



REPUBLIC OF KENYA

THE SENATE

ELEVENTH PARLIAMENT – THIRD SESSION

VOTES AND PROCEEDINGS

TUESDAY, JUNE 23, 2015 AT 2.30 P.M.

1. The Senate assembled at thirty minutes past Two O'clock.
2. The Proceedings were opened with Prayer.
3. MESSAGE FROM THE NATIONAL ASSEMBLY ON THE PRESIDENTIAL MEMORANDUM ON THE PUBLIC PROCUREMENT AND DISPOSAL BILL (NATIONAL ASSEMBLY BILL NO. 40 OF 2014)

The Speaker reported the following Message from the National Assembly regarding the Presidential Memorandum on the Public Procurement and Disposal Bill (National Assembly Bill No. 40 of 2014)-

"I am in receipt of a Message from the National Assembly to the Senate, dated 19th June, 2015 and received in the Senate on the same day, regarding the Presidential Memorandum on the Public Procurement and Disposal Bill, National Assembly Bills No. 40 of 2014. The Message is signed by the Speaker of the National Assembly. In accordance with standing order 40(4) of the Senate Standing Orders, I hereby report to the Senate the Message of the National Assembly which is as follows-

PURSUANT to the provisions of Standing Orders 41 and 142 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly-

THAT WHEREAS, in exercise of powers conferred on him by Article 115 of the Constitution, H.E. the President refused to assent to the Public Procurement and Asset Disposal Bill (National Assembly Bill No. 40 of 2014) and referred the Bill to Parliament for reconsideration;

AND WHEREAS, the National Assembly, on Thursday, June 18, 2015 reconsidered and passed the Bill, **fully accommodating the President's reservations** and without proposing any amendments to the said reservations;

NOW THEREFORE, in furtherance of the provisions of Article 115(3) and (4), I hereby forward the Memorandum of the President, containing his reservations to the Bill, to the Senate for reconsideration.

Honourable Senators,

As you are aware, Article 115 of the Constitution provides for the process of Presidential assent to Bills and referral of Bills by the President back to Parliament for reconsideration. In particular, Article 115(1) provides as follows-

Within fourteen days after receipt of a Bill, the President shall-

assent to the Bill; or

refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

The Message from the National Assembly indicates that His Excellency, the President, in exercise of the powers conferred under Article 115(1)(b), referred the Public Procurement and Asset Disposal Bill, 2014, back to Parliament for reconsideration by Parliament.

Article 115(2) of the Constitution provides that where the President refers a Bill back for reconsideration, Parliament may either-

- a) amend the Bill in light of the President's reservations; or
- b) pass the Bill a second time without amendment.

Where Parliament amends the Bill fully accommodating the President's reservations, in terms of Article 115(3) of the Constitution, the appropriate Speaker is required to re-submit the Bill to the President for assent.

However, pursuant to Article 115(4), Parliament may resolve to pass the Bill a second time without amendment or with amendments that do not fully accommodate the President's reservations. To do this, Parliament requires a vote supported by-

- a) two-thirds of members of the National Assembly; and
- b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.

Article 115(5) and (6) of the Constitution then provide for the re-submission of a Bill passed in accordance with Article 115(4) of the Constitution to the President and for the process and timelines for assent of such a Bill. On a purposive interpretation of the Constitution, it can safely be concluded that the same procedure and timelines apply to a Bill that is amended by Parliament to fully accommodate the President's reservations in terms of Article 115(2) of the Constitution since no reference is made to the procedure to be applied.

Honourable Senators,

The Public Procurement and Asset Disposal Bill, 2014 is a Bill that concerns county governments in terms of Article 110(1) of the Constitution. Consequently, the Presidential Memorandum on the Bill is to be considered by both Houses of Parliament. In accordance with the provisions of the Constitution, the Bill cannot become law until both Houses of Parliament have re-considered it in light of the Presidential Memorandum. This point is important to note as a Bill not properly considered by each House, regardless of the outcome, cannot receive Presidential assent, and if it did, it would be a nullity for all purposes.

Honourable Senators,

I note that this is the first time in the life of the Eleventh Parliament that a Presidential Memorandum is to be considered by both Houses of Parliament. As such, it is necessary that in this Communication I set out the procedure that is to be followed by the Senate upon receipt of such a Memorandum.

Standing order 158 of the Senate Standing Orders, which is replicated as standing order 155 of the National Assembly Standing Orders, sets out the following procedure for consideration of a Presidential Memorandum-

Whenever the Senate receives the President's reservations on a Bill pursuant to Article 115 of the Constitution, the Senate shall, within seven days of the receipt refer the President's reservations to a Joint Committee appointed for that purpose.

Within fourteen days of referral of the President's reservations to a Joint Committee, the report of a Joint Committee shall be laid on the Table of the Senate by a Senator who is a member of the Joint Committee appointed for that purpose authorized by the Committee in that behalf.

Where the report of the Joint Committee appointed for that purpose includes an agreed version of the President's reservations, the Senate shall consider the report of the Joint Committee upon a Motion "That the report of the Joint Committee on..... (subject) be approved" and the Senate shall vote to approve or reject the Motion.

If the Motion under paragraph (3) is-

- (a) rejected, the Clerk shall send a message to the National Assembly conveying the resolution of the Senate and paragraph (5) shall apply; or
- (b) agreed to, the Clerk shall send a message to the National Assembly conveying the resolution of the Senate, and if the National Assembly has similarly agreed to the Motion, and the Bill originated from the Senate, the Speaker shall, within seven days of the resolution of the Senate, resubmit the Bill to the President for assent.

Where the Joint Committee fails to submit a report under paragraph (2), or the report of the Joint Committee is to the effect that the Committee has failed to agree to the President's reservations or where the Joint Committee fails to agree on a version of proposed amendments to the President's reservations, the President's

reservations shall be taken to have been approved by Parliament upon the laying of the report on the Table of the Senate under paragraph (2).

Honourable Senators,

It is to be observed that the Standing Orders of both Houses provide for the establishment of a Joint Committee to consider the President's reservations on a Bill. The mechanism of a Joint Committee to consider a Presidential Memorandum on a Bill is a most important one. It is based on the recognition that the Presidential Memorandum comes at the end of a legislative process in which Parliament (by which to say both Houses of Parliament as a single entity) has considered and concluded the legislative process and agreed fully and in every respect on the version of the Bill that is to become law and has presented it to the President for assent. The President, in returning a Memorandum for reconsideration, is therefore addressing Parliament on the outcome of its legislative process. The two Houses therefore, having previously concurred on the Bill, need to have opportunity to jointly consider the President's reservations on their Bill.

However, this does not take away the prerogative of each House to make a separate decision on the Presidential Memorandum. But such a decision must be informed by the views of the other partner to the process of making that Bill. This is particularly useful for legislative efficiency because the consideration of a Presidential Memorandum, unlike the consideration of a Bill, has no opportunity for mediation in a Mediation Committee. The Joint Committee, even though it has some similarities with a Mediation Committee, is not a Mediation Committee. Its only role is to enable both Houses to discuss the President's reservations on a Bill and to see whether an agreed version on the President's reservations can be arrived at. This is so only for the purpose of avoiding a situation where the Houses might have agreed on the manner in which to proceed on a Memorandum if only each House had known what the other would propose. The Joint Committee's role must also be understood in the context of Article 115 of the Constitution which provides for such a high threshold for amendment of a Presidential Memorandum that anything short of full agreement by both Houses leads to the President's reservations prevailing over Parliament's position.

Unlike the Mediation Committee in which disagreement leads to the defeat of a Bill and technically allows the Houses another chance at fresh legislation, failure to agree on a Presidential Memorandum leads to the enactment of the Bill in a manner sought by the President despite any reservations that one or both of the Houses may have. The importance of seeking a collective parliamentary position at the outset cannot therefore be gainsaid.

Honourable Senators,

Concerning the process of disposal of a report of a Joint Committee once laid in the Senate, I have noted that standing order 158(5) provides for a scenario where the President's reservations shall be taken to have been approved by Parliament upon the laying of the report of a Joint Committee in the Senate. This is to occur where the report of the Joint Committee is to the effect that the Committee has failed to agree to the President's reservations or where the Joint Committee fails to agree on a version of proposed amendments to the President's reservations.

While this may be aimed at ensuring the expeditious disposal of the Presidential Memorandum, I do not find that it accords with the Constitution which requires at Article 115 that Parliament as an entity, and each House specifically, pronounces itself on the Presidential Memorandum by-

- amending the Bill in light of the President's reservations;
- passing the Bill with amendments that do not fully accommodate the President's reservations.

To the extent that standing order 158(5) of the Senate Standing Orders provides for a "*deeming*" of approval of the President's reservations upon laying of the Report on the table of the Senate, without consideration by the Senate, it does not accord with Article 115 of the Constitution and it must therefore yield to Article 115. I must hasten to add, however, that this finding extends only to standing order 158(5) of the Senate Standing Orders and not to the entire standing order 158.

Accordingly, pursuant to standing order 1, I rule that if the Joint Committee fails to submit a report, or the report of the Joint Committee is to the effect that the Joint Committee has failed to agree to the President's reservations, or where the Joint Committee fails to agree on a version of proposed amendments to the President's reservations, the Senate shall consider a Motion to be moved by a Senator who is a member of the Joint Committee **"That the Senate approves the Bill fully accommodating the President's reservations"**. A Message communicating the resolution of the Senate on the Motion shall thereafter be sent to the National Assembly.

In accordance with Article 115 of the Constitution, it should be noted that a Motion to approve the President's reservations fully accommodating the President's reservations is approved if-

it is passed by a majority of the delegations in the Senate; or
no amendment to it secures the affirmative vote of two-thirds of the delegations in the Senate; or
the requisite majority of twenty-four delegations to pass it is not obtained when a vote is called.

Honourable Senators,

I wish to observe that the Message received from the National Assembly, apart from notifying the Senate of the receipt by Parliament of the Presidential Memorandum, as it should, appears to suggest that the National Assembly after receiving the Presidential Memorandum, proceeded to consider the Memorandum and to pass the Bill fully accommodating the President's reservations. This appears to have proceeded in a manner otherwise than that contemplated under standing order 155 of the National Assembly Standing Orders, which is replicated as standing order 158 of the Senate Standing Orders. With tremendous respect to the other House, this failure to observe the provisions of the Standing Orders which apply to both Houses puts us in some difficulty.

As a Legislature, it is imperative that we ensure compliance with the law and with our respective Standing Orders, more so where the Standing Orders provide for procedures governing Joint Committees. While the National Assembly is perfectly in order to determine for itself how it shall transact the business peculiarly in its own domain, no such prerogative can extend to a process which by the Standing Orders of both Houses requires Parliament, as an entity, to undertake a particular action or process. In this case, standing orders 158 and 155 of the Senate and the National Assembly Standing Orders, respectively, expressly require that both Houses appoint a Joint Committee to consider the Presidential Memorandum. I am unable to see how the National Assembly, without recourse to the Senate, unilaterally ignored, bypassed and or neglected to observe its procedures and went ahead to dispose of the Bill as if this procedure did not exist, and now invites this House to complicity in that scheme, after the fact.

A correct reading of Article 3(1) of the Constitution leads to the conclusion that the obligation to *"respect, uphold and defend"* the Constitution, including the Standing Orders which are made pursuant to Article 124 of the Constitution, is an obligation on all persons, jointly and severally. It would therefore afford no defence to any person on a charge of violation of the Constitution to claim that another person had similarly violated the Constitution or the laws.

Honourable Senators,

In the event, I hereby rule that the Presidential Memorandum on the Public Procurement and Asset Bill, 2014 be considered in accordance with Article 115 of the Constitution and standing order 158 of the Senate Standing Orders, subject only to the qualification that I have made regarding standing order 158(5).

Accordingly, for the Senate, in accordance with Article 115 of the Constitution and standing orders 158(1) and 216 of the Senate Standing Orders, the Rules and Business Committee, in consultation with the parliamentary parties have nominated the following Senators to serve on the Joint Committee on the

Presidential Memorandum on the Public Procurement and Disposal Bill, National Assembly Bills No. 40 of 2014-

Sen. Billow Kerrow

Sen. Beatrice Elachi

Sen. Mutahi Kagwe

Sen. (Prof.) Anyang' Nyong'o

Sen. (Dr.) Agnes Zani

A Motion for the appointment of these five Senators to the Joint Committee shall be moved at the appropriate time this afternoon. Thereafter, a Message regarding the appointment of the Senators to the Joint Committee shall be transmitted to the National Assembly in accordance with rule 9(2) of the Houses of Parliament (Joint Sitzings) Rules which appear as the Fourth Schedule to the Senate Standing Orders.

I thank you."

4. **NOTICE OF MOTION** – (The Deputy Senate Majority Leader)

THAT, WHEREAS the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014) was passed by Senate on 20th May, 2015 and by the National Assembly on the 26th May, 2015.

AND WHEREAS the Public Procurement and Asset Disposal Bill, was presented to His Excellency the President for assent in accordance with the provisions of the Constitution on 27th May, 2015;

AND WHEREAS His Excellency the President declined to assent to the Public Procurement and Asset Disposal Bill, and sent a memorandum to Parliament on 10th June, 2015;

NOW THEREFORE pursuant to Article 115 of the Constitution and Standing Order Nos 158, 216 and the Fourth Schedule of the Senate Standing Orders, the Senate resolves to appoint the following Senators to the Joint Committee to consider the memorandum by His Excellency the President on the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014).

1. Sen. Billow Kerrow;
2. Sen. Beatrice Elachi;
3. Sen. Mutahi Kagwe;
4. Sen. (Prof.) Anyang' Nyong'o; and
5. Sen. (Dr.) Agnes Zani

5. **NOTICE OF MOTION** – (The Deputy Senate Majority Leader)

THAT, pursuant to Article 124 (1) of the Constitution, the Standing Orders of the Senate and the Resolution of the Senate during the Special Sitting of the Senate held on Monday, 15th June, 2015, the Senate approves the following Senators as Members of the Select Committee on Legal and Constitutional Review:-

1. Sen. Kipchumba Murkomen
2. Sen. Kiraitu Murungi
3. Sen. Naisula Lesuuda
4. Sen. (Eng.) Muriuki Karue
5. Sen. Billow Kerrow
6. Sen. James Orengo
7. Sen. (Dr.) Boni Khalwale
8. Sen. Mutula Kilonzo Junior
9. Sen. Halima Abdille

6. **STATEMENTS**

The following Statements were issued pursuant to Standing Order 45(2) (b)-

- i) The vice-Chairperson of the Standing Committee on Agriculture, Livestock and Fisheries issued a Statement sought by the Nominated Senator (Sen. Mvita) regarding genetically modified organisms.

Thereupon, the vice-Chairperson reported that the Government of Kenya approved the National Biotechnology Policy in 2006 and further enacted the Biosafety Act in 2009 and the National Biosafety Authority was established in 2010. The National Biosafety Authority provides the regulatory and institutional framework for oversight on the safety of genetically modified foods for human consumption and the environment.

The vice-Chairperson further stated that biotechnology is one of the tools that can be used to address food security under harsh climatic conditions and that this could be achieved through modification of genetics of crop varieties to withstand drought and other abiotic stresses. The Government of Kenya is taking several steps to enhance food security in the country including subsidized fertilizer programme whose objective is to increase access and utilization of fertilizer with a focus on small holder farmers.

The vice-Chairperson further informed the Senate that Water Efficient Maize for Africa (WEMA) is a public-private partnership consortium to develop and deploy royalty – free African drought – tolerant and insect – pest protected white maize varieties to farmers and that the African Technology Foundation (AATF) based in Nairobi is leading the partnership.

- ii) The vice-Chairperson of the Standing Committee on Land and Natural Resources issued a Statement sought by the Senator for Nyamira County (Sen. Okong'o) regarding the construction of a petrol station on riparian land at Kinate junction in West Mugirango Constituency.

Thereupon, the vice-Chairperson informed the Senate that there are a number of court cases touching on the Konate petrol station in Nyamira County and that the principle of sub-judice does not allow for comments and deliberations on matters before a court of law.

Consequently, the vice-Chairperson committed to issue a full report upon finalization of the cases related to the construction of the said petrol station.

7. **MOTION- APPOINTMENT OF SENATORS TO THE JOINT COMMITTEE ON THE MEMORANDUM BY HIS EXCELLENCY THE PRESIDENT ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL, (NATIONAL ASSEMBLY BILL NO. 40 OF 2014)**

Motion made and Question proposed-

THAT, WHEREAS the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014) was passed by Senate on 20th May, 2015 and by the National Assembly on the 26th May, 2015.

AND WHEREAS the Public Procurement and Asset Disposal Bill, was presented to His Excellency the President for assent in accordance with the provisions of the Constitution on 27th May, 2015;

AND WHEREAS His Excellency the President declined to assent to the Public Procurement and Asset Disposal Bill, and sent a memorandum to Parliament on 10th June, 2015;

NOW THEREFORE pursuant to Article 115 of the Constitution and Standing Order Nos 158, 216 and the Fourth Schedule of the Senate Standing Orders, the Senate resolves to appoint the following Senators to the Joint Committee to consider the memorandum by His Excellency the President on the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014).

1. Sen. Billow Kerrow;
2. Sen. Beatrice Elachi;
3. Sen. Mutahi Kagwe;
4. Sen. (Prof.) Anyang' Nyong'o; and
5. Sen. (Dr.) Agnes Zani

(Sen. Charles Keter on behalf of the Senate Majority Leader)

Debate arising;

And there being no other Senator willing to contribute;

Mover Replied;

Before the Question was put, and pursuant to Standing Order No. 72, the Speaker informed the House that the Motion did not affect Counties.

Question put and agreed to.

RESOLVED ACCORDINGLY

THAT, WHEREAS the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014) was passed by Senate on 20th May, 2015 and by the National Assembly on the 26th May, 2015.

AND WHEREAS the Public Procurement and Asset Disposal Bill, was presented to His Excellency the President for assent in accordance with the provisions of the Constitution on 27th May, 2015;

AND WHEREAS His Excellency the President declined to assent to the Public Procurement and Asset Disposal Bill, and sent a memorandum to Parliament on 10th June, 2015;

NOW THEREFORE pursuant to Article 115 of the Constitution and Standing Order Nos 158, 216 and the Fourth Schedule of the Senate Standing Orders, the Senate resolves to appoint the following Senators to the Joint Committee to consider the memorandum by His Excellency the President on the Public Procurement and Asset Disposal Bill, (National Assembly Bill No. 40 of 2014).

1. Sen. Billow Kerrow;
2. Sen. Beatrice Elachi;
3. Sen. Mutahi Kagwe;
4. Sen. (Prof.) Anyang' Nyong'o; and
5. Sen. (Dr.) Agnes Zani

8. **MOTION- APPOINTMENT OF SENATORS TO SERVE IN A SELECT COMMITTEE ON LEGAL AND CONSTITUTIONAL REVIEW**

Motion made and Question proposed-

THAT, pursuant to Article 124 (1) of the Constitution, the Standing Orders of the Senate and the Resolution of the Senate during the Special Sitting of the Senate held on Monday, 15th June, 2015, the Senate approves the following Senators as Members of the Select Committee on Legal and Constitutional Review:-

1. Sen. Kipchumba Murkomen
2. Sen. Kiraitu Murungi
3. Sen. Naisula Lesuuda
4. Sen. (Eng.) Muriuki Karue
5. Sen. Billow Kerrow
6. Sen. James Orengo
7. Sen. (Dr.) Boni Khalwale

8. Sen. Mutula Kilonzo Junior

9. Sen. Halima Abdille

(The Senate Majority Whip on behalf of Senate Majority Leader)

Debate arising;

And there being no other Senator willing to contribute;

Mover replied;

Before the Question was put, and pursuant to Standing Order No. 72, the Temporary Speaker (Sen. Murkomen) informed the House that the Motion did not affect Counties.

Question put and agreed to.

RESOLVED ACCORDINGLY

THAT, pursuant to Article 124 (1) of the Constitution, the Standing Orders of the Senate and the Resolution of the Senate during the Special Sitting of the Senate held on Monday, 15th June, 2015, the Senate approves the following Senators as Members of the Select Committee on Legal and Constitutional Review:-

1. Sen. Kipchumba Murkomen
2. Sen. Kiraitu Murungi
3. Sen. Naisula Lesuuda
4. Sen. (Eng.) Muriuki Karue
5. Sen. Billow Kerrow
6. Sen. James Orengo
7. Sen. (Dr.) Boni Khalwale
8. Sen. Mutula Kilonzo Junior
9. Sen. Halima Abdille

And the time being thirty minutes past six O'clock, the Temporary Speaker (Sen. Murkomen) adjourned the business of the Senate without Question put, pursuant to the Standing Orders.

9. **SENATE ROSE** - at thirty minutes past six O'clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Wednesday, June 24, 2015 at 2.30 p.m.*

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