just come as a Committee from discussing the future formula that will be used for three years. The Constitution, in Article 217 says that that formula belongs to the Senate. We are not a useless House. We know our responsibilities. Even a lay person who has not gone to a school of law can see the powers of the Senate in the Constitution.

Mr. Deputy Speaker Sir, what this committee will do is to think innovatively of how then we shall be able to continue dealing with the judges that are not seeing? In the Bible, Jesus said that they have eyes, but they do not see. How will this committee work with those other many judges about 80 per cent of them who have eyes and see? How shall we work with them to ensure that the other 20 per cent can respect the institution of the Senate? I dare say that when I think somewhere in my heart; I always respect my intuition. I think the Chief Justice of the Republic of Kenya who is the President of the Supreme Court is with the Senate. He appreciates because if those people do not appreciate, then the Senate will have to find a way that we can communicate that information to other stakeholders.

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It is also important for the governors to appreciate that what Senate is doing is to assist them to do well. If you put them in a corner to account for the money and to prudently use the money, the persons who take the glory are finally the governors. Senate is complimenting their responsibilities. We are not attacking them; we are assisting them. It is also suspect that the challenge against Parliament is only targeting the Senate and not the National Assembly. Could it be because this Senate does not allocate money to the Judiciary?

Could it be because we have no direct role? That conflict of interest is not there. So, someone thinks that because he or she will not sit in a Committee of Senate to be allocated money, then he or she attacks it as an easier institution to be used as an example.

We, as a House, must rise. That is why I respect the opinion of other colleagues who think that this committee should not be formed. However, I want to urge them to shelve the small issues of who are the Members of the Committee and why it was formed. If anyone has an issue with the amount of money that will be paid to this committee, he or she can move a Motion to say that the committee should work with no allowances. We are not interested in allowances, but in finding solutions to what is bedeviling the Senate today for posterity and for the good of this country.

Thank you.

**Sen. (Dr.) Khalwale:** Thank you, Mr. Deputy Speaker Sir. I rise to support this Motion. I start by begging my brother, the Senator for Nyeri, Sen. Kagwe, not to be worried about an *ad hoc* committee. I remember in 2012, there were land clashes in Nakuru County, specifically Banita Settlement Scheme. The Committee on Lands in Parliament was working on the case, however, Parliament then formed an *ad hoc* committee which I chaired. When we went on the ground, in spite of there being a Committee on Lands, we found that the then sitting Member of Parliament, the previous Member and their cohorts of supporters were the ones fueling the problem.

We found that some of the members of the then Provincial Administration were also involved. When we went there and held meetings and *barazas* in public as an *ad hoc* Committee of Parliament, the Luos and the Kikuyus who were being chased away by whoever was chasing them, actually found peace and started living in harmony with them. From then, I have never heard of any land clash in Banita Settlement Scheme. I wish to beg Sen. Njoroge who comes from that county that the peace he saw there was taken there by an *ad hoc* committee.

My second point is to beg our colleagues who are opposing to realize that, the reality is that there is a problem even if we want to bury it in whatever points they are raising. At the moment, there is abuse of the doctrine of separation of powers.

**Sen. Kagwe:** On a point of order Mr. Deputy Speaker Sir. Sen. Khalwale did allude to the fact that we are afraid of *ad hoc* committees. We are not afraid of *ad hoc* committees, neither are we against them. We are simply saying that as a matter of moving forward on this matter, this may not be the most effective way of doing so. I am

convinced that even though there have been other *ad hoc* committees in the past, as Sen. G.G. Kariuki said, there is more than one way of killing a cat. We are convinced that a smaller part of the Committee on Legal Affairs and Human Rights can do this job more effectively than an *ad hoc* committee. It is a question of implementation and not one of liking or disliking.

**Sen. (Dr.) Khalwale:** Mr. Deputy Speaker Sir, I have heard my colleague. I was making the point that there is obvious abuse of the doctrine of separation of powers to the extent that there appears to be an attempt by a section of the Judiciary to try and be seen to be superintending the other two arms of Government. If we may call it a triangle, that has got the three corners of government. However, we want to remind the Executive, Parliament and the Judiciary that, that triangle has got the angle 60 at all their turning points. Therefore, they should not misconstrue the triangle of the doctrine of separation of powers to be a pyramid where one arm of the Government sits at the apex.

The issue of governors has been spoken to. Indeed, if those who wish to oppose this committee could just spend a week in the County Public Accounts and Investments Committee of the Senate, they will realize how we are heavily disadvantaged and challenged. Today, we are dealing with an issue of summons pertaining to a particular county. Tomorrow, another one and the next day, we will deal with another excuse. It has made it difficult for us to report to this House on time because most of the time getting a governor to come is not easy. We are forced to invite him two times and, subsequently, summon him before it dawns on him that he cannot run away. We hope that this committee will unlock this impasse so that our Committee can be functional.

The issue of Governors running to court for summons as evidenced in the case of the then Governor for Embu is very sad. Members of the public still think that this man is a Governor. He is not. The purported winning of a case was in respect of an earlier case that was there which was overtaken by events in the sense that it was in respect of the first attempt to impeach him.

Today, in my Committee, the Governor of Murang'a, who was doing very well caused me to come up with a Motion that is about to come to the House so that he could be exempted from the four counties that had refused to honour summons. He has now written to us a letter telling us that he has summons but cannot come. So, we have to put our feet down and ensure that we force them to move away from impunity. They should respect invitations from this House.

I am glad to inform the House that the County Public Accounts and Investments Committee (CPAIC) has taken a decision whereby in two weeks' time on 11<sup>th</sup> November, we will sit with the Attorney-General and the Director of Public Prosecutions (DPP) to decide the next step we should take now that some Governors have defied summons. We do not want to ask the DPP to take up the matter to cite a Governor for contempt and then he belittles us. I am very hopeful that if this Committee swings into action, the threat by MCAs to sue the Senate to stop over sighting counties so that they can become superior to the Senate will not take effect.



I am hopeful that this Committee will find time to deliberately walk through the Constitution with a toothcomb so that we can appreciate Articles 96, 125, 226 and 228 as far as the Controller of Budget is concerned and Article 229 as far as the Auditor-General is concerned. This Committee should explain to the whole country to understand that Articles 202, 203 and 204 that speak to the issue of equitable share of the commonwealth of this country can only be exercised by the Senate.

*[The Deputy Speaker (Sen. Kembi-Gitura) left the Chair]*

*[The Temporary Speaker (Sen. Murkomen) took the Chair]*

I hope that with a toothcomb, the country will be shown by this important Committee that Articles 218 and 219 of the Constitution which speak to the issue of division of revenue cannot be a preserve of the National Assembly but a job that should be discharged by the two Houses.

We would like the country to be brought on board so that we realise that in the new scheme of things under Article 219, the issue of Equalisation Fund is addressed. This may not be knowledged to most of us that the money that was meant for the Equalisation Fund for last year has never been disbursed. Therefore, the counties that were supposed to benefit from the equalization fund have not benefited because we do not have a proper push. It is this push that we want from this Committee.

I would like to conclude by asking my colleagues and Members who sit in this committee to not only do the legal work but to also do more of the political work. The British call the Office of the Auditor-General the Office of the “sniffer dogs.” They also called the offices of the Public Accounts Committee and Public Investments the “office of blood hounds.”

We need to use our sniffer dogs. Once the sniffer dogs have sniffed it, as blood hounds, we go for them. We should jail them so that Kenya can be free from the abuse of public funds.

I want to conclude by sharing an experience. During the last Parliament, I went to Othaya. The picture I had of Othaya was that this was a place which had everything because the first Minister for Finance in Kenya came from Othaya. When I went there, the then President came from Othaya. After we did our work at the Othaya New District Hospital, we passed near a primary school which was in the neighbourhood of the home of the Third President of Kenya. After seeing what I saw there, I could not believe that I was in Othaya. This means that everybody in central, coast and western regions require devolution. The petty poverty indices that indicate that certain areas are better off is because they look at the few palatial homes that we have in certain parts of the country and think it is the collective wealth of everybody.

I support.

**Sen. (Prof.) Lonyangapuo:** Thank you, Mr. Deputy Speaker, Sir. I rise to support this Motion. The formation of this Committee is not a new undertaking. This is not something that we should have taken time to belabour about. As we all know, in the Constitution, Article 124(1) gives us the mandate to establish committees. This one says that each House of Parliament may establish committees and shall make Standing Orders for the orderly conduct of these proceedings including the proceedings of its committee.

If there is an idea that we want to work on, especially now that we think that there is some misinterpretation or misunderstanding on the role of Senate, there is no harm getting a specific and specialized and dedicated committee, in this case, an ad hoc committee that can take a short time to deliver what we want. This does not have to be a standing committee. It is just like the one that we formed the other day for Royalties Accruing from Exploitation of Natural Resources in Counties which was led by Dr. Zani. A Bill has just been generated now to that effect.

With regard to this one, this is a committee that will work strictly with the other arms of Government in interpreting and telling them about the work of the Senate. Indeed, in Article 96(3), the Senate participates in law making functions of Parliament. We are supposed to make those laws. However, if the Judiciary finds that it has a challenge with what we have come up with, it is essential that we have a committee that can canvass with the other arms of Government to know why we are moving in one direction. We cannot be stopped from doing what we are supposed to be doing just because the courts have come up with an injunction. That should not make us not to proceed with the law making business that is here.

Sen. Khalwale has cited an example where some Governors have refused to appear before the Public Accounts and Investments Committee and yet in the same Constitution that those Governors have, Article 96 (3), you will see that the Senate determines the allocation of national revenue among counties. For the last two days, as Sen. Murkomen mentioned, the Committee on Finance Commerce and Budget has been in Naivasha looking at the horizontal formula of sharing the funds among counties.

Mr. Speaker, Sir, the Senate is also supposed to exercise oversight over national revenue allocated to the county governments. So when anybody purports to say that they are challenging that mandate, we do not know what they mean. They misinterpret and misquote this Article of where the functions of the county assemblies are given, Article 185 which talks about the legislative authority of the county assemblies. We should not mix the two and misinterpret them. Article 185 (3) says: "A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other executive organs." This is not oversight over the national revenue allocated. That is our duty. We are supposed to oversight over the funds that have been given yet the county assembly is, they are supposed to exercise oversight over human beings; over executive committees and any other county executive organs within that county.

Mr. Speaker, Sir, when people misunderstand this and rush to court, it may be essential to have a committee, such as the one we have just formed, so that we can put the case and make laws that are functional. So many other people, as you have mentioned, may be having issues with the way the Senate is working. That is none of our business. You can already see that the main trouble is coming from the “congregation of governors”. They call themselves Council of Governors, which is almost now behaving as an extra county. When you are talking about Council of Governors, it is like you are talking about “county of governors”, because they are now harvesting money from the counties and putting it in a kitty, which is now trying to fight any law that has been enacted by the National Assembly or the Senate. Eventually, the whole thing rotates around accountability and we cannot negotiate that. We must stand firm and do all it takes, including forming such committees such as this one.

Mr. Speaker, Sir, if any Member in this House has a problem with the composition of the Ad Hoc Committee, then we should know who should be removed from here. If we want more than 13, that is allowed or we can also seek the presence of the Speaker. By the way whether the Speaker should be a Member of this Committee or not, I do not know. May be we should discuss about the membership, and whether it has merit or no and then we remove that name. Otherwise I have no problem with this. I would say that this is the right way to go. Other Members were advancing the case saying this Committee should have been a sub-committee of the Committee on Legal Affairs and Human Rights. I do not know how members constitute the Committee on Legal Affairs and Human Rights. I know that some Members such as Sen. (Dr.) Zani and Sen. Khalwale are not members of that Committee. So, this one is a composition that is befitting the job that is indicated here. If we have a problem with the number, that is allowed and we can debate it.

Mr. Deputy Speaker, Sir, this is a straightforward Motion. I support it very strongly and suggest that it should be allowed to proceed. Sen. Wako, as you know, has a wealth of experience in this field. We call him *emeritus* having been the Attorney General for years and maybe we should add Sen. G.G Kariuki here as well, because of the wealth of experience of being Senator number one so that we can enrich our numbers. I support this and wish that we pass it so that they move quickly to start work and anything that may want to hinder the Senate from performance, can easily be brought to a level of understanding by all persons that are supposed to know.

Mr. Speaker, Sir, there will also be time when we can form other *ad hoc* committees in the future that will be dedicated to such a precise activity. For example, I am thinking about an *ad hoc* committee to deal with the insecurity that we see around. That does not make the Committee on National Security and Foreign Relations irrelevant. However, we are getting a specific and a committed Committee for a short period that can deal with and clear a problem that may be disturbing the people of Kenya or making things not to move as we want.

Mr. Speaker, Sir, I rest my case and I support this Motion.

**The Temporary Speaker** (Sen. Murkomen): Sen. Wangari.

**Sen. Wangari:** Thank you, Mr. Temporary Speaker, Sir. The first time I saw this Motion in one of last week's Order Papers though we were not able to debate it, I was in a meeting with Sen. Wako. The first thing I told him was that it looked to me like the Committee on Legal Affairs and Human Rights. That was my first reaction. Secondly, I asked him whether it was a preserve of lawyers only. Thirdly, I also enquired whether out of 13, we only had two women in it.

Mr. Temporary Speaker, Sir, before I even go to the composition, I know it is a fact and it is in the public domain that the Senate is being fought from every quarter. We have issues with the Governors, we have had problems in my Committee, that is the County Public Accounts and Investments Committee. I know my Chairman has already alluded to some of the issues that we are facing; we have a problem with *ex parte* orders being given by courts or by the Judiciary. That is in the public domain. But we also must interrogate, as a House, whether we want to do things just for the sake of it or we want to critically look at the matter before we act and make rushed decisions.

I do not dispute the floatation of this idea in the kamukunji. It is well in order. However, any time a Motion has been brought to this House, it is up for debate. It is up to Members to express whether they agree with it or not and it is their constitutional right to either support or oppose a Motion.

Mr. Temporary Speaker, Sir, as we split Committees in this House, we should realize that we already have an operation problem as the Senate in terms of quorum of Committees. There is no one committee you will walk in today and find more than four Members. We are doing only bare minimum in most committees because most Members are in two or more Committees. Some are in three. We already have even an *ad hoc* Committee on Harambee. We have four of them. Despite this being a political tool like we term it, in terms of output, the expectations of the big mandate and of the very heavy load being put on this Committee in terms of expectations to the Senate and guiding the public, I feel that, given our constrained numbers, we cannot have another properly, an *ad hoc* committee.

Mr. Speaker, Sir, when I look at this composition, I think this work can very well be done by the Committee on Legal Affairs and Human Rights. I know we want to make a political statement. The leadership of this House, and I know recently we have had a retreat for the leadership, where we interrogated some of these issues. Some of these matters can be dealt with saying that we only need lawyers and to say that they are not good politicians. The problems that we are dealing with are people who interpret the law; that is the Judiciary. It is not that they do not know the law; they know the law. Some of them require diplomacy and public relations skills. If you look at this list, knowledge of law is not a preserve of lawyers and it cannot be. Yes, they have studied it but I think all of us have our understanding of the same.

I have listened to Sen. Orengo say that we have included come gracious ladies in the Committee. I think he was referring to the Senators who are female. There is a trend

that we have picked in this House where we only include women as an after-thought whereas we constitute 27 per cent of this House. It is not a matter of choice. It is very unfortunate that this happens all the time; that we come to the Chamber and notice that we do not have the required percentage of women in the committees. Even if it passes, the basic minimum should be 27 per cent, proportionate to our membership. This is not a choice; it is something which we must adhere to as a House. We cannot be an appendage all the time.

Mr. Temporary Speaker, Sir, this is not to say that proposing this Committee then means that we do not have a problem as a House. We have a problem and not a small one. We have a myriad of cases, but these cases can be dealt with through the established committees. The Committee on Legal Affairs and Human Rights is capable of dealing with this issue. They could form a sub-committee to deal with the issue. The political leadership of this Senate could decide to pick a small number of Senators to deal with the issue. In principle, I think it would look very bad that we already have a problem of making sure that our committee work is not affected. Even if we want to send a political message, that political message must be very clear and not lose the value of the formation of a committee. We must not lose the output that is expected of a committee, we must not lose the fact that we are in two or three other committees. It will not make sense and I do not think it is realistic.

I want to join those who have opposed this Motion because I feel that what we need is the tracking of the decisions of this House and the work of committees. The Committee on Implementation chaired by Sen. Orenge should be able to complement what the Committee on Legal Affairs and Human Rights is doing in terms of tracking what decisions we have taken as a Senate to make sure that our constitutional right is not tampered with and that we are able to execute our constitutional mandate without hindrance.

Mr. Temporary Speaker, Sir, we are in agreement that we need to exercise what lawyers call prior restraint. You cannot injunct the other arm of Government from discussing what the Constitution gives them as their mandate. These issues cannot be resolved by having a 13 Member or 16 Member Committee. I think this is a deeper issue and we need the leadership of this House to do Public Relations and apply all the skills in order to reach out to the Executive and sit with the National Assembly leadership. I think even in the National Assembly, there are people who are very reasonable that can be able to discuss some of these issues without necessarily creating another *ad hoc* committee.

I oppose the Motion.

**Sen. Ong'era:** Thank you, Mr. Temporary Speaker, Sir, for giving me this opportunity so that I may also make my contributions to this Motion. From the outset, I would like to support this Motion, first of all, by thanking the Mover and the Seconder of this Motion for seeing it fit that they should look at the very issues that we have been interrogating as a Senate with regard to our relationship with the courts and they saw it fit to form an *ad hoc* committee.

This is politics and we are here as politicians to play politics in this House. We know that if you are still playing your politics “*kwa ligi ndogo*”, it is high time you moved to a bigger league so that your politics can be heard and listened to.

It is only in this wisdom that the Mover of this Motion saw it fit that he gets an *ad hoc* committee that is extra-ordinary by having representation from the Senate Majority Leader and the Senate Minority Leader and also to pick on eminent lawyers who can help interrogate these issues with the courts and also to pick on very distinguished Senators who have had a long standing experience.

Mr. Temporary Speaker, Sir, I am very pleased to note that Standing Order No.177 with regard to gender threshold has been met; at least we have four women and we can live with that for the moment. It is quite encouraging to note that the Mover of this Motion noted that it was important to ensure that women leaders were there and even those who are not lawyers. I note that Sen. (Dr.) Zani is there and she will be able to contribute immensely having been a teacher of long standing.

As we know, we now have rogue courts that have decided to take the Senator for a ride. They do not have respect for the doctrine of separation of powers. I am glad that when you were on the Floor of the House, you noted that it is not all the judges who are rogue; there are other judges who are eminent and who I agree with you in private discussions actually say that they get shocked at the political activism that some judges have actually taken to. They have decided to become politicians. These are the kind of judges we are hoping can step aside from the Bench and come and join us in this august House other than doing politics on the Bench.

I hope that when this *Ad Hoc* committee begins its honourable task, it will be able to jumpstart the ill relationship that exists between us and the Judiciary. It is high time that we had respect for the doctrine of separation of powers between the Executive, the Legislature and the Judiciary. I do not see any reason why the Judiciary does not appreciate and respect the constitutional work that this Senate has been given. It is our inherent right to impeach governors. We do not just do it in an *ad hoc* manner; we do it based on reason and proper evidence before us. Once more, I want to congratulate the Mover of this Motion.

I beg to support.

**Sen. Lesuuda:** Thank you, Mr. Temporary Speaker, Sir. I rise to oppose this Motion. I want to pick from where Sen. Martha Wangari left. As we oppose this Motion, we are not refusing the spirit of this Motion. It is something that we have discussed in this Chambers. As it has been clearly stated, we have discussed this at the kamukunji level. I am also aware and we are all aware that it is something that has been deliberated on even informally, led by our own Speaker and also some of the Members who are in this *Ad Hoc* Committee led by Sen. Amos Wako. He has continuously given us briefs of what has transpired.

We also know that the Mover of this Motion, Sen. Mutula Kilonzo Jnr. has been doing a lot on the background, with many of the Members who are in this *Ad Hoc*

Committee. We also agree that as an institution and as the Senate, a lot is at stake. We agree that from the first day when we started the impeachment process, we saw the role that the Judiciary played to curtail the function and the duty of this House. We have continued to see it, and the number of injunctions and the cases as well. So, it should not be misconstrued that any Member of this Chamber who is opposing the formation of this *Ad Hoc* Committee is not alive to the magnitude of the challenges that we are facing as an institution or as the Senate. We are saying that at the committee levels that we already have in this House, it is possible to reach a consensus and a solution with the other arms of the Government.

Secondly, it is important to note that this requires more of an engagement and dialogue, we need to sit down. It is more of an engagement between this House and other arms of the Government that we do not look like we are antagonistic, we are forming the best. With all due respect, these are some of the best brains that we have here in terms of law as well, leading from the Chairperson. However, we also have to explore the soft power which we have in this House. I know that the Committee on Legal Affairs and Human Rights also can and should probably, that is what Sen. Mutahi Kagwe was saying that we have two or three Members whose business is to lead this issue from the front. Every other time that is what they are thinking about, they are bringing ideas even to the Committee on Legal Affairs and Human Rights on how to resolve some of these issues.

Mr. Temporary Speaker Sir, we will continue to talk in this House. We are talking about the Judiciary every day, at committee level, at political rallies and at the kamukunji level, we are talking about other arms of government. By now, the Committee on Legal Affairs and Human Rights should have started taking action and steps and leading from the front as well apart from us now saying "Let us start fresh and let us have an *Ad Hoc* Committee to solve some of these problems that we are facing". I would like to echo the sentiments of my colleagues who have opposed this *Ad Hoc* Committee and say that let us have the existing committees. Even all the Members of this Senate should continue to give their input, support and ideas of how best we can resolve the issues that are facing this House.

We also do not want to send the picture to the Judiciary or even to the Executive and I know that is what we have been doing. We have been trying to fight our way out, we have continued with some of our deliberations even with injunctions but look at where we are. We are still at the drawing line. It is important for us to notice that time is also of essence. It is going to be two years and we are still talking about the Judiciary, the Executive and also the role that we have to play. It is important for us to accept that we have a challenge as a House and that it can be resolved through the soft power, dialogue and engagements with the other institutions.

As I conclude, I want to echo the sentiments of Sen. Martha Wangari. We are not playing victim here, but every other time that a committee is being formed either *Ad Hoc* or a committee of this House, it is always said that we added Sen. (Dr) Zani, it was actually said while we were debating this just so that we could meet the gender threshold.

As we respect the law and all the issues that we are talking about as an institution that the law has to be followed, let us do it without having to shout it at the top of our voices like it is a favour, why that lady senator is being added to that committee. Do it from outside and bring it here just like everybody else and then we deliberate on the issue.

As I conclude, I would like to mention that the Committee on Legal Affairs and Human Rights, the legal advisors and the staff of the Senate that we have all eyes on you as well. We need results. I know we have deliberated on these issues. Apart from having the *Ad Hoc* Committee, there are results that we expect to see and I think it has been alluded to by some of our colleagues who have also contributed. We have the capacity at the level of the committee. The Chairman, Sen. Amos Wako is also the Chairman of the Committee on Legal Affairs and Human Rights; he is also coming to chair this *Ad Hoc* Committee. We also have very many members, half of them who are also in the Committee on Legal Affairs and Human Rights.

It is important to note that for effectiveness, a team of thirteen, who are supposed to be the thinkers and the brains of what we are supposed to do to regain our position, it is more effective when you are a smaller group so that you give direction, you look at the work that is ahead of you, then you can share and walk along with the rest of the Senate.

I oppose this Motion and I hope that it is clear that those who are opposing are also alive to the matters that are bedeviling this Senate. We hope for a more effective way to resolve this matter once and for all.

**The Temporary Speaker** (Sen. Murkomen): There being no other contributor Sen. Mutula Kilonzo Jnr. to---- Sen. Kagwe, you have something to say?

**Sen. Kagwe:** Mr. Temporary Speaker, sir. I wanted to propose that the Mover replies but it is okay that you have called him.

**Sen. Mutula Kilonzo Jnr.:** Thank you, Mr. Temporary Speaker Sir. I have listened carefully to all the pronouncements made by my fellow Senators. Frankly, I want to say that I am a little disappointed. One, because none of you as bothered to say that your fellow Senators have done a good job in the little that we have done in an attempt to try and get the legal teams that are defending your positions as Senators of this Republic out there. The work that this team-----

**Sen. Kagwe:** On a point of order, Mr. Temporary Speaker Sir, Sen. Naisula in her contribution made it very clear and in my contribution, I made very clear that we are very grateful about the work that has been done. I specifically mentioned Sen. Mutula Kilonzo Jnr. because I know that Sen. Mutula Kilonzo Jnr. has spent a lot of his time and money in defense of the Senate. I hope that it is something that he will continue to do. So, let the Senator stand corrected that we appreciate, are thankful and grateful.

**Sen. Mutula Kilonzo Jnr.:** Thank you, Mr. Temporary Speaker, Sir. My Chairman, Sen. Mutahi Kagwe, has very nice words but always qualifies them when he finishes the sentence but I appreciate together with other Senators. Senators, I do not think even in your arguments and appreciating the work, we have, in fact, delved in to the details of this. Let me highlight that the work that you are doing as Senators under Article



96, there is an injunction. There are also injunctions in your work in the oversight committee and under Article 125, the right by the committee to summon witnesses. Make no mistake that the injunction is against the County Public Accounts and Investments Committee, the one which is chaired by Sen. (Dr) Khalwale. It actually reads all committees and it is not governors. The fact that there is an injunction means that we are enjoined in all ways.

On Articles No. 181 and 182 on impeachment, there is an injunction. The only thing that has not been enjoined, which may be they will, is Article 217 on the revenue sharing formula. I want to repeat the words of Sen. Orengo, which, in fact, captures the mood. Most of you have said that you capture the spirit but you forgot the mood. We have to make a statement about what we are doing as a Senate in terms of the numerous court orders and court cases that have singularly and collectively rendered the work of this Senate useless. Article 110 of the Constitution, Article 111, legislative making, Sang Bill injunction--- You know what happened to Sen. (Prof.) Anyang'Nyong'o when he wanted to have a meeting. It is all about court orders and I do not think there is anything more important today in the Senate and in your Committees other than these court orders. I was waiting for somebody to say that, in fact, we should suspend all the work of the Committees until we sort out this issue. If you want to subject this to the Committee on Legal Affairs and Human Rights where we have six pending Bills from various Committees, what is the purpose of sitting down to read all these Bills, use all our legal staff to give us briefs on this and yet by the time we finish, just like the Sang Bill, an injunction is issued against convening, sitting and whatever else that comes with that Bill?

The gravity of the things that are happening at the Senate will soon dawn, that by the next time we come back during the new term, we will have no work to do. There will be no board, there will be no Committees, it will be the end of the financial year and no governor would have set foot here yet the reports that are coming---

By the way, reports are coming to this Senate every three months – quarterly – and we will have no right to summon anybody to answer to those reports, yet the controller of Budget or the Auditor-General is generating reports as he is required by law.

So, Mr. Temporary Speaker, Sir, although some Senators have opposed this *Ad Hoc* Committee and suggested that, in fact, this issue should go to the Committee on Legal Affairs and Human Rights, I want to plead with you to search in your heart – and now I am going to preach. Search in your heart, fellow Senators and find peace; say that the House of the Senate of the Republic of Kenya should move with speed through this Committee to find a solution so that, that land where we want to go, as the Senate, we can reach there quickly. That is the end of my summon.

*(Laughter)*

Search in your heart carefully; it is not about the Committee on Legal Affairs and Human Rights; it is not about Sen. Wako and it is not about allowances. We have been spending a lot of time and even resources of our legal entities and law firms to assist this Senate. So, it is not about allowances and it is not about who sits where and when. It is not about nominated Senators; this is about this Senate. I urge you, Sen. Kagwe---

**The Temporary Speaker** (Sen. Murkomen): What is it, Sen. Njoroge?

**Sen. Njoroge:** Mr. Temporary Speaker, Sir, is it in order for the Mover to keep on repeating, time and again, the word “allowance?” I never heard any contributor objecting to the formation of this Committee because of allowances. Once again, this has nothing to do with the Committee on Legal Affairs and Human Rights. What we were saying is that this is a duplicate of the Committee.

Thank you, Mr. Temporary Speaker, Sir.

**The Temporary Speaker** (Sen. Murkomen): So what is out of order?

**Sen. Njoroge:** Is he in order to insinuate that some Members have any claim regarding the allowances?

**The Temporary Speaker** (Sen. Murkomen): Order, Sen. Njoroge! I heard the Mover replying very clearly. What he said is that just in case there is anyone out there who thinks that it is anything to do with allowances, it is not about allowances. It has nothing to do with an individual; it has nothing to do with Sen. Njoroge.

Proceed and conclude, Senator.

**Sen. Mutula Kilonzo Jnr.:** In fact, Mr. Temporary Speaker, Sir, the word that was used by Sen. (Dr.) Machage in so far as the date is concerned, suggested that there are people who wanted to be paid as Chairperson and Vice Chairperson in retrospect. That is all there was about allowances and I think it was being a little – let me use the word – “petty.”

But, Mr. Temporary Speaker, Sir---

**The Temporary Speaker** (Sen. Murkomen): Order, Sen. Mutula Kilonzo Jnr.! That is unparliamentary language; there is nothing in Parliament called “petty.”

**Sen. Mutula Kilonzo Jnr.:** Well, let me substantiate and, in fact, withdraw the word “petty.” I think there are Senators who suggested that somebody wanted to be paid in retrospect and they were being misled or were misinformed about the true purpose of this Committee.

Therefore, Mr. Temporary Speaker, Sir---

**The Temporary Speaker** (Sen. Murkomen): What is it, Sen. Kagwe?

**Sen. Kagwe:** Mr. Temporary Speaker, Sir, would I be in order to ask for clarification? I recall that during your contribution, you alluded to the fact that either the Committee was not going to be paid at all or that they were going to ask not to be paid at all. In fact, in your contribution, you alluded to something to do with the aspect of *pro bono* work. Would I be in order to ask the Chairperson or the Mover to clarify that particular position?

**The Temporary Speaker** (Sen. Murkomen): Order, Sen. Kagwe! What kind of point of order is that? I am no longer on the Floor.

Continue, Sen. Mutula Kilonzo Jnr.

*(Laughter)*

**Sen. Mutula Kilonzo Jnr.:** Mr. Temporary Speaker, Sir, Sen. Kagwe is being a little mischievous. I do not think I said those words.

**The Temporary Speaker** (Sen. Murkomen): But maybe for the record, I simply said that any Member who may not be happy or who may imagine that I may not want, in future, for any allowances to be paid, he can move an amendment to ensure that, that is indicated in the Motion but it is too late now.

**Sen. Mutula Kilonzo Jnr.:** Thank you, Mr. Temporary Speaker, Sir.

Therefore, as I conclude, I want to ask the Senators who are right in front of me and who ably opposed this Motion for reasons that this is a matter that should go to the Committee on Legal Affairs and Human Rights, to consider that, in fact, if you come to the Committee, there is a larger agenda than we should have because of many things that need to be done. But this Committee, from what I have seen in the recent past, is an extreme sacrifice from your fellow Senators in order to address issues that affect you directly. If, in fact, you are to suggest that the Committee on Legal Affairs and Human Rights should suspend its work, maybe that would be a good idea so that by the time you come back, we will have a solution to what is bedeviling this Senate. That will simply sound a death knell to our mandate through several court orders, court injunctions and people imagining that they will stop you.

In fact, one of these fine days, a Member or a constituent is going to injunct you from going to your own county if we are not careful. If we do not send a message in this Senate collectively that this Senate cannot be injuncted by any person when we are exercising our legislative mandate, then we would have failed and we would have abdicated our responsibilities. So, choose this very carefully so that, then, you will have a nice, beautiful sleep tonight, knowing that the Senate of the Republic of Kenya has now reclaimed its space somewhere in the history. Please, pass this Motion unopposed.

Thank you, Mr. Temporary Speaker, Sir. I beg to reply.

**The Temporary Speaker** (Sen. Murkomen): Very well. Hon. Senators, before I put the question, I would like to remind you that this is not a Motion affecting counties under Standing Order No.72.

*(Loud consultations)*

Order, hon. Senators! Order, Sen. Kagwe! Order, Senators! When the Chair is on his feet and reading a very serious Motion, it is only fair that you become calm, Sen. Naisula and Sen. Sang.

*(Question put and agreed to)*

**The Temporary Speaker** (Sen. Murkomen): Let us move to the next order.

## **BILL**

### *Second Reading*

#### THE GOVERNMENT PROCEEDINGS AMENDMENT BILL (SENATE BILL NO.10 OF 2014)

**Sen. Mutula Kilonzo Jnr.:** Thank you Mr. Temporary Speaker, Sir.

I beg to move that the Government Proceedings Amendment Bill, Senate Bill No.10 of 2014, be read a Second Time.

The amendment contained in the Governments Proceedings Act seems to amend Section 21 of the Government Proceedings Act by inserting the following new sub section immediately after sub section 4 which will read; “this section shall, with necessary modifications apply to any civil proceedings by or against a county government in any proceeding in connection with any arbitration in which a county government is a party.”

In passing the County Government Act, the drafters of that Bill omitted a very important aspect of law which I have highlighted in this Bill.

I want to read from the HANSARD a ruling in the Miscellaneous Civil Application No.448 of 2006 determined by hon. Justice David Majanja on 31<sup>st</sup> January, 2014. This one reads as follows.

“Since the application was filed, the legal landscape concerning the liabilities of local authorities in their offices under the Local Governments Act has changed. The Constitution has introduced devolved Governments through counties to replace local authorities.”

He then proceeded to address the law and said; under Section 18 of the Sixth Schedule, all local authorities established under the Local Government Act as it exists before the effective date shall continue to exist subject to any law that might be enacted pursuant to Section 134 of the County Governments Act. The Local Government Act stood repealed as at 4<sup>th</sup> March, 2014 and it proceeds to say so.

A study of the Act reveals that there are no transitional provisions with regard to county governments for pending court cases and judgements against local authorities. Under Section 134 of the County Governments Act, all issues that may arise as a

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consequence of the repeal under sub section 1 shall be dealt with and discharged by a body responsible to matters relating with transition. That body was a transition to the Devolved Governments Act under Act 1 of 2012.

More importantly, in the Urban and Cities Act which was passed after the County Governments Act contains a transition provision which states as follows:

“Any legal right accrued cause of action commenced in any court of law or tribunal established under any written law in force or in defence, appeal or reference as filed by any or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against being established by law.”

This section vests the power to proceed with the Act or to defend actions and legal proceedings against any defunct local authority upon a body established by law which is neither constituted in this Act.”

The judge continues to state as follows:

“What is clear though is that proceedings commenced against or in existence are not extinguished by operation of law but will continue to exist. He then further interprets Section 23(3) (e) of the Interpretation and General Provisions Act which provides that in any written law, repeals in whole or in part another written law. Unless a contrary intention appears, the repeal shall have no effect on investigations, legal proceedings or remedy in respect or a right privilege obligation, liability penalty forfeiture or punishment as aforesaid and such investigations or legal proceedings may be instituted, continued or enforced.”

In conclusion, this is what the judge said: “In my view and taking into account the legal provisions I have cited, the county is legally constituted under the law that takes place of all local authorities unless there is a contrary enactment.

I, therefore, find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against the County of Bungoma which must bear the burden of the judgements. This one continues to say, the court cannot grant orders incapable of enforcement.” Therefore, the court proceeded in the case filed against the Town Clerk of Webuye Council to enforce these order against the county of Bungoma.

What am I saying? In drafting the County Governments Act, fellow Senators and Mr. Temporary Speaker, we forgot to put a legal mechanism to protect the counties against legal proceedings commenced before the enactment of this law. What does this mean? If you look at the audit reports of Nairobi or Makueni counties, you will see that all the county councils that were disbanded by the enactment of the County Governments Act had more debts than you can imagine. How will the debts be enforced? Once these people obtain a judgment, they can go and attach the county government’s cars, assets and any other thing that can be attached without any legal protection. Senators, unknown to many of you, many counties are grappling with debts that were incurred before the

promulgation of the County Governments Act and there is no protection whatsoever against proceedings or execution against them.

In the Government Proceedings Act, the local Government that was the predecessor of the now county Governments had a protection of law to the extent that you could not go to the City Council of Nairobi and pull their car because of a debt. That is why they have a Pending Bills Committee. They are protected by law. Our counties are not protected by law. While we, as Senators, are working hard to have sharable revenue going to our counties, there are people who are ensuring that this money will only go to pay debts. The Nairobi County is completely clogged with tens and tens of billions of debts incurred by their predecessor. If the County Government of Nairobi City does not pay those bills, they will proceed to attach assets and paralyse the county.

This amendment, to only one section of the law seeks to introduce a protection that is enjoyed by the Government of Kenya that was enjoyed by the local governments which was; before you commence action or execute against the Government of Kenya, you must first have issued a notice. You cannot attach anything.

The same protection is also granted to the Teachers Service Commission (TSC). The same protection is also granted to other Commissions. However, this protection is not granted to the people that we serve and those are the counties. That is our mandate. This lacuna of the law is something that we must plug in.

It appears to be a simple amendment, but this amendment will protect county governments against what I call rogue debtors who will proceed quietly to pull the rug under the feet of Governors so that they can then attach property to satisfy debts which have not gone through the legal process.

Once we put this protection, they will follow the process that everybody follows when you want to attach or file a suit against the Government. You issue a mandatory notice and then you get a judgement which must go through a process. Before you can execute – in fact, you cannot execute against the Government – you then get paid but you are not allowed to paralyze the work of the Government simply because you have a debt or you have been granted a judgement in your favour. I want to suggest that it was, in my own view, an oversight.

You were one of the people and the architects of this law and we must come to that understanding that, in fact, we did not intend to expose our counties because if we had given the protection to our former municipal councils, former town councils and other councils, we should give an equal protection of law to our county governments so that like the County Government of Webuye, let us not end up having orders like we have here where the judge said in Paragraph 17: “Bungoma County do give vacant possession of LR.No.Ndivisi/Muchi1265 in Webuye Township to the plaintiff on a date to be agreed upon”. There was no order of stay; it was straightforward: “That Bungoma County do pay the applicant Kshs100,000 being damages together with interest with effect from 1<sup>st</sup> July, 1991 until payment in full”.

Hon. Senators, in 1991, we never contemplated the County Government of Bungoma, but the County Government of Bungoma is going to pay from 1991 to a person who they did not know; to a person who they did not contract; to a person who rendered services to a defunct municipal council, but they did not take responsibility, because in contemplating the county governments, we did not offer them the protection that they are supposed to have like any other government.

Mr. Temporary Speaker, Sir, I dare suggest that we must offer our counties – they are not municipal councils – protection that is also given to the national Government. In fact, not to have this law protecting county government is, in my own view, discrimination because we all say we have one national Government and 47 county governments. One national Government enjoys protection of law in terms of execution and civil proceedings and 47 others do not enjoy the same. Before the committees that have set up this Senate get to the bottom of the audit reports of the previous municipal councils--- I can tell you when you read those reports, you will shed tears as to the mismanagement of resources, waste *et cetera*, and these debts are going to be loaded on our county governments if we do not, in fact, contemplate this legislation.

The Government Proceedings Act as it is now is one of those laws we should have done away with a long time ago. Therefore the Committee on Legal Affairs and Human Rights is happy to report that we are in the process of coming up with a similar legislation, but the one that affects counties directly. Before we do that, I am strongly pleading with Senators to allow that we amend Section 21 of the Government Proceedings Act by including a new section, which section will give the necessary protection of law to our county governments not to face the same wrath that Bungoma County has faced. This was brought to my attention by a judge of this beautiful country. It is possible that there are counties that have not been bold enough to subject these sort of judgements to legislators so that we can take action on it. I think it would be a far cry not to respond to the call of justice, to protect counties against what I call historical injustices financially by municipal councils.

In moving this Bill, I would like to say, as contained in the Memorandum of Objectives of the Bill that it is not a money Bill and, in fact, we must seek directly to protect our county governments from what I have described in here before.

I will invite a Senator who is familiar with Government proceedings because she was a State Counsel and she knows what I am talking about. Allow me to ask Sen. Janet Ong'era to second the Bill.

**Sen. Ong'era:** Thank you, Mr. Temporary Speaker, Sir. I stand here this afternoon to second this Bill and from the outset, I would like to congratulate my colleague; the Duke of Makueni, Sen. Mutula Kilonzo Jnr., for having had the foresight and thought of bringing this very important Bill.

The proposed amendment under Section 21 of the Government Proceedings Act is meant or seeks to extend the application of this provision to county governments. In so

doing, this Senate as the guardian angel of the county governments will be protecting the interests of county governments.

**Sen. Sang:** On a point of order, Mr. Temporary Speaker, Sir. Did you hear Sen. Ong'era referring to the Mover of this Motion in other terms other than the ones provided by the law? Do we have dukes in this House?

**The Temporary Speaker** (Sen. Murkomen): Sen. Ong'era, did you refer to him as Duke Mutula Kilonzo Jnr.?

**Sen. Ong'era:** Mr. Temporary Speaker, Sir, I was expressing my opinion, but I referred to the Senator for Makueni as Sen. Mutula Kilonzo Jnr., although I only refer to him as the Duke of Makueni. It is a just a tongue that praises in case Sen. Sang has forgotten. Under Article 96 of the Constitution, we are aware that this Senate represents the counties and serves to protect the interests of the counties and their governments.

It is very timely that we should have an amendment that provides to protect the interests of the counties. This amendment will provide for transitional provisions for dealing with pending actions and judgements against local authorities which now became the counties.

Under this, we will be able to deal with issues of debt collection as the Mover had outlined before, several pending matters, like there have been many judgements which have arisen out of these issues. If I could quote some of these judgements, for example, we have a judgement under the Town Clerk of Webuye County. This is a Miscellaneous Civil Appeal No.448 of 2006 against Ayub Murumba Kakai. There is another matter that arose amongst the several ones and this is the Clerk, Municipal Council of Kisii and others under Miscellaneous Application No.3 of 2013 and there have been numerous and many other pending matters which have arisen but have not been prosecuted because of lack of a legal vacuum to deal with them.

Mr. Temporary Speaker, Sir, there is a statutory lacuna right now, which has not been dealt with by the County Governments Act or the Urban Areas and Cities Act. They have not made any provision that will deal with this. This is a straightforward amendment which we need not really elaborate much, because by providing for this amendment, we will be able to provide a clear way in which matters can be dealt with at the county.

I beg to second the Motion.

*(Question proposed)*

**Sen. (Dr.) Zani:** Thank you, Mr. Temporary Speaker, Sir. Let me start by congratulating Sen. Mutula Kilonzo Jnr. for thinking about counties and remembering them, especially in this dispensation under devolution when county governments must be protected. I think this was something that was overlooked by many of the statutes that have been put into place. As much as Sen. Mutula Kilonzo Jnr. says that this is a small amendment, I think the impact is great because it addresses a big mischief that needs to be addressed well before time.

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The Government Proceedings Act, Cap. 40, of course, was enacted long before devolution and, therefore, it did not envisage, calculate or put into place provisions. Indeed, quite a number and bits of legislation need to be amended to include county governments right from the onset. Before devolution, most of the statutory provisions that were being made were made only with the national Government in mind, yet it is very clear that with devolution now, we really have to think about the counties and their impact.

Mr. Temporary Speaker, Sir, I want to touch on specific articles just to emphasize on the whole idea that counties and county governments are now very much entrenched and we cannot overlook them at all. In Article 174, where we have the objects of devolution in Section (h), one of the objects of devolution is to facilitate the decentralization of state organs, their functions and services from the capital of Kenya and, therefore, entrenching enough responsibility at the county level. That decentralization has to be decentralization not only in terms of resources, but also in terms of statutes that need to be applied. I think it is good at this point to also encourage Members of County Assemblies (MCAs) to look at legislation that is already in existence and try as much as possible to make it conform, so that it can actually link up to what is happening at the counties.

Mr. Temporary Speaker, Sir, in Article 6, where the stress is on devolution and access to services, the territory of Kenya is divided into counties and we have those 47 counties very clearly listed in the First Schedule. In Article 2, the national and county governments are described to be distinct, interdependent and, therefore, this amendment also takes into consideration the independence in terms of operations; this has to be taken into consideration and emphasized. That distinctiveness of counties, therefore, is something that we cannot overlook. This goes on even in terms of the proceedings of the counties in what it does and the various responsibilities that are given to the counties. The nature of business at the county level is as serious as that of the national level and, therefore, we should not overlook what is happening at the county level and just focus on the national level.

Mr. Temporary Speaker, Sir, Section 21 makes very specific provisions on the manner in which court orders against the Government are to be satisfied, but this section did not take into consideration the county governments by the legislative proposal that should be put in an amendment. That amendment will be having a section on its own which will deal with necessary modifications, apply to any civil proceedings by or against a county government or in the proceedings in connection with any arbitration in which a county government is a party. I think this becomes key and very critical. I am happy that this amendment has not just been slotted in arbitrarily at a point where we are talking about national/county governments, but it is a sub section in and of itself with a lot of clarity about how the proceedings at the county level should be handled.

Indeed, Mr. Temporary Speaker, Sir, from the two Senators who moved and seconded the Bill, we have already heard that there is a lot of loading of debts that is

happening to counties; counties that did not even know how those debts were acquired; municipal councils that have been asked to audit those debts and explain what has happened and they have not. We already know that what is being given to the counties in Section 203 in terms of the resources is very little. We know that the recurrent expenditure is already quite a burden and it is very unfortunate that processes have not been put into place for us to find out how these county governments are going to manage, especially debts that they did not plan on. We know that there is meant to be a developmental budget and that is where the focus for Kenyans is. They are looking to see how we are going to improve but, unfortunately, somebody can be very naughty to sneak in expenses that they cannot account for into the county government expenditures. We really need to protect these county governments from this.

Therefore, Mr. Temporary Speaker, Sir, I find that this amendment is very useful in trying to ensure that nothing is loaded onto the counties, and that it is not done in a sneaky manner because then, this amendment makes it very clear that those provisions that have already been made in the Government Proceedings Act, Cap. 40, are taken into account by this specific amendment. Sen. Janet Ong'era informed us about what happened in the Kisii County in terms of the malfunctioning that has been taken into consideration. I think the whole proposal, as sub-section 5, will help to apply civil proceedings by or against a county government and, therefore, they will be protected even in terms of civil proceedings.

We know that this is very important even at the personal level; that individuals are not going to be held responsible, as individuals, for anything that they do for or on behalf of the county. This provision is a statutory provision that keeps coming up in various legislative proposals and it is a key proposal because sometimes individuals have to act. It is true they act in their capacity as individuals, but at the end of the day, they need to be protected and they need to feel that they are protected so that they can actually have the bravery to articulate some of the issues that are very key to them.

Mr. Temporary Speaker, Sir, in terms of even the levels of arbitration that the county is able to engage in with the Government as a party, we know that there are lots of arrangements that are coming up with the Public Private Partnership (PPP) arrangements that have become the norm. I think it is very important. So, in supporting this Bill, I just want to congratulate Sen. Mutula Kilonzo Jnr. for protecting the counties, and this is what we are here for. Under Article 96, we are here to protect, as the Senate, the counties and the interests of those counties. I think this is going to be a tremendous contribution in that direction; to ensure that our counties are protected.

Thank you very much, Mr. Temporary Speaker, Sir.

*(Applause)*

**Sen. Sang:** Mr. Temporary Speaker, Sir, I rise to support this very important Bill. I want to take this opportunity to congratulate the Senator for Makeni, Sen. Mutula

Kilonzo Jnr. – the “duke” of Makueni, as you have allowed Sen. Janet Ong’era to refer to him today – for a very important Bill. Sen. Mutula Kilonzo Jnr. has had a fruitful day today, having moved a very important Motion that succeeded; and, now, moving a very important Motion, which I am sure my very good friend, the Senator for Nyeri, Sen. Kagwe, will obviously support, unlike his position with regard to the Motion that was successfully moved by Sen. Mutula Kilonzo Jnr.

The functions and core mandate of this House are to protect county governments. There cannot be a better law that seeks to protect counties than this Bill that has been brought by Sen. Mutula Kilonzo Jnr.

Earlier when county governments and this House were established, some of the first Motions we discussed dealt with providing immunity to the county governments especially with regard to debts that were accrued by the former local authorities.

That Motion was moved but, unfortunately, it appears as if many of our county governments are being forced to pay the debts of the previous local authorities. Therefore, obviously, many other counties will face the challenge that Bungoma County faced as shared by the Mover of the Bill.

The amount of resources allocated to the national Budget to pay the national debt is mind-boggling. We have over Kshs300 billion worth of resources being used by the national Government to pay the debts we have accrued as a nation. We hope that the little resources we are sending to our counties will go directly to development projects to our counties rather than go to recurrent expenditure or to pay debts. This is very crucial. If a county government will be faced with an option of either paying a debt of Kshs50 million or Kshs100 million or buying drugs for our dispensaries in the counties, I am sure the right thing to do will be for the counties to purchase drugs. In so doing, they may not pay their debts. Knowing the court system that exists in this country, some people are likely to go to court and obtain court orders to execute. Without these kinds of laws, our counties will lose a lot of their properties in the name of execution of court orders.

Therefore, this is a very crucial Bill that will essentially protect our counties. It is also important that as counties start from a clean slate, we encourage them to live within their means so that they do not start accumulating a lot of debt five, 10 or 20 years down the line. We should subject our counties to start paying debts that they are accruing as at now. We want to call upon our county governments to live within their means and look for innovative means of generating revenue internally without rushing for some of the loans that are not well thought out. This will help our counties to grow. We need to protect the counties.

Mr. Temporary Speaker, Sir, State Corporations are protected under the State Corporations Act. The national Government is also protected and all the other national and public institutions are protected. It would be absurd to imagine that the Nandi Hills Town Council in my county or the Kapsabet Municipal Council or the Nandi County Council had the immunity of the law but the County Government of Nandi right now does not have that protection.

This is one of the most crucial Bills in this House other than the Division of Revenue Bill and the County Allocation of Revenue Bill that this House has had to deal with which directly goes into protecting our counties. It is important for our county governments to realise that this Senate will always do what is right. We do not always read from the same page with our county governments when we are protecting them in the manner we are doing today. Today, we are protecting them, through this Bill, against forces that would easily organise processes through courts that would then take some resources, facilities and assets of our counties. This is the protection that this House is giving to the county governments.

It is also important to note that we have to protect counties against internal challenges. If you have county executive officials who are not willing to be accountable, you need to deal with them. It is saddening to read the ruling that was issued by the High Court in Bungoma. This one essentially said that you cannot hold County Executive Committee Members (CECs) accountable. Whereas counties are under threat from external sources and factors, there is increasing threat to devolution from within. A county government can easily be brought down to its knees because of the inefficiencies we see in the CECs and the Governors. It is the responsibility of this House to protect devolution from external threats and challenges but more importantly from internal challenges and mechanisms that can derail it. This House needs to participate, in its protective role when devolution is under attack from external sources from the national Government and regional authorities.

In my county, for instance, we have a number of regional authorities operating within the region. One of the issues we continue to ask ourselves is: How do you ensure that the parastatals like the Kenya Forestry Services that operate over some resources in counties will sit on a round table with our county governments and ensure exploitation of natural resources and assets within our counties will be done in a manner that not only benefits the national Government but also the local communities and the county governments? These are the things we expect our counties to engage in.

As a Senate, we will provide a platform where we will protect our counties whenever they have challenges. It is important to note that the issue, as indicated by the Mover, was brought to his attention by a judge. We expected the County Government of Bungoma, having faced this challenge, to approach this House whose mandate and responsibility is to protect them. We call upon Governors, instead of crying foul and sharing their challenges and their problems with people who may be willing to listen and not provide solutions, to petition this House on some of these challenges so that as a House, we take them up.

It is important, as we continue to engage as a Senate, that we ask our counties to look at the Senate as a solution to their challenges as provided for. We will not be doing a favour to county governments. We will be executing our mandate as the Senate, a mandate given to us by the Constitution which is to protect devolution and to ensure that

the interests of counties are taken care of. There cannot be a better legislation than this particular one that gives protection to our counties with regard to some of these debts.

I want to wind up by congratulating a number of the Movers of various Motions and Bills in this House. Whereas sometimes some institutions which are not keen on ensuring that the Senate undertakes its responsibilities have branded the Senate anti-devolution, we also want them to look at some of these Bills.

Mr. Temporary Speaker, Sir, we moved a very crucial Bill; the County (Amendment) Bill on the establishment of county development boards which was a crucial Bill alongside several other Bills. This is one of the crucial Bills that joins the league of the many Bills that we have passed in this House to protect and serve the interests of counties. We call upon our partners in the county governments to appreciate that we are here to support them and to work with them in the path of strengthening devolution.

I want to appreciate the office of the Clerk of the Senate. We are informed that from now on, every other time a Bill is Read the First Time, all those Bills that affect counties are transmitted to our county assemblies and county executive for them to give input. We want to call upon our county governments to take advantage of that opportunity and give their input so that when the Bill is at the Third Reading, we do not want to hear governors saying that it is anti-devolution. We are now giving them an opportunity, immediately after the First Reading, to give their input. If the county governments are not going to give us input at that stage, it would be hypocritical for them at the last stage of the Bills to raise issues and say that the Bills do not serve their interests. Therefore, we want to congratulate our counties.

Mr. Temporary Speaker, Sir, in the Committee on Legal Affairs and Human Rights, we have processed many of these Bills at the pre-publication stage. We process some of these Bills at the Second Reading and, therefore, we want to call upon the counties to forward their concerns to the Senate. We exist essentially to support and to protect them. We will do exactly that, but the best way for us to support them is by sharing some of these concerns like the challenges that Bungoma County is going through. For that reason, I take this opportunity to thank the Mover and the Seconder of this Bill and say that this Bill goes a long way in protecting and supporting our counties.

I support.

**Sen. Hargura:** Thank you, Mr. Temporary Speaker, Sir. I would like to thank the Mover of this Bill. This Bill will go a long way in enabling us to protect and serve the interests of the county governments. As it has already happened, Kenyans will always demand what is due to them from the county governments and the national Government. However, Government institutions have been insulated from some processes which if not controlled, will make it difficult for the Government to operate. There is no way we will have the county governments being an exception to this rule.

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

*[The Temporary Speaker (Sen. Ongoro) took the Chair]*

Madam Temporary Speaker, I thank the Mover of the Bill for having gone through the existing legislations to make sure that they are compliant with the new Government structure in the sense that whatever applies to the national Government and to the existing Government institutions should also apply to the county governments. In this case, when it comes to somebody going to court to claim anything from the Government, there must be a procedure which has already been taken care of in Section 21 of the Government Proceedings Act. We should make sure that it applies to the county governments.

Madam Temporary Speaker, as the Mover has said, this might have been an oversight when the County Government Act was passed. We have already seen its effects in the case of Webuye and we need to move fast to stop this damage. If one has anything against the county government, then the same procedure which is applied to Government institutions should also apply to the county governments. This is so that whatever funds we move from the centre to the county governments are not spent on settling debts of the previous county councils, municipal councils and the like, which were the predecessors to the current county governments. Because of that, I support this Bill.

Government officers or those who are entrusted with doing business on behalf of Kenyans, either through appointment or election, should be very careful. They should be prudent whenever they commit the governments at any level or in any public institution so that we do not incur these unnecessary debts. What happens is that maybe somebody borrowed funds or any property from a Kenyan, just like we do in business. Maybe a county council would owe somebody something; that person has a right to have his property restored or whatever is owed being paid back.

We should also urge public officers to be prudent and not to commit the Government unnecessarily because with the transition from the county councils to county governments, we also have to be careful. Sometimes people could even come up with debts which they could not get through the county council maybe because it was not procedural and then one could try to make use of this transition to lump all these things on the county government. Because of that, we have to be prudent, as public officers, to make sure that we do not commit government to unnecessary debts because that will now disadvantage the Kenyan whose property or service has been used and now you come up with a law which will disadvantage the Kenyan himself. So, it requires prudence on both sides; public servants have to be careful on how they commit public institutions. Similarly, Kenyans also have to claim what is theirs but not collude with public servants, thinking that what belongs to the public belongs to nobody and so, anybody can get it.

So, Madam Temporary Speaker, I support the Bill and hope that once it is implemented, we will save our county governments from what they have already started experiencing, like in Webuye and Kisii, as it has been mentioned.

Thank you, Madam Temporary Speaker.

*(Applause)*

**Sen. Kagwe:** Thank you very much, Madam Temporary Speaker. From out outset, I rise to support this Bill; I could see a bit of concern somewhere---

*(Laughter)*

Madam Temporary Speaker, when we are out there as Senators, because we are not seen in *Harambees*, we do not have the Constituencies Development Fund (CDF), we do not have the Governor's kitty and we do not have money to give for scholarships, one of the things we are asked is: "What is the role of the Senator?" Today, thanks to Sen. Mutula Kilonzo Jnr., this is a very good example of exactly what the role of a Senator and the Senate is. I, therefore, want to start by congratulating Sen. Mutula Kilonzo Jnr. I would have expected no less than what he has done; I would have expected no less than him noticing an anomaly like this within the law; just to pick out of all the things that are going on around the country and to have such an eye for detail is, indeed, a great thing for our Senate. It goes to show that Sen. Mutula Kilonzo Jnr. is an asset to this House.

Having said so, Madam Temporary Speaker, this is also a good opportunity for us to explain to the nation what we really do rather than what we are expected to do. We will also tell the public that the role of a Senator is to legislate, so that when they do not see us in *Harambees* or at cattle dip or church functions that that other elected leaders are able to attend, it is a good opportunity to tell them: "This is the work that we do and how we protect the counties." We protect counties by ensuring that the laws that exist in our land are those that are explicit in terms of protecting not just the county individuals, but also the county assets.

The law as exists today exposes our counties so viciously and badly that we are lacking. Not many people know of this gap in the law. If people knew of this gap in the law, a lot of our counties would be in problems. In fact, when you hear of, for example, Bungoma County and other counties, this is just the tip of the iceberg. When you combine two things, the huge bad debts that exist and historical debts some of which were definitely illegitimate and were a result of serious corruption, both in the Judiciary - I dare say- and also amongst the suppliers to the local governments, when you look at the bulk of that debt, if the people who are owed that money and who have got injunctions were to go around the county governments collecting what they are owed and what they are holding injunctions about, the country would come to a standstill. The county governments would simply stop at an instant. Therefore, it is important for us to appreciate what we are doing here and the importance of this particular amendment. We

also need to see how in our work of protecting the county governments we are amending a law that stands as a dangerous existence as far as the laws of this nation are concerned.

Madam Temporary Speaker, when we consider the amount of money that is currently being spent in our counties; Kshs190 billion in one account, another Kshs200 billion in another, a lot of that money has been spent in buying vehicles and tractors to pave roads by the county governments. Indeed, they are even buying vehicles for the County Executive Committee Members (CECs). All those assets are currently under threat. Without this amendment, all those assets, including the tractors are all under threat because all of them can be picked up tomorrow.

We have people in this country called auctioneers. Unless something has changed, the last time I personally had to deal with an auctioneer, I saw a human being whose humanity was a big question mark in my mind because this is an individual without any morals or qualms. This is an individual who can take an ice cream out of your daughter's mouth at the age of ten under the guise that they can even auction ice cream. When you think that these are the people that the county governments are now exposed to, you are left with no option but to move very quickly because it is within the realms of our imagination to see a situation where vehicles belonging to county governments are actually under a hammer somewhere in a *bundu* in Nyeri or Kasipul Kabondo. I hope that this is what this House will do; to move very quickly to pass this amendment into law. I would also urge that eventually when the Bill goes for assent to the President's Office, that the President hastens to very quickly sign it into law, because without that, we will still be working--- But, in the meantime, it is important for the county governments to be on the lookout for this sort of thing.

Madam Temporary Speaker, it is also important for the judges and the Judiciary to be aware and to be alive to the fact that if they go and make the kind of rulings that they have continued to make, they are exposing county governments in a very severe way. It must be remembered that it was not done; the law was not amended to introduce the fact that vehicles can be auctioned or vehicles can be acquired by those who are owed money by the county governments. That is not what happened. It was left out; it is an oversight in law. Therefore, it is important to realise that, as a matter of fact, what we are doing is inserting into law something that already existed prior to the transition from the local governments to county governments.

Therefore, Madam Temporary Speaker, once again, I support the amendment to this Bill, and propose that the Senate should move very quickly into making similar amendments in similar Bills for us to execute our constitutional responsibility of protecting the county governments.

With those few words, I beg to support.

**The Temporary Speaker** (Sen. Ongoro): Sen. (Prof.) Anyang'Nyong'o

**Sen. (Prof.) Anyang'Nyong'o:** Thank you very much, Madam Temporary Speaker. I would also like to support the amendment to that Act of Parliament as Moved by Sen. Mutula Kilonzo Jnr. If you look at Fourth Schedule in the context of the Fifth



Schedule of the Constitution which lays out the separation of powers, assignments or functions between the National and county governments, you will find that we made laws in the last Parliament regarding the Fifth Schedule. But we did not make all the laws that were necessary to make sure the separation of power between the national and county governments work smoothly. Many laws that exist in the Republic of Kenya assume that there is only one government.

It is, therefore, just logical that my friend, Sen. Mutula Kilonzo Jnr., has started this very important process of making sure that the Senate makes relevant laws to effect the Fourth Schedule because it assigns functions to the two levels of government, but only one level of government has what you might call “completer laws” to perform functions than the other one. The other one still has a huge deficit of laws to be passed by this House, which looks out for the affairs of the counties to function properly.

**The Temporary Speaker** (Sen. Ongoro): Order Sen. (Prof) Anyang’-Nyong’o. You have spoken for only two minutes; you have 13 minutes remaining to continue your contribution.

### ADJOURNMENT

**The Temporary Speaker** (Sen. Ongoro): Hon. Senators, it is now 6.30 p.m. and it is time to interrupt the business of the House. The House, therefore, stands adjourned until tomorrow Wednesday, 29<sup>th</sup> October, 2014, at 2.30 p.m.

The House rose at 6.30 p.m.