

# PARLIAMENT OF KENYA

## THE SENATE

### THE HANSARD

Thursday, 3<sup>rd</sup> November, 2016

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

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

#### PRAYER

**The Speaker** (Hon. Ethuro): What is it, Sen. Sijeny?

**Sen. Sijeny:** Mr. Speaker, Sir, I was supposed to table a report but it has not arrived. I ask for your indulgence.

**The Speaker** (Hon. Ethuro): Is that a reason to intervene, surely? Proceed to the next order.

#### STATEMENTS

**The Speaker** (Hon. Ethuro): There are no requests for statements. Let us go to responses.

#### ALLEGED MISAPPROPRIATION AND LOSS OF PUBLIC FUNDS IN THE MINISTRY OF HEALTH

Proceed, Sen. (Dr.) Machage, Chairperson of the Standing Committee on Health.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I sought a response from the Ministry regarding the safety and security of Mr. Bernard Muchere. I was advised as follows;

(i) He has not received any threats to his life.

(ii) He has not reported any matter to the police concerning his safety and security.

However, the Committee has written to the Cabinet Secretary for the Ministry of Interior and Co-ordination of National Government and requested that Mr. Muchere's security is ensured.

**The Senate Minority Leader** (Sen. Wetangula): Mr. Speaker, Sir, it would be helpful if the Chairperson told us who has given him the information. It could be the same people threatening Mr. Muchere. It was widely covered in the electronic and print media that the internal auditor at the Ministry of Health who exposed the fraud that has now gone viral in the country had reported threats to his life.

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We know that crime fights back anytime they are exposed. It would be helpful for the Chairperson to tell us whether he got that response from those who are threatening Mr. Muchere. Then in that case, it is not helpful.

**The Speaker** (Hon. Ethuro): Order, Sen. Wetangula! You had already made that request. Let the Chairperson respond.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, had the Senator listened to me carefully, I said I talked, myself to Mr. Muchere, personally!

**The Speaker** (Hon. Ethuro): Order, Sen. (Dr.) Machage. I did not hear that.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I said I sought a response.

**The Speaker** (Hon. Ethuro): That is correct.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I believe that meant what I have just said.

*(Laughter)*

**The Speaker** (Hon. Ethuro): No, you did not say that. That is why the clarification was being sought. When do we expect the substantive Statement?

What is it, Sen. Sang?

**Sen. Sang:** On a point of order, Mr. Speaker, Sir. Could the Chairperson confirm that that response by the said auditor was not also induced? He could have been threatened not to give information that he is under threat. It is possible that the said auditor, having been threatened and the story covered in the media that he would be threatened not to talk anymore. Since he is a doctor, he could decipher the demeanor of the said auditor. Can he confirm that the auditor was not under any duress?

**The Speaker** (Hon. Ethuro): Respond, Sen. (Dr.) Machage.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, whereas that is a reality, it was not possible for me to read that kind of insinuation that he was responding that way because he was threatened not to respond the way he should have. I believe he was sincere in his response. In any case, it is very difficult to read somebody's mind unless one is a qualified psychologist, which I am not.

#### PROLONGED DROUGHT AND FAMINE IN VARIOUS COUNTIES

**The Speaker** (Hon. Ethuro): Chairperson of the Standing Committee on Devolved Governments, yesterday, we allowed a 24-hour notice for the benefit of Sen. Bule. We agreed to proceed without further reference to him.

Proceed, Sen. (Prof.) Lesan!

**Sen. (Prof.) Lesan:** Mr. Speaker, Sir, I walked in late because I have been out there making an attempt to comply with your order. We have tried the best we can. The earliest we can get the report from the Ministry of Devolution and Planning is on Sunday. However, we are not sitting until Tuesday. Therefore, the earliest I can bring the report to the House is on Tuesday. We have tried as much as we can to make the Ministry understand the urgency. They assured me that as they prepare a report for the House, they are carrying out activities in the various affected counties in the country to alleviate the suffering caused by the famine and drought in some of those areas.

One particular area they mentioned, and which I know they are doing something is the Tana River County. They have released stocks of grain which was available from the Galana Irrigation Scheme. They are also doing some work in Kajiado and parts of West Pokot. I request the House to allow me to continue following this Statement so that it can be brought to the House on Tuesday afternoon.

**The Speaker** (Hon. Ethuro): The Statement should be brought to the House on Tuesday afternoon. The Chair is just curious that you will be working on a Sunday which means they will be working on a Saturday too. Those two days are not usually working days.

**Sen. (Prof.) Lesan:** Mr. Speaker, Sir, this is an emergency as you have told me. We have told them that this question needs to be answered in the House. They had assured that we would get the response this next week. They said they wanted to be sure that the report is here. They have asked the officers who are dealing with this to work on this over the weekend.

**The Speaker** (Hon. Ethuro): Order, Chairperson. I will save you the trouble. Get the report on Monday morning at 8.00 a.m. We will not open our offices on Sunday to await your report.

What is, Sen. Haji?

**Sen. Haji:** On a point of order, Mr. Speaker, Sir. From the statement read by Sen. (Prof.) Lesan, he seems to have concentrated on Tana River because the questioner is from Tana River County and Kajiado because Sen. Mositet raised the same issue yesterday. I hope on Tuesday, he will bring a report on the whole country.

**Sen. Billow:** Mr. Speaker, Sir, unless the Ministry does not want to give the Chairperson the response, we know for a fact and it is in the public domain that the Ministry has already developed an elaborate programme for the drought. They have already allocated up to Kshs5 billion. They have already started distributing food in Samburu and many other places. Therefore, it is a question of whether they are committed to give a response.

**The Senate Minority Leader** (Sen. Wetangula): Mr. Speaker, Sir, indeed the question came from Sen. Bule. However, in several riders, we asked the Chairperson to give the Senate the entire profile of the famine situation and food shortage in the country. In so doing, news have come forth that, in fact, what is lacking in this country is not food. What is lacking is proper planning and movement of food from areas where there is food to areas where there is no food; that is, in Nandi, Trans-Nzoia, Uasin Gishu, Bungoma, Kakamega---

**The Speaker** (Hon. Ethuro): Order! Sen. Wetangula, you must learn to take the Chair seriously. There is no matter before us. What are you prosecuting?

*(Sen. Wetangula spoke off record)*

Order! Sen. Wetangula, this House must have rules. The Statement will be here on Tuesday. The Chair knows the mood of the House. That matter was visited and nothing has changed.

Chairman, you talked of attempts for Tana River and Kajiado counties but it does not inspire confidence. You should give some figures and when the distribution took place.

**Sen. (Prof.) Lesan:** Mr. Speaker, Sir, the report has delayed because the famine is experienced countrywide and it affects many pockets of the country. They are attempting to give us a comprehensive report of both what they are doing in terms of the activities going on now and what plans they have for the rest of the country and that will answer the question. I also expect to be informed of other issues that I have raised to them on phone because that might be necessary. It is just that we want to give a comprehensive answer.

**The Speaker** (Hon. Ethuro): It is so ordered.

*(Statement deferred)*

PLIGHT OF RESIDENTS OF KASARANI,  
MALEWA WARD, GILGIL CONSTITUENCY

**The Speaker** (Hon. Ethuro): Is the Chairman of the Committee on Legal Affairs and Human Rights in? If he is not in, let us have the Vice Chair, Sen. Sang.

**Sen. Sang:** Mr. Speaker, Sir, unfortunately, we have not received a response from the Ministry. Our staff went to the Ministry yesterday but nothing is forthcoming as at now. I request that you allow me to update this House next week on Tuesday.

**Sen. Wangari:** Mr. Speaker, Sir, the reason I asked for the Statement is because every time there is recruitment of police, Kenya Defence Forces (KDF) and the National Youth Service (NYS), the children from Malewa Ward in Gilgil are always told to go to Naivasha---

**The Speaker** (Hon. Ethuro): Order, Senator. We are not prosecuting the House. The issue is whether Tuesday is okay for the response.

**Sen. Wangari:** Mr. Speaker, Sir, since the Chair was away, I agree that next week on Tuesday is okay.

**The Speaker** (Hon. Ethuro): It is so directed.

*(Statement deferred)*

Let us move to Statement (d)

PLIGHT OF KENYAN REFUGEES FROM UGANDA CAMPING  
AT THE ENTRANCE OF PARLIAMENT BUILDING

**Sen. Haji:** Mr. Speaker, Sir, this Statement was requested by none other than the distinguished Senator, Moses Wetangula. Part of the Statement was issued on 19<sup>th</sup> October, 2016. However, I want to read this supplementary Statement on questions sought by Sen. (Dr.) Khalwale, Sen. Sijeny and Sen. (Dr.) Machage. The first question was why the refugees are finding it difficult to go back to their initial land now that they

left Uganda yet there is no record in Lwakhakha, Malaba or Busia of any property belonging to them – be it land or shop – having been taken over by the locals.

The second question was about how many children and women have been left suffering out in the street. The third question was about the measures the Government is taking to secure their good health from the scorching heat and cold in the night and finally whether these IDPs can be given Kshs400,000 each, similar to what was given to the other IDPs who were resettled.

Mr. Speaker, Sir, the Government is aware that a group of returnees is currently camping along Parliament Road. The Government is further aware that a team visited Kiryandogo in Uganda in order to facilitate the repatriation of Kenyan refugees. Subsequently, on 21<sup>st</sup> November, 2014, the Government set up a taskforce with the mandate to profile and work out modalities of repatriation of the refugees to Kenya. In collaboration with the Ugandan Government, the United Nations High Commission on Refugees (UNHCR) and refugees' leadership, the task force conducted the profiling exercise of the refugees between 14<sup>th</sup> and 16<sup>th</sup> December, 2014.

From the profiling exercise, 246 households with 979 family members were identified for repatriation; 42 families with 72 family members indicated their unwillingness to return; 21 households were rejected on account of lacking the necessary proof of their status; 43 households were not available for profiling while 47 households were asylum seekers. From the report, it is only 246 households that were cleared to be repatriated and all of them have since been paid between Kshs100,000 for families of between one to three members and Kshs150,000 for families with four or more members.

Mr. Speaker, Sir, from the original list documented by the taskforce, the returnees had indicated their home areas where they preferred to be returned. It revealed that they came from across the country, but majority were from Western Kenya and Rift Valley. The areas included:-

- (i) Coast – Mombasa, Voi, Lamu, Malindi and Kilifi;
- (ii) Rift Valley – Eldoret, Nakuru, Londiani, Molo, Naivasha, Marakwet, Maralal, Gilgil, Kilgoris and Isiolo;
- (iii) Western Kenya – Mount Elgon, Kitale, Busia, Trans Nzoia, Bungoma, Cherangani, Malaba and Turbo;
- (iv) Central Kenya – Murang'a, Limuru, Kiambu, Meru, Nyandarua, Nyahururu, Kinangop, Thika, Nyeri and Nanyuki;
- (v) Eastern Kenya – Athi River, Kitui and Mwingi;
- (vi) Kisumu; and,
- (vii) Nairobi.

Mr. Speaker, Sir, as stated in the taskforce report, only 246 households were cleared for repatriation. However, during the repatriation process, most of the Kenyan refugees in Uganda decided to return home. This meant that even the households that had not been cleared by the taskforce were transported along.

On closure, a scrutiny of a list provided by the leaders of the returnees, there is discrepancy between the list provided by the leaders of the returnees and that held by the Government. It is suspected that either some of the returnees are not Post-Election Violence (PEV) victims or they could be people out to benefit from the process. Alternatively, the returnees could have split families where children are presenting

themselves as households yet they may be family members of those who have already been compensated among the 246.

The UNHCR is helping the Government to sort out the discrepancies to avoid a situation where some of the returnees take advantage of the process. Another dilemma is that those already compensated are on the streets demanding more compensation and assistance. If this is allowed, it means that the demands will never end.

Mr. Speaker, Sir, a tripartite meeting held on Monday, 17<sup>th</sup> October, 2016, between the Government, UNHCR and the leaders of returnees agreed that the returnees' leadership will work with the Government and the UNHCR to sort out the issues raised in their petition within two weeks. However, the returnees still insist on remaining along the road until a solution to their issues is found. I do not know whether that is overtaken by the fact that they are no longer here right now.

**The Senate Minority Leader** (Sen. Wetangula): Mr. Speaker, Sir, indeed, as the distinguished Chairman ended, those Kenyans who were camping at the Gate of Parliament are not there anymore. Could he tell the House where they are because I heard on radio one lady protesting that they were bundled into vehicles and taken to Nakuru? That is not the issue. The issue is if they were Kenyan refugees in Uganda, were they refugees who went to Uganda as a consequence of the PEV of 2008? If they were, then the areas the Chairman has enumerated as being places where they came from are suspect because we know the epicentre of the post-election skirmishes. These were Naivasha, Eldoret or Uasin Gishu, parts of western, Nyanza and Nairobi. There were no post-election difficulties in Murang'a, Nyeri and places that he has counted. So, are these Kenyans who were in Uganda for other reasons or they went to Uganda because of PEV?

Secondly and lastly, the people who went to Uganda because of violence that erupted after elections must either have been business people owning shops or land or a bit of both. What happened to their properties when they left the country? When the Government went to Uganda to ask them to come back to Kenya, why did the Government abandon them along the way and let them come and stay at the Gate of Parliament for two-and-a-half weeks? On a previous Saturday, a child was born at the Gate of Parliament by one of the returnees and the Government continued to ignore their plight. Tell us!

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, could the Chair confirm or deny that the so called IDPs were actually transported in an inhumane way and assaulted in the process of that exercise to the extent that some had to get medical attention?

**Sen. (Prof.) Anyang'-Nyong'o:** Mr. Speaker, Sir, I would like to get information from the Chairman concerning whether the Ministry has information up to date regarding where the various IDPs who went to Uganda or elsewhere and their origin in terms of counties. If that data is still available, what is the Government doing to resettle them?

**Sen. Billow:** Mr. Speaker, Sir, it is clear that this Government does not have a coherent policy regarding IDPs. We have IDPs problems across this country in many places. On this particular one, I just wanted to know this because we have a Government in place. Could the Chairman explain who was responsible for the midnight exodus of the refugees from the Gate of Parliament? I am sure the Government works even at midnight. Could he explain who did that? If it was the Government, why would it engage in a

banditry kind of action moving people in the middle of nowhere? Is that the way we treat our people? Could the Chairman explain?

**Sen. Kembi-Gitura:** Mr. Speaker, Sir, on the response given by the Chairman of the Committee---

**The Speaker** (Hon. Ethuro): Order, Deputy Speaker!

**Sen. Kembi-Gitura:** Mr. Speaker, Sir, I request you to accept my apology. On the answer given by the Chairman of the Committee, I am personally interested in the question of integrated Internally Displaced Persons (IDPs). It appears that they were not considered in this statement although we have raised that issue many times. Is the Chairman satisfied that the integrated IDPs who have been recorded at every County Commissioners' office – at least in Murang'a we have the record – have been settled financially or that arrangements have been made for them to go back to secured land which they used to possess before the rising of the post- election violence?

**The Speaker** (Hon. Ethuro): The last two from Sen. Sijeny and Sen. Sang.

**Sen. Sijeny:** Mr. Speaker, Sir, the Chairman has not given us the data concerning the number of women especially the ones who were out here and what precautions are being taken to ensure that the women and the young children even the one who was delivered there are well taken of and they have all the essentials as provided for in the Constitution.

**The Speaker** (Hon. Ethuro): Sen. Sang!

**Sen. Sang:** Mr. Speaker, Sir, could the Chair also provide an inventory of the land belonging to all the IDPs who were uprooted from their homes – if at all they were – and who were resettled elsewhere so that we know what happened to their parcels of land and who is occupying them. Finally, in terms of the midnight operation, could the Chairman confirm that it is the Government policy that every time they engage in such an exercise, it has to be done at night?

**The Speaker** (Hon. Ethuro): Let us allow the last one from Sen. Karaba!

**Sen. Karaba:** Mr. Speaker, Sir, it is like we are dealing with an amorphous problem. Can we be assured by the Chairman that whatever happened in Kenya that time that we have refugees moving to the neighbouring countries would never happen again? We are dealing with the Government. The Government is there to protect every Kenyan. It is like we can allow some people to occupy other people's property as others turn to be refugees. Has it happened in other places?

**The Speaker** (Hon. Ethuro): Order, Sen. Karaba! Chairman, proceed to respond.

**Sen. Haji:** Mr. Speaker, Sir, from the reaction of the House, I do not need to mention all those Senators who have asked this supplementary questions. I strongly feel that they are all valid and important. They need to be attended to. Therefore, we shall endeavor to get an appropriate statement from the Cabinet Secretary. This statement has taken over two weeks. The Senators should bear with us that in another two weeks, we will be required to give an elaborate and proper feedback to this request.

**The Speaker** (Hon. Ethuro): It is so ordered. Next statement! What is it, Sen. Sang?

**Sen. Sang:** On a point of order, Mr. Speaker, Sir. Whereas I appreciate your direction on the two weeks, I would be requesting that you dissect the statement. There are more clarifications that we sought. A specific one as to the whereabouts of the

refugees, the Chairman should be able to give an indication in the earliest opportunity possible. That may be Tuesday next week. He needs to tell us the whereabouts of those individuals.

**The Speaker** (Hon. Ethuro): Chairman, I think that is important. I would add that you tell us the destination as related to the origin and who was responsible for the movement. So, you need to confirm whether it was a Government operation and if so, where were they taken?

**Sen. Haji:** Mr. Speaker, Sir, I will try to bring the answer on Thursday next week.

**The Speaker** (Hon. Ethuro): It is so ordered.

Chairman of the Committee on Education.

#### IMPLEMENTATION OF THE BASIC EDUCATION ACT (2013) ON OUTLAWING CORPORAL PUNISHMENT IN SCHOOLS

**Sen. Karaba:** Mr. Speaker, Sir, I was there yesterday after a very serious discussion in the Senate. I personally went to see the Cabinet Secretary and I found out that he had already left for Mombasa. I saw the statement on his table but it is not signed. So, we are waiting until he comes back to sign the statement so that it can be tabled here next week. I am taking it seriously. The questioner is also not in.

**The Speaker** (Hon. Ethuro): Order, Chairman! How do you access the Cabinet Secretary's office including the desk in his absence? How can the Cabinet Secretary for Education be so serious to the extent that he does not appreciate digital platforms that the statement can be signed wherever he is and be transmitted electronically? What is it, Sen. Sang?

**Sen. Sang:** On a point of order, Mr. Speaker, Sir. While appreciating the enthusiasm by the Chairman of the Committee that he might have given the energy to get to the desk of the Cabinet Secretary, now that he confirms that he saw the letter, could he give a highlight of the statement if he read it?

**The Speaker** (Hon. Ethuro): Order, Sen. Sang! We do not operate that way. We deal with certified statements. What is it, Sen. Kembi-Gitura?

**Sen. Kembi-Gitura:** On a point of order, Mr. Speaker, Sir. I am getting concerned about the Chairmen of Committees having to hustle by going to the offices of Cabinet Secretaries to follow up or to push them to do what they should be doing. Every day we listen about this issue, it is about chairmen saying how they have hustled so much and how many trips they have made to the offices. This cannot be allowed to go on because chairmen of committees are supposed to transmit the requests and get answers in good time without them being reduced to messengers. It is not acceptable. It is time we hold meetings between the Senate, chairmen of Committees and the Cabinet offices so that they can understand that a chairman of a committee is an important person. He has a duty to do and they cannot be reduced to be running up and down following statements which is something that Cabinet Secretaries and their officers should do. It is degenerating to a serious situation when we hear that a Senator has been camping at the Cabinet Secretary's office. Why should that happen? Why should a Chairman of a Senate Committee be camping outside an office even now forcing Sen. Karaba to peep into his office to see that the statement is lying on the desk unsigned? It is wrong. We need to---

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**The Speaker** (Hon. Ethuro): Order, Sen. Kembi-Gitura! I did not stop you because it is not a grave matter. I stopped you because you are becoming repetitive and it does not make it more grave. You have put it well and I want to encourage the chairs; the Cabinet Secretaries are not doing you a favour. This is a constitutional responsibility which they must deliver. So, do not feel frustrated as to camp at their offices or if you are so inclined like Sen. Karaba to even gain illegal access actually up to the desk, at least to have a peep at the copy to satisfy yourself that something is happening, you know it does not happen until it is signed. So, as far as I am concerned, nothing has happened because there is no response that you have brought to the House.

The suggestion made by Sen. Kembi-Gitura is definitely noted. We will endeavour to may be look for at a tripartite arrangement to clarify some of these roles if there are people who are not convinced.

**Sen. (Prof.) Anyang'-Nyong'o**: Mr. Speaker, Sir, the issue that Sen. Kembi-Gitura has raised raises a much more fundamental issue. That is in the way in which the Senate manages the answers to this question. I do not think that the answer to a question from a Cabinet Secretary (CS) should depend on the Chairperson interacting with the CS's office nor do I think it should be the responsibility of a chairperson to search for that answer anywhere. That should be the responsibility of a particular office in charge of answers to questions in the Senate. That office should simply convey an answer to a particular chairperson and not devolve that function to chairpersons.

**The Speaker** (Hon. Ethuro): Sen. (Prof.) Anyang'-Nyong'o, you are repeating what the situation is. However, circumstances are such that the chairpersons will wait for those statements to come, but they are not forthcoming. When answers are brought to the House, we deal with chairpersons and not that other office. So, we can understand where the chairpersons are coming from.

*(Sen. (Prof.) Anyang'-Nyong'o spoke off record)*

Order, Sen. (Prof.) Anyang'-Nyong'o! There is no amount of deliberations here that will save the situation.

I said that Sen. Kembi-Gitura had put a proposition which we will consider. That is a way of solving the issue. For now, what you have said is correct. What everybody knows is correct, but it is not working. So, we must find ways of making it work.

**Sen. Karaba**: Mr. Speaker, Sir, I am of the opinion that your office writes a very strong letter to all the CSs warning that it is important that they adhere to whatever comes from the Senate. If it is from the Speaker's office, they will understand the seriousness. We are really frustrated by those officers. We have gone to an extent where we even try to plead with them. It is like those are our statements yet when we come here, not many people will understand the predicament we face. We are faced with an avalanche of questions and insinuations which are not very palpable to some of us. So, please, intervene on our behalf.

**The Speaker** (Hon. Ethuro): I hear you, Mr. Chairman.

**Sen. Ndiema**: Mr. Speaker, Sir, for those of us who have worked in the public service before, there used to be a circular which specifically said that parliamentary business takes priority over any other business. What need to be done is to ask the Head

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of the Public Service and the Secretary to the Cabinet to reinstate that circular which states that parliamentary business takes priority. That would be enough because over time, perhaps, it has been forgotten. Many of the CSs and Principal Secretaries have not gone through the system of civil service to know this. They think that parliamentary business is not their business and we are interfering with their normal duties by requiring them to respond to questions.

**Sen. (Prof.) Anyang'-Nyong'o:** On a point of information, Mr. Speaker, Sir. I would like to inform my colleague, Sen. Ndiema. Is he not aware that the most standard circular in the Jubilee Government is that looting and stealing takes priority over everything else?

*(Laughter)*

**Sen. Sang:** On a point of order, Mr. Speaker, Sir. Sen. (Prof.) Anyang'-Nyong'o has made a very serious reference to a circular in the Jubilee Government. Would I be in order to request that he tables the same circular giving details of when it was written and by whom so that we do not engage this House in a circus? Is he in order to trivialize a very important issue? He should be able to substantiate by tabling that particular circular.

**Sen. Kembi-Gitura:** On a point of order, Mr. Speaker, Sir. With great respect to Sen. (Prof.) Anyang'-Nyong'o, I do not think that that statement should be left to just go and be recorded in the HANSARD for posterity. It is a very serious statement. Sen. (Prof.) Anyang'-Nyong'o is also a very senior legislator. That statement is an extremely dangerous because he said that everybody knows that the most important circular in the Jubilee Government is the one that he has referred to. Unless he tables it because he has been a Cabinet Minister himself and he has referred to a document that he purports exists in his own words. It will be incumbent upon him to either substantiate by tabling that circular like Sen. Sang has requested or withdraw and apologise, not just to the House, but to the entire Republic.

He made it in the hallowed walls of the Senate where unless you make an order as the presiding officer of the Senate, then this is very dangerous. We are live on television talking about our nation and everybody is watching, including our children. What message is he sending out? That is extremely dangerous statement coming from such an important leader who sits as the Chairperson of the County Public Accounts and Investments Committee (CPAIC). There must be an apology given.

**Sen. Mbuvi:** On a point of order, Mr. Speaker, Sir. Is it in order for Sen. (Prof.) Anyang'-Nyong'o to talk about looting in Jubilee while he knows very well that corruption was initiated by the current Opposition leaders when they were Cabinet Ministers in the *nusu mkate* Government? He was himself mentioned in the National Hospital Insurance Fund (NHIF) scandal and the Senate Minority Leader was named in the Tokyo Embassy saga. What is he telling us? There is also the Kisumu Molasses Plant and the maize scandal. They are the initiators of corruption in this country.

**Sen. Ndiema:** On a point of order, Mr. Speaker, Sir. Sen. (Prof.) Anyang'-Nyong'o stood on a point of information and I believe he wanted me to give an okay. I do not recall allowing him to inform me. So, on what basis was he given the Floor to inform me? Who was he informing?

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**Sen. M. Kajwang:** On a point of order, Mr. Speaker, Sir. I never heard Sen. (Prof.) Anyang'-Nyong'o talk of a circular, but he gave information. So, those asking him to table the circular need to go back to the HANSARD. More substantively, the Senator for Nairobi County has made many wild allegations about so many people. That cannot be allowed to go unsubstantiated. If it is about making allegations, we can equally make allegations about the land that the good Senator took from street urchins in Pipeline, Nairobi; a matter that is before a parliamentary Committee. Would I be in order to request the Senator for Nairobi to substantiate by tabling evidence, regarding the allegations he has made against Sen. (Prof.) Anyang'-Nyong'o, the Senate Minority Leader and many other innocent Kenyans who are not in this House?

**The Speaker** (Hon. Ethuro): Order, Members. The proceedings were going on well until unsolicited information came to the Floor. I have listened to all the Members and there are five more. I feel that I should not allow them because the rate at which the deliberations are going, they may not be of any usefulness. Let me deal with the ones that are before us.

First, Sen. (Prof.) Anyang'-Nyong'o definitely talked of a circular. Sen. M. Kajwang seems to have a selective hearing. This is not even a matter of memory. He talked about a circular. He was informing Sen. Ndiema that there are no other circulars except the one he referred to. I do not want to repeat; he knows it and we all heard. He has been challenged by Sen. Sang, Sen. Kembi-Gitura and Sen. Sonko to substantiate or withdraw and apologise in the normal way we do business. So, Sen. (Prof.) Anyang'-Nyong'o has that burden to discharge.

Secondly, for the same reason, Sen. Sonko demanded substantiation or an apology. In the process, he created his own. Sen. Sonko, the wheels of justice go both ways. You will have to substantiate about Sen. (Prof.) Anyang'-Nyong'o and the Senate Minority Leader. If you fail to do so, you withdraw and apologise.

Finally, Sen. M. Kajwang could not hear what Sen. (Prof.) Anyang'-Nyong'o said. However, he was clear that he heard what Sen. Sonko said. He continued in the same trend that Sen. Sonko started and made an allegation against Sen. Sonko. To you, Sen. M. Kajwang, substantiate on the land issue against Sen. Sonko, or you withdraw and apologise.

We will proceed along those lines.

**Sen. (Prof.) Anyang'-Nyong'o:** Mr. Speaker, Sir, the effect of my statement confirms an English saying that 'the guilty are afraid.'

Secondly, I will definitely produce the circular in four days time.

**The Speaker** (Hon. Ethuro): Order, Sen. (Prof.) Anyang'-Nyong'o. The Standing Orders allow you to produce evidence in the next sitting. Being a Thursday, the next sitting is on Tuesday. Did you count Friday, Saturday, Sunday and Monday? You may wish to be on record, because the Standing Orders can only allow you to substantiate today or the next sitting. You do not have the luxury of the number of days.

**Sen. (Prof.) Anyang'-Nyong'o:** Mr. Speaker, Sir, I will do so during the next sitting.

**The Speaker** (Hon. Ethuro): Next Tuesday.

**Sen. Mbuvi:** Mr. Speaker, Sir, I will substantiate. I will come with my full dossier on Tuesday. For instance---

**The Speaker** (Hon. Ethuro): Order, Sen. Sonko! I am very clear and do not need to repeat. All those allegations that the Senators made have been exhausted. This particular session is for substantiation or you withdraw and apologise. I take it from you that you want to substantiate on Tuesday. Let us wait for that Tuesday for you to substantiate. That is the end of the matter.

**Sen. Mbuvi:** Mr. Speaker, Sir, I concur with you. On Tuesday I will come with the dossier on the National Hospital and Insurance Fund (NHIF) saga, maize scandal---

**The Speaker** (Hon. Ethuro): Order, Sen. Sonko! This is a House of rules. Once an order has been given, you are under duty to comply. You will bring the details on Tuesday; we do not need them now.

**Sen. Mbuvi:** Much obliged, Mr. Speaker, Sir. I will come with the details on Tuesday.

**The Speaker** (Hon. Ethuro): Sen. M. Kajwang.

**Sen. M. Kajwang:** Mr. Speaker, Sir, I am limited by the number of days in the Standing Orders. If I had more days, I would have substantiated. You are aware that there is a matter before the labour court.

**The Speaker** (Hon. Ethuro): Order! My instructions are clear and I am so plain today that you do not need to try to interpret my statements. Tell us whether you are substantiating and proceed, or if you are not substantiating, withdraw and apologise. If you cannot substantiate today, you have Tuesday.

For your information, Senators, I will not accept any reason for any Senator who has committed himself to Tuesday. Failure to substantiate on Tuesday, I will enforce the Standing Orders as they are.

**Sen. M. Kajwang:** Mr. Speaker, Sir, under the circumstances, I withdraw. I promise you that once the evidence is gathered, I will resurrect the matter, but for now I withdraw and apologise.

**The Speaker** (Hon. Ethuro): Order, Members. I take it that Sen. M. Kajwang has withdrawn and apologised. I take it too that Sen. (Prof.) Anyang'-Nyong'o has not substantiated and he will do so on Tuesday, which is the next sitting day as provided for under our Standing Orders. I also confirm that Sen. Mike Mbuvi Sonko, the Senator for Nairobi, has not substantiated today and he will do so on Tuesday, which is the next sitting day after today.

I want the two Senators to know that they must be in the House on Tuesday to do what they have promised the House and Kenya. Failure to do so, it cannot just be a matter of abdicating responsibility; it will meet the necessary implications as per the Standing Orders.

**Sen. Kembi-Gitura:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): Sen. Kembi-Gitura, I hope not on this matter because we have disposed of it.

**Sen. Kembi-Gitura:** Mr. Speaker, Sir, with great respect, I would like to have your direction on a small issue on this saga because it is an extremely important and deep issue. The Senator says he will substantiate on Tuesday, next week. What is the effect of a Senator coming on Tuesday and saying, "I am unable to substantiate, I now wish to withdraw and apologise?"

**Sen. Billow:** Mr. Speaker, Sir. On the same issue Sen. Kembi-Gitura has raised, I remember the Standing Order in the National Assembly was and is the practice, if you cannot substantiate at that particular sitting, then you withdraw and apologise. If you want to resurrect it in the other subsequent week, it is a different matter. However, you cannot leave that door without substantiating or withdrawing because, once it goes out, it is published and it is damaged.

**Sen. Sang:** Mr. Speaker, Sir, I appreciate the directions you have given. This being a House of debate, statements may be pronounced on the Floor, but the information or documents that you need to use to substantiate them are sometimes held by other persons other than yourself. If, for example, you go for a particular document and you know for a fact that it exists, but the very authorities that hold it, may be reluctant to give it to you. Therefore, you are then left with no other option than to appear in the House and say that you are unable to access it. So, we should have some bit of latitude because if we have a strict provision with regard to substantiation, then we will curtail debate in this House. Nobody will make an attempt to provide substantiate anything in this House.

Mr. Speaker, Sir, even as you give directions, it should be understood that most of the time the substantiation is with regard to documents that are not within Senator's possession, but other authorities that he may not have control over.

**The Speaker** (Hon. Ethuro): Order, Members! I had disposed of this matter. The Deputy Speaker should not be anticipating debate. He has attempted to go ahead of the game.

Sen. Sang, I am afraid I cannot help you. If you make an allegation, first, Standing Orders require that whatever you say should be accurate or factual. So, make an allegation knowing that you have already done your homework and you are in possession of the documents. That is the time you make the allegation. If you do not have or you are frustrated or you are unable or you cannot for one reason or the other, do not make the allegation. That is why you have the option of withdrawing and apologizing just in case it slipped your mouth without you knowing. So, it is just as simple and clear as that. However, I do not think it is as frustrating as you create the impression. The legislative history of this country is full of opportunities where Members have been able to substantiate things and carry the day. So, it is not that gloomy.

Finally, Sen. Billow, I sympathise with you. We have Senate Standing Orders not Kenya National Assembly where you served. Now you are the Senator for Mandera County. We are referring to Standing Order No.94(1). Let me just read because it is important for people to know that we are not allowing anything to go beyond what is required in our Standing Orders. It says:-

“A Senator shall be responsible for the accuracy of any facts that the Senator alleges to be true and may be required to substantiate any such facts instantly.”

That is where the Member challenges the other instantly.

Paragraph (2) says:

“If a Senator has sufficient reason to convince the Speaker that the Senator is unable to substantiate the allegations instantly, the Speaker shall require that such Senator substantiate the allegations not later than the next sitting day.”

That is why I was not agreeing with the number of days Sen. (Prof.) Anyang'-Nyong'o was talking about. I wanted him to make specific reference to the next sitting day. Today is Thursday. Our next sitting day is Tuesday, next week.

So, Sen. M. Kajwang, in anticipation of his frustrations to acquire any meaningful document, he decided to go by the first option.

Sen. Mbuvi and Sen. (Prof.) Anyang'-Nyong'o want to convince us they can do better. So, we are giving them one day. I am sure the good Lord will keep us alive until that day.

Paragraph (2) continue to read as follows:-

“The Speaker shall require that such Senator substantiates the allegations not later than the next sitting day, failure to which the Senator shall be deemed to be disorderly within the meaning of Standing Order No.110 (*Disorderly conduct*) unless the Senator withdraws the allegations and gives a suitable apology, if the Speaker so requires.”

Hon. Senator, if you are in doubt, please, consult Sen. (Dr. Machage). He is usually good at it.

Sen. Kembi-Gitura, I will invite you to wait for the substantiation. Your matter was dealing with that last wording. Unless the Senator withdraws the allegations and gives a suitable apology if the Speaker so requires. You can be sure I will require, especially if you keep us waiting.

*(Members consulted loudly)*

Order Members! That is a non-issue. We will revisit it on Tuesday, next week. We must make progress Members now. This is not a school to learn.

*(Sen. Kembi-Gitura consulted loudly)*

**The Speaker** (Hon. Ethuro): You are completely out of order, Deputy Speaker, Sen. Kembi-Gitura!

Sen. Karaba let us get your Statement on Tuesday. I am sure the Cabinet Secretary would have come back from Mombasa. Let us go to Statement (f); the Member is not here so we can keep it in abeyance.

Statement (g); the Member is not here. Statement (g).

SHOOTING OF INNOCENT CITIZENS BY ADMINISTRATION  
POLICE IN UGUNJA TOWN AND ITS SURROUNDING

KILLING OF TWO PEOPLE IN KAJIADO COUNTY BY SUSPECTED KWS RANGERS

*(Statements deferred)*

## STATUS OF THE NATIONAL SECURITY COMMUNICATION SYSTEM

**Sen. Haji:** Mr. Speaker, Sir, at the sitting of the Senate held on 23<sup>rd</sup> March 2016, Sen. M. Kajwang requested for a Statement on the Status of the National Security Communication System, particularly so to be informed on:

- (a) The objective of the total cost of the project.
- (b) The geographic coverage of the project and explain what benefits Kenya should expect from it.
- (c) The implementation of the project and procedure under the Public Procurement and Disposal Act used to select and award the contract.
- (d) The current status of the project and its expected date of completion.
- (e) The security agencies that will utilize the system.
- (f) The procedure under the Public Procurement and Disposal Act used to allocate the 4G frequency spectrum licence to the implementation of this project.
- (g) The value of the 4G licence and how much has been paid for by the implementers.
- (h) Whether the amount paid for the 4G licence has been deposited in the Consolidated Fund.
- (i) How the Government intends to take over control and management of this project upon successful completion.

Mr. Speaker, Sir, I wish to state that the Kenya National Security Communication Network and Surveillance Systems for National Police Service (NPS) is a highly security issue, which can only be released to vetted persons and such a meeting held in camera.

**Sen. M. Kajwang:** Mr. Speaker, Sir, in the one-and-a-half years that I have been in this Senate, that is the shortest and laziest Statement I have heard from any Committee Chairperson. With a lot of respect to the Chairperson of this Committee, a man I hold in high esteem, this is not acceptable.

The nine points that I sought to inquire on in my Statement, there is nowhere I am asking for the password to the system. I am not asking for the encryption algorithm or other confidential matters. I am seeking progress update on a project that was launched by the President himself. The President took an unprecedented move in a television commercial and told Kenyans that this was the project that would solve all our security problems. How then can it be that when we seek answers on behalf of the people of Kenya, we are told that this is highly sensitive and can only be released to vetted people? When the President appeared on that commercial advert, were Kenyans vetted so that they could be deemed fit to consume the information?

Mr. Speaker, Sir, I humbly request this Committee to dig further, look at the nine issues and separate those that are of national security and those that are of public interest. Article 35 of the Constitution gives us the right of access of information held by the State. Is it top secret to ask about the objectives of a project that is funded by taxpayers? Is it top secret to ask how much it will cost the taxpayers? Do Kenyans not have a right to know whether the 4G spectrum licence, which is a national asset, was valued and whether it was paid for? If it was paid for, do we not have a right to know on which date and how much was received into the Consolidated Fund? Do we not have a right to know as

ordinary Kenyans whether the procurement laws known in this land were followed in awarding that licence?

If the Committee cannot dig deep and give us a satisfactory answer, I beg that you declare them hostile and impose any other sanctions that you feel appropriate. It cannot be that when we speak and ask questions on behalf of Kenyans, we are told that it is a security issue. It is this kind of opacity and lack of transparency that leads us to where we are on issues to do with National Youth Service (NYS), Goldenberg and the mafia House scandal that is currently going on. We must get to a level where the Government feels obliged to respond to the needs of the people when they request for information.

Mr. Speaker, Sir, I am completely dissatisfied with this answer and beg for your guidance.

**Sen. Haji:** Mr. Speaker, Sir, there is no point in Sen. M. Kajwang being worked up and picking on the Chairperson. The Chairperson is just a messenger who is relaying the message. In any case, not everything has been lost. This matter can still be pursued because the Statement says that it cannot be discussed in an open forum. We can summon the Cabinet Secretary and do it in camera, if you so wish, but there is no way I can improve on what has been said.

**Sen. Mutula Kilonzo Jnr.:** On a point of order, Mr. Speaker, Sir. Yesterday, you issued clear directions to the Chairperson of the Committee on Education. Is it in order for Sen. Haji, Senator for County No.007 to suggest that he is a messenger on behalf of somebody? I propose that you rule him out of order following your determination yesterday on what Sen. Karaba similarly said.

**Sen. M. Kajwang:** Mr. Speaker, Sir, again, with a lot of respect to the Chairperson, I do not want to shoot the messenger even though I believe that as the Chairperson of the Committee, he is more than a messenger. I have canvassed nine issues in that Statement. Not all of them can be issues of high national security. These are issues that concern Kenyans and are alive. This is a project that has been called 'Safaricom Gate'. This is a project that is seen to---

**The Speaker** (Hon. Ethuro): Order! Initially, I allowed you a lot of leeway; do not repeat. Let me dispose the matter.

**Sen. M. Kajwang:** Mr. Speaker, Sir, much obliged, but the prayer by the Chairperson that this matter be prosecuted in camera is not acceptable.

**Sen. (Dr.) Machage:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): What is it, Sen. (Dr.) Machage?

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I rise under Standing Order No. 92. Would I be in order to refer Sen. M. Kajwang to this Standing Order that refers to matters of *sub judice* and/or secret?

**The Speaker** (Hon. Ethuro): Sen. M. Kajwang, Sen. (Dr.) Machage is responding to the issue you raised about whether a matter can be secret and be dealt in camera. We can confirm that some matters are secret and will be dealt with accordingly. Some matters are *sub judice* and we have provisions on how to dispose them.

The request by the Chairperson that the matter should not be addressed in the open is not, in principle, a bad idea, but you are contesting that it cannot be that all particulars are secret in nature. That is the issue that the Chairperson needed to convince



the House, starting with the Chair. Unfortunately, I cannot aid either of you because I do not have both Statements.

I direct that the Chairperson responds to this Statement next week on Tuesday. If there is something he considers secret, he must let me know in advance, but that Statement must be responded to on Tuesday. I also agree with Sen. M. Kajwang that there is no response.

What we said yesterday with regard to the issue of the Chairperson of the Committee on Education is the same thing we will say to the Chairperson of the Committee on National Security and Foreign Relations.

Regarding the issue as to whether or not a Chairperson is a messenger, I could not believe it coming, Sen. Haji. Sen. Haji, by definition, outlook, persona, experience and exposure, cannot by any stature of imagination be a messenger. Earlier in the day, the Deputy Speaker stated that Chairpersons are not messengers. You have never been a messenger and you cannot be a messenger in your old age.

We want to see the Chairperson of the Committee on National Security and Foreign Relations, the one and only Sen. Haji, on Tuesday, the way we know him, to respond to that Statement.

**Sen. Haji:** Mr. Speaker, Sir, I was not aware of the ruling of yesterday. I want to declare that I am not a messenger.

*(Laughter)*

**The Speaker** (Hon. Ethuro): Order, Sen. Obure! That is not the way you communicate to the Chair. However, I see you have communicated after the fact.

**Sen. Obure:** Mr. Speaker, Sir, I forgot to mention that Sen. Haji is remembered as one of the most effective public administrators in the country. Therefore, he cannot be a messenger.

**The Speaker** (Hon. Ethuro): Indeed what I have said about Sen. Haji cannot be the complete curriculum vitae. He served as a Provincial Commissioner in Rift Valley not just once, but twice. That is the home of the second President of the Republic of Kenya. You do not serve twice in such areas. You can give Sen. Haji that information quietly and privately. Let us have Sen. M. Kajwang' who is requesting for a Statement.

**Sen. M. Kajwang:** Mr. Speaker, Sir, my request for Statement is much briefer than the other one.

**The Speaker** (Hon. Ethuro): Order, Sen. M. Kajwang! Some statements are unhelpful and actually harmful. That was not in contestation. You have the right to seek a Statement. I am aware, and I have given you the chance. Do not qualify.

#### WATER HYACINTH MENACE IN LAKE VICTORIA

**Sen. M. Kajwang:** Thank you, Mr. Speaker, Sir. I rise pursuant to Standing Order No.45(2)(b) to seek a Statement from the Chairperson of the Standing Committee on Land and Natural Resources on the water hyacinth menace in Lake Victoria. In the Statement, the Chairperson should:

(i) Explain the economic and social impact of the water hyacinth on the communities that live around and depend on Lake Victoria.

(ii) Explain the measures that the national Government has taken to control the spread of the hyacinth and lessen the suffering of these communities.

(iii) Describe and quantify the resources allocated to the affected counties to help in the mitigation and control of the hyacinth.

**The Speaker** (Hon. Ethuro): Chairperson!

Proceed, Sen. Obure!

**Sen. Obure:** Mr. Speaker, Sir, that seems like a very weighty request. However, we will attempt to make a response in two weeks' time.

**The Speaker** (Hon. Ethuro): Order, Sen. Obure! You may just be polite. However, the use of the word 'attempt' does not inspire confidence.

**Sen. Obure:** Mr. Speaker, Sir, we will give a response for that request in two weeks' time.

**The Speaker** (Hon. Ethuro): It is so ordered!

**Sen. Obure:** On a point of order, Mr. Speaker, Sir. A while ago, I sought a Statement from the Chairperson of the Standing Committee on National Security and Foreign Relations regarding---

**The Speaker** (Hon. Ethuro): Order, Sen. Obure! I thought it was an emergency. That can come after the Statement by the Majority Leader.

BUSINESS FOR THE WEEK COMMENCING TUESDAY

8<sup>TH</sup> NOVEMBER, 2016.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I am reading this Statement on behalf of the Senate Majority Leader.

Hon. Senators, pursuant to the provisions---

**The Speaker** (Hon. Ethuro): Order, Sen. (Dr.) Machage! You may resume your seat.

Order, Members! We had occasion to deliberate on this matter. I refer Members to Standing Order No.45(c);

"The Senate Majority Leader or, in his or her absence the Senate Minority Leader or, in the absence of both the Senate Majority and the Senate Minority Leader, a Member of the Rules and Business Committee designated by the Senate Majority Leader for that purpose shall, every Thursday or on the last sitting day of the week, present and lay on the Table, a statement informing the Senate of the business coming before the Senate in the following week."

I would like Sen. (Dr.) Machage to confirm where he belongs here.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I am a member of the Procedures and Rules Committee which is a subcommittee of the Rules and Business Committee. In that capacity, I am reading this Statement on behalf of the Majority Leader.

**The Speaker** (Hon. Ethuro): Order, Members! Your Speaker appreciates your contribution to this House. However, this House is a House of rules especially on a matter that has already been canvassed at length and severally. A directive has been given by the Chair and we cannot go back to it. This matter is about the Majority Leader, the

Minority Leader or a Member of the Rules and Business Committee. In our case, because we have now changed, it is still the Senate Business Committee (SBC). It has nothing to do with the Rules and Procedures Committee. Therefore, you are a stranger to the membership that is supposed to.

*(Sen. Mutula Kilonzo Jnr. spoke off the mic)*

*(Laughter)*

Order, Sen. Mutula Kilonzo Jnr.!

Secondly, I have made it abundantly clear that these statements must be signed. In all fairness, first, you could not have proceeded because there are Members of the SBC in the House. Secondly, I have no indication that you have been delegated that responsibility. Third, this Statement must be signed by none other than the author, the Majority Leader. To be honest, if there is any other important role for a particular leader of the House to play, this is it. Failure to do so is abdicating responsibility.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, with dues respect to the ruling, I received this Statement with instructions that it had come from you.

**Sen. Mutula Kilonzo Jnr.:** Mr. Speaker, Sir, that is even worse.

*(Laughter)*

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, defend me from Sen. Mutula Kilonzo Jnr.

**The Speaker** (Hon. Ethuro): Order, Senator! I cannot defend you when you have exposed yourself.

*(The Senate Majority Leader (Sen. (Prof.) Kindiki) entered the Chamber)*

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, if it is that it was not from you, then, first, the messenger must be reprimanded. Secondly, I apologize.

**The Speaker** (Hon. Ethuro): What is it, Sen. Kiraitu?

**Sen. Murungi:** Mr. Speaker, Sir, let me not say what I was about to say because he has apologized. Imputing any improper motives on the Speaker himself is gross misconduct which would warrant him being excluded from this House.

**The Speaker** (Hon. Ethuro): He has apologized. He is an honourable Member who has a presence of mind to apologize. He does not have to be pushed. Other honourable Members including the leadership must appreciate. Therefore, I take and know for a fact that he was doing it in good faith.

Majority Leader, are you there?

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Yes, Mr. Speaker, Sir. I would like to take you from your last statement. I equally apologize to the House for my delay without any reservations or conditions. I was caught up in other businesses related to this House. There are some Bills we are working on. I also apologize to Sen. (Dr.) Machage for putting him in some form of hazard. However, all is well, that ends well. May the House kindly take my apology.

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I rise under Standing Order No.45 to issue the Statement on the business of the Senate for next week, that is commencing on 8<sup>th</sup> November, 2016.

On Tuesday, 8<sup>th</sup> November, there will be a SBC meeting at 12:30 p.m. Its purpose will be to schedule the business of next week. Subject to the directions of that meeting, the Senate is expected to continue with the business that will not be concluded in today's Order Paper focusing on debate on Bills at Second Reading and Committee of the Whole stages.

On Wednesday, the Senate will continue with business not concluded during Tuesday's sitting including Divisions on Bills that will have been concluded at Second Reading. We will further consider Bills at the Committee of the Whole including the following Bills;

1. The County Library Services Bill (Senate Bill No.6 of 2015).
2. The Petition to County Assemblies (Procedure) Bill (Senate Bill No.35 of 2014).
3. The Physical Planning Bill (National Assembly Bill No.46 of 2015).

The Senate may also consider any other business that will be scheduled by the SBC.

Finally, on Thursday, 10<sup>th</sup> November, 2016, the Senate will consider Bills at Second Reading and also deliberate on Motions and any other business that will be scheduled by the SBC.

I conclude by reminding the House that we have less than one month to the end of the Fourth Session. The Fifth Session is truncated by the Constitution. It is a short session. More or less, we have less than one calendar year to conduct all outstanding businesses. I have highlighted this fact because we have a lot unfinished business including various Bills. We also have ongoing oversight work by the County Public Accounts and Investments Committee which we have not discussed even a single report for at least the first year. Therefore, we have a lot of work. I request all of us to try our best for the remaining period.

Finally, we have an outstanding issue which I hope in one way or another, through the SBC, it will be resolved. It is about the many Bills that this House has passed yet up to now they remain stuck and have not been enacted into law because some people somewhere have decided that they want to frustrate the Constitution of Kenya. How that can happen for not one, two, three but for four years remains a mystery to me. Therefore, I hope that somehow, a lasting solution on this issue will be found.

I assure the whole House my full cooperation in support in whatever measures, action and strategy that this House may deem necessary to make sure we frustrate those who want to frustrate the Constitution of our country.

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

*(Sen. (Prof.) Kindiki laid the document on the Table)*

**Sen. Mutula Kilonzo Jnr.:** On a point of order, Mr. Speaker, Sir. The Senate Majority Leader has made a very passionate statement about pending business particular Bills that have passed through this Senate and have not been considered by the National

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Assembly or assented to by His Excellency the President. The Senate Majority Leader has made lofty statements and passionate appeal. Would I be in order to ask him to come with a better agenda in terms of Bills on Thursday? If he says that we have a month and the next term is truncated, we want to determine for ourselves that the Senate Majority Leader has timelines of how we are going to navigate the 21 or 22 Bills that are currently not assented to or pending in the National Assembly.

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

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

Mr. Deputy Speaker, Sir, I would like the Senate Majority Leader to give us a list of Bills that have been considered either at First or Second Reading in the National Assembly. He should also tell us the Bills that have not been considered and why they have not been considered.

**The Deputy Speaker** (Sen. Kembi-Gitura): Senate Majority Leader, do you have a response to that?

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, I would like to thank Sen. Mutula Kilonzo Jnr. for the intervention he has made. I agree fully that we need concrete steps on how this matter will be addressed. I will be consulting with the rest of the leadership to make sure that next week we are in a position to give suggestion. What I can say is that no single one of us has a silver bullet for this matter. We need to initiate something and I am sure with the support of colleagues, we can rest this matter or at least take it to a different level other than lamenting here from time to time.

Mr. Deputy Speaker, Sir, I thank you and once more thank Sen. Mutula Kilonzo Jnr.

**Sen. (Dr.) Machage:** On a point of order, Mr. Deputy Speaker, Sir. Our Constitution gives a guideline on what happens to Bills that have been passed by this House and not assented to by the President beyond a certain period. What makes the Senate Majority Leader think that the Bills did not take the normal path of automatic assent when that period indeed expired?

**The Deputy Speaker** (Sen. Kembi-Gitura): Senate Majority Leader, that is directed to you.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, if I have heard the Senator for Migori correctly, I do not think the Constitution anticipated this kind of scenario. If it were inaction by the Executive, there is a solution where, by default, the law comes into operation. However, the inaction between the two Houses was not anticipated. Therefore, that is a constitutional issue that we must confront but I am sure we will find a way.

In the long term, I have been a proponent of the view that we need to amend the Constitution so that if inaction by either House of Parliament persists, then there could be some kind of recourse including automatic enactment of that law after a certain period has elapsed. Otherwise with this kind of thing, you can cause a paralysis. The law is silent but in the long-term, through constitutional review, that issue can be resolved.

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In the past, I have been opposed to a referendum but I am beginning to think that we needed a referendum like yesterday. That is part of the thought process that should inform us as we look forward to initiating some way forward next week on Thursday God willing.

**The Deputy Speaker** (Sen. Kembi-Gitura): Very well. Sen. Mutula Kilonzo Jnr., you do not seem convinced.

**Sen. Mutula Kilonzo Jnr.:** Mr. Deputy Speaker, Sir, Sen. (Dr.) Machage has a point which is that Bills from the National Assembly that concern the Senate but have not come to the Senate have gone for assent directly and those laws have come into force. Similarly, what prevents the Senate from using a similar process by sending Bills to His Excellency the President for assent and, therefore, become law because this has happened before? Senate Majority Leader, we are trying to help you precipitate something that is useful. However, Sen. (Dr.) Machage has raised a very valid point.

**The Deputy Speaker** (Sen. Kembi-Gitura): Senate Majority Leader, that is an important point. Let me hear your response.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, the proposal by Sen. (Dr.) Machage supported by Sen. Mutula Kilonzo Jnr. sounds attractive but unfortunately, it is illegal. What the National Assembly has been doing is illegal. I do not think the Senate should also engage in an illegality. It is illegal because the law is clear on the mutual relationship on law-making. I have been expecting some public spirited Kenyans to challenge those laws because they are illegally enacted. That is my position.

**The Deputy Speaker** (Sen. Kembi-Gitura): You said that you have been expecting some public spirited Kenyans to challenge the laws, are you not one?

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, I am. However, there is a concept in law especially the law on property. This is the concept of encumbrances. In future, once I am free from any encumbrances, maybe I will assume that role. For now, by virtue of what I do at the moment, I am encumbered from doing that.

Mr. Deputy Speaker, Sir, on a serious note, this is a serious constitutional and governance issue. I long for the day when somebody will answer this in one way or the other. A message has to be sent that the Constitution is a sacred document that represents the will of the people and it cannot be subverted by the whims of an individual or an institution.

I want it to go on record that I believe in comments I have made about those laws and I have no apologies to make to anybody. I hope in future in the fullness of time, this matter will be addressed and somebody will be held culpable and responsible for subverting the will of the people of Kenya in the Constitution.

**Sen. Obure:** Mr. Deputy Speaker, Sir, I have listened to the Senate Majority Leader. We are actually talking about a very serious matter. In fact, the matter of crisis proportions that we sit in this House, deliberate on Bills and pass them but somebody decides that that will be the end of the road for those Bills. I request the Speaker to work with the entire leadership of this House and find a way forward in respect of this matter so that it is resolved once and for all and as quickly as possible.

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Ndiema, I can see some interest but I do not know whether it is on this issue. If it is, then press the correct buttons.

**Sen. Ndiema:** Mr. Deputy Speaker, Sir, as legislators and as a Senate, we cannot run away from the responsibility of implementing to the full the Bills that we have passed. We cannot pass it to the citizens who have elected us to represent them and to ensure that we defend them. It is high time we got a full list of all those laws.

We have the Committee on Implementation which should look into the matter. We also have legal experts in this House. Therefore, there is nothing that prevents us from even going to the courts of law to ensure that the law is followed and the Bills are brought to finality. That is the option that is open. Perhaps, we have not pursued it to the fullest.

**The Deputy Speaker** (Sen. Kembi-Gitura): Thank you, Sen. Ndiema.  
Sen. (Eng.) Muriuki.

**Sen. (Eng.) Muriuki:** Mr. Deputy Speaker, Sir, this issue is very crucial to the life and image of this House. However, having said that, let us be realistic. The issue is not just a Bill which was passed by this House and got stuck in the other House or it has not been consented to yet. The law is much wider. When we passed the new Constitution in our own goodwill as Kenyans, we separated the Executive, the Judiciary and the Legislature. It was in word before but now it is there in reality.

Mr. Deputy Speaker, Sir, before, MPs were not independent. There was the appendage that someone could remember you and appoint you as Minister or an Assistant Minister. What has happened is that in the Constitution, we thought the powers and also the economy of it would also be separated fully. Now that that it is not the case, the Executive is even more powerful than it was before which was not what we intended. As a result, our Senate Majority Leader will not have the courage to do what we want done.

This House has been going to the High Court to ensure there is constitutionality and there is nothing to prevent us from doing it now. It is only that we are just being timid. We need a driver. As far as I am concerned, if the leadership of the House, especially the Senate Majority Leader, does not raise the flag on our behalf, then I do not know who else will do it on our behalf as the Senate Majority Leader has said. So, let us take courage and do what is supposed to be done, which is to ensure that we are heard. Ministries still get money which was supposed to be devolved. That means instead of you going to your governor or your county government to do things, you still go to the Executive. It makes the Executive even much more powerful such that you do not want to appear being anti or against or having reservations or issues with the Executive.

This is where the issue is. I would urge Members of this House to stand up and be counted and make sure that the Constitution is adhered to. It is failing because we have failed to ensure we guard it.

**The Deputy Speaker** (Sen. Kembi-Gitura): Sen. Murungi!

**Sen. Murungi:** Thank you, Mr. Deputy Speaker, Sir. I understand the frustration of the Senate Majority Leader. The Senate has passed many important Bills over the last four years which go into some limbo and we are not told what happened to them. I do recall that one of the Bills is an important Bill for this country. The Bill which was passed by this House brought by the Senate Majority Whip, Sen. Elachi, which was establishing the National Food Security Council and cascaded committees which would oversee the

distribution of food and encourage food production in the country to ensure that no Kenyan dies for lack of food and would sort out the endless circles of hunger and famine that we witness almost every year in this country.

Mr. Deputy Speaker, Sir, it is sad that petty competition between our brothers in the other House and ours has made it impossible for that Bill to see the light of day. Kenyans are dying while we are dancing on the graves of those people. It is a shame that the august House of Parliament can behave dishonorably. When a Bill comes from the other House, the Senate Majority Leader is the first to tell us we give it priority. Even in the House Business Committee where we sit, he says let us give the Bills from the other House priority but our Bills are put in cold storage immediately they are seen for one reason or another. What happens in the courts, I know we have a good new Chief Justice but there are issues there. If you filed a case today, we might go home before the case is heard. We need to think of political action that we can take to ensure the Bills passed by this House have been disposed of in one way or another by the National Assembly. We are not asking them to be passed but we are asking them to deal with them and be disposed of.

Mr. Deputy Speaker, Sir, I want to suggest that as a House, we create our space and say we are not going to pass any Bill coming from the National Assembly unless they clear all the backlog or Bills that are pending in their House that come from this House. We are in a political contest, we are politicians and there is political self-help that can undertake as Senators. Otherwise, if we become gentlemen and ladies dealing with people who are not – we are not going to get anywhere. I can give you an example of what happened to us last week in the Senate Oversight Fund Committee. We passed the rules here which had been published and the Public Finance Management Act. The money is with Parliamentary Service Commission (PCS). We are not asking for the money from the national Treasury. The national Treasury has already given the money and it is with PSC. What we have been trying all the while is to try to develop rules of procedure for the Senate to access this money from the PSC which is supposed to empower Members of Parliament including Senators in the performance of their work.

Mr. Deputy Speaker, Sir, we discussed those rules with the Committee on Delegated Legislation of the National Assembly and requested that issues with rules published under PFM Act saying we should go back to national Treasury, we mutually agreed that those rules should be withdrawn and we re-publish new rules which were agreed on between our Committee and the Committee of the Delegated Legislation of the National Assembly. We read those rule clause by clause and there was consensus. They said they had no issues. It is on that basis that the rules were published. The Speaker of the National Assembly is the one who signed those rules.

Mr. Deputy Speaker, Sir, it was strange that after the rules were published and laid before our House and the National Assembly, our House passed the rules. The Statute Instruments Act says once the committee passes the rules, they do not come to the Floor; they go to the rule making authority. So, they communicated the consent of our committee to the PSC. The Committee of the National Assembly decided to annul the rules on the basis that they are in conflict with the PFM Act. That was dishonest and dishonourable because it was a matter we had agreed on before. The rules were not published at the PSC. So, unless this House puts its foot down, this “criminal behaviour”

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will continue hurting Members of this Senate because we decided to follow the law and we are decent but we do not see the same decency from our colleagues in the other House.

Mr. Deputy Speaker, Sir, we have come to a point where we have been pushed to a wall. It is Shakespeare who said; “be reluctant to enter into any war. Do not be the first. But once you find yourself in a war because a war can be brought to you, you must fight it bravely, you might fight – in those days, gender issues were not so pronounced – Shakespeare said you must fight like a man.” So, I am saying time has come for Senate to fight for her rights. We have to stand up for our rights because nobody else will do it. So, I urge the Majority Leader not to be discouraged. Put on your war boots and call your troops. We are ready for the fight.

*(Applause)*

**The Deputy Speaker** (Sen. Kembi-Gitura): Thank you very much. I do not know whether the Majority Leader wants to make a response but even before you do, if you want to, the issues raised by the honourable Senators are of extreme weight and importance. I believe it is a matter that has been simmering for a long time because as all of us are aware, Bills have gone down to the “Lower House” and have not come back to us. This is a serious issue because as Sen. (Dr.) Machage said, we are a House of legislation and one of our core duties is to legislate and when we pass Bills, we must see them to the end. That is the point that has been made by Senators and they are matters of great importance. So, it is a matter that requires a bit of consultation but before we do that, I would direct the Leader of Majority to do this; first, I know you have a tracking document of all these Bills. Unfortunately, procedurally, it is not shared with the Senators so that they may not know how many Bills have been passed in Senate and have gone to the “Lower House” and have not come back. The tendency is that everybody knows the Bills that they were interested in. There are many Bills of this nature. I will put the burden on you because you are the Senate Majority Leader. You will table in this House a list of all the Bills that have been passed by the Senate, referred to the National Assembly and have not come back. Have a complete track of all the Bills. Once you have tabled them, then I would propose that you have an open debate in the House on the way forward. The issues that have come up from the Members are extremely important.

The Senate Majority Leader, you have a duty and you must help us to find a way forward on these issues because we cannot keep passing Bills, nothing seems to happen to them and some of the Bills that we should have an input on have been taken for assent without our knowledge or having come back to us. This is an important issue.

I am directing that maybe by latest Thursday, next week, you table a list of all those Bills. When you table them, give us your considered opinion on the way forward. If need be, let Senators debate that issue further so that we can know how we will deal with the situation. It is a matter of great importance like Sen. (Eng.) Muriuki has said, constitutionality is involved in all these. It is an issue that we need to look at and settle, once and for all. That would be my direction.

*(Applause)*

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, I will comply with your direction. I have three things to mention. One, of course, in your own wisdom, you are directing that the report be tabled on Thursday, but it would have been earlier if need be because the information is available.

**The Deputy Speaker** (Sen. Kembi-Gitura): Do you want to do it on Tuesday?

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, it can be done on Tuesday, next week.

**The Deputy Speaker** (Sen. Kembi-Gitura): Do it on Tuesday, then.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, thank you. Secondly, again without seeking to amend your direction, I would suggest that we also table to the House a list of all Bills that have come from the National Assembly to the Senate and their status.

In my previous life, I used to be a law professor and we used to tell our third year students in a subject called Equity and Trust that one of the maxims of equity is that he who comes to equity must come with clean hands. In other words, whoever wants to be assisted comes to equity, approaches a court or some other judicial body seeking redress, must themselves be in good order and have good records. So, the Senate must also demonstrate ---

**The Deputy Speaker** (Sen. Kembi-Gitura): Senate Majority Leader, I am sure that you must have also taught them that equity assists the vigilant and not the indolent.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, that was the second maxim. I am sorry for referring to the seventh maxim without first mentioning the second maxim. I agree with you fully that equity also aids the vigilant and not the indolent. So, I agree with the Chair and the other Senators who have spoken that this is the time for us to be vigilant and we do not have to apologise for that.

Finally, I agree with Sen. Murungi's remarks and opinion that a political strategy is important and would, perhaps, yield urgent and better fruits. However, I would not say inciting, but Sen. Murungi's speech was very energizing and has created a warfare mood. I assure him that I have taken the gauntlet and put all my warfare paraphernalia and I am willing to do battle.

Let me suggest that the judicial option should not also be discarded. For the political option, you can even get a compromise and get a short term solution.

**The Deputy Speaker** (Sen. Kembi-Gitura): The Senate Majority Leader, my direction to you was that you table the pending Bills. I am a reasonable person so, I agree with your further proposal that you also table those from us that we have dealt with. I also directed that you give a way forward by way of opening a debate. So, the issues that you are now dealing with are issues that I was hoping you deal with then you table what I have asked you to table on Tuesday, next week.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, thank you for that guidance. In conclusion, the same way we went to court with regard to the Division of Revenue Bill is the same way we should go to court on all the outstanding Bills. In fact, two years ago, we almost went to court, but we got a short term political solution that sedated us for a while and that is why we are back to square one. So, without violating your order, the judicial route must also be pursued, but on Tuesday, I will table

the information as directed. I will also propose the way forward so that we can have the debate.

**The Deputy Speaker** (Sen. Kembu-Gitura): Very well. I think that will close the debate.

Sen. Ndiema, do you have a point of order or what is the issue?

**Sen. Ndiema:** Mr. Deputy Speaker, Sir, in addition to the list of Bills from both Houses, we should also get a separate list of Bills which we passed, but have been plagiarised or amended and brought in as fresh Bills from the National Assembly and we have passed them. They are quite a number. We pass Bills here, they go to be changed and come as fresh Bills from the National Assembly. It is important he tables them because there is no good faith from the other side. We need to know and the public should know.

**The Deputy Speaker** (Sen. Kembu-Gitura): Thank you very much, Senators, for that very important debate.

Now, I have to reorganize the Order Paper. We do not have sufficient numbers to go to Division. So, I will stand down Order Nos.8, 9, 10, 11, 12, 13, 14 and 15.

## BILLS

### *Second Readings*

THE ASSUMPTION OF OFFICE OF GOVERNOR BILL  
(SENATE BILL NO.10 OF 2016)

THE COUNTY GOVERNMENTS (AMENDMENT)  
(NO.2) BILL (SENATE BILL NO.7 OF 2016)

*(Bills deferred)*

## DEFERMENT OF THE COMMITTEE OF THE WHOLE

THE COUNTY OUTDOOR ADVERTISING CONTROL BILL  
(SENATE BILL NO.11 OF 2015)

THE COUNTY LIBRARY SERVICES BILL  
(SENATE BILL NO.6 OF 2015)

THE PETITION TO COUNTY ASSEMBLIES (PROCEDURE)  
BILL (SENATE BILL NO.35 OF 2014)

THE PHYSICAL PLANNING BILL  
(NATIONAL ASSEMBLY BILL NO.46 OF 2015)

*(Committee of the Whole deferred)*

**BILLS***Second Readings***THE TREATY MAKING AND RATIFICATION  
(AMENDMENT) BILL (SENATE BILL NO.5 OF 2016)***(Bill deferred)***The Deputy Speaker** (Sen. Kembi-Gitura): Next, Order.**THE CONSTITUTION OF KENYA AMENDMENT BILL  
(NATIONAL ASSEMBLY BILLS NO.26 OF 2013)**

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Mr. Deputy Speaker, Sir, I beg to move, that the Constitution of Kenya Amendment Bill (National Assembly Bills No.26 of 2013) be read a Second Time.

This is one of the latest Bills that has come from the National Assembly and even as I move this very short Bill, this should confirm what my colleagues who have spoken and I have just said that we have been very diligent in discharging our obligations despite the acts of provocation that have been perpetuated against us by the National Assembly. I urge the House that we should continue discharging those duties, but at the same time, advancing the position that we have taken of making sure that our Bills are considered and finalised.

Mr. Deputy Speaker, Sir, the purpose of this Bill is to amend Article 204 of the Constitution. As the Mover of this Bill, I may not say some of the issues that I would have said ordinarily, but I am sure they will come out as Senators debate on the Bill. The purpose of this Bill is to amend Article 204 of the Constitution, so as to remove the disbursements of the Equalisation Fund from the purview of the national Government and transfer it to the constituencies, where the marginalised areas exist.

Mr. Deputy Speaker, Sir, the purpose of the Bill is to ensure that the Equalisation Fund which is established to assist marginalised areas attain the same level of development as the rest of the country. The constituencies, according to this Bill, are better placed to ensure the implementation of the identified programmes within the areas of jurisdiction.

This is a one page Bill with several sentences. Article 204 of Constitution establishes the Equalisation Fund. It provides that the Fund should be for purposes of uplifting marginalised areas; areas which have been historically left behind in development. The Bill removes the word “national government” from Article 204 (2) of the Constitution so that it just says that ‘the Fund shall be used to’--- It will mean, therefore, that the Equalisation Fund, according to the proposal in this Bill, will be disbursed by Parliament in the Appropriation Act. That is the upshot of this amendment. The Equalisation Fund will not be disbursed from the national Government to the counties as is proposed currently in the Constitution. Instead, Parliament will enact a law that will disburse that money to the constituencies, similar to what is happening today in

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the National Government Constituencies Development Fund, what is popularly known as the Constituencies Development Fund (CDF).

This Bill tries to remove the disbursement of the Equalisation Fund from the national Government to the constituencies. The Parliament will pass an appropriation law that will allow constituencies to identify projects and spend that money at that level. Therefore, the Bill has an impact on devolution. The purpose for which the Fund was created was to give strength to the devolved units. That is what it does.

Mr. Deputy Speaker, Sir, as you are aware, it took time for the Equalisation Fund to be operationalised. However, since last year, there are guidelines. The guidelines were published by the National Treasury on how the Equalisation Fund is to be operationalised. The national Government has committed resources in the current financial year to operationalise and make sure that the Equalisation Fund benefits areas which have been left out in development in our country.

I believe that the greatest threat to our country today is marginalisation of some parts of our country. I believe that devolution, including the creation of the Equalisation Fund, was aimed at tackling this important national issue. Going forward, I hope that through the Equalisation Fund, our country can have fairly the same levels of development. That should guarantee national unity which is missing in this country and national security. I am convinced that most of the national security challenges we are facing today arise from historical injustices and issues of marginalisation.

Mr. Deputy Speaker, Sir, I come from a historically marginalised area. I can assure you that if there is something that is hurting the unity of this country, it is the feeling by certain parts of our nation that there are certain sections that have been forgotten. Therefore, the purpose of the Equalisation Fund was to avoid leaving the matter of distribution of national resources to bureaucrats sitting in Nairobi, because not every other part of the country is represented in that bureaucracy. This Bill tries to remove the disbursement of those funds from the national Government and transfer it to the constituency level. An Act of Parliament will be enacted to guide on the appropriation of that fund.

Mr. Deputy Speaker, Sir, I do not want to say more than that. I beg to Move. Since I do not see the Senate Minority Leader, his deputy, the Senate Minority Whip and the deputy, I will ask Sen. Ongoro, who is seated near the seat of the 'power of the few,' to Second the Bill.

Thank you.

**Sen. Ongoro:** Mr. Deputy Speaker, Sir, I would like to thank the Senate Majority Leader for Moving this Bill. I have been away for some time and I have not had time to interrogate the Bill, but the Senate Majority leader has given us a preview of what it entails. I will not belabour many points.

It is true that this is an important Bill that seeks to amend Article 204 of Constitution. Many of the problems that we are dealing with as a nation can be traced to the issue of inequality and the fact that some regions in this country feel left behind in matters development for many years. It is also true that if we want to decentralise development and all other matters, the word 'regional' is quite big and does not talk to the real issues at the grassroots. Therefore, transferring the issue and matter of consideration to the level of constituency could make a lot of sense that seeks to give this

nation the critical solutions that we need in our attempt to ensure that all regions and all constituencies feel that they are being fairly considered in matters development.

I support and second.

*(Question proposed)*

**Sen. (Eng.) Muriuki:** Thank you, Mr. Deputy Speaker, Sir, for giving me the chance to contribute on this Bill. An amendment to the Constitution is a provision which is to be exercised by Parliament sparingly and when it is absolutely necessary. This can only be done if we feel those who drafted the Constitution may have fundamentally erred or left a loophole that we have to revisit.

Having said that, let us appreciate that there are many funds. For example, before the Constitution of Kenya 2010 was promulgated, we had the Women Enterprise Fund, Roads Fund, Constituencies Development Fund (CDF) and many others. Each one of them was brought about to fill in some gap that was there. Legislators felt that in order to fill that gap there was need to set aside some funds. The Committee of Experts saw that it was a good idea to set up an Equalisation Fund. They also spelt out how those funds would be spent. The responsibility was given to the national Government. As much as the Senate has the mandate to determine who gets what, the Committee on Revenue Allocation (CRA) had the mandate or the obligation to propose which areas or counties are marginalized.

There has also been a debate in the country as to whether we are talking of a marginalized county or a marginalized area. Sometimes it may be a very well-endowed county, but you might find an area in the same county which is seriously marginalized. When you look at it from the national level, it is easier for people in that marginalized area to state their case. However, if you take this money and share it like the CDF money in the constituency, in my humble opinion, we will not do what was envisaged to be achieved through this Fund.

To that extent, I do not find merit in changing the Constitution. Instead, we need to leave that responsibility to the organs mandated to do so by the Constitution. Constituencies should be left to fund their own projects which are of importance to specific areas and, therefore, we oppose this amendment to the Constitution. I do not think going the way the National Assembly has proposed and passed, we will achieve the objectives of what was intended in creation of the Equalisation Fund.

As I mentioned, we are looking at the marginalized counties, constituencies, areas, people or disadvantaged groups who are not economically empowered. These people are living in this Republic. It is not fair to share this money according to the constituencies.

For that reason, I oppose this Bill.

**Sen. Mutula Kilonzo Jnr:** Thank you, Mr. Deputy Speaker, Sir. I rise to oppose this amendment. In the first instance, this amendment is unconstitutional. On the outset, I want to say that even the memorandum and objects of reasons by the author of this Bill is in itself unconstitutional. This is because it suggests that; “the enactment of this Bill shall not occasion additional expenditure and no referendum is required.” I am going to tackle that in a short while.

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Secondly, this question of the Equalisation fund has given the Committee of Finance and Budget of the Senate absolute grief. I want to state the reasons. First, is because the national Government through national Treasury has come up with regulations. In those regulations, we have objected vehemently to the manner in which they have been drafted. The national Treasury has refused to accede or listen to our proposals.

There are actually two proposals that we have objected. One of them is that 10 per cent of the Equalisation Fund has been put as an administration cost for a council that is formed under those rules. At Kshs18 billion currently, that translates to Kshs1.8 billion that is now set aside for administration of the fund. This is where PSs will be sitting in Nairobi and allocating themselves money for purposes of buying stationery, photocopiers, *et cetera*. First of all, a travesty that where you have recognised you have marginalization and people are suffering and you have people set up a fund, so that they can have hospitals and basic services. Principal Secretaries sitting in Nairobi will consume Kshs1.8 billion and do nothing other than entertain themselves and buy tea.

Thirdly, the Council of Governors (CoGs) has gone to court to oppose those regulations and an injunction was issued to stop the disbursement of those funds.

I am aware and maybe the Senate Majority Leader should have been here to confirm that, in fact, the Kshs18 billion set aside for Equalisation has already been released to Members of Parliament through projects that they gave to national Government before they passed the Appropriation Bill. So, we are actually doing an academic exercise. When they realised that we were going to oppose this Bill, they forced the national Government to give them this money by listing a number of projects. It is a pity that money has been released. So, this is academic. However, we need to tell them the truth. They have violated the law.

Mr. Temporary Speaker, Sir, What was the purpose of the Equalisation Fund? The Majority Leader has mentioned it. This was part of enhancing devolution. Therefore, if you want to find the basis of Article 204, you have to read Article 174 – The Objects of Devolution. The people who have moved and seconded this Bill have not mentioned, this one I am surprised they have supported it.

One of those objects is to protect, to promote the interest and rights of minorities and marginalized communities; that is Article 204 – Objects of Devolution. If you are going to touch the Objects of Devolution, Article 255 requires a referendum. That is why I oppose this Bill. Who is the person who is mandated to do this under this Constitution?

Article 216 (4) of the Constitution states:-

“The Commission shall determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas for purposes of Article 204 (2).”

The Commission on Revenue Allocation (CRA) formulated the marginalization policy which was tabled before the National Assembly. We forget that before this Senate, the National Assembly was both sitting as the National Assembly and as the Senate under the transitional clause. They were given a mandate by this Constitution to discuss the marginalization policy on our behalf. That marginalization policy identified 14 counties and it was passed. If they acted on our behalf as the Senate, on what basis will we pass this policy that removes counties and replaces them with constituencies?

This Bill is more unconstitutional than anything else; it is mischief. Therefore, if we allow this amendment that appears innocuous by amending paragraph (3) by removing the word ‘counties’ and replacing it with the word “constituencies,” this Senate would have violated Articles 174, 216 and 255 that require a referendum to change.

Reading further, Article 204 (4) deals with the criteria of who is supposed to check the Equalisation Fund. It states that:-

“The Commission on Revenue Allocation (CRA) shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalisation Fund.”

The Equalisation Fund has already been released to constituencies unconstitutionally by a list provided by Members of Parliament (MPs), so that they could pass the Appropriation Act. The Senate Majority Leader should not have moved this Bill on the Floor of this Senate. There have been tremendous violations of this law that to even discuss this Bill is a travesty of justice, will and purpose of the Senate.

Article 204 (8) of the Constitution reads:-

“Legislation under Clause (7) shall be supported by more than half of the Members of the National Assembly, and more than half of all the county delegations in the Senate”.

The drafters of this Constitution were aware of Article 96; that it is our role to protect counties. That is the reason if you read Article 204 (5), (6) and (7) even the changing of policy and criteria must come to the Senate. My fellow Senators, if we agree to change the criteria to go to constituencies, what then is our role in the Senate? We will have, with one stroke of the pen and vote, abdicated our responsibilities as Senators and further, degraded our position as the Senate. It is something that we have allowed and is done quietly and innocuously. We should not attempt to violate this Constitution in a policy that the National Assembly passed on our behalf. At the very least, this Senate must defend the decision that there are 14 counties that are marginalized. That marginalization policy is what has informed the Equalisation Fund. The word ‘constituencies’ is not in the marginalization policy. How will the Members who support this Bill reverse that decision?

We have a new Act of Parliament which never came through this House, although it was supposed to. This Senate, through the Committee chaired by Sen. Murkomen, where I am the Vice Chairperson, has proposed that we increase the amounts reserved for Equalisation Fund. This Bill is a reversal of all those things that this Senate has worked for.

Mr. Deputy Speaker, Sir, they have amended the Constituencies Development Fund (CDF) Act so that they can have what they are calling national Government projects. As we contemplate and imagine that we can amend the Constitution in this manner, we need to know the functions that the counties are responsible for, including water and basic facilities.

This is one of those Bills that we must reject in totality for being a violation of the Constitution and the will of the people who for the last 52 years, have been marginalized. This is just a small opportunity for Wajir County, Mandera County and Taita-Taveta County - my neighbour in Makueni - to at the very least be at par with Nairobi, Kiambu and other counties.



This Constitution has contemplated that it should take 20 years to bring Kitui County, Taita-Taveta County and Marsabit County to the level of Nairobi and Kiambu counties. That is what the Equalisation Fund is supposed to do. Even then, it is an atrocity to have 20 years. We should give them enough funds so that within less than 10 years, this country can be equalized. Equity and social justice are the things that are in the Equalisation Fund.

Mr. Deputy Speaker, Sir, I, therefore, oppose vehemently.

**Sen. Mositet:** Mr. Deputy Speaker, Sir, I rise to oppose this Bill. This Bill tries to assist some people as we go for the elections. This Bill will not achieve what Equalisation Fund was supposed to do. It is meant to assist some people at the constituency level to campaign. I say so because even identification of the programmes to be carried out is purely left to the Members of Parliament. We know that the Equalisation Fund was supposed to be set aside, so that the areas which have been marginalized for the last 50 years are identified through public participation in the counties. That is why in the Constitution the expenditure of funds was supposed to be done through the national Government or the county governments.

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

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

For this Equalisation Fund, it cannot be done any better other than making sure that the public participates in identifying those areas within their counties and wards even if we are talking of constituencies so that those areas which have been marginalized can be identified and the funds utilized properly. This Bill says that they need to transfer the funds so that they can be used through the constituencies which are marginalized.

Madam Temporary Speaker, if we wanted to treat those areas which are purely marginalized, the best they should have talked of is wards so that within the wards, we can say a particular ward, say in Kajiado County or Makueni or Kiambu where we have an area called Ndeiya, that area requires to be brought to the level of development just like any other developed area in the country. So, with my all energies, I oppose this Bill.

On the other hand, Madam Temporary Speaker, for the people who went round to identify the counties which are marginalized and came up with a number of 14, the criteria they were using is yet to be seen whether they captured all the marginalized areas. As I stand here, some of the areas in my county are the most marginalized in this country. Up to date, there are some people who have never seen a cup or a *sufuria*. We have some areas which are marginalized such that when they are told we go enter a vehicle, one must be introduced that we are going to have something called a car and it is going to pass here and this is how you are going to enter it. We do not have roads in those areas. Up to now, we have areas that have no water. The people of Oltiaseka in Kajiado County are suffering. In fact, I had to call the Chief Executive Officer (CEO) of Tana Athi Water Services Board and told him if nothing is done, those people may die for lack of water.

Madam Temporary Speaker, when you go to the areas of Magadi and Mosiro, the reason we lost the seat of Mosiro Ward to the Opposition is because the people feel they have been marginalized for so long such that when we promise them that we are going to

provide them with water, they do not believe because the 50 years that have passed, they have not seen any development. We feel that the criteria which was used has to be revised to bring on board areas which are more marginalized. For example, in a county like Makueni, we have areas within that county which are marginalized and are below the standards of development and they need to be captured.

Madam Temporary Speaker, I do not support this Bill. As the Senator for Kajiado County, I call upon this Senate to come up with a law so that we can revise the counties which are marginalized and go deeper to identify the wards which are more marginalized so that an area like Ndeiya within Kiambu County which is under-developed can be captured. For the architects of the Constitution, this was a noble idea. I believe that if this Fund can be utilized properly and those areas are captured well and development is taken to them, people will not feel as if they do not belong to this country. They will not feel that the only people who are taken care of are those that have produced presidents for this nation. That will make competitive politics healthier without any bitterness. As it stands today, people say it is our chance to take presidency because of development. If we can utilize this Fund well, we will bring sanity into our politics.

Madam Temporary Speaker, on the issue of spending of funds at the county level; even though we know it is the first time devolution is taking place in our country, counties are not doing well but still, we can trace development within our counties more than it was before. I believe this Senate is going to adjust and ensure the loose areas where the governors take funds without utilizing them properly can be tightened. I believe we will be getting value for our money.

Madam Temporary Speaker, we also need to challenge the National Assembly that they need to oversight the national Government. As much as we have been talking about wastage of funds in our counties by governors, we need to see the National Assembly talking a lot more about the theft which is ongoing. They need to rise and not to be seen to be part of the executive but to play their role as per the Constitution in Article 95. It has been worrying for people to wake up and read that there is theft in this or that Ministry. That is not giving us a good picture. The National Assembly must stand up and be seen to be working. Thank you.

**The Temporary Speaker** (Sen. Ongoro): Thank you Senator. Sen. Ndiema.

**Sen. Ndiema:** Thank you, Madam Temporary Speaker. I stand to oppose this Bill which seeks to set the clock of devolution backwards. It looks like we were not serious in implementing the Constitution. Several years down the line, while the Constitution stipulates clearly that 0.5 per cent of the national funds should be allocated for equalisation, it is sad that up to now, no money has trickled down to help those who are disadvantaged. As if to add injury, we are now seeing a proposal which goes to make it worse for those who were supposed to benefit.

Madam Temporary Speaker, I would have expected the percentage of the Fund to be increased by amending this Bill. The current figure of 0.5 per cent is too little to solve problems of all marginalized counties, constituencies, wards and communities. What we should be getting from the National Assembly, if they were serious to ensure that marginalization is addressed in all areas, is a proposal to increase this amount so that when we are allocating revenue to the counties, the issue of poverty does not arise because there will be adequate funds through this Equalisation Fund. We shall be talking

about population, area and so forth and not poverty index Equalisation is supposed to address that.

This amendment is, indeed, unconstitutional. If we are to look at the functions or areas that the Constitution envisaged such as water, roads, health and electricity, are devolved according to the Fourth Schedule of the Constitution. These are devolved functions of counties. These functions have been specifically mentioned in the Constitution as the destination of these funds. We are denying counties those funds and giving them a structure which does not exist.

Constituencies exist for political reasons. Ideally, they do not have administrative structures capable of even implementing those projects. They do not have engineers, architects or planners. They will rely on the capacity of the county government. If the persuasion was that of the Equalisation Fund going down to the grassroots, then I would say it should not stop even at the constituency level. In fact, it should have gone to the ward level. When we talk of the ward level, we are talking of counties. The county assemblies should determine how much will be allocated to each ward.

This Bill devolves functions and county governments must be involved. The Senate, being the representative and protector of counties, should be involved. In fact, I do not expect that any Senator would support anything in this Bill that seeks to remove the function from the county government to other institutions. I hope the intention of this Bill is not to take this amount or the equalisation fund to be part of the CDF. It appears like it is going that direction which in itself is unconstitutional because CDF has historically seen funds managed, controlled or influenced by legislators at the level of the constituency. According to the Constitution, it is not their function. The function of any legislature, including the Senate and the National Assembly is to legislate and not administer or execute development.

It is high time that the Senate started thinking of what to do with the CDF. It is true it has helped, but now that we have counties, there would be no need of having the CDF. There would be no need of CDF even on national projects and functions, if the counties were to be managed properly. This is because Article 187 of the Constitution says that even where a function belongs to one level of Government, by agreement, every level can effectively do it. The other level can still do it. Education and construction of classrooms are national functions. However, the Constitution recognises that, perhaps, counties could do better in the construction of classrooms because they have engineers on the ground, capacity, auditors and so forth. The national and county governments can agree to allocate that responsibility to the county government and *vice versa*.

In effect, this Bill seeks to go around the constitutional requirements. How will public participation come in where the county government is not involved? At the county level, there are elected representatives of the people from the ward level. There are structures for public participation. When it comes to the national Government, these funds are sent to constituencies. I do not know why they did not say sub-counties since they exist as a structure of a devolved government. Why constituency? They do not have the structures or a way of ensuring public participation.

I urge all Senators to ensure that this Bill does not see light of the day.

**Sen. Omondi:** Madam Temporary Speaker, thank you for giving me the opportunity to add my voice to this Bill. I oppose it in totality because it aims at bringing

down devolution and touches on the lives of Kenyans. As the custodian of devolution, I cannot allow us to pass such an amendment to the Constitution that aims at bringing down devolution.

The Equalisation Fund aims at bringing equality and improving the lives of Kenyans who have been marginalised for the last 50 years. For example, I was in Turkana County in 2011. The first question that people asked me is: How is Kenya? That was a clear indication that some parts of this country are looked at as if they are not part of Kenya simply because of marginalisation. The Equalisation Fund aims at giving quality services to all Kenyans.

As a legislator representing Persons with Disabilities (PWDs) – I think when I use an example of Turkana County amongst other counties that have bad terrain – accessibility is a problem. I remember when I went to Turkana County and had a forum with PWDs, they could not use wheelchairs because of the terrain. If we had such a fund, the people of my category and the group that I represent here would easily access the basic services.

As I oppose this Bill, we should not allow passing or debating Motions that will bring down the socio-economic pillar of Kenyans. This is violating the rights and the human rights aspect of Kenyans. We, as Senators, should not allow violation of the Constitution. We should not allow people in the counties to suffer by bringing amendments that will make them face a lot of challenges. As we work on the teething problems in the implementation of the Constitution, we must be careful with the laws that we enact and the amendments that we make.

The best option is for us, as the Senate, is not to debate and approve such an amendment because history will judge us harshly. We represent the people who trust and believe in us. They have entrusted us to pass Bills and Motions that will improve their lives.

Madam Temporary Speaker, we sometimes fail because of bias and end up failing the people we represent. We have the Members of National Assembly who represent the affected constituencies. I want to believe that they never voted for this amendment. If they did, then they failed in their role of representing the people who elected them. If a Member from a marginalised area can forget the people he or she represents, that is lack of respect to the electorate. That is not being accountable for the roles that they elected them to perform on their behalf.

With those remarks, I join my fellow Senators who have stood firmly and opposed the amendment and the Bill.

Thank you.

**Sen. Hargura:** Thank you, Madam Temporary Speaker. I join my colleagues in opposing this Bill. When Kenyans passed the Constitution (2010), it was clear that we accepted that we are not at the same level because different parts of this country have been marginalised. That is why this Equalisation Fund was created. It was a noble idea.

However, it has limitations in the sense that the amount is not sufficient because it is 0.5 per cent. Again, the period of 20 years is not enough to cure that marginalisation. While we are still findings ways of enhancing the funds and maybe even increasing the period, we have seen the Members of the National Assembly trying to make sure that the equalisation is not attained in any way. The drafters of the Constitution knew that there is

basic infrastructure necessary for any society to develop and that is why this Fund targets basic infrastructure like water, roads, health and electricity. If this is availed to all parts of this country, all Kenyans will have an infrastructure to build on.

We have two levels of Government which share functions. The way the article on the Equalisation Fund is crafted, it is clear that the national Government is the one to collect the revenue. It can either implement directly where it has the capacity or may use the Fund directly or indirectly through the conditional grants to the counties in which the marginalised communities exists. It was clear that it is either the national Government to do it directly or give it as conditional grants to the county government, which will make sure that the money is spent for a particular purpose. The national Government does not have the leeway of doing whatever it wants. That safeguards the usage of the Fund.

Madam Temporary Speaker, it is clear that it has to be passed through an Appropriation Bill by Parliament, which is done by the National Assembly. The Members of the National Assembly think that since they are used to controlling public funds, which I believe is unconstitutional--- They cannot be the ones legislating and at the same time executing the projects. They have done it through the Constituencies Development Fund, which was ruled to be unconstitutional. We also know that they control part of the roads funds which are disbursed through the Kenya Rural Roads Authority. Now, they still feel that there is something for them in the Equalisation Fund. While Kenyans are moving away from duplication of functions and responsibilities, they still feel that they can add more to themselves from the Equalisation Fund, yet we already have problems with how the National Government Constituencies Development Fund money is spent. It is a Fund that is patronised by the persons who are supposed to oversight its expenditure. Therefore, when it is misappropriated, nobody complains. That is why the Members of the National Assembly have been claiming that the National Government Constituencies Development Fund is used well. However, it is misused by the persons who are supposed to oversight it; there is nobody else to raise the red flag.

When there are acts of misappropriation in the national Government, there are many people to raise the red flag, but when it comes to National Government Constituencies Development Fund, the implementer is the same person who is supposed to oversight. That is why we think that the National Government Constituencies Development Fund is doing well. In some parts of this country, that is pocket money of the Members of the National Assembly.

Madam Temporary Speaker, by adding this Fund in that category, it will increase the marginalisation which it is supposed cure. As I speak, in the Financial Year 2016/2017, an Appropriation Bill has been passed and these funds have been factored. The question is: How that was done? The information we have is that the Appropriation Bill prescribes projects in each constituency and the cost. How was that reached? Where are the regulations for the expenditure of the Appropriation Bill? These are things which are being done by the National Treasury in collaboration with the National Assembly without informing this House, yet it is this House which is supposed to deal with the county issues. The marginalisation in counties and the areas to be covered are county functions.

There is a misapplication of law because this House has already been bypassed. I remember when the issue came up, I asked the Chairman of the Committee on Finance,

Commerce and Budget whether he was aware. He also raised it with the Cabinet Secretary for the National Treasury and we realised that it had been done. If you asked the Members of the National Assembly, they will tell you that the Senate has no business in this. Now, they have gone to the extent of even amending the Constitution and they want us to rubberstamp it, so that they can continue doing the wrongs they have been doing to this country.

Already, the Members of the National Assembly have arrogated themselves the responsibility of the public. They are the ones who identify the projects without public participation. We do not know this entity called 'constituency.' We only have two levels of government; the national Government and the county governments. That is why the article on Equalisation Fund talks of the two levels of governments. This Bill tries to create another level, which has the capacity to execute government functions, when we know that the constituency is a political entity and it has no executive capacity.

Madam Speaker, the Equalisation Fund shall be used by the meeting with monies appropriated under Paragraph (a) to the respective constituencies of the areas identified under Article 216(4). It shall also be used by those constituencies for the purpose of which the appropriation was made in accordance with such funds as Parliament may establish. That means it is like a constituency has a capacity to implement, but you know very well they do not have. They only have the county government and sub-counties which have administrators and government officers from the county government. So, that will still raise more questions. How will these projects be implemented on the ground? Who is supposed to provide the actual execution like the technical staff? Where will the constituencies get this?

So, basically, this does not look like somebody was interested in delivering any projects. It was just a matter of getting money out of the national Government. When it lands on the ground, it will take the same route as CDF and the Roads Fund. It will be the same thing. So, I support one of the Members who said that this is just creating some campaign money for some individuals. We should not be used to be part of that system which creates those kinds of illegalities.

Madam Speaker, what we would have been talking about here is how to enhance the amount allocated to the Equalisation Fund. I remember when CRA said that it was only 14 counties which were to benefit, Sen. Musila raised a lot of issues and his was number 15. The main issue was that the Fund is not adequate. It will be spread thinly if we go up to maybe number 20 on that list of prioritization. Nevertheless, the way to cure is to increase the funding. So, what I would have expected from the National Assembly would have been to increase that 0.5 per cent to 5 per cent. That would have done the justice required. It is a fund which has a limited time of 20 years. That is what I would have expected. The other question is how much has been collected to-date. The Constitution says that:

"Any unexpended money in the Equalisation Fund at the end of a particular financial year shall remain in that Fund for use in accordance with Clause (2) and (3) during subsequent financial years."

This Constitution was passed in 2010. How much has been generated to-date? Has it been spent or it is still in that account? Those are the questions we are asking and require

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answers. I doubt whether there is anything in that account. It may have been spent by the national Government without following this law. This is because we have not heard of any projects under the Equalisation Fund in the previous Appropriation Bills.

These are the questions which we need answers for not the MPs coming and taking whatever is there for their use. So, we would like to know how much has been allocated to-date and how it has been spent. I believe when this Constitution started being implemented, this article was being implemented. Each Financial Year, from 2010/2011 or 2011/2012, there must have been some 0.5 per cent of the budget that was being set aside for Equalisation Fund. How much is it? Where is it? What plans are there for it to be spent? What we have now is a way of giving it to the constituencies. If this goes through, then we will not even know the history of the previous years what was done to that fund.

Allow me to reiterate that I vehemently oppose this Bill. If anybody is to come up with any amendments, then it should be in enhancing the allocation so that more parts of this country can benefit from this Fund.

Thank you.

**The Temporary Speaker** (Sen. Ongoro): Thank you, Sen. Hargura. Proceed, Sen. Obure.

**Sen. Obure:** Thank you, Madam Speaker, for giving me the opportunity. I will make very brief remarks.

First and foremost, I would like to say an emphatic “no” to this Bill. I strongly believe that we, as lawmakers, must all work towards fulfilling the spirit of the Constitution at all times. We all know that the injustices of the past led to the existence or creation of marginalized areas in our country. Those injustices have caused so much pain and suffering to Kenyans living in those unfortunate areas which we now refer to as marginalized areas.

In the wisdom of the drafters of our own Constitution, they proposed the establishment of an Equalisation Fund to restore equity and fairness; a fund which would be used to provide basic services; water, roads, health facilities, electricity and such other amenities at those marginalized areas in order to bring those areas to the level enjoyed by citizens in the rest of the country.

Article 204 (3) is very categorical and makes a lot of sense to me. That the national Government may use the Equalisation Fund either directly or indirectly through conditional grants to counties in which marginalized communities exist. This is very sensible because it is consistent with the enhancing the objectives of devolution. You will also remember the same Constitution has told us that devolution will only exist at two levels; the national Government and county governments. There is no mention anywhere in this Constitution about constituencies because at the constituency level, there is no capacity and they cannot implement these projects. They do not have technical expertise and do not have staff dedicated for purposes of implementing projects of this kind. It can only be done at the level of the counties. That is what was envisaged in the Constitution, in the first instance, for a good reason.

Therefore, I strongly oppose this Bill and advise my colleagues of this Senate to oppose it. They should oppose it completely so that it does not undermine the objectives of devolution.

**Sen. (Dr.) G. G. Kariuki:** Madam Speaker, I have been listening to this debate since I came back yesterday. Having been away for some time, it is difficult to follow what is being said, particularly this Bill that we are talking about today. If you look at it, you will find no reason why the National Assembly Speaker allowed it to be debated and to be forwarded to this House. That was to demean the responsibility of this House.

Everyone knows that we have had problems with the National Assembly. It started at the Kenyatta International Convention Centre (KICC), the day we reported as new Members of the Senate. The National Assembly had more fire and the 'war' was fought. I wish that the tone that we are using today was what we started with at the KICC. That is where the National Assembly and the Senate and the leadership lost direction. We ended up in a situation where everybody operated in their own way. The Senate had to establish its power and the National Assembly had the power in terms of numbers. We lost quite a lot.

I pray that when we come back, we will be new people who are ready to make positive contributions to this House. Some people exercise their powers in their own way to prosecute others for no reason. The answer to this problem is when political leaders will decide to move this country towards more development than they found it. If we do not realise our mandate as the Senate, we will continue to have these problems.

There was a dispute between the National Assembly and the Senate on who should manage the Constituencies Development Fund (CDF). To date, this has not been resolved. The matter was taken to the High Court, but the answer has not been found. Now they have the audacity to think that they can manage the Equalisation Fund. The Senate was created to defend county governments and not deal with anything else. The national Government and the National Assembly should not interfere with affairs of county governments because we represent them; we are here for that reason. We should not fail to represent the people at the counties.

This Bill will not solve anything; the situation will remain the same. The money will still go to the National Assembly. This situation is not only misleading, but badly thought out. The Senate Majority Leader should tell the Members of the National Assembly that we cannot be intimidated. We were denied money to oversight the county governments, a job which is constitutionally given to us, and we did not raise an issue. We were then told that we will be given Kshs1 billion, which we are not sure of. Unless the Senate approaches these things in a different and modern way of politics, it will be difficult for us to move forward.

We do not need to oppose this Bill because it is already unconstitutional. We should have rejected it when it was sent to this House because it has no legal support. I agree that sometimes politics does not recognize the legality of anything; it is about personal interests. The Senate should exercise its powers and take back this Bill to the National Assembly. The Senate should not act like it is powerless. Sometimes I feel like I am in an institution that has no power, yet our responsibility as the Senate is beyond that of the National Assembly. The Senate is a House where even the Head of State and other dignitaries can seek advice from.

I do not blame the young Senators because I was also a very young man when I first came to Parliament. I was a rebel and I caused a lot of problems. That is why I do not complain whenever the young Senators behave the way they do sometimes. You are



lucky that now you can say whatever you want in this House and go home without any fear. During our time, when you said anything that opposed the Government, you would find some people waiting for you outside.

Madam Temporary Speaker, we do not need to oppose this Bill. The Senate Majority Leader should consult with the Majority Leader of the National Assembly and tell him that things have changed. We cannot allow them to bully the Senate. They do not need to pass the Equalisation Fund on our behalf.

Our country has been independent for more than 50 years and the Senate has existed for four years. However, if we compare ourselves to the United Kingdom (UK), United States of America (USA) and other developed nations, we are still marginalized. Therefore, we need to share the little we have, so that we can move on and achieve something.

Madam Temporary Speaker, I have not seen you in a long time. You look smart and beautiful.

Thank you very much.

**The Temporary Speaker** (Sen. Ongoro): Thank you for those compliments. I now call upon the Mover to reply.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Thank you, Madam Temporary Speaker. I beg to move.

Given that we do not have the numbers, I request under Standing Order No. 54 (3) that you defer the putting of the question to next week.

**The Temporary Speaker** (Sen. Ongoro): Request granted. We will have it on the Order Paper next on Thursday.

*(Putting of the Question on the Bill deferred)*

Next Order!

## BILL

### *Second Reading*

#### THE CONSTITUTION OF KENYA (AMENDMENT) (NO. 2) BILL (NATIONAL ASSEMBLY BILL NO. 2 OF 2015)

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Madam Temporary Speaker, I beg to move that the Constitution of Kenya (Amendment) (No. 2) Bill (National Assembly Bill No. 2 of 2015) be read a Second Time.

This is another Bill from the National Assembly. As I said during the previous Order when I was moving the Bill, we in this House continue to discharge our obligations. Notwithstanding the criminal and illegal behaviour by the National Assembly of sitting on our Bills, we continue processing the Bills that come from the National Assembly not because we like the National Assembly but because the Constitution requires that we discharge our obligations for the benefit of the people of our country who elected us to represent them.

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Madam Temporary Speaker, this is a constitutional amendment Bill. I know there have been debates out there on whether or not the time has come to amend the Constitution and there have been various views from various quarters. Personally, I think since 2010 up to now, six years is a long time. We start entertaining the thought of a possible constitutional amendment comprehensively not just in terms of specific piecemeal amendments but comprehensively. I think there will be a national convergence that between the sixth year to the tenth year, we must confront the issue of this Constitution and fill the gaps that may exist, remove the contradictions that we have experienced and, therefore, this Bill could be trying in a piecemeal way to seal some of those loopholes.

Madam Temporary Speaker, this Bill is about the immunity of Parliament. It tries to cure a problem that we have experienced in the last three years being the first Parliament that has been created under the current Constitution. The problem has been that in some instances, other arms of Government have tried to claw into the purview and the mandate of Parliament.

This is contrary to the doctrine of separation of powers and against the spirit of constitutionalism. Parliament has had problems with the Executive in several aspects, also challenges and run-ins with the Judiciary. We have had cases where matters being considered before this House or the National Assembly have been taken over by the Judiciary, not in a complementary manner, but sometimes in a condescending, spiteful and illegal manner. We have pronounced ourselves in the past that Parliament is not subservient to any other arm of Government. It is complementary to the other arms of Government but not subordinate to the Executive or the Judiciary. This amendment Bill protects and entrenches further the immunity of Parliament from claw back by the other two arms of Government.

Madam Temporary Speaker, I would like to highlight three things on this Bill. The first one is that it gives functional immunity to individual Members of Parliament so that whatever a Member does in good faith and in exercise of parliamentary functions, cannot be used against him or her. The same applies to the Judiciary. You cannot hold a judge responsible for a decision that they have made in good faith and in the performance of judicial functions. However, two or three years ago, Senators were sued in their individual name for something that they had passed in this House. You sue the Parliamentary Service Commission (PSC), the Speaker of the Senate or the National Assembly and also individual MPs. In this case, it was the Senators. I have never heard of such kind of situation anywhere in the world. I have read constitutions of all the countries of the world and I have never experienced such a situation, where a legislator issued or can be sued or be made liable for actions or missions related to parliamentary functions, except where there is no rule of law.

That is the first clarification that this Bill brings. That, an MP is not liable in an action or suit in respect of anything done or meted to be done in good faith in the lawful performance of a function of Parliament. This is clear, and I do not think there should be contention on whether this is justifiable or not. It is absolutely necessary but it is one of the clarities that we missed in the Constitution-making process. That is why, for example, we have had instances like I have illustrated.

The second thing that this Bill tries to do is to amend Article 165 of the Constitution on the High Court and in particular in exercise of supervisory jurisdiction.

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There has been misconception and misunderstanding, especially with some of the younger judges who have joined the Judiciary in the last 10 years and who may not have been very grounded in legal theory, that the High Court, in supervisory jurisdiction, also supervises Parliament.

The High Court has various jurisdictions. Part of it is to supervise agencies and institutions of state to ensure that they perform their functions constitutionally and in accordance with the law.

Madam Temporary Speaker, world-over Parliament, being the body that represents the will of the people, does not fall within the purview of the administrative or supervisory functions of the High Court. The High Court can supervise the activities in State parastatals and Government Ministries, but not Parliament. The only way that the Judiciary as an arm of Government can interact with Parliament is by interpreting the law and declaring the product from Parliament as being against the Constitution. Their role is purely interpretative. They interpret the Constitution and can declare the Acts or Motions passed by Parliament as unconstitutional or illegal. However, they have no mandate or power to try and force Parliament to enact a law. They can recommend, but they have no power to compel Parliament to pass what they think is a good law. The sovereign mandate of making laws is with the Parliament, the same way the sovereign mandate of interpreting the law is with the Judiciary.

Madam Temporary Speaker, secondly, in Article 165 of the Constitution, there are some exceptions to what the High Court cannot interfere with in its supervisory jurisdiction. Therefore, this Bill adds another category; that matters before Parliament that are live and active when Parliament is exercising its mandate cannot be the subject of the judicial interference. In particular, it provides that:-

“Article 165 of the Constitution of Kenya is amended to provide the exemption of matters falling within the function of Parliament, either of its Houses or even a county assembly as provided for in this Constitution in so far as those matters are pending or undergoing consideration before Parliament, either in its Houses or a county assembly.”

In other words, one of the functions of Parliament is to make law. A court of law cannot stop Parliament from discussing this legislation, which is in the Second Reading, because there is an injunction or a case under determination. After the law is passed, the court can declare the law unconstitutional for some reasons.

Madam Temporary Speaker, Parliament cannot be stopped from making laws, representation and its oversight roles. I have heard some pundits out there talking about the concurrent exercises that are going on, especially with regard to the National Youth Service claims of corruption. On one side, there are court cases on the same matter, and on the other side, the Public Accounts Committee of the National Assembly is also hearing the matter. I see no contradiction; that is the correct position. For example, you cannot say that because a matter is before a court, Parliament cannot do its oversight functions. You cannot say that because the matter is in court, we cannot deal with it. There has been untidy interference.

I know that there is the *sub judice* rule. However, my argument has always been that once a matter is live in a House of Parliament, in exercise of its constitutional functions, no court can injunct or prevent Parliament from proceeding on that matter, the same way Parliament cannot stop a court from making a decision. Parliament cannot

force the court to interpret the law in a certain way or to decide a case in some way, the same way the judiciary cannot interfere on the work of Parliament.

Finally, the Bill will give Members of County Assembly (MCAs) the same immunity when they are overseeing and legislating. For example, you cannot say that you voted “Yes” for this Act of the County Assembly or the Act of Parliament, we hold you responsible.” You are immune and Parliamentarians around the world from any level of government, like judges, enjoy functional immunity. This is consistent with comparative constitutional law, international law and best practice. Further, for the first time in the history of our country, this will clarify the relationship between the three arms of government. It will also instill institutional discipline and respect among the three arms, so that you do not have one arm of government thinking it is superior to the other and is supervising the other.

Madam Temporary Speaker, I do not want to exceed that, I want to stop there. I hope Senators will support this Amendment Bill. In my view, this is a good amendment. As I have said, time has come for us to start reflecting. Perhaps after the general elections, we could address how to audit the Constitution and bring comprehensive constitutional amendments that take care of loopholes and gaps that we have identified in the last six or so years.

I beg to move and request Sen. Obure to second.

**Sen. Obure:** Thank you, Madam Temporary Speaker. I thank the Senate Majority Leader for being eloquent in moving this important amendment to the Constitution. I will be very brief in my remarks.

I start by saying that this Bill is long overdue. The Constitution gives Members of Parliament, Senators and MCAs powers to perform legislative and oversight roles. It is important that in performing those roles Members are given protection. The immunity must be extended to them in order for them to feel that they are sufficiently protected to effectively perform those roles. This Bill will give the legislatures at the county and national levels the independence they require to perform their roles more effectively. The institutions involved; the Senate, the National Assembly and the County Assemblies and their Members, will be more confident in discharging their constitutional duties. When they do this in good faith, based on information they have been given which they believe to be truthful, they should be given immunity as proposed in this Bill.

The Senate Majority Leader has spoken about the need to review the Constitution. Of course, there is a general feeling around the country that the Constitution as it is today should be left intact. However, even at the time when we were passing this Constitution, we had reservations. We felt that the Constitution was largely good for Kenyans to the extent of 80 per cent but you will also acknowledge that approximate 20 per cent of it was objected in certain respects. The time has come when we must seriously consider a general review of the Constitution. This will ensure that we remove those shortcomings and weaknesses in order that the entire population of Kenya is fully satisfied with the Constitution that governs us.

Madam Temporary Speaker, issues actively being pursued in the legislature. I agree with the Senate Majority Leader that there should be no interruption of issues that are actively being pursued in the Legislature or are under debate or consideration by

various Committees of Parliament. No organ of Government should interfere with those proceedings until they are fully concluded by the Legislature or its organs.

Madam Temporary Speaker, this is a good Bill that should be adopted by colleagues in this House.

I beg to second.

*(Question proposed)*

**Sen. Omondi:** Thank you, Madam Temporary Speaker, for allowing me to contribute to this Bill that seeks to amend the Constitution of Kenya. I support this Bill simply because it is an amendment that seeks to bring some sanity and draw lines between the organs of Government.

It also seeks to allow Parliament to carry out its mandate without interference. It reaches a time when our hands are tied and we cannot deliver or carry out our day to day constitutional requirements. Our Constitution still has some grey areas that need to be amended. However, we must only carry out amendments that will add value to the people of Kenya, without infringing on their rights. I will support any amendment on the Floor of this House that seeks to improve the lives of Kenyans through service delivery. As the Senate, we should not allow any amendment that infringes on the rights of the people of Kenya.

Madam Temporary Speaker, we represent the people of Kenya who are in the counties. For a common *mwanaanchi* to feel represented, we must support what benefits them and makes their lives better than it was 50 years ago. We should not legislate to benefit ourselves, but the people we represent.

I wish to remind Kenyans who live above the poverty line not to forget where they came from. Where we came from, we were not able to get a cup of water and we have Kenyans who are undergoing such a life. As we represent them, we must represent them having it in mind that we are working towards bringing down the poverty level. We can only bring down the poverty level when we legislate laws that are friendly to the users, that is, the people we represent.

Madam Temporary Speaker, many a times we come up with good laws but the law enforcement brings this country down. It is so shameful nationally and internationally that we have the laws in place but we are not able to use the law to bring sanity in this country. One of the areas that we feel ashamed is when we see the country facing a lot of corruption that leave Kenyans in poverty. Kenyans sleep on empty stomachs when people in power who are supposed to deliver quality services to the people have looted everything and the law is in place. It is because we are biased as a nation and as a Government. There are people who are untouchable. It is so annoying and I say that violation of the Constitution is against the law. The Constitution is above everyone. If we can legislate laws that are implemented, having the strength of the Constitution, I know we can achieve and deliver quality services to the people of Kenya.

With those few remarks, I support.

**The Temporary Speaker** (Sen. Ongoro): Thank you, Senator. I now call upon the Mover to reply.

**The Senate Majority Leader** (Sen. (Prof.) Kindiki): Madam Temporary Speaker, I thank Sen. Obure who eloquently and ably seconded this Bill. I have taken note of the points he has made and I hope other Senators have and they will improve on those legislations. I also thank my sister, Sen. Omondi, for her contribution and insights. I thank you.

With those few remarks, I beg to move.

Likewise, because of numbers, I request under Standing Order No. 54 (3) that you direct the deferment of the putting of the Question.

**The Temporary Speaker** (Sen. Ongoro): Request granted.

*(Putting of the question on the Bill deferred)*

Senator No.1, you can be excused for many things but not this one.

### ADJOURNMENT

**The Temporary Speaker** (Sen. Ongoro): Honourable Senators, it is now 6.30 p.m, time to interrupt the business of the Senate. The Senate stands adjourned until Tuesday, 8<sup>th</sup> November, 2016 at 2.30 p.m.

The Senate rose at 6.30 p.m.