

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 30th December, 2014

Special Sitting

*(Convened via Kenya Gazette Notice
No.9288 of 23rd December, 2014)*

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

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

PRAYERS

COMMUNICATION FROM THE CHAIR

CONVENING OF SPECIAL SITTING OF THE SENATE TO CONSIDER
PASSAGE OF THE SECURITY LAWS (AMENDMENT) BILL, (NATIONAL
ASSEMBLY BILLS No.39 OF 2014) BY THE NATIONAL ASSEMBLY

The Speaker (Hon. Ethuro): Hon. Senators, I have a Communication to make.

First, I wish to welcome you from the Christmas holiday and also thank you for finding time from the busy December festivities to attend this Special Sitting of the Senate. By a letter dated 23rd December, 2014 and pursuant to Standing Order No.29(1) of the Senate Standing Orders, the Senate Minority Leader, supported by at least 15 other Senators, requested the Speaker to appoint a day for a Special Sitting of the Senate to deliberate on the matter of the introduction, debate, passage and the enactment of the Security Laws (Amendment) Bill, (National Assembly Bills No.39 of 2014), which is now the law.

Hon. Senators, having considered the request by the Senate Minority Leader, I was satisfied that it met the requirements of Standing Order No.29(2). It is in this respect that I convened this Special Sitting of the Senate, by Gazette Notice No.9288 of 23rd December, 2014, which was carried in a Special Issue of the Gazette of 24th December, 2014.

Standing Order No.29(5) requires that whenever the Senate meets for a Special Sitting, the Speaker shall specify the business to be transacted on the appointed day and the business so specified shall be the only business before the Senate during the Special

Sitting following which the Senate shall stand adjourned until the day appointed in the Senate Calendar. In this case, Tuesday, 10th February, 2015.

Indeed, hon. Senators will observe that at Order No.2 on today's Order Paper – I hope everybody has a copy of the Order Paper – pursuant to these provisions of the Standing Orders, and as indicated in the Gazette Notice, the Senate Minority Leader will be giving notice of a Motion for the deliberation on the introduction, debate, passage and the enactment of the Security Laws (Amendment) Bill, (National Assembly Bills No.39 of 2014). You will also observe that the Motion has, with the approval of the Speaker, been listed at Order No.3 of the Order Paper.

Hon. Senators, it is noteworthy, and I wish to emphasize to all hon. Senators that debate on the Motion shall be limited to the substance of the Motion; namely, the manner of the introduction, debate, passage and enactment of the Security Laws (Amendment) Bill, (National Assembly Bills No.39 of 2014). It is, therefore, not permissible and out of order for any matter to be introduced or canvassed other than the Motion before the Senate. I will not hesitate to invoke the Standing Orders for any matter that is outside this.

Hon. Senators, it is also my expectation, that matters of this nature are emotive, that you remain sober, relevant and bring the issues that are pertinent to the debate.

I thank you.

Next Order!

NOTICE OF MOTION

CONSTITUTIONALITY OF THE SECURITY LAWS (AMENDMENT) ACT, NO.19 OF 2014 PASSED BY THE NATIONAL ASSEMBLY

The Senate Minority Leader (Sen. Wetangula): I beg to give notice of the following Motion:-

THAT:

WHEREAS on 8th December, 2014, the Security Laws (Amendment) Bill, National Assembly Bills No. 39 of 2014 was published;

AND WHEREAS the Bill sought to make amendments to the following array of laws relating to security-

- (1) The Public Order Act (Cap. 56);
- (2) The Penal Code (Cap. 63);
- (3) The Extradition (Contiguous and Foreign Countries) Act (Cap. 76);
- (4) The Criminal Procedure Code (Cap. 75);
- (5) The Registration of Persons Act (Cap. 107);
- (6) The Evidence Act (Cap. 80);
- (7) The Prisons Act (Cap. 90);
- (8) The Firearms Act (Cap. 114);
- (9) The Radiation Protection Act (Cap. 243);
- (10) The Rent Restriction Act (Cap. 395);
- (11) The Kenya Airports Authority Act (Cap. 395);

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- (12) The Traffic Act (Cap. 403);
- (13) The Investment Promotion Act (Cap. 485);
- (14) The Labour Institutions Act (No. 12 of 2012);
- (15) The National Transport and Safety Authority Act (No. 33 of 2012);
- (16) The Refugees Act (No. 12 of 2006);
- (17) The National Intelligence Service Act (No. 28 of 2012);
- (18) The Prevention of Terrorism Act (No. 30 of 2012);
- (19) The Kenya Citizenship and Immigration Act (No. 12 of 2011);
- (20) The National Police Service Act (No. 11A of 2011); and
- (21) The Civil Aviation Act (No. 21 of 2013)

AND WHEREAS the Bill was introduced in the National Assembly and read a First Time on Tuesday, 9th December, 2014;

AND FURTHER WHEREAS the Bill was passed by the National Assembly on Thursday, 18th December, 2014, assented to on Friday, 19th December, 2014 and thereafter published in the Kenya *Gazette* Supplement No. 167 on 22nd December, 2014 as Act No. 19 of 2014;

COGNIZANT THAT Article 110(3) of the Constitution requires that before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

FURTHER COGNIZANT THAT Article 96 of the Constitution provides that the Senate represents the Counties and serves to protect the interests of the Counties and their Governments and further participates in the law-making function of Parliament by considering, debating and approving Bills concerning Counties as provided in Part 4 of Chapter Eight of the Constitution;

RECALLING that the Supreme Court of Kenya in Supreme Court Advisory Opinion No. 2 of 2013 reaffirmed the central role of the Senate in the legislative process and in particular with respect to Bills that concern County Governments and further pronounced itself on the manner in which, pursuant to Article 110(3) of the Constitution, the Speakers of the two Houses are to jointly resolve the question as to whether a Bill is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill;

AND NOTING IN PARTICULAR that on legislation relating to security the Supreme Court of Kenya in Supreme Court Advisory Opinion No. 2 of 2013 cited, with approval, the Final Report of the Task Force on Devolved Government Vol: 1 A Report on the Implementation of Devolved Government in Kenya [page. 18] which stated, inter alia, that “although security and policing are national functions, how security and policing services are provided affects how county governments discharge their agricultural functions. As such, a Bill on security and policing would be a Bill concerning counties.”

AND WHEREAS despite the Supreme Court’s Advisory Opinion, the National Assembly failed to adhere to the requirements of Article 110(3) and (4) of the Constitution in respect to the Security Laws (Amendment) Bill, National Assembly Bills No. 39 of 2014 by considering the Bill and proceeding to secure presidential assent to the Bill without seeking the concurrence of the Speaker of the Senate and in terms of Article

110(3) and without referring the Bill to the Senate in terms of Article 110(4) of the Constitution;

CONCERNED that the exclusion of the Senate in the consideration and enactment of legislation that relates to security adversely impacts the Senate's ability to represent the counties and to protect the interests of the counties and their governments in security matters which are of great concern to the counties and to the county governments and which affect the functions and powers of county governments;

FURTHER CONCERNED that the continued exclusion of the Senate in the legislative process in the national Parliament could eventually result in the weakening and eventual dismantling of the devolved system of government which is the cornerstone of the Constitution of Kenya, 2010;

RECALLING the resolution of the Senate of Thursday, 13th November, 2014 on the processing of legislation between the two Houses;

OBSERVING that despite the resolution of the Senate, the unconstitutional and unprocedural processing of legislation continues to persist as evidenced by the consideration and passage by the National Assembly of the Security Laws (Amendment) Bill, National Assembly Bills No. 39 of 2014;

NOW THEREFORE THE SENATE RESOLVES-

1. That the Security Laws (Amendment) Act, No. 19 of 2014 is unconstitutional and therefore null and void as the consideration and passage of the Bill violated Article 110(3) and (4) of the Constitution;

2. That the Security Laws (Amendment) Act, No. 19 of 2014 be included in the compendium of Bills set out in the Resolution of the Senate of Thursday, 13th November, 2014 in respect of which the Senate is seeking an Advisory Opinion from the Supreme Court on the constitutional status of Acts of Parliament which have been passed by one House of Parliament and assented to in contravention of Article 110(3) of the Constitution.

The Speaker (Hon. Ethuro): Next Order!

Yes, Minority Leader.

POINT OF ORDER

DETERMINATION ON WHETHER DEBATE ON THE CONSTITUTIONALITY OF
THE SECURITY LAWS (AMENDMENT) ACT IS *SUB JUDICE*

The Senate Majority Leader (Sen. (Prof.) Kindiki): On a point of order, Mr. Speaker Sir.

The Speaker (Hon. Ethuro): What is it, the Senate Majority Leader?

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir. I rise under Standing Order No. 92 of the Standing Order of the Senate of the Republic of Kenya. I have listened with great concern as the Senate Minority Leader gave notice of a Motion, which Motion he intends to move, concerning a matter which is squarely, directly and actively before a court of law. Allow me just to refer to Standing Order No. 92(1), because it is clear.

It states that:-

“Subject to paragraph (5), no Senator shall refer to any particular matter which is *sub judice* or which, by the operation of any written law, is secret”

Mr. Speaker, Sir, the thrust of the Motion by the Senate Minority Leader is a matter which is *sub judice* and actively before the High Court of the Republic of Kenya. The matter of the Security Laws (Amendment) Act, 2014 is active in court within the meaning of Standing Order 92(3) (c) which says:-

“In determining whether a criminal or civil proceeding is active, the following shall apply—

Civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.”

Mr. Speaker, Sir, the matter of the intended Motion is a matter which has been heard. When I look in this hallowed Chamber of this Senate, I see colleagues who are even actively litigating in that matter as counsel. The dignity, impartiality and consistency of this Senate is at stake, if we allow a Motion concerning a matter that is active before a court and where a ruling is expected this Friday, to be discussed in this Senate.

Mr. Speaker, Sir, the reason I stood on this point of order is not because I impute any improper motives on the Mover or sponsor of this Motion. It is not to try and, perhaps, ignore the issues that may be relevant. However, we have taken a consistent position in this House; that we need other arms of Government to respect the Senate and equally, the Senate must be respected by other arms of Government. This is because we cannot keep on demanding respect when we cannot reciprocate that respect. We have asked courts not to injunct this House, because when a matter is active before this House, it cannot be injuncted. You wait until the matter is finished. If it is a law, you follow it to the court and the court is free to make an interpretation about that law, as is happening in the current matter.

Mr. Speaker, Sir, I humbly request the direction of the Chair. This is because the sole purpose of this Sitting is to discuss a matter which is active before the High Court. We are setting a dangerous precedent. We are setting up this Senate to ridicule. This Senate is the last hope that Kenyans are looking up to, as the bastion of legality and constitutionality. So, with great respect to the Mover, it will be illegal to allow a matter that is active before court to be moved before this House. The purpose of these Standing Orders is to ensure that when an illegality is quoted, like in this case, then the matter does not arise at all.

Mr. Speaker, Sir, I am being reminded – and it is important – that the same Standing orders that I have relied on require – I think in paragraph 4 – that any Senator who is alleging that the *sub judice* rule has been breached must provide evidence. I have with me certified copies – stamped by the Registrar of the High Court of Kenya – of the proceedings on the matter in question, including the certificate of urgency, under which this matter and petition was filed, including the notice of Motion and petition itself. What this Senate is about to entertain is a matter that is squarely before the High Court. If we proceed, we will be breaching the Constitution, tradition and doctrine of separation of

powers. We will have undone, by a single stroke, all the gains that this Senate had accumulated in very difficult circumstances.

Mr. Speaker, Sir, I now wish to table a copy of the proceedings to be part of the record of this House.

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

(Hon. Wetangula stood in his Place)

The Speaker (Hon. Ethuro): Sen. Wetangula, on that one!

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, what my distinguished learned friend and junior has done is to jump the gun. He is objecting to no Motion. There is no Motion before the House yet. I have only given Notice of Motion; an intention of a future happening. The future happening is in on Order No.3. So, there is no Motion to object to.

Mr. Speaker, Sir, be that as it may, if the Chair can then give us a hearing on that. First, the Special Sitting of today is not to discuss a matter that is before any court of law. A Special Sitting of today is to discuss an Act of Parliament unprocedurally and unconstitutionally passed by the “Lower House.” That is the Motion before this House. It is not about a matter before court. The Notice of Motion that I gave made no reference whatsoever to any matter before any court.

Mr. Speaker, Sir, secondly, in selectively reading Standing Order 92, my distinguished learned friend omitted carefully to read to you 92(5) that says:-

“Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee.”

This House is guided under Standing Order No.1 by the Constitution, Statute Law, usages, forms, precedents, customs, procedures, traditions of Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya.

Mr. Speaker, Sir, *Erskine May*, the bible of parliamentary procedure, is very clear on matters of *sub judice*. It says on page 387 that exceptions to *sub judice* have for example been made on matters before civil courts which relate to ministerial decisions or concern issues of national importance. The matter referred to is before a civil court and is also a matter of national importance. Therefore, it comes under the exceptions in *Erskine May*, which is one of the major references that any Speaker in the Commonwealth relies on.

This matter has not also been canvassed for the first time in Parliament. In the last Parliament – in one of those many now commonly called “Solomonic” rulings of Speaker Marende – the issues of *sub judice* were adjudicated and argued before Speaker Marende and he made very good rulings which I will invite you to look at, take cognizance and follow.

Mr. Speaker, Sir, the first is a Communication from the Chair which I have passed to you, dated 10th September 2009. In this matter, a matter was canvassed before the Speaker in the House by the then Minister for Justice and Constitutional Affairs, the late Mutula Kilonzo, may he rest in eternal peace. Speaker Marende cited the equivalent of

our Standing Order No.92, and I can read the relevant portions, at page three, which I have given you:-

“ In the House of Commons of the United Kingdom, the *Sub judice* rule provides that matters awaiting the adjudication of courts of law should not be brought forward for debate in the House, but this is subject to the discretion of the Chair and the right of the House to legislate on any matter or to discuss any matter.”

The House has the right to discuss any matter and to legislate on any matter. It is all within your discretion.

Mr. Speaker, Sir, number two, Speaker Marende went on to say, quoting *Erskine May*, that matters of national importance also fall within that exception. That is on page four. However, he goes on to say something very fundamental at page Five.

“It must be noted, hon. Members, that the court proceedings are presided upon by judicial officers properly trained in law who have taken an oath to discharge the functions of the office without fear or favour and without extraneous influences being brought to bear on their work. In the ordinary course of affairs, judicial officers of any repute are very unlikely to be swayed by what is said in Parliament. It does not inspire confidence in the able and learned men and women who serve in our judiciary if we allow the propagation of a view – which view is being propagated by the Senate Majority Leader – that the Judiciary are always looking over their shoulders at what Parliament has said or what stand Parliament may take on a matter before making their recommendations will affect them. It would, probably, itself be an affront on the principles of separation of powers if one arm of the Government were to take such a view of another arm of Government. In my considered view, in a properly functioning democracy with a sound and professional judiciary, the burden of the evidence required to show that there is a likelihood of prejudice to the fair determination of any matter by the court should be set very high indeed.”

Mr. Speaker, Sir, I want to urge you to find that we are going to debate a matter of national importance. We are not seeking to influence any court decisions. The courts are unlikely to be influenced by a debate on the floor of the House because courts of law, properly described and established, act on facts placed before them and the law canvassed before them; not on extraneous matters debated in chambers in county assemblies, in the National Assembly or in the Senate of Kenya.

Mr. Speaker, Sir, the second ruling by your distinguished colleague, Speaker Marende, on 10th September, 2011, and I again gave you a copy. This was a matter that was canvassed before the National Assembly by the then Member for Kisumu Town, Hon. Olago Aluoch. Speaker Marende in ruling on the issue of *sub judice* said the following at page six of that ruling:-

“As I have previously ruled, the *sub judice* rule is not one to be invoked lightly. A claim of likelihood of prejudice of the fair determination of a matter is similarly not to be invoked without circumspection---”

The Speaker (Hon. Ethuro): Order Senator! That is on which page?

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, it is on page six, the last long paragraph. If I may start again:-

“As I have previously ruled, the *sub judice* rule is not one to be invoked lightly. A claim of likelihood of prejudice of the fair determination of a matter is similarly not to be invoked without circumspection. I have ruled before and reiterate that gagging this House and preventing it from discharging its constitutional mandate requires tangible reasons to be advanced.”

Mr. Speaker, Sir, it is not enough for the distinguished Senator to place before you pleadings before a court. He has to demonstrate that debating the matter here will affect and influence the proceedings in the court and that, in fact, it will amount to casting aspersions against the judge; that the judge who is hearing the case is likely to be influenced by what distinguished Senators will say here. That Judge should be removed from the bench because he has no business being a Judge. Speaker Marende went on to say:

“The danger of prejudice to the due administration of justice must be clearly shown.”

The Senate Majority Leader has not shown any, he has not even attempted to show any.

Speaker Sinden of the Australian House of Representatives held similar views when in 1976 – and this is what I referred to under Standing Order No.1 as comparable jurisdiction and precedence from other jurisdictions – said the following which is quoted here:-

“There is a long line of authority from the courts which indicates that the courts and judges of the courts do not regard themselves as such delicate flowers that they are likely to be prejudiced in their decisions by a debate that goes on in the House”

Mr. Speaker, Sir, even if it had been shown – which it was not – which is the same case here, that the proceedings were active within the meaning of our rules, I am not prepared to find that in the present circumstances there was or there is a likelihood that the debate in this House would prejudice the fair determination of the matter.

My objection to that point of order is on two limbs. One, it was like jumping the gun because there is no Motion before the House. Assuming that you rule that he was right in saying what he said, he has no limb to stand on to curtail debate on the basis of pleadings that he has placed before the House simply because a matter is before court. This is not a court of law. It is an arena and a theatre of political debate and legislation. That is a court of law that determines matters on facts and law and nothing else. Woe unto this country and our judiciary if any judge sitting out there would raise his hair and determine a matter because he heard the distinguished Senator for Tharaka-Nithi raise something about it on the Floor of the House.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Sen. Murungi.

Sen. Murungi: Mr. Speaker, Sir, we have all come from long distances to attend this Special Session because we are taking this matter seriously. I do not want, in any way, to trivialize this session. I want to give very brief responses to what the Senate Minority Leader has said regarding the preliminary objection which has been raised by the Senate Majority Leader.

The Senate Majority Leader has been accused of jumping the gun. If you look at Standing Order No.92, it does not only deal with issues of *sub judice*, but also deals with matters which are by their very nature, secret. If we are to follow the logic of my learned friend, then we would allow even the secret matters to be discussed first so that we cannot jump the gun. The Senate Minority Leader as a lawyer knows very well that in any proceeding you can raise issues of competence of the proceedings before they start and I think that is what the Senate Majority Leader has done.

It would not be permissible for any Senator to raise matters which cannot be raised on the basis that those issues should be canvassed later during the hearing of a Motion. It is that spirit that the Senate Majority Leader raised this issue. He raised the issue on the basis that the matter which we have been called from our holidays to come and discuss cannot in fact be discussed in this session. I am very sorry that the Senate Minority Leader has caused us all this trouble to come and discuss a matter which should not be discussed.

Secondly, he referred to Standing Order No.1 as a basis for introducing authorities and, indeed, the authorities he has cited like *Erskine May* are very powerful authorities as far as parliamentary proceedings, the law and its interpretation, are concerned. If you look at Standing Order No.1, it is very clear that it can only be invoked in cases where matters are not expressly provided for by the Standing Orders. It also says that decisions made in paragraph one shall be based on the Constitution of Kenya, the Statute Law, the usages, forms, precedents, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that they are applicable to Kenya. The hierarchy is very clear; you start with the Constitution of Kenya, then the Statute Law. If the matters are not provided for either in the Constitution or the Statute Law, then you can go to usages, forms, precedents, customs and so on.

Therefore, the matters the Senate Minority Leader referred to fall under category three. In our case here, the matters are expressly provided for in Standing Order No.92(1). It states:-

“Subject to paragraph (5), no Senator shall refer to any particular matter which is *sub judice* or which, by the operation of any written law, is secret”

It is quite obvious that the Minority Leader is referring to the Security Laws (Amendment) Act, No.39 of 2014, which is in court and it is his own party which has taken this matter to court so he cannot say he is not aware. So, he is referring to a matter which is active in court and the ruling is coming on Friday. As I am talking now, the judge is doing his research and listening to what the lawyers said. Therefore, any debate in this Senate today might form part of the research that the judge will consider. We do not know what the judge is looking at and what we are saying here is going to be covered in the media tomorrow. The judge could be watching the national television as we are talking and you cannot prevent him from doing so. That means that he could be influenced by what we are saying in these proceedings today.

Mr. Speaker, Sir, finally, we attended a very important conference with the leadership of the Judiciary and what came out is that we need to respect each other's territory. If a matter has started in the Senate, then the Judiciary should wait for the Senate to conclude and consider whether the matter is constitutional or not. Similarly, if

the matter has started in the judiciary, it would be unfair and, indeed, we would not be gentleman enough after discussing the way we did, to come and continue discussing the same things we said we would not discuss.

Therefore, for us to preserve our dignity as the Senate and for us to be the apex House of devolution which respects the Constitution and the rule of law, I think it is only fair that just as we did with the Makueni case, where in the impeachment of the Governor, we declared that since the matter is already in court, let the court finish with it and then we shall look at it. Let us in the same spirit treat this matter because our friends in CORD have already gone to court. Let us allow the court to finish with it, the Senate is here and we can deal with it after the court finishes.

Thank you, Mr. Speaker, Sir.

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

Sen. Orengo: Mr. Speaker, Sir, first of all, let me declare my interest. I am, indeed, acting as counsel and a very competent one on this matter that is being referred to. This is a matter that is being referred to because when the Senate Majority Leader tabled the documents which are supposed to have pleadings, he did not tell us who the parties are and what the case number is. He just tabled some papers and did not put on record what he is talking about. Therefore, it is a bit unfortunate.

Secondly, the decision as to whether this matter is *sub judice* or not, will rest on you and not some vote of the House. That is considerable authority, power and trust that are vested in you.

Mr. Speaker, Sir, you have to address this issue not on the basis of what we are saying, but on the basis of what the Standing Orders say and on the basis of what the Senate Majority Leader has put before you.

Mr. Speaker, Sir, I refer you to Standing Order No. 92(4) which places responsibility on the Senator who is making the allegation. It is not on all of us, what we are saying is of no value. Standing Order No. 92(4) says:-

“A Senator alleging that a matter is *sub judice* shall provide evidence to show that paragraphs (2) and (3) are applicable.”

Therefore, the onus is on the Senator making the allegations.

Mr. Speaker, Sir, he has failed in fulfilling the requirements of the Standing Orders. For example, the ruling which was made by Speaker Marende which has been cited and tabled before you, and at that time the issue of *sub judice* was being raised by the Minister for Justice, not an ordinary Member, he was somebody who had a direct responsibility. Having said all that he had to say, the Speaker was not satisfied that he had fulfilled the requirements of the Standing Orders. He said this on page 5:-

“The Chamber Summons attached to the documents presented by Mutula Kilonzo is blank in the space provided for indicating the date on which all parties concerned should attend hearing for the matter. No hearing notice or other evidence has been provided.”

Mr. Speaker, Sir, the fact that we are being told that this matter is coming on a certain date is based on what is being alleged on the Floor of the House. There is no evidence being provided to the House and that onus is on him. But more important ---

(Loud consultations)

The speaker (Hon. Ethuro): Order Senators! Sen. Orengo shall be heard.

Sen. Orengo: Mr. Speaker, Sir, more importantly, it is the question of prejudice. That has not been dealt with and it is too late now to deal with it because the Senator making the allegation should have addressed that issue of prejudice. This is because the burden is on him and not on the House.

On the same decision that was made by Speaker Marende on the 10th September, 2009, he had this to say, and this was not the part that was read by the Senate Minority Leader. It says:-

“On the question of the likelihood of prejudice to the fair determination of court proceedings, it is useful to note that the legal term “prejudice” is not just any term. It is a term of art, finds expression in many areas of the law and may be described in a myriad ways. The concept is supposed to operate to prevent procedural and substantive injustices, not to create them.”

Mr. Speaker, Sir, allegations of prejudice must be scrutinized carefully. There has been no allegation at all of prejudice. There is nothing to scrutinize. The specific allegations of likelihood of prejudice should be detailed with sufficient particularity to allow the Chair to make an informed decision on the merit of the allegation.

Mr. Speaker, Sir, what then are you required to do when no evidence has been placed on that very important consideration which is required by the Standing Orders? That concrete evidence on the issue of prejudice must be provided. However, that has not been provided. It is too late now to try and provide it because the Senator who was making that allegation has had his bit and on that account alone, this matter fails.

The other thing that this House must remember, for example, if today the President, in his exercise of his powers and authority, wanted to declare war and he needed the permission of Parliament, and in the intervening period somebody went to court, and the country is under attack, would you stop this Parliament from giving authority to the President to declare war simply because that the matter was *sub judice*?

This is, probably, the reason Mr. Speaker said that we should address each other with decorum and I do not want to cast aspersions. However, I am beginning to believe that the Senate, in order to make sure that its authority is not undermined and similarly not to undermine the authority of the Judiciary, that on matters which come before us, we should be able to create a balance where we can discuss matters before us, without causing prejudice in this case which has not been alleged.

I must say in conclusion that the rule of *sub judice* is not a constitutional rule. It is not in any law other than the Standing Orders. Standing Orders are rules. Therefore, they cannot overcome the Constitution and the statutory laws as passed and enacted by Parliament. To that effect, because of the significance of this issue that is being raised, Parliament must also be heard if the Fourth Estate is talking on this matter and informing Kenyans what their opinion is, even the National Assembly has taken a position on this matter - this mongrel which you are interpreting in a negative way - then I am sure that this Senate will be confined to oblivion. This is because you will always find a reason for not deciding or debating anything.

I conclude by saying that, indeed, this matter is not *sub judice*. The Senate Majority Leader has failed to exercise what is required of him under the Standing Orders and prove that this matter is *sub judice*.

Sen. Kembi-Gitura: Mr. Speaker, Sir, I thank you. If this matter is not *sub judice*, then I do not know what is *sub judice*. The pleadings have been tabled before this House. This is in Petition No. 60 of 2014 in the matter of so many things, but finally it is in the matter of the Coalition for Reforms and Democracy (CORD) and the Attorney-General of the Republic of Kenya. All that you need to do or everybody needs to do to be able to make an informed ruling on this matter, is to read the declarations that are sought in this Petition.

Mr. Speaker, Sir, I must, first of all, say that it is important that the Senate Majority Leader has brought this matter of *sub judice* as a preliminary objection before the Motion is moved. This is because if the Motion were to be moved and the Senate Minority Leader has one hour to move it; the seconder will have maybe another ten or thirty minutes, in that case, if indeed, the matter is *sub judice*, it will go beyond repair. There will be damage beyond repair because the Motion would have been moved and matters *sub judice* would have been canvassed.

I do not need to go back to what *sub judice* is because Standing Order No. 92 is clear. Therefore everybody should read and understand. However, if you look at the Motion, the first thing it is seeking - and it is important to read this out - is that the Security Laws (Amendment) Act No. 19 of 2014 is unconstitutional and, therefore, null and void and as consideration and passage of the Bill violated Article 110 (3) and (4) of the Constitution---. That is important because if you read page 26 of the Petition, you find that what is being sought by the petitioners at “a” is a declaration that the Security Laws (Amendment) Bill 2014 in its entirety was not procedurally debated and passed by the National Assembly in accordance with the Constitution of Kenya and “b” is important, it reads:-

“That the presidential assent to Security Laws (Amendment) Bill was unconstitutional and improper, the National Assembly having failed to comply with Article 110(3) and (4) of the Constitution of Kenya and, therefore, invalid, and therefore, null and void.” That is exactly ---

The speaker (Hon. Ethuro): Order Senator! Which page?

Sen. Kembi-Gitura: Page 26 and 27 of the Petition, Mr. Speaker, Sir. “a”.

The last one that I read was declaration “d.”

The National Assembly, having failed to comply with Article 110(3) and (4) of the Constitution of Kenya is, therefore, invalid and, therefore, null and void.

I invite you to look at the resolution we are being asked to make in this House pursuant to the Order Paper. What we are being asked to resolve is that the Security Laws (Amendment) Act No.19 of 2014 is unconstitutional as the consideration and passage of the Bill violated Article 110(3) and (4) of the Constitution.

Everything is the same and a replica of the declaration and the orders sought. The question is this: What would be the effect of us, as the Senate - without going to the merits, because we do not want to go there – making a resolution in this House in terms

of resolution No.1 sought? If we declare it unconstitutional because Article 110(3) and (4) was not followed, what is the court being asked to resolve tomorrow?

The most important thing about this is that – I am very happy that Sen. Orengo, my senior colleague in the profession, started by disclosing that he is counsel in this matter. These are the same people who took the matter to court and awaiting ruling on 2nd which is Friday, the day after tomorrow. They are awaiting the decision of the court on whether or not there was constitutionalism in the passing of this Bill. What are we doing now as the Senate?

Mr. Speaker, Sir, are we being asked to preempt what the High Court will do or are we being asked to come up with a resolution to say that this is an unconstitutional resolution? What will happen if the court rules that it is not unconstitutional? We will have two institutions of this Republic giving contrary opinions about a matter affecting all of us, as a nation, and that will be a danger.

That is why I have been on record as saying that if we want to have true democracy in this country, then we must respect and build institutions. We must respect and abide by what the court will say on Friday. If any of us does not agree with it, they will go to the Court of Appeal, and subsequently, to the Supreme Court.

The question we must ask ourselves is: What will be the effect of making a resolution today while we are still awaiting a declaration by the High Court? We are dealing with this matter as a preliminary point of objection. We should not enter into the trap of dealing with matters *sub judice* when, indeed, we are enjoined by our own Standing Orders.

It is not entirely correct to say that the Standing Orders are not constitutional. The Standing Orders are founded in the Constitution because it is the Constitution that provides that the House of the Senate shall create Standing Orders that will govern how the Senate carries out its business.

Mr. Speaker, Sir, we are waiting from you a ruling that will be very important. This ruling will be important because it will finally lay to rest what is *sub judice* and what is not. This is important. That is why none of us is going to the merits or demerits of the substance. We are trying to protect the institution called the Senate and the High Court or Judiciary, so that we are together on this. We should create strong institutions and, therefore, a strong democracy in this country.

With those few remarks, if you look at the declaration sought and the resolution we have been asked to make in this House, you will possibly not find anything other than the fact that this matter is *sub judice*. Thank you.

Sen. Hassan: Mr. Speaker, Sir, thank you for this opportunity. We are all here with regard to this matter which is of national interest. I will guide you to make this decision and urge you to invoke the traditions used, not only in the Kenyan Parliament, but also in the larger Commonwealth countries. I think that way you will have a constitutional back up.

Article 117 of the Constitution says that there shall be freedom of speech and debate in Parliament. That freedom of speech is on everything and anything. This law does not gag any Member of this Senate or Parliament from debating anything anywhere. We have founded a Constitution that is revolutionary.

Some of us were in the trenches of making the Constitution and realised that as we made it, this Parliament; being the expression of the sovereign will of the people must be allowed to speak on anything and everything, whatever the agenda is. Therefore, the freedom of speech provided to this Parliament is absolute.

Secondly, Article 117(2) says in part, Parliament “may”. That is why we decided to have Standing Orders to guide the rules of debate. It is important as we look at the constitutionality of Standing Order No.92 to remember that Parliament must discuss anything and everything as one of the avenues for redress for the people of Kenya. This does not prevent them from having the capacity to go to court, to come to this Parliament or to persuade the Executive in whatever forum that we may be in a position to entertain or speak to.

Therefore, to limit ourselves and to say that this Parliament has limit in terms of freedom of speech is to breach the Constitution which allows us to speak on anything and everything. That is why, in the first instance, I came to this Parliament with the hope that where there is travesty anywhere, we will discuss it here and pronounce ourselves on the matter. That is why we have privileges. That is why matters that are pronounced in this Parliament are safeguarded within those kinds of privileges and legislations that we have created.

Today is a moment in history to revolutionalise the traditions of Parliament across the world that the rules of *sub judice* do not apply where the sovereign will of the people wants to express itself on a matter. Courts are created by that sovereign will, we are created by that sovereign will and we represent that sovereign will almost directly. Therefore, in the event that you want to go into specifics, I will also assist you in that this regard. It would have been easier for you to use Article 117 of the Constitution.

On 30th July, 2009, Speaker Marende made this pronouncement.

“If this House is to remain relevant, it must resonate with the concerns of the people.” We know the concerns regarding this Act. In this instance, the public interest was the response to the pyramid schemes.

There is overwhelming interest to the Security Laws (Amendment) Act. The ruling continues to say.

“The *sub judice* rule was not crafted to defeat the ability of this House to pronounce itself on matters of national importance.”

This is a matter of national importance. If the constitutionality of this Act is not a matter of national concern to you, then it is a matter of national importance to us. We know that power when left unchecked can be abused.

The ruling continues to read; “to rule in this manner would be to reduce the House to a bystander.”

It irks me to see my colleagues from the other side of the aisle wanting to relegate this House to a bystander. They are watching helplessly unable to intervene as rights of Kenyans are imperiled constantly. Some of my colleagues here have thumped these Senate proceedings as if they have just scored from a non-ranked system of the Kenya Certificate of Primary Education (KCPE). They are very excited. Today they are the same people swallowing their own jargon and words saying that we need to protect the

Senate. The only way to protect the Senate is to continue with this debate and look at the constitutionality or otherwise.

Mr. Speaker, Sir, you are the first Speaker of the Senate of the Republic of Kenya under the 2010 Constitution. Therefore, it is important for you not to limit the reach of this House. Let the reach of this House be on any matter constitutional or which affects issues of national importance or interests.

Allow me to just speak on one issue because I think it is not specific. I will look at the Security Laws (Amendment) Act, Section 65. I am not going into details, but I want to tell the Speaker why this matter is of national importance. If it is not important for everybody else, it is important for the Senate. If it is not important for my colleagues on that end, it is important for the colleagues of the Senate who want to protect it. It says: Pursuant to Article 238 (2) of the Constitution---

(Sen. (Dr.) Khalwale applauded)

The Speaker (Hon. Ethuro): Order, Sen. Khalwale! I thought Sen. Hassan was wondering about the vigour from the other side. My understanding was that you were completely supportive, but you have supported it with the same vigour.

Proceed Sen. Hassan.

Sen. Hassan: In terms of process, it says:

“The Constitution exercises oversight of the service through relevant committees.”

Then the Act itself is why I am going to be this specific. Section 58 says:-

Security Laws (Amendment) Act is amended by deleting the word ‘Parliament’ and substituting the word ‘National Assembly.’

At least, if you want to take anything from my house, you need to follow a process of consultation with this House. This can be compared to a guy or woman who has come to pouch your spouse simply because he or she appears to be a friend. It is wrong for you to have come and pull out any effect of this Senate without having concurrence of this Senate. Therefore, that process was flawed. If for nothing else, the Senate would have bothered itself with that one Section because I know the other Sections are of concern to many other institutions that are pronounced in this matter.

As I go to sit, I heard Sen. Murungi, whom I have enormous respect for say something---. When I was in distress he stood by my side. He took for me a petition to court. Finally when the National Rainbow Coalition (NARC) Government came to power, through Sen. Mugo, I was taken back to university. That was the whole effect of me going to the university to learn some of these things.

(Laughter)

The Speaker (Hon. Ethuro): Order, Sen. Omar! Your memory must be failing you. You seem to remember history and not the present. This House also showed a lot of empathy to your situation just recently.

Sen. Hassan: Absolutely. I thank this House for that empathy. This Senate is a House of debate. Sen. Murungi, courts determine on matters of facts and law. If any magistrate or judge is sitting somewhere in front of his television watching me or Sen. Wetangula being persuaded by strong argument, they have the opportunity to persuade them differently. I do not think he or she will even make reference to this debate. This debate is important because we need to speak to public policy. This is a House of policy too.

Mr. Speaker Sir, Motions do not influence the decisions of courts. If a judge is seated out there and has decided to listen to the eloquence of the Senators, he or she should not be guided by the debate. He still stands on the altar of facts and law. I want you to be guided. I reiterate my previous point and I can tell you that in this country the word “activist” is regarded as a shameful derogatory word. I now advise you from that activism which I still harbour in great supply.

This is because in a country where the Constitution is under one of its most severe threats, you need no other way, but courage and activism. From that, they refer to this as an activism Constitution – *iliandikwa na watu wa* human rights. That is what they keep saying derogatorily. In Article 117 when activists said that Parliament should not be gagged, the activists had seen a situation of this nature. This is an avenue of redress which we need to discuss. You have the opportunity today to overhaul and set a new precedent that these Houses shall not be confined, restricted and gagged by the rules of *sub judice* which are selectively, and with a heavy dose of amnesia, being used to stifle debate by my friends or colleagues on the other side.

Thank you for that opportunity to speak on this law.

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

Sen. Billow: Thank you very much, Mr. Speaker, Sir. This House has worked together for the last two years in a very bipartisan manner. In fact, I want to thank the Members because in this debate, so far, we are conducting ourselves in a very respectful and dignified manner. This is something that all of us should appreciate.

We also wanted to protect the Constitution when we came into this House. This Constitution, among other things, provides for institutions. One of the key institutions in this country that also needs to be protected in terms of its rights and mandate in the same way that the Judiciary, National Assembly and the Executive need to be protected, is the Senate. This institution of the Senate also requires that its rights be respected as provided for in the Constitution. That is one of the things we undertook to do.

There are two fundamental issues here that you are being asked to make a decision on. One is on the freedom of speech and debate of proceedings in Parliament that ought not to be impinged or questioned by any institution, including a court or anyone else. That is one rule that needs to be observed that we are being asked to look at. The second, of course, is the matter of *sub judice*: That if a matter before the court, awaiting adjudication by the court, that matter should not be discussed in Parliament. These are the two issues that have been put before you.

However, the one thing that none of us here has, but which you do and has been repeated by our colleagues, is the singular distinction of discretionary power to determine whether this matter is *sub judice* or not. Looking at the two issues – the freedom of this

House and the need to look at the future of this House and also the courts - I do not underestimate or understate the significance of the courts because constitutionally, it is essential for public confidence that the Judiciary is seen to be independent. Therefore, our debates should not be seen to be interfering with the Judiciary. However, I want to remind our colleagues that even as we look at this matter, let us look at it in a bipartisan manner.

When the case for Makueni came into this House for impeachment, majority of us, including the Senate Majority Leader, made it very clear that we must go ahead and discuss the impeachment in this House. We said that the court has no powers, absolutely to stop us discussing the matter before this House. However, it was you who decided as the Speaker that that matter – you persuaded us – was in the court and that we could not discuss it. The reason I raise this point is that the same colleagues who said at the time that it is in the best interest of this House to debate---

(Applause)

Mr. Speaker, Sir, I want hon. Senators to appreciate that---

The Speaker (Hon. Ethuro): Order, Sen. Billow! You know you are exciting them, and so you cannot have your cake and eat it.

(Laughter)

Sen. Billow: Mr. Speaker, Sir, my colleagues in this House very passionately defended the rights of this House to debate the Makueni Impeachment Motion. They very passionately said that the matter cannot be *sub judice*. I want to remind our colleagues that Kenyans will judge us harshly. If yesterday we were very passionate that this House was right to debate a matter in court and a few months later we very passionately again say that we have no right, Kenyans will judge us harshly.

I want to emphasize one point; that this House does not have the power – we all know – to render or to declare any law unconstitutional. Our responsibility as Parliament is to make laws. It is the responsibility of the Judiciary to interpret the law. It is the Judiciary which has the powers to declare it unconstitutional. So, I will agree if there is an argument that we do not have powers to make those kinds of decisions.

Mr. Speaker, Sir, I want to ask our colleagues in this House that today we should not forfeit our right to challenge the National Assembly. For me the focus is the National Assembly and not the Judiciary. I wish I saw this Motion earlier because I would have convinced my friend to write it in a different way although it can still be amended. The focus of our attention should be the National Assembly because that is where the requirement in the Constitution Cap.110 that you should have been consulted by the Speaker of the National Assembly.

Mr. Speaker, Sir, in fact, what many of us came to hear today is for you to tell us whether you were consulted or not. If you told us that you were not consulted, then we, as a House, will decide. Gentlemen, we have gone to court with a list of Bills challenging the National Assembly on why those Bills went to the President for assent before being

passed through the Senate. This is what we came for. We came for a fight. Allow us to ventilate.

The only request I want to make is that I do not think that by the dint of the Motion here we can render the work of the court fruitless. We have no powers to declare any law unconstitutional, but what we can do is to ventilate on the process taken by the National Assembly who, without consulting you, went ahead and made a law which amended 22 laws. That for us should be the key thing and I want to finally ask you that ultimately this decision is yours. If you want this House to survive, please, make that decision. We just want to ventilate on that House; *hiyo mahali*. But the decision is yours. If you tell us that we are offside, we will abide by your ruling, but remember that the ball is in your court.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, I really must appreciate you, having witnessed the pressure under which the Speaker of the “Lower House” worked, it must have been very brave of you to allow us to come here. I really must thank you.

I will take over from where Sen. Kembi-Gitura left. He left by appealing to you to remember that if some parties here will feel aggrieved by the decision that will be made by the High Court, they will explore the option of appealing to the Court of Appeal and, probably, the Supreme Court. I want to assume that he was attempting to speak for both sides of the House. If he was, then may I remind him that we in the opposition - we are the children of the change movement of this country have a further option after the Supreme Court and that is falling back to the people.

Mr. Speaker, Sir, I would like you, in making your ruling, to put into consideration the implications of the people saying that their elected leaders have failed to articulate matters of national importance. I want to refer you to Article 94 (4) of the Constitution. It says:-

“Parliament shall protect this Constitution and promote the democratic governance of the Republic”.

Mr. Speaker, Sir, before Parliament does that, the same Constitution in 94 (1) says that the legislative authority of the Republic is derived from the people and at the national level is exercised by Parliament. So, if the Senate Majority Leader wants to say that what the National Assembly said about this matter of national importance is enough, he is, therefore, falling in the same trap that the Speaker of the National Assembly and the President found themselves. That is: They forgot that under this Constitution, Parliament is bicameral and, therefore, if only the National Assembly has spoken, it does not mean that Parliament has spoken. Parliament only speaks after the Senate and the National Assembly have spoken. Please, in your ruling, do not reduce this country to one which is operating under a unicameral Parliament. Your ruling should reflect and recognize the fact that this is a bicameral system of legislature.

Finally, I would like to remind the House that according to Standing Order No.1(2), the House has got traditions, usages and practices. The ruling of a previous Speaker is manifestly important when a Speaker is to make a decision in the Chair. Senator Marende said certain things on the issue of *sub judice*.

The Speaker (Hon. Ethuro): Order! He is Speaker Marende.

Sen. (Dr.) Khalwale: Yes, Speaker Marende, in his Communication from the Chair, said the following on the issue of *sub judice* because then, Parliament was worried that we were going to influence the court the way we are fearing now. He said that; “it must be noted, hon. Members, that court proceeding are presided upon by judicial officers who are properly trained in law, and who have taken an oath to discharge the functions of that office without fear or favour, and without extraneous influences being brought to bear on their work”.

Mr. Speaker, Sir, to assume that what we shall say hear will be used by the judges is to assume that our judges, who are presiding over this matter, are not properly trained and that they make their decision based on what they hear from other sources other than matters canvassed in a court of law. We, as a House, would like to make a decision so that it goes down in history that as this important issue was being ventilated, the Senate said as follows and the National Assembly said as follows.

Mr. Speaker, Sir, this is a special opportunity for you to look different from what hon. Speaker Justin Muturi looked like on that fateful day.

(Applause)

Sen. (Prof.) Anyang’-Nyong’o: On a Point of Order, Mr. Speaker, Sir. I think I will speak from here because I have spoken from there for many years as a Minister. I could as well stand here.

Mr. Speaker, Sir, first, I thank you for having accepted to allow this Session to sit. That is a great mark of patriotism. It has helped us come together as two sides of this House to deliberate on this matter. Let me also say that we, who through the Senate Minority Leader requested this sitting, would have opted for this sitting to have occurred before we took the matter to the court. However, time is always passing. Therefore, time passed until such time that the urgency of taking the matter to the court preceded the sitting of this House. We would have really wanted the issue before the court to be by-partisan. Bringing this House together today helps us to debate a matter of national importance that we have taken to court.

Mr. Speaker, Sir, I just want to address myself to two issues. The first issue that I want to address myself to is whether we are being asked to pre-empt a matter before the court, which my friend Sen. (Prof.) Kindiki raised. That is related to another matter that Sen. (Dr.) Khalwale has also brought forward, whether discussing this matter can in any way prejudice the justices hearing this case; or whether it can, in any way, influence their opinion, their mind or their way of looking at the case.

Mr. Speaker, Sir, precedence in this House is very important, especially precedence when it come to the rulings of Speakers, present and past. The ruling of Speaker Marende that Sen. (Dr.) Khalwale has referred to is dated the 10th September, 2009. It was on a matter and I will read the heading of that ruling:-

“Ruling on objections to debate on the Report of the Joint Sitzings of the Departmental Committee on Justice and Legal Affairs and the Committee on Delegated Legislation on the Appointment of the Director and two Assistant Directors to the Kenya Anti-Corruption Commission”

The then Minister for Justice and Constitutional Affairs, my dear friend, the late hon. Mutula Kilonzo had brought the matter to the House then arguing that debating that matter in the House could be tantamount to *sub judice*. The Speaker, therefore, went to a great length to discuss that issue and quoted several authorities from the Commonwealth as well as the books of law that my dear friends are familiar with them.

Mr. Speaker, Sir, we must accept that as a Speaker, in preparation for this Session, you must have looked at the rulings of your previous colleagues. Therefore, I would not at any one moment assume that you are not familiar with this ruling. However, I must bring the substance of this ruling to hon. Members of this House so that we argue from the same plane.

Mr. Speaker, Sir, one of the things that Speaker Marende said, and I quote him:-

“In the House of Commons of the United Kingdom, the *sub judice* rule provides that matters awaiting the adjudication of a court of law should not be brought forward for debate in the House, but this is subject to the discretion of the Chair and the right of the House to legislate on any matter or to discuss any matters.”

That was a precedence set by your predecessor, Speaker Marende. I want to underline that last sentence: This is subject to the discretion of the Chair and the right of the House to legislate on any matter or to discuss any matters.

Mr. Speaker, Sir, we have a matter before us, which as, the minority in this House, we deemed to be of national importance and we feel that it is a matter that both you and us should accept discussion in this House. Speaker Marende then went on to say:-

“As a result both Houses of the United Kingdom Parliament have adopted a qualification to the *sub judice* rule by which discussion is permitted on a matter relating to a ministerial decision as well as issues of national importance.”

Mr. Speaker, Sir, what we have before us is not a ministerial decision, but an issue of national importance. National importance has the following terms:-

First, that the people of Kenya feel, and very strongly and it has been expressed in many ways, that the Kenyan Constitution is being harassed, undermined, raped and violated. They have expressed it in so many adjectives. The people of Kenya are concerned and, therefore, they see that this House, the Senate, as the “Upper House,” should debate this matter and pronounce itself nationally and internationally.

The second issue of national importance is that this House has actually been by-passed in making decision on a matter of national importance. How has this House been by-passed? The Constitution says, and it has been discussed, that any Bill passed in either House should be reported to either House. However, I am afraid I must place this buck at the door of the President because for him to sign a Bill, he should be advised whether that Bill has passed through all the processes of Parliament, not just the National Assembly.

Mr. Speaker, Sir, if we allow this Bill to become a law, when we, as Senate have had nothing to do with it, then, indeed, we shall have redefined the definition of Parliament, for Parliament to be the National Assembly and not Parliament to be the two Houses as defined in the Constitution.

Mr. Speaker, Sir, as a House, it is a matter of national importance because the nation looks up to this House as “the Upper House.” Therefore, we should not sit by when important Bills are becoming law. If we do so and let this Bill become law, we shall have accepted silently that the definition of “Parliament” has been redefined by both the National Assembly and the President. Therefore, let me not hear after this debate today anybody complaining in the future that this House is being ignored. If you do so, it means that you actually enjoyed this House being ignored.

(Applause)

Mr. Speaker, Sir, Speaker Marende went on to say – and this is very important because he made a decision of monumental importance:

“The House has recently reconsidered the scope and application of the *sub judice* rule and the rule now finds expression under Standing Order No.80 of our new Standing Orders...”

That is the then Standing Orders.

Mr. Speaker, Sir, I want to read out Speaker Marende’s decision; I want to request the House to bear with me and to be patient with me as I read this part.

“There are three elements of the rule; the first is that for a matter to be *sub judice*, it should relate to active court proceedings. The second is that there must be a likelihood of prejudice to the fair determination of the matter by the reference to it in the House. The third point or element is that the Chair has discretion to allow reference to a matter, notwithstanding that it is active and that there is a likelihood of prejudice to its fair determination by the courts.”

Mr. Speaker, Sir, you, as the Chair will have to determine today, notwithstanding any fear that the matter may be prejudice; you must decide that this matter is of such vital national importance that it must be discussed by the House.

“Thirdly, regardless of the answer to the first two issues; whether the Speaker should exercise his discretion in favor of allowing debate on the report of the two Committees....”

That was relevant to those two Committees.

But, Mr. Speaker, Sir, I want to refer to yet another matter in the report and I am choosing them very carefully to be relevant to the debate today. On the question of the likelihood of prejudice to the fair determination of court proceedings, it is useful to note that the legal term “prejudice” finds expression in many areas of the law and might be disguised in a myriad of ways. The concept is supposed to operate to prevent procedural and substantive injustices so as not to create them. Allegations of prejudice must be scrutinized carefully such that specific allegations of likelihood of prejudice should be detailed with sufficient particularity to allow the Chair to make an informed decision on the merits of the allegation. I repeat “an informed decision on the merits of the allegations.”

But much more importantly, Mr. Speaker, Sir – and this is a point that Sen. (Dr.) Khalwale referred to – it must be noted, hon. Members, that court proceedings are presided upon by judicial officers, properly trained in law and who have taken an oath to

discharge the functions of their office without fear or favor and without extraneous influences being brought to bear on their work.

(Applause)

In the ordinary course of affairs, judicial officers of any repute are very unlikely to be swayed by what is said in Parliament. In my considered view and in the considered view of Speaker Marende, in a properly functioning democracy with a sound and professional Judiciary, the burden of the evidence required to show that there is a likelihood of prejudice to the fair determination of any matter by the courts should be set very high, indeed. I do not see that this has been proved. That was in that particular case.

But much more important, Mr. Speaker, Sir, Speaker Marende said:-

“I take the view that as a general proposal, this House, in line with precedents from other similar jurisdictions, should not abandon a matter over which it is seized on the ground only that the matter has become the subject of litigation in a court of law.”

(Applause)

Mr. Speaker, Sir, I rest my case.

(Several hon. Senators stood up in their places)

The Speaker (Hon. Ethuro): Order! Order!

Sen. (Prof.) Anyang’-Nyong’o, I did not want to interrupt you, but I am not sure whether you are quoting sections or reading the entire document.

(Laughter)

Sen. (Prof.) Anyang’-Nyong’o: Mr. Speaker, Sir, I am quoting sections.

The Speaker (Hon. Ethuro): Proceed, Sen. Murkomen.

Sen. Murkomen: Thank you, Mr. Speaker, Sir. First of all, I would like to congratulate you and my colleagues because today, unlike what we witnessed a few weeks ago, we have demonstrated that we are a House of reason where we persuade each other---

Sen. Hassan: *Bado! Bado!*

Sen. Murkomen: I have heard Sen. Hassan saying *bado*; I hope nobody will do press-ups like I saw last time. I also hope that nobody’s trouser will be torn today.

(Laughter)

I am keenly watching Sen. (Prof.) Anyang’-Nyong’o so that the water bottle he is holding does not land on my side!

(Laughter)

Sen. (Prof.) Anyang'-Nyong'o: Mr. Speaker, Sir, I am not arguing.

(Laughter)

Sen. Murkomen: Mr. Speaker, Sir, I have never seen my friend – I am saying it in public and I am willing to say and say it again – Sen. James Orengo is one person who influenced my decision to join the legal career and he is my role model. However, I have never seen him, in his entire life as a legislator and as a practitioner, fumble like he did today because he knows exactly what he told me.

(Laughter)

Mr. Speaker, Sir, I was amongst the people who emphasized that we must discuss the Makueni issue because it was important for the status of the Senate. It was important because the Senate cannot be injuncted; but because Sen. Orengo and Sen. Amos Wako are senior counsel and I am still a junior counsel to them, I was persuaded. But even then, I realized that finally you were also persuaded. Now, what we are being told here is that the Speaker has made a decision---

(Several hon. Senators stood up in their places)

(Loud consultations)

Mr. Speaker, Sir, I am on a point of order and everybody has had his chance uninterrupted.

Mr. Speaker, Sir, at that point in time, you were persuaded that we cannot proceed with the Makueni issue. We even went ahead and decided that we want to look for a better way of working with the Judiciary, which we did. We sat down together and agreed that for the Comity of the three institutions of governance, it is important that we respect each other. So, most of us were persuaded then by the decision of the Speaker of the “Upper House” and I am still persuaded by that decision of the Speaker of “the Upper House.”

Mark you now, I sit in the Speaker’s Panel and if there is a person who must be persuaded by the Speaker first, it is myself. We changed our minds and agreed. So, there is a lot of good reading here about Speaker Marende’s decisions. Well and good. However, you cannot say that Speaker Marende’s decision, which was taken before the new Constitution was in place in 2009, will overrule the precedent set by the Speaker of the “Upper House.” You cannot tell me today that on account of a decision that was already in place.

(Applause)

(Loud consultations)

Mr. Speaker, Sir, I really do not want the “Men in black” mentality to be introduced here. I want to be heard in silence.

The Speaker (Hon. Ethuro): Order! Order, Senators! I have previously protected you from Sen. Murkomen. So, it is not your responsibility to do the same to him now. But I hope Sen. Murkomen also appreciates when those kind of things happen to you so that you do not do them to others.

(Laughter)

Proceed, Sen. Murkomen.

Sen. Murkomen: Mr. Speaker, Sir, there is a lot of excitement on the other side, which is okay. But can they moderate that excitement?

(Several hon. Senators stood up in their places on points of order)

Mr. Speaker, Sir, I am on a point of order. There cannot be other points of order!

The Speaker (Hon. Ethuro): Order, Sen. Murkomen. Let us just allow three points of order from Sen. (Dr.) Khalwale, Sen. (Prof.) Anyang’-Nyong’o and Sen. Wako in that order.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, because you have been consulting, I am concerned that probably something has escaped your ear. The Senator for Elgeyo-Marakwet actually, repeatedly, suggested that Sen. (Prof.) Anyang’-Nyong’o could throw a bottle of water at him, which passed. But then he went on and said you have to protect him from the mentality of men in black, probably, you want to guide him that he cannot go on lower than that.

The Speaker (Hon. Ethuro): Thank you for bringing that to my attention. I had not heard that bit.

Sen. (Prof.) Anyang’-Nyong’o: Mr. Speaker, Sir, is Sen. Murkomen right or in order to compare your decision on a case where the House was injuncted and in this one where the House is not injuncted? He is a lawyer - is he in order to make that argument?

Sen. Wako: Mr. Speaker, Sir, Sen. (Prof.) Anyang’-Nyong’o has raised the point I wanted to raise that in the Makueni case, we had a court order. Secondly, in that case, I was with the Speaker to say that he must go on and the HANSARD will bear me out.

On this one---

The Speaker (Hon. Ethuro): Order, Sen. Wako. It was not your contribution, so do not rely on the prompting of Sen. Hassan Omar. For Sen. Murkomen, it is true I heard the issue of water but I think it was on a light touch. Sen. (Prof.) Anyang’-Nyong’o also said some other things and Sen. Sijeny was almost protesting. So, allow some of these things to pass.

Proceed, Sen. Murkomen.

Sen. Murkomen: Mr. Speaker, Sir, Sen. (Dr.) Khalwale knows very well as our good friend that the last time the Lower House was debating the same Bill, he was clad differently and he was doing press ups outside the Chamber. He is my friend and I told him: "I did not know you were that energetic."

My point is that this is a court process which can be brought to our attention by a citizen going to get an injunction. However, our Standing Orders, under Standing Order No.92, give us the powers, as a House, to make a decision. Nobody needs to bring an injunction as Parliament, on our own motion. We can say that for the good of our country, we want to delay a debate of a particular matter or close it completely for the benefit of the nation.

Mr. Speaker, Sir, there is an argument being made in this House that we want to debate this Motion and ultimately, it will not influence the Judiciary. A House of Parliament that does things that cannot influence the Judiciary should be closed. The objective of this House is to pass legislation or law so that the Judiciary can apply it. If we are coming here as my friends have said, we do not intend to influence anybody, then we should have as well not have come here. The reason Parliament has the *sub judice* rule is for the simple reason that Parliament is taken seriously in this country; that when Sen. Murkomen speaks in this House on a matter that is in court, it is taken seriously---

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Speaker, Sir.

Sen. Murkomen: With all due respect, Mr. Speaker, Sir, am I not on a point of order? Nobody was interrupted except me. I am the only person being interrupted.

The Speaker (Hon. Ethuro): What is your point of order, Sen. Wetangula?

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, you heard very clearly. Is it in order for the distinguished Senator for Elgeyo-Markwet to assert on the Floor of this House that everything this House does influences the Judiciary when we pass Motions, make Statements and you make Communications here, we impeach governors and do many things that do not necessarily influence the Judiciary? The Motion we have brought here today is not meant to influence the Judiciary. Is he in order?

The Speaker (Hon. Ethuro): Proceed, Sen. Murkomen.

Sen. Murkomen: Mr. Speaker, Sir, I am begging you because the Standing Orders are very clear. If a Member is on a point of order, there cannot be a point of order on another point of order. I do not know where the excitement about what I say comes from. However, this is the point---

The Speaker (Hon. Ethuro): Order, Senators. Ideally, what Sen. Murkomen is saying is the correct position, but Sen. Murkomen, you are fully aware and the House is aware, there are certain contributions that elicit certain responses. When those responses are quite many, we must also allow some ventilation. You have argued about constricted space before.

Proceed.

Sen. Murkomen: Mr. Speaker, Sir, when everybody was speaking, I took my notes and I did not interfere. I am just saying that to be told---

The Speaker (Hon. Ethuro): Sen. Murkomen, the Chair is satisfied that you are not the type to be derailed by some other extraneous matters.

Sen. Murkomen: Thank you, Mr. Speaker, Sir. For avoidance of doubt, I am not persuaded, as the Senator of Elgeyo-Marakwet County, that I can sit in the Senate of the Republic of Kenya and make decisions that the Judiciary does not take seriously. The reason the Standing Orders put in place the rule of *sub judice* is because they knew that when Sen. Murkomen sits in the Senate and makes a certain decision, whatever he has said can be extracted from the HANSARD and can be used in court. Whatever he has said can be reported by newspapers and influence the court. In fact, I am almost convinced that part of the proceedings here – if you look at the pleadings that have been tabled by the Majority Leader – I asked them to say this because Sen. Orendo was here saying that Kindiki did not provide evidence. Every Senator who spoke here in opposition to this Motion was objecting in the first instance as of his own and in the other to support another person. Therefore, we cannot be told that since Kindiki did not make the case, Murkomen cannot make that case---

The Speaker (Hon. Ethuro): Order, Sen. Murkomen. He is known as Sen. (Prof.) Kindiki.

Sen. Murkomen: Yes, Mr. Speaker, Sir, he is the Majority Leader of the Senate of Kenya.

The point I am making here is that we are being asked, through this Motion, that we declare that the Security Laws (Amendment) No.19 of 2014 is unconstitutional and, therefore, null and void as the consideration and passage of the Bill violated Article 110(3) of the Constitution. If this declaration is not going to influence the courts, what will influence the courts?

An hon. Senator: It is for our own purpose.

Sen. Murkomen: There is nothing like “for our own purpose” because we do not act in futility. The persuasion I am almost receiving from the other side is that everybody – and Sen. (Dr.) Khalwale put it very clearly that: “We may not be voted back if people do not hear us talking about the Security Bill at the Senate. Our people are watching and they will mark us based on the debate of a certain Bill.” The feeling I am getting from the other side is that: “Let us also have a forum so that we are seen to be relevant in debating the same Bill.” The Senate cannot be used for political reasons; it is a House of good reputation. It is the Upper House of this Parliament and it must be respected.

Mr. Speaker, Sir, there is an argument that has been made by Sen. Hassan in Article 117. Article 117(1) states that:-

“There shall be freedom of speech and debate in Parliament.”

Sen. Omar Hassan read something into that section and the HANSARD will bear me witness. He said: “There shall be freedom of speech and debate on anything in Parliament.” There is no “anything” here. That is why this House cannot debate a President of another country---

Sen. Hassan: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Hassan Omar, since you have been mentioned specifically?

Sen. Hassan: Mr. Speaker, Sir, it is wrong for Sen. Murkomen to play to the theatrics of the nation. I said there shall be freedom of speech and I quoted the provisions of the Constitution. I further elaborated that freedom of speech is on anything or any matter. Therefore, it is up to you, in terms of making your decision, to make a judgment of what this freedom of speech which is not contained is. So, for Sen. Murkomen to quote me is totally out of order.

Sen. Murkomen: Mr. Speaker, Sir, he has just repeated what I said; that we debate everything and anything. That is not the position. This House cannot debate a President of another country---

The Speaker (Hon. Ethuro): Order, we will be checking the HANSARD. That is a matter I will determine for the future.

Sen. Murkomen: I am even satisfied with what he has repeated, that---

The Speaker (Hon. Ethuro): He has done it differently from yours but it remains the same.

Sen. Murkomen: Therefore, Mr. Speaker, Sir, that is why we do not even discuss the conduct of another Senator without a proper Motion. We also do not just discuss the President of another country. There are certain limitations to freedom of debate in this House. Those limitations are found in our Standing Orders. We cannot be told we are debating anything and everything at anytime, including the *sub judice* rule.

My other point is to say that we are being asked here to do an interpretation of the Constitution. I have always said here in this House, that all of us, including any citizen, has a right to interpret the Constitution but the final *arbiter* and institution for interpretation of the Constitution is the courts; that is listed in Article 165, which is very clear.

Article 165 (3)(d) states that:-

“Subject to clause (5), the High Court shall have -

(d) The jurisdiction to hear any question respecting interpretation of this Constitution including the determination of –

(i) the question whether any law is inconsistent with or in contravention of this Constitution”

Our friends have already gone to the final entity or institution of law to make determination on whether it is constitutional or not. Why are they reversing back to a place where it is not its responsibility?

I want to say this and I will go on record, we have said in this House that any person or citizen of this country that is going to question any legislation including Sen. Sang’s Bill, once we have completed a law and it is out there, we have said in this House that, that law can be declared unconstitutional any day, it is the rule of the court. Any person can go to court like the Coalition for Reforms and Democracy (CORD) has gone to court. Once they go that direction, the Speaker of the Senate and any Senator cannot be enjoined or summoned to come and explain why they made a particular law, it can be declared unconstitutional without reference to the institution that passed the law. So, to be told that we now, therefore, sit here to interpret the Constitution, to convert ourselves to the High Court, is to negate the same principle we have been arguing that we must respect other institutions.

I want to conclude by reading the exception of the same ruling which has been read selectively - of Speaker Marende. Speaker Marende in his ruling, towards the end, says that:-

“To the extent that no evidence has been produced to the Chair, that there are any active criminal or civil proceedings rendering debate on the Motion relating to Mau Forest Complex *sub judice*, I rule that the debate on the Motion on Adoption of the Report of the Government Task Force on the Conservation of the Mau Forest Complex is not *sub judice* and this House is at liberty to proceed with the deliberations”.

His argument was to the extent that no evidence has been produced to the Chair that there are any active criminal or civil proceedings.”

An hon. Senator: Which ruling are you reading?

Sen. Murkomen: Mr. Speaker, Sir, I am reading the ruling of Speaker Marende of Thursday, 3rd September, 2009. His ruling was on the Report of the Task Force on the Conservation of Mau Forest. I am going to table the same ruling.

Mr. Speaker, Sir, you served in the Speaker’s Panel, so this could jog your memory; that there was a decision on the question of the Report of the Task Force on the Conservation of Mau Forest which was on Thursday, 3rd September, 2009.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Speaker, Sir.

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

The Senate Minority Leader (Sen. Wetangula): The distinguished Senator for Elgeyo-Marakwet is a lawyer. I think he has to have some fidelity to factored law. We quoted two rulings from Speaker Marende. The one he is purporting to distinguish and said we were reading selectively is a ruling none of us has made reference to. The rulings that we made reference to are the ones of 10th September, 2011 and 10th September, 2009. They were delivered on the same day but different years. These are the rulings that we read to you.

Sen. Murkomen: Mr. Speaker Sir, for avoidance of doubt, I said that the rulings of Marende have been brought here selectively. If I said quoted selectively, I withdraw and apologise. For that purpose, let me go on record to say that the ruling of Marende, the same Speaker, on Thursday, 3rd September, 2009, on the Report on the Task Force of Conservation of Mau Forest, I will table it now and give it to the Clerk. However, before I do that, let me read it again for the record.

It says in the third last paragraph that:-

“The documents presented to the Chair, Mr. Isaac Rutto - I am sure it meant Hon. Isaac Rutto on 27th August, 2009, are more than four years old. As the Chair had earlier indicated, nothing in the document provides any evidence that this case has ever been set down for hearing. Standing Order No.8, which is equivalent to this one, does not envisage it to be the role of the office of the Speaker to make inquiries in the court registry to establish the status of matters before them. Where *sub judice* is alleged, unless there is good cause to the contrary, the Chair will consider only evidence tendered to it.

It goes further in the next paragraph to say, therefore:

“To the extent that no evidence has been produced to the Chair, that there are any active criminal or civil proceedings rendering debate on the Motion relating to Mau

Forest Complex *sub judice*, I rule that the debate on the Motion of Adoption of the Report of the Government Task Force on the Conservation of the Mau Forest Complex is not *sub judice* and this House is at liberty to proceed to debate”.

What the Speaker was so clear about, was the fact that in the absence of evidence of active proceedings in the House, then the House can proceed. In this case, it can be distinguished because Sen. (Prof) Kindiki and myself - I have another document, a report from the registry that is very clear that there are active proceedings. In these proceedings, the CORD principal who is sitting here, is an active litigant. Sen. Orengo who is sitting here, taking notes is one of the lawyers. Could it be that we were called here to assist this case to proceed?

Applause

Could it be possible that the record of this House is being sought so that it can be used to validate a process that was rushed? I want to say that the Senate is a senior House, it cannot be misused. We must respect our traditions and continue working as a team. I want to go on record, if there was evidence anywhere that Articles 110(3) and (4) were by passed---

An hon. Senator: Article 110 (3).

Sen. Murkomen: Article 110(3) and(4), if there was evidence that again this is another Bill where the two Speakers never sat down - many people have referred here that Senate was by-passed. How? The Constitution does not mention the whole Senate. What the Constitution mentions in Article 110 (3) and (4) is the two Speakers of the National Assembly and the Senate. What it says is that, if a question comes to them about the validity of the question of legality of whether it is a matter concerning counties, the two Speakers will sit down, they can sit under a tree, concur over a phone call and they can do it by acquiescence or in writing. Therefore, once that decision has been made by the two Speakers, we are all *functus officio*, whether it was on *Twitter*, *Whatsapp*, *Facebook*, this House is bound by the decision that has been made by the two Speakers. We cannot come here and act in futility to appear to be taking away the power and the role of the Chair to make a determination.

For all that I have said, I beg you to continue with the ruling that you had made before to protect the integrity of the House, to ensure that there is consistency in this country that this matter is *sub judice*. If my friends lose the case on Friday or any other day, let them call us. I will be among the first people to be willing to debate matters that will not put us again in a collision path with the Judiciary.

I support.

Sen. Wako: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Amos Wako?

Sen. Wako: On a point of order, Mr. Speaker, Sir. This is a Special Sitting called by you specifically to sit and at the conclusion of today to stand adjourned to 10th February, 2015. We have taken two hours on points of order and maybe only two hours are remaining to go to the substance of the Motion. I think that there has been proper ventilation on these points of order. All the points for and against have been ably put on both sides. I would urge that the Speaker makes a ruling and then we know where to go.

If you decide that there is substance in the *sub judice* issue, then we will finish with it. If you decide that we go ahead then we can go ahead, since we have two hours to proceed.

The Speaker (Hon. Ethuro): Order, Senators! I think that, that is a good observation, except that the requests and interventions are very many. Some Members have already petitioned me. So, I will allow a few more and then make a ruling.

Sen. Keter: On a point of order, Mr. Speaker, Sir. I just want to go on record that what we are asking you to make a decision on is not the merits or demerits of the Motion. I think that it is important for us, as the Senate, to know that. Nobody is raising an issue on the Security Laws (Amendment) Act. It is good that---

The Speaker (Hon. Ethuro): Order, Senator! You are off the mark. This was just in relation to what Sen. Amos Wako suggested. You have started lecturing the Chair.

(Laughter)

Sen. Keter: Mr. Speaker, Sir, whatever points we want to canvass are more or less the same. I would propose that if some people have a different opinion, you could allow maybe one from the other side and one from this side. You can then make a ruling and based on that ruling, we can proceed. It is now 4.45 p.m. and if the Mover takes one hour, maybe we might have to go beyond 6.30 p.m.

The Speaker (Hon. Ethuro): Let me allow Sen. Ongoro.

Sen. Ongoro: Thank you, Mr. Speaker, Sir. Allow me to also ventilate on this matter. I would like to start by thanking the hon. Senators from the Jubilee Coalition for making time to come to this House in spite of all the threats that we read about in the newspapers. They have shown a lot of maturity and come to the House to debate this issue.

Mr. Speaker, Sir, may I also take this opportunity to thank my colleague, Sen. Murkomen, for drawing our attention to the fact that the traditions of this House should be considered. I absolutely agree with that and that is why we were making reference to that. I just have two points to add as to why you should allow us to proceed to debate this Motion.

I want to draw the attention of the hon. Senators to the Constitution once again. Article 1 notwithstanding, which has been adversely referred to, let us make reference to Article 2 (1) of the Constitution and allow me to read. It reads:-

“This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.”

Article 2 (2) reads:-

“No person may claim or exercise State authority except as authorised under this Constitution.”

Of specific importance to me is Article 2 (3) which states:-

“The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.”

Mr. Speaker, Sir, bearing that in mind and agreeing with me, as all have done, that the Constitution is supreme, and since we cannot contest the supremacy of the Constitution, when 22 laws are amended at one go--- If you read through, you will find

that these amended laws affect the Bill of Rights almost in its entirety, especially when you consider Article 28, then you will find that you should allow us to debate this Motion before this House.

Mr. Speaker, Sir, secondly, having read through the 22 laws amended at one go, three quarters of them affect counties. If and when you allow us to debate, we are going to show cause why and how they affect counties. Since that is one of the mandates of the Senate and now that we have evidence that they have been signed into law without being brought to the Senate and we have spoken with one voice in this Senate before when such things happened--- I am actually shocked that on this matter, my colleagues have isolated us, when actually we were in agreement that any law passed without being referred to the Senate is actually an illegality. That was presented here by none other than the Senate Majority Leader, if I am not wrong. I am shocked that in just a few days on this matter, which is not different from the matter that caused him to table and lead all of us to object, he is now speaking differently.

Mr. Speaker, Sir, lastly, I am not convinced that debating this Motion is going to in any way have any adverse effects on any matter that is before the courts. Again, when you read the Constitution and consider the spirit of separation of powers, as enshrined in this Constitution, you will find that the arms of the Government – Judiciary, Legislature and Executive – have got express mandates. I do not see how we can abdicate our mandate because another arm of Government is doing what their mandate constitutes. That is why if you read the Constitution, the spirit of separation of powers is very expressly contained, from the first page to the last. So, we must continue with our mandate even as the Judiciary continues with their mandate.

Mr. Speaker, Sir, with those remarks, I beseech you to allow this Chamber to proceed to debate this matter that has been brought before it.

Sen. Ong'era: Mr. Speaker, Sir, thank you for giving me this opportunity to also make my comments with regard to the point of order that was raised on the *sub judice* rule. The *sub judice* rule was put there by Parliament. We are the ones who set this rule and the only reason we set this rule was to prevent Members of Parliament, in the event that there was a matter that was in court that was likely to prejudice the outcome of that matter. Here, we are dealing with a matter which is of great public interest in this country. This is a matter that we cannot say that Parliament should be gagged. If we look at Article 117 that was elaborately stated by my brother, Senator number one, Sen. Hassan, the freedom of speech for Parliament to debate on matters which are of national interest cannot be gagged because of the *sub judice* rule. Therefore, if I may go back to Article 2(4), that my sister, Sen. Ongoro elaborately stated, it says:-

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of that inconsistency and any act or omission in contravention of this Constitution is invalid.”

Nowhere in this Constitution is the *sub judice* rule mentioned. The *sub judice* rule has only been mentioned under Standing Order 92 because this is merely procedural. We have set these rules for ourselves. Therefore, if you look at the Standing Orders 92(5), it calls for your discretion. This discretion has to be exercised by you judiciously.

If I may go to the ruling that was made by the eminent and able Speaker Marende, this is what he said about the *sub judice* rule and why the discretion of the Chair is important. He said:-

“The *sub judice* rule is one imposed voluntarily by Parliament itself. It is exercised subject to the discretion of the Chair.”

It is important to note what the then Speaker said. He said

“It is important to note as relates to the National Assembly, the *sub judice* rule does not find expression in the Constitution or in any other law.”

I am not convinced that the Senate Majority Leader has indeed tabled sufficient evidence as is required by our Standing Orders. By merely tabling documents without elaborating where the actual rule of *sub judice* has been infringed in, it is not sufficient for the Chair to be able to make a proper decision.

Finally, I want to plead with you, Kenyans are watching. Your Chair is one of the greatest in this country because we have said that this is the “Upper” House. We hope that you will use your discretion wisely, notwithstanding what my colleagues on the other side have said, whom I have said, I have a lot of respect for. I hope that you will see logic in what we are requesting, so that this House can be bold; so that we can be able to show--

(Loud consultations)

Mr. Speaker, Sir, can you please protect me? There is a lot of loud consultation

The Speaker (Hon. Ethuro): Order, Senators. I have seen a familiar face on the other side.

(Laughter)

Please, proceed, Sen. Ong’era

Sen. Ong’era: Thank you, Mr. Speaker, Sir. We, as Members of this Parliament cannot just be taken as mere flower girls. We need to put into perspective Articles 93, 96 and 110. This is a bicameral Parliament, and not a House of the National Assembly only. This is a Parliament that has two Chambers and we are not flower girls in this House.

I rest my case and support Sen. Wetangula.

Sen. Lesuuda: Mr. Speaker, Sir, thank you for giving me this opportunity to also add my voice on this important issue that is being discussed in this House.

The lawyers have spoken and even those who were in Parliament before when the rulings were being made by Speaker Marende. Personally, I have been quietly following and listening to the debate. It is important to note the timing of even bringing the Motion to this House. Many Kenyans have been asking and raising issues that this is a very important matter that needs to be discussed. They are asking why the Senate is meeting over a Bill that has already been passed and assented to and is a law and there is a case that is also alive and active in a court of law of this country.

We are then asked whether we are coming here to rubberstamp what has already been done or we just want to flex our muscles. However, I think that it is important that

we come and deliberate on this issue. It is good that Sen. (Prof.) Anyang'-Nyong'o has said that the reason they went to court before bringing it to this House is because of the essence of time. However, it also shows us that they are aware that these issues should have been canvassed here even before going to court. But then because the matter is alive in court, why do we not let the issue be deliberated on in court? The same way that we are saying that we have selective amnesia, I think they also have selective amnesia because they have been on record on other matters like the Makueni County case---

The Speaker (Hon. Ethuro): Who are they?

Sen. Lesuuda: They are the Senators from the Opposition who are sitting across. I remember very well when we canvassed in the *Kamukunji* and even in this House; my colleagues in the opposition severally said that---

The Speaker (Hon. Ethuro): Sen. Lesuuda, if your point has been made, you do not have to continue in that line.

Sen. Lesuuda: Mr. Speaker, Sir, secondly, saying that the issue before us is not *sub judice*, is not true, because for our colleagues to convince us to pass this Motion as it is, they will have to table facts and law here so as to convince us to pass this Motion as a House. I definitely know, and I am sure that if the Senate Minority Leader rises to move this Motion, he will definitely raise facts and merit that will enable us as a House to pass this Motion as it is. I also want to echo what my colleagues have said, that this House has no mandate to render a law unconstitutional. I am sure that is why the Coalition for Reforms and Democracy (CORD) has also gone to court.

It is also important for us as a House to protect the dignity of this House, the same way we have been saying it on other matters. This is also another opportunity so that we do not come with our hidden agendas when it suits us as a House; we come and say that this is the right thing to do. When it does not suit us, we come and say that it is not the right thing to do.

Mr. Speaker, Sir, I want to echo my voice that, as a House, we should also respect other institutions. When we met with the Judiciary, there are several things that we agreed on. These are things that we need to honour even for other institutions to take us seriously and respect us. If we thought before that we should not respect the Judiciary, that was before we met them and agreed on a number of issues. Therefore, it is important to let the Judiciary as an institution to do its job. We can raise other matters; for example, why the amendment Bill was only passed by the National Assembly and not by both Houses, but not the merit of the laws that have already been passed.

I rest my case.

Sen. Elachi: Mr. Speaker, Sir, our image as the Senate will always remain that of the Upper House. I want to remind our Senators that during the case of Machakos, the Speaker stood and told us to retain our traditions. Today, we are talking about a matter that is in court where we have extensively quoted Speaker Marende and other Speakers especially in the matter where hon. Olago had sought a ruling, he says:-

"I, therefore, stay my ruling on the matter to allow the former hon. Member to pursue the legal processes to their logical conclusions."

That means the matter was in court and hon. Olago wanted the matter to be debated in the House. When you look at the ruling of the 1st November, 1996, the Chair ruled, and I quote:-

“The principle is that parliaments and courts of justice must respect each other and parliaments must and should not be interfered with or prejudiced by their own discussions, the proceedings of a court of law anymore than they expect them to interfere with proceedings.”

Mr. Speaker, Sir, today CORD decided to gag us by going to court. We would have debated this issue but they gagged us. They denied us the opportunity to debate the same issue by going to court first. It is CORD who gagged the House so we cannot debate it. Therefore, we must be very fair in what we do. When you go to court, it means you do not even respect Chapter Six of the Constitution which states very clearly that if you are a state officer, you are not supposed to be active in other matters. Now CORD, who have been respecting the rule of law and running to the courts to get their decisions, realized they will not win the case and came back again to the Senate. I want to thank the Senate Majority Leader for asking you to stop the debate on the Motion. I want to ask the Speaker to give us a ruling so that we can go back to our children.

The Speaker (Hon. Ethuro): The sooner you conclude your contribution, the sooner I will make my ruling.

What is your point of order, Sen. Orengo?

Sen. Orengo: My point of order is that the record may bear the Whip of the Majority witness as saying that state officers cannot represent litigants in court. It is the judiciary itself which has in a ruling, in one of the cases which affected me directly, ruled that I had every power and authority to appear in court and that Article 77 does not apply. So, I am not touting and next time you do not have a lawyer, just come to me.

The Speaker (Hon. Ethuro): Sen. Elachi, I hope you are properly informed.

(Sen. Elachi consulted loudly)

Order, Senator!

I am now directing you that the assertion by Sen. Orengo is the correct one, contrary to yours.

Proceed, Sen. (Prof.) Lonyangapuo.

Sen. (Prof.) Lonyangapuo: Mr. Speaker, Sir, we have sat hear listening and debating whether this Motion is properly here. I also wanted to mention that this is not a school of law where every lawyer is trying to show how much they know.

(Laughter)

This is the Senate and everybody here is capable of debating and contributing appropriately. We are not here to discuss the merits or demerits of this Motion. As the originator of the Motion mentioned, this Act is quite important and every Kenyan is keen to know how it affects them. This House has conducted itself---

(Loud consultations)

Mr. Speaker, Sir, protect me from the noise.

The Speaker (Hon. Ethuro): Order, Sen. (Prof.) Anyang'-Nyong'o. We need to protect everybody else from you because you spoke out of turn but I will assume you are publicly spirited. That applies to Sen. Murkomen, Sen. Wako, Sen. Orenge and Sen. (Prof.) Kindiki. That again goes with what Sen. (Prof.) Lonyangapuo has said, it must be something to do with lawyers.

(Laughter)

Sen. (Prof.) Lonyangapuo: Yes, and they should not sit together.

Mr. Speaker, Sir, throughout the course of this year in our sittings, there were times when we saw some laws being passed and assented to without passing through the Senate yet we thought they affected counties. So, to the extent that on 11th November, 2014, we decided to seek an advisory opinion from the Supreme Court on the constitutionality of the status of the Acts which we are still waiting for, there was nothing wrong to continue waiting for the outcome rather than our colleagues rushing to the court without involving the whole Senate, the way we have always done. This destabilizes and weakens the position of the Senate.

Mr. Speaker, Sir, we also saw some drama in the National Assembly where some of our colleagues were in that House and we were wondering what they were doing there. Instead of recalling the Senate to come and properly sit, they erroneously found themselves in the other House. It was wrong. The Senate stands strong and will always speak sensibly. We have not even asked whether the Chair has fulfilled Article 110 but we have gone ahead to bring this Motion here.

Lastly, I know that our colleagues in the Lower House sometimes want to ignore the Senate but this is not the time to bring up the matter. We can still bring up the matter and discuss them substantially if we have an issue. I rest my case by saying that you should determine whether this is okay or not but from our perspective, it is better to wait for the ruling from the court on 2nd January, 2015.

Thank you.

The Speaker (Hon. Ethuro): Sen. (Prof.) Lonyangapuo, except that you are not allowed to discuss the conduct of the other House; be guided.

Finally, Sen. Sang.

Sen. Sang: Mr. Speaker, Sir, I rise on a point of order to contribute. There are a number of issues which have been raised and canvassed by Senators this afternoon. The issue of *sub judice* rule has adequately been discussed and precedence tabled before you. I would not want to repeat the issues raised by other Senators. It is important to understand that as a Senate, we have had challenges all along in terms of passage of Bills. We have also had challenges between the legislature, more so the Senate, and judiciary.

We have engaged on several occasions. We have had opportunities in this House to ignore some of the processes going on within the Judiciary and some of the outcomes have embarrassed this House.

As we speak, we have a Governor who was impeached by this House long time ago but the Governor is still running office. This means that we need to be careful as a House on how we handle matters before this House so that we do not engage in an exercise in futility. If we are not careful, we are going directly the same route in a process that could easily embarrass this House.

Mr. Speaker, Sir, on the issue of the relationship between us and the Judiciary, we initiated a process in this House that caused a lot of concern especially from the “Lower” House when the Senate engages with the leadership of the Judiciary. We agreed on a number of informal issues; some of the things we need to engage in, the processes that we need to do and how we need to relate. This process that we are about to engage in this afternoon, spearheaded by the Senate Minority Leader, will completely go against the spirit of the same engagement that we had with the Judiciary.

It would be wrong as a Senate, if we are going to be the first ones to break that spirit of engagement and the new found way of doing things between us and the Judiciary. Therefore, I want to persuade you to find that this matter is *sub judice* and that we do not engage in it. Let us allow the courts to finalize the process.

On the issue of Article 110 (3) of the Constitution, the Senate Minority Leader and the Senate Majority Leader have been given responsibility and powers by the Standing Orders to call for a Special Session. They have specific powers given to them but on the matter of Article 110 (3) of the Constitution, they do not have a role. I want to persuade the Senate Minority Leader to appreciate that on this particular issue, he should tell us that the two Speakers did not sit and did not agree but if you draft a Motion making a presumption that they did not agree, that is wrong. He needs to ---

The Speaker (Hon. Ethuro): Order, Senator! You are now discussing the Motion.

Sen. Sang: Mr. Speaker, Sir, thank you, I stand guided. We have discussed the issue of Article 110 of the Constitution and we want to agree that that is the responsibility of both Speakers and the leadership of this House have no role on that particular issue.

If you look at the Motion that this House passed to establish, we have passed two Motions that are relevant to the issues before us this afternoon. One is a Motion setting up an *ad hoc* Committee on courts that is chaired by the Senator for Busia County, Sen. Wako. Some of us are Members and the Senate Majority and Minority Leaders are Members of that *ad hoc* Committee. If you look at some of the issues being canvassed within the Motion that is intended to be brought before this House, those are already issues that are being handled by that *ad hoc* Committee. I want to persuade the Senate Minority Leader to have faith in some of the Committees that we have created to handle some of those issues.

On the issues of, for example, including the Security Laws (Amendment) Bill before the court processes, enjoining it as part of the issues before the Judiciary, we can do it as a Committee. I am persuading the Senate Minority Leader to allow some of the institutions which he is part of in this House to handle some of these issues instead of calling the entire House to debate and make a ruling on this.

Finally, on the constitutionality of Bills, I want to make this clear; Sen. Ongoro read Article 6 (4) of the Constitution on the constitutionality of Bills and it is clear that

any law that goes against the provisions of the Constitution is unconstitutional but that declaration is done by the courts. The final arbitration on that matter is by the courts.

Mr. Speaker, Sir, I want to invite you, if, for example, we were to discuss this Motion and one of the issues being raised in the Motion is to declare that the Security Laws (Amendment) Act is unconstitutional, if this House was to find that that law is unconstitutional, the CORD coalition has gone to court. If the courts find out that that law is not unconstitutional and this House has found out that that law is unconstitutional, who gets embarrassed? We know that the final decision lies with the courts. So we will have subjected this House ---

The Senate Minority Leader (Sen. Wetangula): On a point of order Mr. Speaker, Sir. We have not gone to the Motion yet and the issue we are discussing is whether we are going to the Motion or not. The distinguished young Senator is engaged in a misadventure that is leading him nowhere because there is nothing that the Motion is seeking a declaration on. The Motion is seeking a resolution and not a declaration and the two are not the same.

Sen. Sang: Mr. Speaker, Sir, I appreciate my learned senior. The import of a resolution and a declaration is still the same. Whereas we may not have gone into the substance of the Motion, a notice of Motion was given and we have read it. The import of the Motion is to resolve and therefore I want to persuade you to find that this is *sub judice*. That we do not go on debating this matter for the sake of ensuring that the good relationship that we are already working on between this House and the Judiciary is not jeopardized on an exercise in futility. I persuade you to rule in favour of the Senate Majority Leader that we do not continue with this Motion.

Sen. Hassan: On a point of order Mr. Speaker, Sir. Sen. Sang has continually referred to some kind of a relationship between the Senate and the Judiciary in a manner as if to assume that we are conspirators or something. The way the public might perceive that kind of co-operated relationship that we are building is that the Senate and the Judiciary is up to something.

Therefore, even as we make reference to these processes, let us tamper them with the kind of objectivity because there is nothing between us and the courts that we are trying to do to interfere with the mandates of these institutions. All we are saying is that let us internalize our Constitution and support institution building in this country.

The Speaker (Hon. Ethuro): I had given Sen. Sang the last contribution. However, I am constrained because I have been petitioned by one senior citizen of the Republic, Sen. G.G Kariuki; just briefly.

Sen. G. G. Kariuki: On a point of order, Mr. Speaker, Sir. Thank you because I seem to have persuaded you to allow me to stand here for a little while to say something. Listening to what has been said this afternoon, I am very grateful. However, I want to say this. From the time we came here, we have been treated to Standing Orders that we know very well. Since morning, there is nothing else we have done other than remind you about the Standing Orders. For someone who deals with academic issues, they would not understand why we should spend a lot of time talking about a Standing Order.

Looking at the issues on the table here---

The Speaker (Hon. Ethuro): Sen. G.G. Kariuki, are you saying that if we go to church, we should not make reference to the Bible?

Sen. G.G. Kariuki: Mr. Speaker, Sir, I am a believer but not a fanatic. I will say the following. This proposal was brought in intelligently and skillfully by honourable Members who thought that they would take advantage of Jubilee. They thought that Jubilee Members would come here and say that we should just move on. This is highly political. When Members of Parliament start talking political issues because these are just party politics and has nothing to do with what is happening. This is nothing but party politics. Unfortunately, Members are directing their party politics to the wrong person called the Speaker.

The Speaker is supposed to be independent and respected. When we want to make our political speeches, we should look for areas where we can make those speeches. We should not use an honourable House like this one and an independent person, the one sitting on the Chair, to determine what is supposed to be done.

I agree that this is a political House. The public is judging us as we bring issues that we had already exhausted in political rallies. You saw honourable Members of this Senate walking across the roads to the National Assembly to go and fight. None of us raised that issue. No action was taken and, in fact, it should not have been done.

(Loud consultations)

The Speaker (Hon. Ethuro): Order, honourable Members. This is not only about the issue of relevance but about discussing the conduct of hon. Members. You know what you need to do.

Sen. G.G. Kariuki: Mr. Speaker, Sir, I thought that the entire public saw that and, therefore, it is obvious. That is what I thought.

The Speaker (Hon. Ethuro): I rule you out of order.

Sen. G.G. Kariuki: My apologies, Mr. Speaker, Sir. We have put you in a very difficult situation this afternoon. This issue should be remembered from today and in many years to come. We are asking you to decide on something that you know too well is completely unacceptable in the way it was brought. However, you have done the honourable thing to allow us to talk about it. However, from my point of view, this proposal ought not to have come here. It was totally unnecessary because of other factors ahead of this Motion. What was wrong with waiting until Friday? If somebody came and said that we should wait until Friday and on Monday, they would bring a Motion similar to this one, nobody would object to that.

However, if one of the lawyer Senators from the other side---

The Speaker (Hon. Ethuro): Order, Sen. Kariuki, conclude. I have already given you some bonus time.

Mr. G.G. Kariuki: Let me finish by saying this. If in future a lawyer goes to court to try and fight a bad law – I am referring to my friend, hon. Orengo, who went to court to fight over this case.

The Speaker (Hon. Ethuro): Order, Sen. Kariuki, resume your seat.

Sen. G.G. Kariuki: Thank you, Mr. Speaker, Sir.

CONSIDERED RULING

DETERMINATION ON WHETHER DEBATE ON THE CONSTITUTIONALITY OF THE SECURITY LAWS (AMENDMENT) ACT IS *SUB JUDICE*

The Speaker (Hon. Ethuro): Order, hon. Senators. First, I want to appreciate everyone who has contributed to this particular point of order on whether this particular Motion should proceed or not. Ideally, for the purpose of the House, a Motion is before the House when it has already been proposed and seconded.

If you look at Article 92 which is the basis that the Senate Majority Leader raised objections to proceed with this Motion, you will see that it is inconsistent with other issues especially if you want to deal with a matter that is unconstitutional before the House.

Sen. Murungi made it abundantly clear that if a matter is secret in nature, the House proceeds to allow it to be prosecuted, and then we are already exposing the secrecy. So, on that basis - I am willing to consider this matter on that basis so that you look at what is required.

Let me comment on the Senate Majority Leader who probably because of constraint of time did not divulge the details. However, he made the point from the very beginning, which was very important on whether this matter is *sub judice* or not. He went ahead to table a document. He was challenged by the Senate Minority Leader and Senator Orendo that he had failed to give the particulars. The question is whether those particulars must be given by the Senate Majority Leader or any other Senator who alleges the same. It was, therefore, my determination that any other Senator who has already objected could also lay more grounds. Those grounds were given by the Deputy Speaker himself in terms of declarations being sought in the High Court.

Ordinarily – I want to appreciate that this is the basis upon which I approved this Motion – that the House must pronounce itself on legislation. Two, I was not aware that the matter would proceed to court. I have carefully looked at the dates and it is true that the recourse from the Senate Minority Leader came before they proceeded to court. Three, I cannot on my own Motion determine whether the matter is *sub judice* and to decide on whether to approve or not. That is not for the Chair but for the House to ventilate and to bring forward those arguments. So, it is on the Floor of the House that the arguments should be made.

Secondly, is this a matter of national importance? I cannot agree more. This matter is very important to the nation. Is there conspiracy between the Senate and the Judiciary? I want to disagree completely. The basis on which the reference to the Judiciary would be made is not because of any other matter but because each state organ has a responsibility to ensure that every institution is given the operational mandate. Since we have been claiming that our mandate is being constricted, we should be the last ones to do the same to others. Can you play politics in the Senate? Yes, we are all politicians. We have no business being here if we are not politicians.

Before I summarise, let me deal with the issue of Article 117 by Sen. Hassan and the need for activism. First, I do not know whether he was accepting the allegations that this was an activism Constitution. However, if you read it, you will see that in Article 117(1), he used the word “shall”, and in Article 117(2), he attempted to use the word “may”. The two words are not related. Article 117(1) says:

“There shall be freedom of speech and debate in Parliament.”

My understanding is that the way you and the rest contribute here freely, you should have that freedom. Article 117(2) goes on to say:

“Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities Parliament, its committees, the leader of the majority party and the leader of the minority party and the chairpersons of committees and Members.”

Indeed, we have a law on powers and privileges which we enjoy. You have unlimited freedom to contribute to whatever subject, of course, subject to the rules of substantiation and the rest which we have been practicing before.

Arguing that this particular Motion should not proceed and whether we are limiting that debate is a different proposition. I think Sen. Murkomen advanced even within the Constitution that there are limitations to certain rights to be provided for. So, even within our Standing Orders, there are also limitations like discussing the conduct of your other colleagues. I think it was on that basis. However, for your request in order to expand the space if there is an opportunity, we will, but within the law.

The question by Sen. Orenge was since *sub judice* is not a matter of the Constitution, whether it has the same velocity, just because it is a Standing Order. My submission is that Standing Orders are derived from the Constitution itself. So, they are basically the force of the Constitution under Article 124. For Sen. G.G Kariuki to be offended by frequent references to Standing Orders, I plead with him that that is the only way to conduct orderly procedural business of the House. Otherwise, there would be chaos and anarchy. You just have to bear with us. I would imagine if I am a good Muslim, the next book I should be holding is a Quran. If I am a good Christian the next book I should be holding is the Bible plus other religious books for the relevant religions.

There was the issue of impeachment of the Governor for Makueni. That reference was made completely out of context. We took a decision as a House on the basis of other things and not because of this kind of business. It is important to appreciate that Dr. Khalwale decided that I am brave going by other experience. I want to confirm to the Senators that you are the brave ones. I was so convinced that the Senators are elite and cannot get to any lower level than you have always been. Today, you have demonstrated my faith in you, that no matter how difficult things are, you can rise to the occasion and debate with decorum and dignity, which you have exemplified today.

On the rulings by the former Speaker of the National Assembly, Speaker Marende, which everybody quoted. I am happy you were quoting them because Speaker Marende did a lot of work for the Parliament of the Republic of Kenya. It was through those rulings that we drafted the new Standing Orders that we have. I am happy to report to you that, at least, I was part of that process.

If you look at the issue that was stated initially on the then Kenya Anti-Corruption Commission Director on 10th September, 2009, I noticed the last sentence on that paragraph on page six was not brought to the fore. The sentence said: “and I do not see that this has been proved.” So, there was always proof. Part of the discretion is that it can come to the House and demonstrate that proof.

If you look at the other one on the nominees of certain constitutional offices on page six, you will note that I have ruled before and reiterated that gagging this House and preventing it from discharging its constitutional mandate requires tangible resource to be advanced. If we find before us that there was even a matter *sub judice*, to some extent, we can discuss it if we allow that they are matters that are not so specific. That is the ruling that has been made. However, if that determination is made before us – I will look at what the Motion was asking. The Motion was asking us – if we were to proceed with it – for two resolutions. Before I go there, let me look at Standing Order No. 92 on matters *sub judice* or secret.

“92(1) Subject to paragraph (5), no Senator shall refer to any particular matter which is *sub judice* or which, by the operation of any law, is secret.

(2) A matter shall be considered to be *sub judice* when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.

(3) in determining whether a criminal or civil proceeding is active, the following shall apply-”

What is relevant to us is (3)(c):

“Civil proceedings shall be deemed to be active on arrangements for hearing, such as setting down a case for trial, has been made, until the proceedings are ended by judgment or discontinuance.”

In this case, the hearing has taken place but judgment is yet to be given.

92(5) “Notwithstanding this order, the Speaker may allow reference to any matter before the Senate or a Committee.”

That was also misused. It did not say before the court. It says before the Senate or before a committee.

The Standing Orders themselves were actually informed by the rulings of Speaker Marende, which I think we will all agree they are fine.

Does the Speaker have discretion? Yes. Does the Speaker use the discretion on the basis of Standing Order No. 1(2)? No, but he can where something is not provided in terms of procedure. He is even constrained to the extent that he must go by the Constitution, statutes and other usages and practices. We have Standing Order No. 92 that has provided for it. The final bit which I think weakens our case_ _ _ Before I do so, I will go to the resolutions:

“Now, therefore, the Senate resolves:

1. That the Security Laws (Amendment) Act is unconstitutional and there null and void as the consideration and passage part of the Bill violated Article 110(3) and (4) of the Constitution.

2. That the Security Laws (Amendment) Act be included in the compendium of the Bill set out in the Resolution of the Senate of Tuesday 11th November, 2014---”

Let us go to the declarations. The declarations are on Page 26 where it says:-

“The reasons wherefore the petitioner prays for the following orders:-

- (a) A declaration that the Security Laws (Amendment) Bill, 2014 in its entirety was not procedurally debated and passed by the National Assembly in accordance with the Constitution of Kenya is unconstitutional and is, therefore, a nullity.”

There is no difference between (1) and that declaration.

On Part (c) it says:-

“A declaration that the Security Laws (Amendment) Bill was unconstitutional and illegal as the National Assembly failed to comply with the mandated provisions of---”.

It is the same thing we want to look for in Section 2 which already we have set our systems. We have the court matters affair which looks at these things.

The final bit which now weakens the Senate position states:-

“Any element in a compound is a determinant of the behaviour of the compound”

Any section of the Senate by extension affects the Senate, and I do not think we need to isolate.

If it was somebody else who went to court, we can appreciate, but if it is some of us who have now gone to court and those are the same ones prosecuting the matter here, then surely---. The basic principle is that he who comes to equity must come with clean hands. So, let us exhaust one process. We, as a House, have fought very hard to ensure that we are recognised. Let us give the courts the opportunity to conclude the matter. This matter can still be revisited and we can still bring amendments as a House since we are a law making body. You can still bring the necessary amendments to the law which we will prosecute on the Floor. That, I will allow. Therefore, we cannot proceed on this Motion.

(Applause)

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Speaker, Sir.

(Sen. Murkomen uttered some words)

The Speaker (Hon. Ethuro): Order, Sen. Murkomen.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I do not understand the excitement and Sen. Murkomen pretending to be the Speaker.

We do not intend to challenge your ruling, but where it is factually incorrect, we have a duty to put the record straight. None of these Members is a litigant in any court and it has to be made very clear that CORD is a coalition of parties and not Senators.

(Loud Consultations)

It helps a great deal for distinguished Senators to get excited but this is not a matter about excitement; this is a matter of this country. This is a matter of the people of Kenya and so you can be as excited as children who are touching toys for the first time but let us get to the facts.

(Several Senators stood up in their places)

The Speaker (Hon. Ethuro): Order Senators. We have done so well so far.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, we have done so well so far, it gives no license to Sen. Murkomen to become a heckler. We can also heckle if we wish. Let us exercise some decorum. I have been sitting here for the last three hours and I have not heckled anybody. So you do not have to heckle at me. You may be playing to some gallery somewhere, but I am not. I am addressing the Speaker.

Mr. Speaker, Sir, I want to make the record clear that none of the Senators seating on your left hand side is a litigant in any matter---

Sen. Murkomen: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order, Sen. Murkomen. He is addressing me not you. Proceed, Sen. Wetangula!

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I want to make the record clear that none of the Senators seating on the left hand side of your seat is a litigant in any matter. You have predicated your ruling on the fact that some of these Senators are litigants. I want that record to be made clear that none of them is a litigant. Sen. Orendo is a distinguished lawyer in this country and he has the right to appear for anybody and everybody including Senators across the Floor. I would similarly appear for any Member who wishes to be acted for by me as a lawyer.

Mr. Speaker, Sir, secondly, my worst fears came to pass that the deliberate prolongation of the point of order raised by the distinguished Senator for Tharaka Nithi was, in fact, a conspiratorial process to make it difficult for this Motion to be debated in this House. The country is watching, the country is listening. You may have your way today but you will not always have your way. The country is bleeding because of erroneous legislations going on. How can this Senate say that we cannot look at this matter when the same Bill and now an Act of Parliament that we are challenging is, in fact, removing authority from your House which you preside over - on of oversight to the security organs and taking them to a House where there is hardly any order? I find this a narrow minded partisan attitude that does not help this country.

Mr. Speaker, Sir, you can frown and do whatever you want but I am telling you that you have heard us and you must live with the guilt that you will carry from here on forth.

(Several Hon. Senators stood up in their places)

The Speaker (Hon. Ethuro): Order, Senators! This is not the last Session of the Senate of the Republic of Kenya; we have still many more Sessions to go, the HANSARD has a record of what everybody said including the altercation between Sen. Hassan Omar and Sen. Murkomen which we will revisit another time.

ADJOURNMENT

The Speaker (Hon. Ethuro): With those very many words, it is now time to adjourn the House. The House stands adjourned until Tuesday, 10th February, 2015 at 2.30 p.m.

The Senate rose at 5.48 p.m.