

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 13th May 2015

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

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

PRAYERS

PETITION

PETITION BY THE COUNCIL OF ELDERS OF THE KIRINYAGA *MIHIRIGA*
KENDA REGARDING THEIR CLAIM TO THE MWEA TRUST LAND

Sen. Karaba: Mr. Speaker, Sir, pursuant to Standing Order No.225(3), I wish to present a Petition on behalf of the Council of Elders of Kirinyaga *Mihiriga Kenda*, which is the Kikuyu name for the nine clans. The Kikuyu's comprise of nine clans, totaling ten clans. At that time, they were nine, but now they mean ten clans. It reads as follows:-

We, the undersigned, citizens of the Republic of Kenya, members of the Kirinyaga *Mihiriga Kenda* and residents of Kirinyaga County and of parts of Embu County, draw the attention of the Senate to the following:-

1. THAT, the people of Kirinyaga County have a historical and ancestral claim to the 54,000 acre piece of land known as the Mwea Trust Land situated in Mbeere South sub-county of Embu County. A summary background to the claim is as detailed below.

2. THAT, the land known as Mwea historically belonged to and was occupied by the people of Kirinyaga since time immemorial, when Embu station, which later on, became Embu District was created in 1906, Mwea area which was Ndia Division, remained within the jurisdiction of Fort Hall which later became Murang'a District. Later in 1912 when Ndia Division was moved from Fort Hall to South Nyeri District, the common boundary between South Nyeri and Embu was defined as below:-

- (i) The River Mukengeria from its source to its junction with River Rutui.
- (ii) The River Rutui to its confluence with River Thiba.
- (iii) The River Thiba to its junction with River Tana

3. THAT, in subsequent reports of the colonial government between 1908 and 1923, the boundaries between South Nyeri and Embu districts were affirmed as stretching from River Mukengeria to its junction with River Thiba.

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4. THAT, in 1923, the Kerugoya sub-district was carved from the larger South Nyeri District, with Mwea area of Ndia Division being part of the new district.

5. THAT, colonial records also indicated that as at 1933, Embu District was recognized to comprise four divisions being Embu, Mbeere, Gichugu and Ndia Divisions. At the time, Ndia Division comprised of Inoi, Mutira, Kiini and Mwirua locations and Mwea remained in then Kerugoya sub-district.

6. THAT, there also existed a written agreement dated 22nd November, 1933 between Senior Chiefs Njega Gioko of the then Ndia and Gichugu divisions and Kombo Munyiri of the then Embu and Mbeere divisions confirming that the boundaries between Kirinyaga and Embu people extended to Rupingazi River up to the confluence with Thiba and Tana rivers, with the area known as Mwea belonging to the people of Kirinyaga.

7. THAT, during the Mau Mau Uprising from 1952, the colonial government initiated a plan to encourage herders from Ukambani to invade and occupy the Mwea area in return for supporting the fight against Mau Mau. Subsequently, between 1957 and 1962, the boundaries of the then Kerogoya sub-district were interfered with, culminating in the southern boundary being moved upward from River Tana to the Makutano-Embu Road; from Makutano junction to Karaba and Gategi to river Thiba.

8. THAT, this revision of boundary which was concluded in the 1960s at the behest of the then powerful Minister for Lands and Settlement, who was from Mbeere, resulted in the 52,000 acres piece of land known as the Mwea Trust Land being excised from the then Kerugoya sub-district now Kirinyaga County to what is now Mbeere sub-county of Embu District.

9. THAT, following the said annexation of the Mwea Trust Land, a decision was made to demarcate and adjudicate the land for settlement, with an officer from Embu being appointed to undertake the process. However, during the allocation process, over 600 names of landless *Mihiriga Kenda* members which had been submitted for allocation of land were removed and their respective allocation given to people from outside Kirinyaga.

10. THAT, this led the *Mihiriga Kenda* to file a suit at the High Court in Nairobi in Miscellaneous Civil Application 268 of 1981, the Republic versus Land Adjudication Officer, Embu District Ex Parte Kirinyaga *Mihiriga Kenda*. In the suit, the *Mihiriga Kenda* sought and obtained an injunction prohibiting the Embu District Land Adjudication Officer from proceeding with the adjudication in respect to Wachoro, Karaba, Riakanau and Makima adjudication sections on the basis of the historical and ancestral claim of the Kirinyaga people to the said land. This injunction remained in place until recently in 2012 when the injunction was lifted.

11. THAT, in the intervening period, a number of initiatives were undertaken to try and resolve the issue of the boundary dispute between Kirinyaga and Embu Districts. Among them-

(i) The task force chaired by District Commissioner (DC), Mr. Akelo, in 1990. The Mwea Trust Land Commission in 1995 which was chaired by the late hon. Chief Justice Zacchaeus Chesoni, whose report was never made public.

(ii) A verification team which comprised of the two respective DCs of Kirinyaga and Embu Districts, two Provincial Commissioners (PCs) of Central and Eastern

Provinces and officials from the Ministry of Lands, 2000, which concluded that the Mwea Trust Land should have been in Kirinyaga District.

(iv) The Charles Njonjo Commission of 2000 similarly confirmed that the land belongs to the *Mihiriga Kenda*.

12. THAT, following the lifting of the injunction that had stopped the adjudication of Mwea Trust Lands in 2012, the County Government of Embu has commenced the process of allegedly adjudicating and demarcating the said 54,000 acres piece of land comprised of the Wachoro, Karaba, Riakanau and Makima adjudication sections, for allotment. As a result of rival claim of the land by the *Mihiriga Kenda* people of Kirinyaga, on one hand, and Mbeere and Kamba people of South Mbeere sub-County, on the other hand. Tension has been rising in the area by the day.

13. THAT, it is therefore imperative that the matter is dealt with urgently and decisively by returning the 54,000 acres piece of land known as Mwea Trust Lands from Mbeere Sub-County of Embu and Kirinyaga Counties.

14. THAT, we have made the best efforts to have this matter resolved and addressed by the relevant bodies, including the National Lands Commission (NLC), but we are yet to receive a satisfactory response from them. Further, we believe that pursuant to Article 94(3) of the Constitution, that gives power to Parliament to alter country boundaries, and Article 188 of the Constitution which sets out the procedure and grounds on which county boundaries may be altered, the Senate is the right forum to bring this matter.

15. THAT, save as stated in the preceding paragraph, none of the issues in this Petition is pending in any Court of Law, constitutional or any other legal body.

WHEREFORE, your humble Petitioners pray that the Senate:-

(a) Expeditiously takes measures to form an independent commission as envisaged in Article 188 of the Constitution for the purpose of investigating the boundary dispute between Kirinyaga and Embu counties with a view to reinstating the original boundary to the pre-1960 boundary, to rightfully place the Mwea Trust Land in Kirinyaga County.

This is contained in the Bill sponsored by Sen. Mutula Kilonzo Jnr. which we have already concluded on.

(b) Pending conclusion of the same, the Senate to intervene to have the process of adjudication and demarcation of the Mwea Trust Lands by the Embu County Government immediately halted or be jointly undertaken by Kirinyaga and Embu County Governments.

The Petition is dated 12th May 2015 and is counter-signed by the Senator for Kirinyaga who also happens to be myself. I have the names of the signatories which are totaling to 6,029.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order, Senators! Pursuant to the Standing Order 226, I shall now allow comments and clarifications related to the Petition for not more than 30 minutes. However, before I do so, I want to bring to your attention that Article 188 of the Constitution of Kenya mandates Parliament to, upon the recommendation of

an independent commission set up for that purpose, to approve alteration of county boundaries.

Indeed, on 11th March 2015, following the conclusion of debate on a Motion by the Senator for Makueni County, Sen. Mutula Kilonzo Jnr., this House directed the Standing Committee on Legal Affairs and Human Rights to initiate and prioritize the drafting of legislation within 90 days of the said resolution to provide for the establishment of an independent commission to inquire into, examine and identify the boundaries of counties, taking into account the criteria set out in Article 188(2) of the Constitution. The Committee was further tasked to review the existing legal frameworks and make appropriate recommendations on how to comprehensively address and resolve inter-county boundary disputes to enhance national cohesion and stability.

Hon. Senators, having reviewed the Petition by the Kirinyaga *Mihiriga Kenda*, as presented on their behalf by the Senator for Kirinyaga County, Sen. Daniel Karaba, I note that the petitioners are essentially asking the Senate to establish an independent commission as provided for in Article 188 of the Constitution for purposes of investigating the boundary disputes between Kirinyaga and Embu counties, with regard to the area known as Mwea Trust Land.

This being the case, and noting that the matter of the legal framework for establishing such a commission is pending before the Senate Committee on Legal Affairs and Human Rights, I direct that the Petition, in terms of Standing Order No.227(1), be committed to the said Committee.

In terms of Standing Order No.227(2), the Committee will, therefore, be required to, in not more than 60 days from the time of reading the prayer, respond to the petitioners by way of a report. The response will be addressed to the petitioners and laid on the Table of the Senate. As you comment, be aware that the issues are actually alive with the Committee.

Sen. (Dr.) Machage: Mr. Speaker, Sir, matters of land and boundaries are issues that are so central to the people of Kenya. They are so intimate that the mention of land in some societies is like scratching a wound.

Sometime back, I brought to the attention of the country when we were drafting the Constitution on the issues contained in the Sessional Paper of 2008 which addressed the matters of boundaries and land as from 1895 when Kenya was still a Protectorate of the British rule. What followed thereafter was my being arrested and handed to the courts where I was accused of hate speech for saying the truth. I was tormented for one and a half years. I even lost my position in the Government on issues that were straight-forward and sensitive to Kenyans.

This issue will never disappear unless we address it in the legislative assemblies of this country. That reminds me of the concerns of the numbers of counties as created in the Constitution. Many people, including those I represent, never agreed on where they were put. Up to now, they are still lamenting. However, in practice, the majorities always have their way and the minorities are only listened to. This is a tricky situation. I, therefore, welcome the Motion that was brought to this House by Sen. Mutula Kilonzo Jnr. We hope that a commission will be set up within the prescribed time.

Thank you, Mr. Speaker, Sir.

Sen. Haji: Mr. Speaker, Sir, six months after we were sworn in, I tried to bring a Motion to this House. However, for very good reasons, I was persuaded to hold on. In spite of that, those Senators who were in Kisumu during the county conference will recall my statement. This is what I said:

“The security situation with us now is the Al-Shabaab and cattle rustling in the North Rift. The serious issue which will come up is the question of boundary dispute in this country.”

As the Chairperson of the Committee on Security and Foreign Relations, I tried all possible means to bring together the Commissioner of Lands, the Cabinet Secretary (CS) for Land, Housing and Urban Development and the Ministry of Interior and Coordination of National Government, for the Government to take some positive steps to rectify what is going on. As late as yesterday, the Governor for Vihiga was complaining about Kisumu collecting taxes from his own region. This is not the first one. All over the country, there are boundary problems. If this issue is not addressed in good time, my word should be taken, seriously because we shall have wars going on and on in the counties. Mr. Speaker, Sir, the Committee which has been given this task should come up with some specific recommendations which will resolve this matter.

The Speaker (Hon. Ethuro): Proceed, Sen. Khaniri. It is not that Vihiga County was mentioned, but you are actually the next one to speak.

(Laughter)

Sen. Khaniri: Mr. Speaker, Sir, thank you for giving me this opportunity to say one or two things. Let me begin by thanking, Sen. Karaba, for presenting this Petition on behalf of his people in Kirinyaga. I echo the words of the wiseman seated behind me, the Senator for Migori, that matters to do with boundaries and land are very sensitive. As we handle these issues, we must be very careful.

You will remember that at the beginning of this particular Senate, when we were just sworn in, I was one of the first people to draft a Motion. I brought a Motion regarding the issue of the boundary of Vihiga and Kisumu counties in Maseno. In your wisdom, the Chair and the Rules and Business Committee (RBC) thought that it was such a sensitive matter and that it was not the right time to handle it, just having come from elections.

Recently, I also requested for a Statement regarding the brewing tension on that particular boundary. As you have heard Sen. Haji say, my Governor made some comments in reference to this. The tension is very high between the two counties. It is important that this matter is resolved, once and for all, so that we can avoid bloodshed. It is a very sensitive matter.

Some of us may not be old enough, but reading from history, the huge junk of Maseno happens to belong to Vihiga County, former Western Province. However, it was hived off and taken to former Nyanza Province. If you heard my Governor, this is what we are rightfully claiming. Article 188(2) that you referred to states:

“The boundaries of a county may be altered to take into account—
(e) the views of the communities affected.”

Mr. Speaker, Sir, as we put the independent commission in place, I can guarantee you the views of the people of Maseno are that they know where they belong and where they want to be. We request that this matter should be expedited so that this situation in Vihiga-Kisumu border is resolved urgently.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I also congratulate the distinguished Senator for Kirinyaga for bringing the views of his people, but further reiterate what my colleagues have said. If you look at the profile of the country, there is likely to be virtually an argument or a dispute between more than 70 per cent of the counties of this country because the creation of them was not arrived at through any scientific process. It was a purely convenient, if not opportunistic decision, that any entity that was a district by 1974 became a county. Three weeks ago, I came from India where the huge State of Uttar Pradesh has just been divided into two. It went through a process that is similar to the provisions of Article 188 of the Constitution.

Mr. Speaker, Sir, I want to urge you, as the head of this House, to hasten the work being done by the Committee on Legal Affairs and Human Rights in bringing a Bill in response to the Motion brought by Sen. Mutula Kilonzo Jnr. so that we can set up an independent commission that can then take up and listen to issues relating to boundary disputes. You have heard the arguments going on between Turkana and Pokot, Turkana and Baringo, Turkana and Samburu and many places. As the defenders of counties and county governments, if we do not act with speed and put this commission in place, there will be a lot of tension among our people.

I hope when this commission is formed, it will comprise of men and women of integrity, who will sit and listen to the views of *wananchi*, dismiss what is fallacious and give effect to what is real and factual, so that we resolve this. I hope that within the next two years, we can bring most of these issues to a conclusion so that we can focus on more positive issues.

Sen. Kittony: Mr. Speaker, Sir, I strongly support that Petition because it is not only what we are seeing here, but there is much more to come if a situation like this one is not dealt with. There are people, not only in Baringo, but in Mt. Elgon who are supposed to be people of Rift Valley and so on. The issue of boundaries should be looked into very seriously, so that Kenyans belong where they are supposed to be because some are in the wrong places.

Sen. Sang: Mr. Speaker, Sir, I thank the Senator for Kirinyaga for presenting this Petition. As rightly put, we, as a Committee, are aware of the importance of finalizing the process of getting a Bill on this Floor. I report that we already have a first draft that we are looking into. We hope that in the next one month or so, the Bill should come to this House for First Reading.

When you have issues to do with county boundaries, I know that we have disputes in over 30 boundaries involving our counties. The temptation can sometimes be, that we think that this is such a big monster that we do not want to confront. We should address the issue of county boundaries, once and for all.

My county is experiencing problems with Kisumu and Kericho counties. Sometimes boundaries have economic implications. We have three sugar factories within the sugar belt region. In the process of privatising the sugar factories, Nandi County has a

historical claim to where Chemelil and Miwani sugar factories are situated. However, currently, as I speak, they are all in Kisumu County. If this is not addressed, we are likely to have a challenge. For instance, in Chemelil Sugar Company, 70 per cent of---

The Speaker (Hon. Ethuro): Order, Sen. Sang! I know that you wear many hats. However, speak to one issue at any one time.

Sen. Sang: Mr. Speaker, Sir, I initially addressed the House as the Vice Chairperson of the Committee. I am now talking as the Senator for Nandi County.

Just to wind up, it is important to address the issue of county boundaries so that the people of Kericho County can have Muhoroni Sugar Company. Nandi County should have Chemelil Sugar Company and Prof. Anyang'-Nyong'o's county should retain Miwani Sugar Factory. Those are the issues we should address so that we have equity across the three counties.

A commitment from me and the Members of the Legal Affairs and Human Rights Committee is that within the next one month or so, we will bring a Bill that seeks to establish an independent commission to look into boundaries coming for its First Reading.

Sen. Ndiema: Thank you, Mr. Speaker, Sir. I join the Senator for Kirinyaga and others who have brought up this issue. It appears as if the issue of boundaries is very sensitive. However, because of hurrying to have the Constitution implemented, this matter was not adequately addressed. Fortunately, there is a window bestowed on us through the commission to address the boundary issues.

Virtually there is a problem everywhere. We hear about the Pokot verses the Turkana issue among many others. According to the Constitution, there are very many parameters that should be considered, including things like geographical features and the views of communities. Communities should choose where they want to belong. Historical and cultural ties should also be considered so that people feel comfortable.

Those who followed the proceedings of the constitution making process will remember discussions on issues of boundaries which were almost concluded. However, unfortunately, instead of correcting the injustices, we went back. The Constitution was supposed to address past injustices. However, as far as boundaries were concerned, we seemed to accept the injustices that were in existence.

Previous governments tried to address this by creating districts. However, when counties were created, issues that necessitated creation of districts were overlooked. This is the right time and we should be bold enough to address boundary issues, once and for all.

The Speaker (Hon. Ethuro): Order, hon. Senators! We are neither the commission nor do we have a Motion to discuss this matter. Let us raise only a few issues then we proceed.

Sen. Boy Juma Boy: Asante sana, Bw. Spika. Waswahili husema; "Ukiona mwenzako ananyolewa, tia kichwa chako maji." Pia wanasema, "ukiona maji ya bahari yametulia, haimanishi kwamba kina ni kifupi." Kina chaweza kuwa kirefu sana. Nasema hivyo kwa sababu ninawaunga mkono waheshimiwa Karaba na Mutula Kilonzo, Jnr. Nimekaa hapa na ndugu yangu Sen. Dan Mwazo tukicheka lakini mipaka yetu ina matata. Kuna shida katika kaunti ya Kwale na Taita Taveta.

Naunga mkono kuundwa kwa tume haraka kwa sababu kuna matatizo mengi. Tumo kimya lakini haimaanishi kwamba huko chini ya bahari, hakuna mambo yanayoendelea.

Asante, Bw. Spika.

The Speaker (Hon. Ethuro): Hebu tumpongeze Sen. Boy Juma Boy kwa sababu amezungumza kwa kifupi na akataja mambo yote kinaga ubaga.

Sen. Orenge: Mr. Speaker, Sir, I stand to express the tragedy of Kisumu County because, at this rate, the county may become non-existent. Now that there is oil that has been discovered in Kisumu, I am afraid that the distinguished Senator from Nandi may even claim *kit mikayi*. There are many things there. If he continues claiming them, he may be cursed. The point I am making is that there are issues about boundaries which cannot be resolved. I was representing a constituency which consists of two communities, Luos and Luhyas.

If you go across to Busia in Western Province, the same issues arise. At one time, we tried to resolve the issues and we felt that if we opened a Pandora's Box, we would never resolve the issue. I have an area in Ugenya where the community is basically Luhya. They said that they would rather remain in Siaya County. I was taking the position that they should be given their own right to declare where they want to be.

We should consider boundaries as bridges and not like the wall we want to build between us and Somalia. In our Constitution, we say that we are a unitary State. The moment you try to have boundaries, these, basically, end up being ethnic boundaries. I do not know whether we want to build one nation, one people or whether we want to move past that.

Having said that, the other danger I see is that in the structure of the Constitution, the final arbiter is the National Assembly and the Senate. The complaints should not be made from here. If the judge is the complainant, then there is nobody who will believe that the case will be determined properly. Even the commission will not have the powers to alter the boundaries. The boundaries can only be altered by a resolution of the Senate and the National Assembly. Therefore, I plead with you, as somebody who wants to be a Kenyan more than a Luo, let us use boundaries as bridges and not as a wall that the Jubilee Government wants to build between one friendly African nation and ourselves.

Sen. Munyes: Thank you, Mr. Speaker, Sir. Let me also join my colleagues in thanking Sen. Karaba in bringing this very important petition from the nine clans of the Agikuyu. I want to take this opportunity to address the chamber and to raise a matter of national importance.

Two of our communities in Turkana and West Pokot have been fighting thinking that by fighting over boundaries, they will determine them. Sen. Orenge has ably put it that the boundaries will be determined by the two Houses of Parliament. The conflict in Turkana and West Pokot is over boundaries because they have 19 disputed boundaries. We have told them that they cannot fight over boundaries because the Senate and the National Assembly have the final say as far as land disputes are concerned.

Mr. Speaker, Sir, we have lost so many lives over land disputes, as you saw in Nadome and Kapedo. We call upon the Committee on Legal Affairs and Human Rights to expedite this process. I know that 50 per cent of cattle rustling problems are based on

land. If we sort out the land boundaries issues and ensure that every side has the correct boundary, then it means that all of us will be happy and we will have cut conflicts by 50 per cent. The other issue is that we cannot develop our counties because we fight over where to put up schools or build dispensaries. As you saw the other day, when Turkana County was attempting to build an eco lodge in Kainuk, West Pokot County came and said, “Stop it, we also want to do the same thing there.” That has affected development in our region.

Mine is, therefore, to call upon the Committee to expedite and inform Kenyans, especially the Turkanas and Pokots fighting out there that it would not help to fight, we had better wait until Parliament - the Senate and the National Assembly - resolves this matter.

Sen. (Prof.) Lonyangapuo: Thank you, Mr. Speaker, Sir. I support my colleagues who have said that we need to address some of these issues that are associated with communities, for example, the boundaries. Although we may think that we do not have an issue and expect the local *wananchi* to be satisfied, they may not understand what we actually mean. Sometimes you find that some bandits and criminals take advantage and cause havoc in the name of “this is their territory.” It is essential that these issues are addressed, especially in my county as well as Turkana County so that it is easy to pick on and know how the development of the area is done, to the extent that if Pokots are found on the other side of the boundary, just as Sen. Orengo has said, it is easier for them to be administered from Turkana County and vice versa. However, today you may find them on the other side, yet they do not want to follow laws and procedure of that side because they think that they come from the other county and vice versa.

Let us look at it and ask the relevant Committee and arm of Government to address it, so that we settle some of these issues. It is easier now to go and fight other problems that have been hiding behind the boundary issues. That is what took me to the Criminal Investigation Department (CID) yesterday where they asked me where I think the boundaries are set. I then wondered why the Government was asking me about boundaries which I do not where they are because it is the government officers who have the maps. We need to save our Government from running business on trial and error basis. We need to identify and come up with proper beacons..

Mr. Speaker, Sir, I beg to support what Sen. Karaba has brought, so that we clearly demarcate some of the boundaries to the satisfaction of the said persons.

The Speaker (Hon. Ethuro): Please, proceed Sen. Dullo. However, you have only three minutes because we have exhausted the maximum 30 minutes.

What is it, Sen. (Prof.) Anyang’-Nyong’o?

Sen. (Prof.) Anyang’-Nyong’o: On a point of order, Mr. Speaker, Sir. I had requested to speak, but it seems to have been overlooked yet my county has been mentioned several times. Do I not have the right to reply?

The Speaker (Hon. Ethuro): You absolutely have no right to reply, but you have the right to contribute. Sen. (Prof.) Anyang’-Nyong’o, your digital status was wanting. However, since you have complained, it seems to be working now. I can see your request, so I will allow you. I had allocated Sen. Dullo three minutes, but I request her to

contribute for two minutes. I will allow Sen. (Prof.) Anyang'-Nyong'o to contribute for another two minutes.

Sen. Adan: Hainitoshi hiyo. Yeye alikuwa analala. Mimi nitachukua dakika zangu tatu.

The Speaker (Hon. Ethuro): Order, Senator! You also came to complain just the same way that he did. What is the difference?

Please, proceed, Sen. Dullo.

Sen. Adan: Thank you, Mr. Speaker, Sir, for giving me this opportunity. First, I join my colleagues to congratulate both Sen. Karaba and Sen. Mutula Kilonzo Jnr. Secondly, I belong to that Committee. However, it is really important for us to fast-track this process because the land is an emotive and sensitive issue. The issue of cattle rustling and fighting that is going on in most parts of this country is as a result of boundaries. I come from Isiolo County and we have a big problem between Isiolo and Meru counties. There is no substantive development that is taking place in Isiolo County currently because of back and forth fighting and erection of barriers by different counties. People are even unable to take their livestock to the market.

Finally, it is really important that when this commission is established, we address the historical injustices that actually brought about these boundary disputes in this country.

Sen. (Prof.) Anyang'-Nyong'o: Thank you, Mr. Speaker, Sir. I support the formation of a commission to look into the issue of boundaries. However, let me appeal to fellow Senators that what we say in this Senate can really either hurt or help this country tremendously. Any emotional statement about boundaries can spark off some violence in this country that we do not really need. Therefore, what is important in the nation is to observe constitutional provisions, that every Kenyan is free to live, move and have property anywhere in this Republic. That is the most important principle.

If we are going to think that by settling all the boundary issues, we shall settle the conflict, we shall not. The African countries were not stupid when at the formation of the Organization of African Union (OAU), they said that the boundaries set by the colonialists will remain the same. The boundaries of this nation, as Sen. Wetangula has said, among the counties, if you think that we are going to settle them by getting them correct, I am afraid that we shall not.

As wise men and women in this House, the best thing for us is to try to guide our people not to engage in unnecessary conflict. Therefore, some of the statements made in this House with regard to property ownership; is that this should be settled through boundary redefinition are extremely dangerous. I appeal to Senators not to make such inflammatory statements that can endanger this nation.

The Speaker (Hon. Ethuro): You have one minute, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, I want to assure Senators the Committee on Legal Affairs and Human Rights has drafted the second draft of the intended legislation. It is very difficult not to admire Sen. Orengo when he says that we should think about ourselves first. Most important is to use this opportunity because the Committee on Legal Affairs and Human Rights is doing this comprehensively. I am appealing to Senators to now turn into peace ambassadors because what Sen. Orengo said

is correct. We would be the final arbiters of this dispute if there is any. Therefore we must turn ourselves from the participation, remove ourselves from the ring and start preaching peace because the Bill is on its way.

Sen. Munyes, please, tell your people that the Senate has come up with a solution and it is coming to this Floor. At some point, we will call a meeting of all Senators so that we can take them through the provisions and receive their contributions.

The Speaker (Hon. Ethuro): Hon. Senators, as we conclude this particular Petition, I want to appreciate because we have had over 10 contributions. That demonstrates the popularity and gravity of this particular issue. I want to thank Sen. Haji and Sen. Khaniri because when they brought these similar Motions in the first year, my office was able to persuade them to put them in abeyance because we felt that we may not look at the matter with sobriety. It is now time this process was commenced.

I want to agree with Senators in urging the Committee for Legal Affairs and Human Rights. The Vice Chair talked about one month or so and I want to dissuade him from words “or so” so that it is strictly within one month. You have also seen the importance of some of these duties because they have serious implications. We will need to sort them out early enough before the next elections so that there is time for peace ambassadors to embark on their peace mission.

Hon. Senators, before I call the next Order, I have a Statement to make. I will allow the Senate Majority Leader to settle. I also caution Sen. Musila to obey orders.

COMMUNICATION FROM THE CHAIR

SERVING OF POLICE SUMMONS TO MPs WITHIN PRECINCTS OF PARLIAMENT

The Speaker (Hon. Ethuro): Hon. Senators, at the sitting of the Senate held on Thursday, 7th May, 2015, Sen. (Prof.) Lonyangapuo rose pursuant to Standing Order No.46 of the Senate Standing Orders, seeking the indulgence of the Senate to make a Personal Statement. He informed the Senate that on that day, he had attended a Kamukunji of the Senate which was held in this Chamber from 11.00 a.m. to 1.30 p.m. He stated that on exiting the Chamber, he met with an officer of the National Police Service (NPS), who identified himself as Corporal Daudi Mutui. He stated that he wished to serve on him “a notice to compel attendance under Section 52(1) of the National Police Act, No.11A of 2011. The notice was issued by Mr. Joseph Ngisa Angasa, a police officer attached to the investigation branch who stated that he was investigating a case of robbery with violence, contrary to Section 295 as read with Section 296(II) – anti-stock theft - contrary to Section 278 of the penal code. The notice went further to compel the Senator to appear at the DCI headquarters at Mazingira House, along Kiambu Road on 8th May, 2015.

The Senator stated that the notice was served on him immediately upon exiting from the Chamber at the doors of this Chamber which is stated to be unprocedural. He, therefore, sought the guidance and protection of the Chair, to ensure that what had happened to him does not become the practice in Parliament.

Hon. Senators, without going into the substance of the matters covered in the notice served on the Senator, in his Personal Statement, Sen. (Prof.) Lonyangapuo brought to the attention of this House and of the Speaker the question of service of summons, notices to appear or other related documents on Senators within the precincts of Parliament. The Senator posed this question: While in the course of the discharge of their functions and while within the precincts of Parliament, should Senators be accosted with summons and notices to appear? This was the question, Sen. (Prof.) Lonyangapuo posed.

Hon. Senators, Members of Parliament, including Senators, the world over, by virtue of the offices they hold, and in order to secure the effective discharge of the functions of those offices, enjoy various powers, privileges and immunities – generally referred to as Parliamentary Privilege. Parliamentary Privilege in essence refers to the freedom of a parliament to conduct its proceedings without interference or obstruction from any other bodies, entities or persons. In Erskine May's *Ties on law: Privileges, Proceedings and Usage of Parliament*, Parliamentary Privilege is defined on page 75 as follows:-

“Parliamentary Privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by Members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals.”

Thus privilege, though part of the law of the land is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body for the protection of its members and the vindication of its own authority and dignity.

Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by members. For our legislature, the National Assembly Powers and Privileges Act, Cap.6 of the laws of Kenya which by dint of Section 7 of the Sixth Schedule to the Constitution applies to the Senate - It provides for various powers, privileges and immunities available to members of Parliament, including freedom of speech and freedom from arrest for civil debt. In particular Section 5 provides for freedom from arrest for a civil debt during a session such that no Member of Parliament is liable to arrest for any civil debt, except a debt, the contraction of which constitutes a criminal offence whilst going to, attending at or returning from a sitting of the Parliament or a committee of Parliament.

Section 6 further provides that no process issued by any court in Kenya in the exercise of its civil jurisdiction shall be served or executed within the precincts of Parliament while Parliament is sitting and/or shall such process be served or executed through the Speaker or any officer of Parliament unless it relates to a person employed within the precincts of Parliament or to the attachment of the Members' salary.

Hon. Speaker Kaparo in a ruling made on 24th June, 1997, had the occasion to clarify the provisions of Section 6 of the Act by stating as follows:-

“Any person attempting to serve summons on any honourable Member on days on which the House meets, contravenes Section 6 of the Powers and Privileges Act. Any such purported service or summons is annulet *ab initio*.

In addition to the National Assembly Powers and Privileges Act, the Speaker's Rules provide for admission to the precincts of Parliament. In particular Rule 5 restricts the entry of visitors to the precincts of Parliament without the special permission of a Senator, a senior officer of Parliament or the Speaker. Rule 9 further requires an officer seeking the audience of a Senator, to not only obtain the necessary pass before entering the precincts, but also wait in the waiting room until escorted.

It is, therefore, evident from these provisions that in addition to civil process issued under Section 6 of the National Assembly Powers and Privileges Act, notices to appear before investigatory agencies cannot similarly be served on Senators while the Senate or its committees are sitting.

Further, no person purporting to serve such notice on a Senator may do so without the special permission and admission to the precincts required under the Speaker's rules.

Hon. Senators, there is, therefore, no doubt that the manner in which Sen. (Prof.) Lonyangapuo was served with the notice to appear was wanting. The Senator stated in his personal statement that the notice was served on him immediately upon his exit from this Chamber; at the doors of the Chamber. It cannot be surely that a Senator, while in the course of executing his or her functions in this Senate and Committees within the precincts of Parliament, would do so with apprehension and anxiety, not knowing if or when he or she will be accosted with notices to appear.

This is certainly not the intention of the National Assembly Powers and Privileges Act, the Speaker's rules and the practices established on the matter of parliamentary privilege. We cannot have process servers lying in wait for Senators on the corridors of Parliament, waiting to accost them with notices to appear as they enter or leave the Chamber or committee rooms. If this were to be allowed, the business of the Senate would be adversely affected. All of us are familiar that in 1975, two Members were taken from here to where you know; detention.

In the circumstances, I would not allow such things to happen. I have, therefore, directed that henceforth, no notices to appear such as happened on Sen. (Prof.) Lonyangapuo or other similar documents, should be served on a Senator within the precincts of Parliament while the Senate or the Committees of the Senate are sitting. Further, no such notices should be served without the notification and special permission of the issue by your Speaker. We are investigating the circumstances in which the strangers found their way to the Chamber.

Sen. Orengo: On a point of order, Mr. Speaker, Sir, while appreciating your observations and address on this issue, the bottom line is that on the basis of those summons, a distinguished Senator still had to appear despite the fact that you have said a nullity was issued.

There has been a contravention and you know that your Members are very popular with the police; whenever something happens, you will hear one of your

Members is summoned to go and appear before a police station or the Ethics and Anti-Corruption Commission. I think you will do us some good if, on the basis of this contravention, some action is taken to show that it is not right that a Member of Parliament is summoned in the manner that you have described. This is because if there are no consequences, then one day despite what you have said, one person may just walk through the door and say: “Mr. Speaker, I have summons for you,” and put you in a very embarrassing situation. Is there anything else that you can do to protect the dignity of this House? There has been a violation which should be punished.

Sen. (Prof.) Lonyangapuo: Thank you, Mr. Speaker, Sir, for a detailed exposition of what the rule and the law is to protect Members and the sanctity of this House. As Sen. Orengo has said, it may be appropriate that you may need to give some of these rules again to officers in those departments for them to continue acquainting themselves with the rules.

Further, yesterday I presented myself to the Criminal Investigation Department (CID) headquarters. It was almost surprising that immediately I arrived, all those charges were quickly withdrawn because they realised that, first of all, they were all wrong and false in the sense that they related to killings which happened in Nadome. For the information of the House, Nadome is found on the border of Turkana and Baringo counties. I am the Senator for West-Pokot County which is about 600 kilometres away from the said site. It would appear awkward that I would be called to give further information to those deaths.

My name has been cleared. However, some of these things that need to be addressed are still underlying. I mentioned to them what the Government needs to do. My brother, Sen. Munyes, Sen. Gideon, a number of other Senators from the North Rift and I, will have a meeting to discuss how some of these problems affecting that region could be resolved.

Sen. (Dr.) Machage: Mr. Speaker, Sir, it is not really interesting to listen to some of the things that can happen to Members of this House, knowing what history has, hitherto, projected on similar circumstances. The law was broken by an officer serving summons to a Member of this House. The Member has confessed that he appeared before the CIDs. That is the seriousness of the matter. How do you show extreme displeasure as the Speaker? Maybe by calling upon the arrest of the person who served that summon to a Member of this House because the law was breached. Instead of making general statements, there must be a legal action against the person who breached that law.

Sen. Madzayo: Thank you, Mr. Speaker, Sir. While we appreciate that those charges against our colleague were withdrawn, I still believe that the law was violated. As you correctly put it, we are interested in the act of that service which was done within the precincts of Parliament. Therefore, it is that act that we are asking you, as our Speaker, to protect us from and to issue those remedial measures of punishment.

Sen. (Prof.) Lesan: Thank you, Mr. Speaker, Sir. This is a matter of concern for Senators in this House. We know what has transpired in the past with regard to members of the security forces of a country entering into the precincts of Parliament. You will notice there is a lot of concern from those of us who are here. We have already seen that the law was broken and we must be seen to be doing something.

We have a committee that deals with security in this country and we have often sent it to look into some of the affairs that have happened that border on security breaches. I suggest that, perhaps, you allow this House to empower the Committee on National Security and Foreign Relations to further look into this issue and report to this House as a matter of assurance that this is not going to happen again with excuses that this has happened before and, therefore, we take it as it is. It is of such concern that I think this House should continue to deliberate further and find ways in which this thing is not repeated.

Sen. (Prof.) Anyang'-Nyong'o: Thank you, Mr. Speaker, Sir. There is somebody in this nation called the Inspector-General (IG) of Police and a body called the National Police Service Commission (NPSC). This fellow who entered this House to serve our colleague is an employee of these two people. Why are we going around that fact? Why can you not direct your letter to the IG and the NPSC and ask them to explain to the nation why a very important law was broken in Parliament by an officer in their service? They should explain why it happened, not just to the Senators, but to the Republic as a whole.

Sen. Nabwala: Mr. Speaker, Sir, as the Speaker of this Senate, you would not like to hear that a Senator has been asked to report to a police station and yet you have no knowledge about what the Senator said. You should know whether the summons arise out of the utterances in this House. We know that we enjoy parliamentary privileges. Therefore, in my view, whoever arrested Sen. (Prof.) Lonyangapuo breached parliamentary privileges. The person should be arrested. We should also know who gave the order and whether it is the Inspector-General of Police. For the policemen to walk into the precincts of Parliament, somebody up there must have given them the order. We would like to know who that person is.

The Speaker (Hon. Ethuro): Order, Senators! I can see the interest is quite immense. I am sure that you will canvass similar issues. I, therefore, reduce the time for contribution to one minute so that you raise the most burning issues. I will go through the list.

Sen. Wamatangi: Mr. Speaker, Sir, I laud you for the decision that you have made. I declare that I have personally been a victim of a similar occurrence, just like Sen. (Prof.) Lonyangapuo, after the death of the late Member of Parliament for Kabete Constituency, hon. Muchai. It is in the full knowledge of this nation the role that I played in organising all the burials for the four who died.

Mr. Speaker, Sir, as I entered this Chamber, one day, I was confronted on the walk-way by a stranger. He produced summons and gave them to me. Upon reading the summons, you will be surprised by what it was about. It read:

“We have reason to believe that you have the information or you were directly involved in the murder of the late hon. Muchai.”

I was surprised by what the summons said. I immediately called the Inspector General of Police at that particular time and the Director of the Criminal Investigation Department (CID). It was after that, they said that they wanted to get information from all Members of Parliament (MPs) who participated in the burial arrangement to know whether they had any other information.

Mr. Speaker, Sir, you can imagine such a statement made on a document which has been served upon me. Eventually when I protested that is when I was told that I did not have to honour the summons. They said that they actually knew the role that I played and asked me not to appear.

Mr. Speaker, Sir, we have the Serjeant-at-Arms in this Chamber and the premises.

The Speaker (Hon. Ethuro): Your time is up, Senator!

Sen. Wamatangi: Mr. Speaker, Sir, please, direct that Serjeant-at-Arms should ensure that strangers do not access this premises. They should be detained, if possible.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I laud your statement and extend our sympathies to Sen. (Prof.) Lonyangapuo for the tribulation that he has gone through. I would, however, add, like Sen. (Prof.) Anyang'-Nyong'o, the Senator for Kisumu County has said, that your statement is very good. However, it must go beyond this Chamber. We request you to write to the Attorney-General as the principal legal advisor of Government to properly advise the agencies of the state as to what the law says. I also urge you to copy that letter, or write separately, to the Inspector-General of Police to put his officers under check and order.

Equally important, I urge you to tell the Serjeant-at-Arms, like Sen. Wamatangi has said, that strangers should not be allowed to come to Parliament to execute whatever warrants they may have.

Mr. Speaker, Sir, as I conclude, things start slowly like this. You have cited the case of the late hon. Shikuku and the late hon. Seroney. Hon. Seroney was, in fact, arrested as he was walking out of that Chair in the procession. Similarly, the late hon. Shikuku was arrested after a Parliamentary sitting for what they spoke in the course of the proceedings.

Mr. Speaker, Sir, you know of the case where a stranger sitting in the Public Gallery kept on pointing a gun at the late hon. Anyona as he was contributing on the Floor of the House because he did not like what hon. Anyona was speaking about. The moment we go that direction, even you, yourself, may not be safe.

Hon. Senator: You do not know that he was arrested before?

(Laughter)

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

The Senate Minority Leader (Sen. Wetangula): In fact, Mr. Speaker, Sir, I had forgotten that, indeed, you were not just arrested; you were frog-marched to some place.

The Speaker (Hon. Ethuro): Order, Sen. Wetangula!

(Laughter)

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, you must use the letter and the spirit of the law to enforce the privileges of Senators. These are not just Senators; they represent large segments of the populations of this country.

Thank you, Mr. Speaker, Sir.

Sen. Orendo: On a point of order, Mr. Speaker, Sir. I am sorry to rise again. However, there used to be a rule in this House which was kept very well. On the procession walk – the route that you follow when you come to the Chamber when the House is in session – not even a police officer was to enter that space. It is only recognised parliamentary orderlies that were supposed to be on the procession space. It is now a habit that you will see many people standing around the Chamber because of its situation and you can never determine what they are up to. That should be looked into for the sake of the protection of this Chamber.

Sen. Ndiema: Mr. Speaker, Sir, I also join in sympathising with the situation of Sen. (Prof.) Lonyangapuo. I applaud your decision and direction. However, it is very important that this matter be investigated further to its conclusion. This is because we are told that it was a police officer who served him with the summons, but we are not really sure whether it was a police officer or not. In future, it can also happen that somebody will come here masquerading as a police officer when it could be a criminal.

Mr. Speaker, Sir, I believe that there is a relevant committee in this House that can handle that matter and even, if possible, try to find out under whose orders that decision was made. As Sen. (Prof.) Lonyangapuo says, he went there and there was nothing more. There is a point in following up that matter.

Thank you, Mr. Speaker, Sir.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, like my colleagues, allow me to extend my sympathies to Sen. (Prof.) Lonyangapuo.

Mr. Speaker, Sir, the country has started sliding back into the bad old days of 1990s when such things used to be seen. You will remember when five Members of the National Assembly from Narok County were harassed in a similar manner. I just want to use this opportunity to appeal to MPs from Turkana, West Pokot and Baringo to march out of the Jubilee side because you will never represent and defend your people when you sit with them; they are the ones perpetuating the insecurity yet they are incapable of taking care of our pastoralists.

Mr. Speaker, Sir, hon. Orendo has suggested correctly that there is need for you to take action. The action that you take against the police should also be duplicated here in Parliament. Why did the officers manning the gate and all points of entry where the police officer passed through allow him in when he had not given the reason why he was coming into this Parliament? I want to believe that the Serjeant-at-Arms knew the rules that you have just read to us before he took up the job. You must punish him.

Sen. Karaba: Mr. Speaker, Sir, for the many years that I was a headmaster, it would be very hard for anybody to arrest a teacher without having to come to my office.

(Laughter)

We are sharing experiences. Therefore, any arrest of a Senator in this august House should have been known by you and the gateman. So, for the first culprit to be shown the door is the gateman. Last week, we were told here by Sen. Musila, who is also a Commissioner in the Parliamentary Service Commission (PSC), that all is well with

security, but only to realise that they can arrest one of us in the name of Sen. (Prof.) Lonyangapuo. That is a big shame.

The Speaker (Hon. Ethuro): Senators, take note also that we should not be repetitive.

Sen. Kanainza: Mr. Speaker, Sir, we have known Sen. Lonyangapuo as a peacemaker. So, it was very unfortunate for him to be arrested for what he has not done. This incident shows that security in Parliament premises is wanting. When you walk on the corridors, even on the floor where your office is located, there are no CCTV cameras, unless they are hidden. We need to enhance surveillance.

In your ruling, you have said that the findings will come out. However, you also need to tell us how soon you are going to deal with this issue, so that we can know who was involved in the arrest of the Senator.

The Speaker (Hon. Ethuro): Order, Sen. Kanainza! Orders do not go forth and back. They only go one way.

Sen. Kittony: Mr. Speaker, Sir, this is a wakeup call. I sympathize with my brother, because we all know his character. It was the wrong person to touch and it is a provocation. We have just returned from India where security is not taken lightly. I see a sinister motive in what happened. It is time that your office acted. I know that there is a new Inspector-General of Police and maybe he does not know his job. Please, remind him on how the Senators are to be treated. A letter from your office should be written to him regarding the same. We are unsafe here in Parliament. We are not sure who the next person to be arrested is.

Sen. Mutula Kilonzo Jnr. and Sen. Machage know what we saw in the Parliament of India in terms of the security measures put in place. It is not a joke. You feel very protected as a legislator.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, I want to echo the last sentiments of Sen. Kittony. When we went to the Parliament of the Republic of India, we were searched five times before reaching the public gallery. But even then, there were CCTV cameras everywhere where they could see us. They even warned us not to cross our legs because we would be captured on CCTV.

Mr. Speaker, Sir, the fact that somebody can be served with an order means that if somebody wanted to harm Sen. (Prof.) Lonyangapuo, he would have done more than serve him with a court order.

Secondly, I want to repeat what Sen. Wetangula has said; that in fact, there is more than one person who violated the law, including the persons who allowed access to this premises. On the proposal by Sen. Orengo, I would add that your letter is like a ruling. First, I would like to propose that, just like the Republic of Australia, we should have nice rulings of the Speaker, so that the next Parliament can quote you, the way you have quoted hon. Kaparo.

I would also suggest that your letter be sent to the Director of Public Prosecutions (DPP) because I think that is where the violation should be investigated.

Lastly, somehow as Senators in this Republic, we look like very soft underbellies. If this had happened in the National Assembly, there would be hue and cry and many other things that they would say and do, which I will not repeat here. It is time that we

demonstrated that we are equal to the task. We are counting on you to protect us because we are not soft in any form.

The Speaker (Hon. Ethuro): Order, Senators! First, Sen. (Prof.) Lonyangapuo's Statement was made on Thursday and I was to make my Statement yesterday, only that he was not here. So, that was just the position in terms of procedure.

We have launched investigations so that we can now fully understand what actually transpired. The outcomes of those investigations will enable us to know what kind of action to take against whom. So, I just want to assure you that the Chair takes the privileges and immunities of Members very seriously because it is so fundamental to our business and the law is very clear. So, whoever breached the law will meet the full force of the law.

Thank you.

Next Order!

PAPERS LAID

Sen. Chiaba: Mr. Speaker, Sir, I beg to lay the following Papers on the Table of the Senate today, Wednesday 13th May---

The Speaker (Hon. Ethuro): Order, Sen. Chiaba! That is not the Table of the Senate. That is your own desk.

(Sen. Chiaba moved to the Dispatch Box)

Sen. Chiaba: Mr. Speaker, Sir, I speak with authority now, as the Chairman.
I beg to lay the following Papers on the Table of the Senate today, Wednesday 13th May, 2015:-

REPORT OF THE TRANSPORT COMMITTEE ON THE ONGOING CONSTRUCTION OF THE SOUTHERN BYPASS

Report of Standing Committee on Roads and Transportation on the inspection visit to the ongoing Southern Bypass road construction in Kikuyu Town.

REPORT OF THE TRANSPORT COMMITTEE ON THE STUDY TOUR TO QATAR AND SINGAPORE

Report of the study tour to Qatar and Singapore by the Standing Committee on Roads and Transportation from 24th October to 3rd November, 2014.

(Sen. Chiaba laid the documents on the Table)

REPORT OF COMMITTEE ON DELEGATED LEGISLATION ON THE PUBLIC FINANCE MANAGEMENT REGULATIONS, 2015 AND LEGAL NOTICE ON THE DECLARATION

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OF NATIONAL GOVERNMENT ENTITIES

Sen. Sang: Mr. Speaker, Sir, I beg to lay the following Paper on the Table of the Senate today, Wednesday 13th May, 2015:-

Report of the Sessional Committee on Delegated Legislation on:-

- (1) The Public Finance Management (National Government) Regulations, 2015.
- (2) The Public Finance Management (County Governments) Regulations, 2015.
- (3) The Legal Notice on the Declaration of National Government Entities (state organs).

(Sen. Sang laid the document on the Table)

THE PERFORMANCE REPORT OF THE MINISTRY OF
ENERGY AND PETROLEUM

Sen. Mwakulegwa: Mr. Speaker, Sir, I beg to lay the following Paper on the Table:-

The performance Report of the Ministry of Energy and Petroleum, in accordance with Article 153(4)(b) of the Constitution of Kenya for the period of 1st July to 31st December, 2014.

(Sen. Mwakulegwa laid the document on the Table)

THE ANNUAL ESTIMATES OF THE EXPENDITURE FOR THE THREE
ARMS OF GOVERNMENT FOR THE YEAR 2015/2016

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, on behalf of the Chairperson of the Standing Committee on Finance, Commerce and Budget, I beg to lay the following Papers on the Table:-

- (i) The Annual Estimates of the expenditure for the three Arms of Government for the year 2015/2016.
- (ii) The medium term, the annual estimates of revenues, loans and grants for the year 2015/2016.

(Sen. (Dr.) Khalwale laid the documents on the Table)

STATEMENTS

The Speaker (Hon. Ethuro): Order Members, because of the three Bills, we will not take response to Statements. We will only take requests.

INTERNATIONAL BOUNDARY DISPUTES IN TURKANA

Sen. Munyes: Mr. Speaker, Sir, I wish to seek a Statement from the Chairperson of the Standing Committee on National Security and Foreign Relations. In the Statement, I would like the Chairperson to state the following:-

(1) What boundary disputes exist between the Republic of Kenya and the neighbouring state of Somalia, Ethiopia, South Sudan and Uganda?

(2) If it is true that those disputes exist, what action has the Kenyan Government taken to resolve these international disputes?

(3) Finally, whether Kenya has completed the boundary status report and deposited boundary dispute instruments with the African Union (AU) before the deadline of 2018?

Mr. Speaker, Sir, my county is affected by this boundary disputes. We all know of the Elemi Triangle, the border of Uganda under the Uganda Escarpment which affects West Pokot. We know of disputes in Migingo which have not been resolved. There is a deadline with the African Union (AU) for every State to determine their territories. It seems from what I have heard, other countries have deposited those instruments. It is Kenya which has not deposited their instruments. We fear to lose the Elemi Triangle. The people in Turkana fear; they are not sure whether they are Kenyans or South Sudanese. As I speak-----

The Speaker (Hon. Ethuro): Sen. Munyes, you are exceeding the Statement as approved.

GENETICALLY MODIFIED ORGANISMS (GMO)
TECHNOLOGY IN THE COUNTRY

Sen. Kisasa: Mr. Speaker, Sir, I rise pursuant to Standing Order No.45(2)(b) to seek a Statement from the Chairperson of the Standing Committee on Agriculture, Livestock and Fisheries regarding the Genetically Modified Organisms(GMO) technology in this country. In the Statement, the Chairperson should explain:-

(1) The Government of Kenya position on the use of GMOs technology for food production.

(2) State whether Water Efficient Maize for Africa (WEMA) is a GMO crop and if so, what is the Government's position on its production and use; and,

(3) He should also explain the steps that the Government is taking to ensure food security in the country.

The Speaker (Hon. Ethuro): Order Members, we need the Chair for the Committee on National Security and Foreign Relations to respond to Sen. Munyes and the Chair for the Committee on Agriculture, Livestock and Fisheries to respond to Sen. Kisasa.

In their absence, I will direct that they respond in two weeks' time.

SAFETY OF KENYANS IN BURUNDI

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I stand in conformity with the Standing Order No.45 and Standing Order No.1 to seek a very urgent Statement from the Chairperson of the Committee on National Security and Foreign Relations on the unfolding events in the Republic of Burundi. The breaking news messages indicate that the military has staged a coup in Burundi. In ordinary circumstances when such coups are committed, there is lawlessness, breakdown of law and order, danger to human life and the security of property. I recall a couple of days ago when you as the Chair of the FP-ICGLR parliamentary leadership, urged the East African Community (EAC) leaders to step in and resolve the issues in Burundi.

Three weeks ago, I travelled to Burundi under the auspices of the United Nations (UN) to try to see how we could resolve the impasse' following the declaration of the President to run for a third term. Obviously, the East African presidents dragged their feet. I understand that they are now in Dar es salaam with the President who may have been deposed in Burundi trying to resolve the problem; but coming too little too late.

My statement would require the Chair to urgently inform this House and the country the status of the safety of our nationals in the Republic of Burundi. We have an embassy in Bujumbura and we have many Kenyans who are either doing business or working through bilateral engagements or working as teachers in universities, schools and other tertiary colleges. We want to hear from the Government how urgently they can evacuate Kenyan nationals back to Kenya until the situation normalizes before they can go back to carry on with their duties because of the fluid situation given the genocidal history of that region, particularly the endless conflict between the Hutu and the Tutsi communities.

Lastly, how are the East African Region and the African Union positioning themselves to forestall any possible mass loss of lives? Today, at 12.00 noon, the BBC was announcing that for the first time demonstrators that were armed with all manners of crude weapons had entered the city centre. This would invariably be followed by looting and attacks on innocent peoples and Kenyans could be caught in the cross fire because I know we have Kenyans banks in Burundi and Kenyans running eateries, restaurants, hotels, bars and other businesses. More importantly, there are many young Kenyan girls and boys who work in hotels in Burundi like they do all over the East African Region.

This Statement is so important that I would request that you direct that it be issued tomorrow because Kenyans are anxious to know about the safety of the compatriots.

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

Sen. Orengo: Mr. Speaker, Sir, I also request that in giving this Statement, the Chairperson of the Committee on National Security and Foreign Relations should inform the House whether the Kenyan Government is still in the mode of "wait and see" policy in the execution of its foreign policy. My understanding is that Kenya being what it is, particularly within the new Constitution; Kenya should assume leadership at least in terms of values and principles. We saw heads of Governments in the region, for example, Tanzania who came out firmly to tell the Burundi President that he could not go for a third term. Similarly, this was said by the Government of the United States of America (USA), the African Union (AU) and the United Nations (UN). As we are watching other

delegations trying to impress upon Burundi and the former President not to run for a third time, I am saying this because I believe that Kenya---

The Speaker (Hon. Ethuro): Order, Sen. Orengo! Statements Time is a time to request for Statements, it is not to justify them.

Sen. Orengo: Mr. Speaker, Sir, I am not justifying. The Chairperson should explain why Kenya failed to demonstrate by saying what should have been said at the right time.

The Speaker (Hon. Ethuro): Order, Senators! Ideally, Statements should be made by one person. We have acquired a habit of riding on to the extent that sometimes they refuse to---

(Hon. Senators spoke off the record)

Order, I am now disallowing this. So, there will only be those two related to that particular one.

Next Order.

(Sen. Wetangula spoke off record)

Yes, sorry. Proceed, Chairperson of the Committee on National Security and Foreign Relations.

(Hon. Senators spoke off the record)

Order, Senators! It is so directed, the Statement will be responded to tomorrow afternoon. Is there any Chairperson in the House? Sen. Karaba has been quite enthusiastic.

(Sen. Karaba spoke off the record)

What is it, Sen. Karaba? Take advantage of this, you will be our envoy.

Sen. Karaba: Mr. Speaker, Sir, since I am the one who will be a saviour, I would like to support what my friend Sen. Wetangula said. I want also to note that next month we will have the East and Central African Schools sports competitions in Rwanda. I am not sure whether by that time, there will be order in the neighbouring country. I wish that the same be included in the Statement so that those games are rescheduled to another country.

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

(Laughter)

Sen. Karaba: Mr. Speaker, Sir, I will make sure that by tomorrow I will have looked for the Chairperson. I do not know what happens now in this case. I will make

sure that I look for the Chairperson and inform him before 6.00 p.m. about the need to issue the Statement.

The Speaker (Hon. Ethuro): It is so ordered. What is it, Sen. Mugo? Is it a point of order?

Sen. Mugo: No, Mr. Speaker, Sir, I am seeking a Statement.

The Speaker (Hon. Ethuro): Okay, let us take the point of order first. Proceed, Sen. (Dr.) Khalwale. I will come back to you, Sen. Mugo.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, do you notice that with the writing clear on the Order Paper that this is the time for Statements? There is no single Chairperson on the Jubilee side other than Sen. Karaba. If it pleases you to know, this has been the habit, not just for a few weeks, but for many months that we have sat in this House. As a result of the same, very many of the statements we have asked for, are pending for a period of more than three months.

The Speaker (Hon. Ethuro): Order, Sen. (Dr.) Khalwale! Chairpersons of Committees are not confined to one side only. There are Chairpersons next to you, behind you---

(Sen. (Dr.) Khalwale spoke off the record)

Order! I am not going to take any count because I am not privy to whether it has been delegated to you, or otherwise. We always talk about the Chairperson, Vice Chairperson or a Member of the Committee. Let us cross that bridge once we reach there.

Secondly, I made an observation that at 4.00 p.m. we will not take any Statements. We are only allowing the requests because of the other business before us. So, maybe they took that into consideration. I think for now, there could be mitigating factors.

Proceed, Sen. Mugo.

OUTBREAK OF CHOLERA IN THE COUNTRY

Sen. Mugo: Mr. Speaker, Sir, I rise to seek a Statement from the Chairperson of the Standing Committee on Health regarding the recently reported outbreak of cholera in the country. In the Statement, the Chairperson should state:-

(1) Whether devolution of health services in the country could be attributed to the rising cases of cholera which is preventable.

(2) Whether the devolved units have the requisite capacity to manage such health problems and;

(3) The circumstances leading to the emergence of cholera cases in areas that have not been affected by the disease in the past.

If the cholera question persists, the country risks being placed under the list of countries that require vaccination for cholera before citizens travel to other countries or before our guests come to this country. We should take action.

The Speaker (Hon. Ethuro): Where is the Chairperson of the Committee on Health? Proceed, Vice Chairperson, Sen. Kisasa.

Sen. Kisasa: Mr. Speaker, Sir, we will issue the Statement in two weeks' time.

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

Sen. Kisasa: Mr. Speaker, Sir, on behalf of the Chairperson of this Committee.

The Speaker (Hon. Ethuro): Order, Senator! You need to appreciate normal things from emergencies.

Sen. Kisasa: Mr. Speaker, Sir, on behalf of the Chairperson of the Committee on Health, we humbly request to give the report within one week.

The Speaker (Hon. Ethuro): Order! I direct that just like the one for Burundi, you are going to do the same tomorrow.

Sen. Kisasa: Mr. Speaker, Sir, tomorrow?

(Loud consultations)

The Speaker (Hon. Ethuro): Maybe you do not know what you are talking about? This is cholera!

Sen. Kisasa: Mr. Speaker, Sir, we have that information as a Committee. So it is possible, we will give the Statement tomorrow.

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

An hon. Senator: She is a nurse! *Wewe unajua haya maneno.*

The Speaker (Hon. Ethuro): Order, Senators! I have directed that the Statement be brought tomorrow afternoon.

Next order!

BILLS

Second Reading

THE PUBLIC AUDIT BILL (NATIONAL ASSEMBLY BILL NO. 38 OF 2014)

(Sen. (Prof. Kindiki) on 12.5.2015)

(Resumption of Debate interrupted on 12.5.2015)

The Speaker (Hon. Ethuro): Who had the Floor? They concluded? Proceed, Sen. Musila.

Sen. Musila: Mr. Speaker, Sir, I join my colleagues in applauding the introduction of this very important Bill. As I say that, we are not establishing the Office of the Auditor-General for the first time. We have always had Auditor-Generals. The problem is that the Office of the Auditor-General has never functioned as it should for many reasons. All the committees which look into accounts of Government Ministries, as a matter of fact, do postmortems of what has been done for many years. We know that even now, as I speak, the audit that is ready is that of the Financial Year 2012/2013. That

is why county governments cannot access money that is current because in the first place, the Auditor-General has not done his work properly.

[The Speaker (Sen. Ethuro) left the Chair]

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

Madam Temporary Speaker, this Bill must ensure that the Auditor-General we are establishing in this Bill is different from the ones who have been there in the past. This country is awash with cases of corruption. As I speak, corruption is endemic in all walks of life, particularly in Government Ministries and counties. All this is because the Office of the Auditor-General is lurking. It is not performing. We hope that with the passing of this law, this office will function as it should and this is indicated in various clauses of this Bill.

As you may be aware, it is now over two years since county governments were established. I can tell you, for a fact, that there are many county governments which have not seen an officer from the Auditor-General's Office auditing their accounts. Therefore, the county governments that this House is supposed to look after have been left alone to go round and spend money without any auditing. All this is because the Office of the Auditor-General has not posted auditors in the counties.

The blame is not entirely on the Auditor-General because he has been on record claiming that he has been starved of funds to audit government institutions. Therefore, even as we pass this Bill, it must be very clear to the National Assembly that the Office of the Auditor-General must be adequately funded so that it carries out the audit it is supposed to do. As it is, the Office of the Auditor-General is basically in Nairobi and in former provinces and has not audited adequately. That is why I continue to say that corruption has become endemic. That is why people misappropriate public funds and get away with it. That is why public finances are misappropriated and we are told about it five to ten years later when, in fact, those accused of misappropriating the funds are no more.

The Office of the Auditor-General has let this country down. We hope that in the passage of this Bill, the Office will move fast to establish audit units at all county headquarters so that county governments are audited as a matter of routine and not once in a while. I repeat that lack of audit is responsible for misappropriation. Lack of audit is responsible for all the ills that are happening in Government.

I was reading a report this morning which traces most corruption cases in procurement. We are appropriating billions of shillings to county governments which have gone to shopping sprees and all manner of things. There is no auditor there who can stop them from doing what they are doing. We have been crying and the County Public Accounts and Investments Committee is always lamenting. Governors are summoned, but refuse to appear. Yesterday, Dr. Khalwale went to Kiambu and was threatened by the Governor. How long will we run the country like this when people do whatever they want to do without anybody policing their actions?

Sen. Karaba: On a point of order, Madam Temporary Speaker. Did you hear what my friend, Commissioner Musila, attributed to this House? He said that one of our Senators was embarrassed in Kiambu by a Governor. As a result of that, he says that he fears to be embarrassed elsewhere. Could he elaborate?

The Temporary Speaker (Sen.Ongoro): Sen. Musila, could you elaborate your claim? Is that a serious claim?

Sen. Musila: Madam Temporary Speaker, it is very easy to substantiate because the person who made that statement is none other than Sen. (Dr.) Khalwale. He said that he was told by the Governor for Kiambu that he would be dealt with if he continued to probe matters concerning that county.

He is sitting right here. If anybody is in doubt, he can confirm what I have said.

The Temporary Speaker (Sen. Ongoro): Hon. Senator, thank you for that information. The Committee on Devolved Governments should investigate that matter on security and harassment and report back to this House. Interrogate that matter on harassment. We should have the full details of what happened between the Governor of Kiambu and the Senator for Kiambu. We want to get to the bottom of that so that a repeat is stopped. How long should we give you? Is one week enough?

Sen. Murkomen: Madam Temporary Speaker, give me seven days.

The Temporary Speaker (Sen. Ongoro): Very well. You are the Chairman of the Committee on Devolved Governments. This matter rests squarely in your committee.

Sen. Murkomen: On a point of order, Madam Temporary Speaker. As far as I know, the issue concerning Kiambu County is a security matter. Somebody was threatened. We would be happy to deal with matters of fostering good relations between the Governor and the Senator. However, when it moves to the stage of one being threatened, that becomes a security issue. The Committee on National Security and Foreign Relations should take over.

The Temporary Speaker (Sen.Ongoro): Senator, I still feel that your Committee is the relevant one. If you feel that there is an aspect of security, you will then involve the Senate Committee on National Security and Foreign Relations. However, on matters that relate to the Governor and the Senator, your Committee should deal with it. We will give you seven days. You should report to us on Wednesday, next week at 2.00 p.m.

Sen. Musila: Madam Temporary Speaker, as I said, the Senator will have a very easy time in investigating this matter because the culprit is just here. He is very ready to substantiate what happened. He is the culprit and the victim.

I would like to conclude by applauding this Bill and to say that it will be useless to have the Bill and to give the Auditor-General all the powers as it is stated in this Bill if we do not give him funding. Funding is important. He has gone on record to say that he has been unable to function because the National Assembly has not allocated his office sufficient funds. We urge the National Assembly that this Bill, even if we pass it, will have no meaning if the Office of the Auditor-General is not funded adequately in order to perform the duties it is supposed to.

We want to ensure that the Auditor-General does his work quickly so that we do not have any backlog of unaudited work. When he audits, reports should be submitted to Parliament as it is stipulated in the Bill and action taken within the framework or the days

given so that we eliminate all these misappropriations and corruption that we hear of, day in day out.

Madam Temporary Speaker, I beg to support.

The Temporary Speaker (Sen. Ongoro): Please, proceed, Sen. Mutula Kilonzo Jnr., the Senator for Makueni County.

Sen. Mutula Kilonzo Jnr.: Thank you, Madam Temporary, Speaker. Please allow me to begin with a sad story. In the ongoing Commission hearings to dissolve Makueni County, the Auditor-General has submitted a report and at the bottom of it---

(Loud consultations)

The Temporary Speaker (Sen. Ongoro): Order, Senators! There is a Senator on the Floor. Please, consult in low tones.

Sen. Mutula Kilonzo Jnr.: Madam Temporary, Speaker, at the bottom of that report, the Auditor-General says that the audit for Makueni County for the Financial Year, 2013/2014 is not ready. This, therefore, presents a tragic situation that when a county like mine is facing all sorts of issues, including allegations of misappropriations all over the place, we do not have a method of dealing with the issue. So, for some reason, the Commission and this Senate will not be able to make a determination based on the report of the Auditor-General. It is a sad story and sad situation. If there is one function that is under attack, it is the function of oversight. That is why the Governor of Kiambu County, if what Sen. (Dr.) Khalwale said is anything to go by, has the audacity to threaten him. This is because the governors have acquired a larger than life attitude because there is nothing that Senators can do after all, even if we accused them of misappropriation, misapplication and many other things.

Madam Temporary, Speaker, I wondered aloud when I saw this Bill, why the last Parliament thought that this Bill should come last in terms of order. Some of the things that Sen. (Dr.) Khalwale has been attempting to do would have been very easy had Parliament thought it wise – and Parliament is forever wise – that this Bill should have been in place before we started the county governments or other devolution units. Just for the record, I am also happy to report that the Committee on Finance, Commerce and Budget, has conducted public hearings, the public has given their views on this Bill and we will be tabling the report tomorrow.

Madam Temporary, Speaker, I just want to highlight key issues which I think should be addressed. In 2004, I represented Governor Mulei who was fired from the Central Bank for one reason which is that he managed to unravel very huge financial irregularities of a certain bank. How did he do so? Governor Mulei picked his son, Sila Mulei, who came up with a software which plugged into that bank's system and was able in a flash to pinpoint the irregularities in that bank. For that reason, Governor Mulei was suspended and later fired under very unkind circumstances. My point is that, although I agree with Sen. Musila and the rest of the Senators who say that we must give this office adequate funding, the solution to his work - and Sen. ((Prof.) Lesan and Sen. Kanainza can confirm because they sit in our Committee on Information and Technology - once

and for all is to introduce an amendment to say that this office will use, by whatever means possible, the latest technology to do audit.

While dealing with Narok County, we waited for the Auditor-General for two months to give us a special audit. It is as if he walked from Nairobi to Narok to go and audit. In a proper functioning system, and I am sure that you agree with me, this report would have been tabled in this House within seven days and this applies everywhere. Even though we are allowing the Auditor-General to do special audits, in the current circumstances, he is just going to be taking two, three or four months. We have had instances where governors have refused to provide documents. We suggested in the Committee that we give the Chairperson powers that are similar to the High Court to *subpoena* documents and get them on oath, so that in violation of that order, then the person can be in contempt. That is the only way that we can enforce these things.

Madam Temporary, Speaker, this Bill will not work if we do not have auditors in every county. Let us not just give funds. Let us insist that there must be an office and officer whom we can send to Narok County quickly to give us documents. On the question of funds, I have seen that the Bill proposes that the National Assembly will give the Auditor-General adequate funds. I have asked our Committee that we find a method of ring-fencing these funds because the word 'adequate' to me appears as if we leave it to the discretion of the Committee on Budget and Appropriations of the National Assembly, yet we know what they have done in the past when it comes to funds. They treat funds as if those funds belong to them, yet they belong to the Republic.

Madam Temporary, Speaker, I disagree entirely and totally with the provision that seeks that when the Auditor-General wants to audit security organs, they must have a meeting to decide what constitutes national security. It is unacceptable. If public funds have been used to purchase items, the Auditor-General must be given access to those documents. The security and spending of this Republic is not greater than the reporting of the money. When Sen. Murungi was on the Floor yesterday, he said this on record, which I want to repeat so that then this is looked at; he said that the gentleman by the name of Mr. Mutea Iringo was dealing with security issues yet he cannot disclose that they withdrew Kshs2.8 billion, which is almost equivalent to the money that we are allocating to Taita-Taveta or many other counties. Why should Kshs2.8 billion withdrawn within a space of three days be a secret? It cannot be a secret.

In fact, for us to know whether our military is able to defend students like in Garissa, we need to know how many tanks are available in the country. We need to know how many G3 rifles they have purchased. Even if that information is not accessed by the public, for crying out loud and for heaven sake, this information must be availed to the Auditor-General. It is not for him to have a meeting, but to summon the person who has spent the funds, so that they can be audited. It is even more acceptable to vet the people who will go to audit these security organs. We are simply saying that we have created a special cartel of auditors, the ones who audit public bodies and others who audit the security systems. Who made these people so large that they are above the law? The Constitution says, and we must repeat for them to hear and if they do not, somebody should knock at their door, and tell them that the law of this country is greater than the people who are managing our security or for this case, mismanaging it.

Madam Temporary Speaker, the question of funding; how much money will go to what, has been a problem that the Auditor-General has had with the Treasury. What is proposed in this Bill is that the Auditor-General will prepare a budget which will go to the Cabinet Secretary, who will think about it and determine whether those funds are adequate. This is how you impede the work of an independent officer. We have asked the Budget Office to check if there is a method that we can ring-fence the funds that can be allocated to the Auditor-General. We ought to do so. If Parliament has ring-fenced the funds that are coming to us, we should insist that the same ring-fence be put on the funds that are available to the Auditor-General.

Parliament itself, being a person interested in budgets, makes its own budgets and we are a judge in our own course but we are not allowing the person who is supposed to check whether we are spending properly to have the same latitude as a Parliament. That portion of the Bill is something that concerns me.

Madam Temporary Speaker, the issue of outsourcing of audits, if we are going to give the Office of the Auditor-General enough funds, why should they look for KPMG or PriceWaterHouseCoopers which are organizations in Kenya and have employed Kenyans? If we are going to recruit members of staff--- This Bill has very innovative ideas on the recruitment of staff; they have said that the salaries of these persons will be paid equivalent to what is in the market. Therefore, we are going to attract people in nice looking suits who work for KPMG or Deloitte and Touché so that they can work for the Government. Then it would be unnecessary to outsource the services of auditing. What would be outsourced, in my view, is technology. If we can find technology in another republic, there is no problem with looking for those experts so that they can assist us in unraveling some of the problems we are facing.

Regarding reports to the county assemblies, this has been said over and over again. The Public Finance Management Act has provisions for quarterly reports. The reason why we do not have audit reports now is because the auditor says he does not have capacity. Even then, I still want to know what he has been doing because even the audits of the national Government are not with us.

On reporting, I would like to suggest, like Sen. Wetangula said, that we put a timeline. One of the things plaguing this Republic are that we make so many laws but we never put deadlines or default clauses. For example, it says the Cabinet Secretary would make regulations. This morning in one of the public hearings, we were told by the Commission of Administrative Justice that there is a law that was passed in 2004 which requires that the Cabinet Secretary would make regulations. It is now 2015 and those regulations have not been passed. One of the methods of getting to the bottom of financial misappropriation and flights of fancy by the county governments is ensuring that the reporting system in this proposed Bill has a timeline and a penalty for not complying. There is no penalty proposed here.

Madam Temporary Speaker, lastly, the Constitution requires that if you misapply funds, you are responsible personally. This Bill has attempted to put a soft landing on those people and it is completely unacceptable and unconstitutional. This Bill should propose that if a person is found to have misapplied funds, irrespective of who he is, he or she must be surcharged or charged and not reported to Parliament. When you report

that person to the Committee on Budget and Appropriation led by hon. Musyimi, what is he supposed to do? Pray for him? We must comply with the Constitution.

With those few remarks, I beg to support.

Sen. Orenge: Madam Temporary Speaker, I also rise to lend my voice to this very important Bill. When this Bill was originally considered by the National Assembly, it had several provisions which were deemed to be not in compliance with the Constitution. Looking at this Bill as passed by the National Assembly, it is an improved version of the Bill that was originally tabled. The matter does not end there. It should be understood by this House that one of the most important tools that Parliament uses in performing its functions under the Constitution which includes oversight is the office of the Auditor-General. If the office of the Auditor-General is not functioning properly and effectively, then it would be lost to Parliament on how to perform its oversight functions. Over the years, the Executive made attempts to undermine the constitutional authority of that office and by extension Parliament by ensuring that this office was emasculated and therefore, its effectiveness as per the Constitution was not in conformity with the Constitution itself. This is in terms of timelines, reporting and such like requirements.

Madam Temporary Speaker, unless we look at some of the provisions which are contained in this Bill, we may think we are doing a great job by passing this Bill but there are provisions in this Bill, in my view, that would actually bring that office into a situation where they will have to comply with whatever the Executive requires. My starting point is that the Constitution itself requires that Parliament must give adequate funds to independent offices including the office of the Auditor-General. It is a constitutional obligation that in the performance, duties and functions of the office of the Auditor-General, parliament itself must determine that it has given adequate funds for the office of the Auditor-General to function. If you look at this Bill generally and I do not want to go into specific provisions because that would take a lot of time, it would seem to suggest that the function is probably left to the Auditor-General himself and to Treasury to eventually make a determination whether or not funds are being given according to estimates. Even if the funds are not adequate, there is no obligation by Parliament to make sure that the funding is adequate.

Therefore, I would urge this Parliament, including the Senate, that this being such an important office, whenever we are confronted with estimates regarding the Republic of Kenya and its departments, we better be on the look out to determine whether we have indeed given that office adequate funds. There are provisions in this Bill that if you look at them carefully, they claw back on the provisions of the Constitution that require this office to be independent. What I have in mind is that there is a body established under this Bill, in Part III, Clause 4 of what is called “the establishment of the Audit Advisory Board”. You can see in that clause that some of the offices represented in that board include the office of the Attorney-General which is part of the Executive. I wonder whether by extension and by use of this particular mechanism, the office of the Auditor-General will be represented in the office of the Attorney-General or the office of the Director of Public Prosecution.

The other public body that is required to be part of the membership of that board is the chairperson of the Public Service Commission. This is a commission that is also

going to be audited by the Auditor-General. These two bodies including other nominees to the board sit on this advisory board. The functions of the Auditor-General are very clear and I do not think he needs advice in the manner he performs his functions so long as he knows what those functions are and what is required of him. The Constitution says that in performing his functions, the Auditor-General shall not be under the direction or control of any person or body.

Madam Temporary Speaker, if you look at the functions which are of particular concern to me, in Clause 26(1)(c), you will find part of the several functions, that this board is the one which is going to consider and approve the budget estimates and plans of the office of the Auditor-General. This is the beginning of the office of the Auditor-General losing its independence. This is because the office of the Public Service Commission, in terms of recruitment of staff, is such an important body and if it is playing a role within the office of the Auditor-General, it is my view that, that would interfere with the independence of that office.

You have heard what Sen. Mutula Kilonzo Jnr. said and here we have another function that seems to go a little bit contrary to what he was saying, about what type of privileges and emoluments the staff in this office should get. Here they say:

“Determine the remuneration and terms of appointment of the staff of the office of the Auditor-General, in consultation with the Salaries and Remuneration Commission (SRC).”

The SRC has constitutional functions. I know that there is some interface there, but I do not understand how this advisory body would now be the one to guide the office of the Auditor-General in the terms of appointment of the staff in the office of the Auditor-General. They then say in Clause 26(1)(e) and (f):

“Give any other advice that may be sought by the Auditor-General from time to time; and Perform any other functions as may be conferred by this Act or any other law.” On the face of it, this may look to be very innocent kind of functions on the part of the office of the Auditor-General. However, when it now comes to fulfilling the functions of this office, at the end of the day, that office will not function effectively and without interference. As you can see, the elements of the Executive, including that office of the Attorney-General and the Chairperson of the Public Service Commission has been introduced in that advisory board.

Madam Temporary Speaker, there is another point which has been touched and I want to say a few points about it. I am grateful to Sen. Mutula Kilonzo Jnr. for having addressed himself to this matter. Clause 39(2) says:

“The audit report on national security may be redacted to shield identities of persons as well as assets and liabilities as the case may be.”

Who will make that decision? It just says generally that it may be redacted, but it is not clear from this Bill who will make this decision. From my experience and if Sen. Wako was here, he would tell you of an experience where a Bill had been passed and assented to by President Kibaki, and when it went to the Government Printer, they decided to print a version, not the one that had been assented to by the President, but the one that they thought would meet the ends of the barons in the office of the President. So, somebody can easily use this provision in the office of the Government Printer and say that:

“According to me, this matter should be redacted and it does not matter what the office of the Auditor-General says.” Therefore, Parliament, which should be the recipient of this report, would not know what is in that report.

Madam Temporary Speaker, again, Clause 43(1) says:

“The appointed auditor shall prepare a report on the examination and audit and submit the report to each relevant Clerk of Parliament, with a copy to the Cabinet Secretary (CS) responsible for finance and the Attorney-General.”

The Constitution, in Article 229, requires the auditor’s report only to go to Parliament and the relevant county assembly. The Constitution was trying to ensure that the Auditor-General is a tool of Parliament, and always responsible and accountable to it. It is clear in the Constitution that the only personal body that the Auditor-General should report to is the legislature, either at the national or county level and not the Executive. We are now seeing a provision introduced here where it will be required of him to report to the CS. I do not want to guess why that is there, but you will find that it is for mischief, if I may be open and candid about it.

Madam Temporary Speaker, in Clause 48, there is a requirement that the final audit report should go to the CS. One of the reasons corruption has been bedeviling this country year after year, is the interference by the Executive in these independent offices. Parliament just becomes a pathologist or mortician who deals with the body of somebody who has expired. The spirit of the Constitution is that Parliament should make interventions in a timely and effective way. Therefore, when a law tries to put burden on the office of the Auditor-General and requires that he reports to other creatures, which are not contemplated in the Constitution, my view is that this Bill has gone beyond the Constitution which is very clear on this particular issue.

In conclusion, Madam Temporary Speaker, this Parliament has a great responsibility not only for now but even for the future. If we begin doing things the right way, we may succeed as a nation. A lot of laws were in place at Independence in 1963 and there were very good provisions regarding the independence of the various arms of Government. However, it is laws like this one before us that slowly enabled the Executive to become a powerful instrument in governance, to the extent that both Parliament and the Judiciary became more executive than the Executive. That is why Sen. (Prof.) Lonyangapuo can be served within the precincts of Parliament and nothing happens. In fact, this matter arose while you were not in the Chair, but I think you were here. I am waiting to see the effectiveness of Parliament even on that single incident; that in a process where there is a small piece of legislation that says you cannot ---

The Temporary Speaker (Sen. Ongoro): Thank you, Senator. Do you oppose the Bill?

Sen. Orengo: Madam Temporary Speaker, I oppose the Bill.

Sen. (Prof.) Lesan: Thank you, Madam Temporary Speaker, for this opportunity to contribute to this Bill. I join my colleagues who have spoken, particularly those who have supported this Bill, because I also support it.

This is a very important Bill. We have seen and watched as Members of Parliament, as resources of this country are wasted away. The country bleeds due to

wastage of funds by corrupt individuals and yet, we hardly hear of any conviction of individuals who have wasted our resources.

The reason why we do not have convictions often is because we do not have the information to convict the individuals. The reason why we do not have the information is because we do not have an audit system that can capture the information we require in good time enough for us to take people to court and hold them responsible for their actions especially with regard to wastage of funds.

Madam Temporary Speaker, the Information and Communications Technology (ICT) is there; and one of my colleagues has referred to it. We can generate audit reports as we operate. It is very possible, with the ICT, that we have a trail of what we do with our funds almost on a daily basis. We can always refer to the information and use it to contain the enormous hemorrhage of resources that are wasted for lack of accountability. ICT is there and there is no reason why we should not always spend our money in training persons but also on equipment that can assist us have a solid---

Sen. (Dr.) Khalwale: On a point of order, Madam Temporary Speaker. I would like to draw your attention to the fact that Senators are making very important points as you can witness from the presentations of Sen. Orenge on areas that require possible amendments. However, the Senate Majority Leader, who is supposed to be taking notes, is not here. For all we care, we are talking to ourselves.

Madam Temporary Speaker, probably, you could guide the House. You know the tradition of Parliament that the Mover must be there to listen and take notes.

The Temporary Speaker (Sen. Ongoro): Sen. (Dr.) Khalwale, that is a good observation. His absence does not stop us from proceeding with the debate. However, it would be in order if he were here. I will communicate the same to the whips to ensure that the leadership of the House is always present when we make important contributions. Nevertheless, we have to proceed.

Sen. (Dr.) Khalwale: Thank you, Madam Temporary Speaker. Could somebody bring him here?

Sen. (Prof.) Lesan: Madam Temporary Speaker, perhaps, we may have to ring the Bell as we do when we want to vote to get them inside here. However, as you have rightly said, we can continue with the debate irrespective of the presence or absence of the Mover of the Bill.

Madam Temporary Speaker, I want to raise only one point with regards to audit. I noticed that in terms of employment of the personnel who will work in the area of auditing, one of the requirements is that they must hold a degree in finance, accounting or economics. We know the challenges of auditing. We know that as Kenya begins exploitation of natural resources, the form of auditing natural resources should not be the same as auditing cash money or material for equipment. For example, when oil is mined from the ground, it is not as pure as the one we see at petrol stations or outlets but a murky mixture of soil, water, oil and all sorts of things. It is our capacity to audit the material at that stage that will allow us earn as much as possible.

Madam Temporary Speaker, we are aware of some African countries that are oil producers. However, some of them are the poorest because they are cheated out of their resources since they have no specialised units to audit materials such as oil. This would

require – in the recruitment of personnel in this country – that we think about the type of persons that we require to help us audit specialised resources especially in their raw form. I have taken oil as an example. Oil comes off the ground and you do not know what grade it is. It is important that we grade the material so that we get the maximum out of it.

Madam Temporary Speaker, I know that there are countries which produce oil. Their oil has been labeled as grade 3 when, in fact, it is grade 1. The difference between grade 3 and grade 1 oil is sometimes ten times. So, those countries lose the resource for simply lacking the type of personnel that can audit special resources like oil.

As Kenya moves into the era of exploiting raw materials, it is important that we not only have auditors of our monies but we also have auditors of special resources that we have in this country. Titanium, for example, is mined in this country at the moment. I doubt whether we are getting the full value of titanium in terms of its grading. It could, probably, be graded as simple red soil that comes from Kwale and gets through yet we know that the phones that we have at the moment are made of Titanium which is the best material available. It should attract the best prices. However, we are unable to reach there because we do not have the kind of specialised units that can audit some of the resources.

Therefore, Madam Temporary Speaker, the terms of employment for persons in this sector should be adjusted to cover all areas; not only finance, accounting and economics. I believe that we now need hydrologists, engineers and people with such backgrounds who can evaluate some of the materials when they are both in crude form or refined.

Madam Temporary Speaker, I am sure that it is in the area of auditing of the materials that will enable us to take charge of the kind of things we want to audit in this country. I am absolutely sure that as we continue to explore oil in this country, this will be the first point at which we stand to lose value of our products unless we look at our auditing procedures, processes and auditing personnel. I have no doubt that this country has this kind of people. It is simply the placement and their choice that we can take care of, in order to utilize them for auditing purposes.

Madam Temporary Speaker, the speed at which this country produces auditing results is worrying especially in this Senate where we are supposed to oversight many things. It is obvious that we cannot oversight without auditors coming along with us. Members of the auditing team must be available for Senators in their areas particularly in the constituencies where the resources that I have talked about are available so that they are audited as we go on.

Therefore, Madam Temporary Speaker, I support this Bill. I can probably see that it is short on one or two areas. However, I am sure that it is the kind of a Bill that we can pass and it will probably assist us to make small steps as we seek other options and ways on how to implement an audit that is of value to this country so that we do not lose resources.

With that, Madam Temporary Speaker, I am sure that other colleagues who are reading at this Bill will probably look at the values that are within it and suggest little areas that we can make improvement on.

Madam Temporary Speaker, I beg to support.

Sen. (Dr.) Khalwale: Madam Temporary Speaker, this Bill is critical. It intends to provide for the functions and powers of the Auditor-General according to Article 229 of the Constitution. If we get it wrong, it means that there will be no oversight in this country; corruption will thrive. Let me just point out to Members that a good football team, however, good the players are, without a good coach, that team cannot win. Therefore, a good Senate and National Assembly, however endowed, unless you have got the technical bench of the office of the Auditor-General with this legal instrument, cannot oversight the Government.

I would like to laud the presence of this Bill but, unfortunately, tell the Senate Majority Leader that he is not taking us seriously. The views that we are giving are meant to enrich this Bill. Since he is not listening to us and we see so many faults in it, I have no option but to oppose the Bill until he moves it in an amended form, and I have reasons. The first reason is that no member of the Executive would like to be audited. I will tell you the story of the Seventh Parliament, when the Controller and Auditor-General made a report concerning the investment of funds at Teleposta, running in hundreds of millions of shillings and took it to the Treasury. The Minister for Finance refused to bring it to Parliament. The Controller and Auditor-General then took personal initiative and brought it to the office of the Clerk. The then Chair of the Public Accounts Committee did his work and when the report indicted the Minister for Finance, the following day, at 1.00 p.m. President Moi appointed the Chairman of the Committee to be a Minister, so that he could not move that report.

Another example is in the County Government of Kakamega. The chairman of the committee on finance resigned yesterday because he was being pushed by the Governor to append his signature and concurrence to misappropriation. They do not want to be audited; we just have to face it. We have to divorce the executive from this office because this is our technical bench.

I would like to draw the attention of Members to Clause 4 (3) of this Bill. We are being told that the Office of the Auditor-General shall ensure a reasonable access to its services in all parts of the country. That is good. But then the Bill goes further to say that this office is free to establish branches across the country. The risk of this is that if you allow the Auditor-General to open offices in those counties, then you are opening a window for compromise by the auditee. The auditees in the counties have got internal auditors. Why would we take their officers of the Kenya National Audit Office?

Madam Temporary Speaker, in Clause 7 (1) (e), the Bill proposes that the Auditor-General will issue the audit report in accordance with Article 229 of the Constitution of Kenya. Without providing funds, the Auditor-General cannot meet this provision. If there is any doubt on the part of the Jubilee Government, they should be aware that the accounts of the year 2013/2014 are yet to be laid in this House by the Auditor-General, yet the deadline was 31st December, 2014, the reason being that he does not have enough resources at his disposal. So, we should match these provisions by giving him the proper budget and necessary human resource.

Madam Temporary Speaker, I want to laud the provision in Clause 7 (2) where they have given room for the Chairman of the Public Accounts Committee in the National Assembly, the County Public Accounts and Investments Committee in the

Senate and any other investigatory Committee to call for special audits. This inclusion will make sure that we do not always deal with postmortems. We now have an opportunity to ask for quick special audits that can unravel mischief before it is too late.

I would like to draw the attention of the Mover to Clause 8 (j) which says that in addition to what is provided for under any other relevant law, the Auditor-General shall develop and maintain a code of conduct and ethics for the office, specific to auditing, guided by the International Code of Practice and Ethics issued by the International Organization of Supreme Audit Institutions. We must laud the Mover on this one, because experience across Africa is that auditors in African countries do not adhere to the best international standards and practices. Therefore, this provision gives room now for the Auditor-General to ensure that he operates in line with the African Organization of Supreme Audit Institutions (AFROSAI) and the International Organization of Supreme Audit Institutions (INTOSAI).

I would further wish to draw the attention of the Mover of this Bill to Clause 20, which provides for the power to obtain information from others. It goes ahead in sub-clause (1) to say:-

“For purposes of exercising or performing his or her functions, duties or powers under this Constitution or this Act, and subject to the law relating to data protection, the Auditor-General shall require a public body or any other person employed by the public body-

- (a) to produce any official document in the body’s or person’s custody, care or control; and,
- (b) to provide the Auditor-General with information or an explanation about any official information, system or asset.”

They want to tie the hands of the Auditor-General, so that when he is told: “Subject to the law relating to data protection, you cannot be allowed to collect this particular data.” I am glad that after inquiring from a lawyer in this House, he has confirmed that such a law is yet to be passed in this country. Why are we making this subjective? I will be proposing an amendment in the Committee that we delete the words “subject to the law relating to data protection,” because you intend to tie the hands of the Auditor-General.

In Clause 20 (2), the Auditor-General may obtain--- Again, those are clever words that are added there as mischief. The word “may” should be replaced with “shall.” The moment you put “may”, you are making it optional and the Auditor-General will face challenges. As they say, the devil is in the detail. The same clause further ties the hands of the Auditor-General where it says:-

“Where the information required is not official, then the Auditor-General will have to apply to the courts to obtain such information.”

Yes, he can apply to court, but how sure are you that he is going to be granted? It might be delayed or denied and a criminal who has stolen public funds and is holding information that is not official runs away with it.

Madam Temporary Speaker, I want to draw the attention of the House to Clause 24 which deals with the establishment and composition of the Audit Advisory Board. I want to associate myself with the sentiments of Sen. Orengo, but be even more specific. This board does not offend me because it is trying to duplicate the current committee at

the national office that normally advises the Auditor-General but my problem with it is the membership. If the reason they are putting the Attorney-General there is because they want him to give legal opinion to the Auditor-General, he is the wrong person. This is because the Office of the Attorney General is also subject to audit. So, if you make him a member of this board, he is going to protect his accounts or negotiate on how his accounts are going to be audited. Therefore, the Attorney-General should not be there.

Secondly, the chairperson of the Public Service Commission should equally and similarly not be there, because the Commission will be audited by the Auditor-General. As the practice is, Parliament should be represented on this board. The practice today and over the years is that the Chairman of the Public Account Committee (PAC) in the National Assembly was sitting in this Committee; I sat in this Committee for five years. I propose that in the amendment, we include here that after deleting Attorney-General (AG), we replace him with the Chairman of the Public Accounts Committee in the National Assembly and after deleting the Chairman of the Public Service Commission (PSC), and we replace him by the Chairman of the County Public Accounts and Investment Committee (CPAIC).

I would like to draw the attention of the mover to Clause 35 and to give him compliments because it is good and it is emphasizing the issue of performance audits. What has been causing us hell over the last 50 years is that we have been receiving financial audits from the office of the Auditor-General. The mischief being that all the Auditor-General is concerned about is to ensure that provisions within the budget estimates are the ones which are reported on paper to have been implemented. He has not been taking too much interest in going on the ground and seeing value for money. This clause is going to ensure that when somebody says that he has build a cattle dip, the Auditor-General should go and confirm that indeed there is a cattle dip that is functional and the materials that were used are equal to the claim as to how much money was made available to these people.

I want to draw further attention of the Mover to Clause 39 to which Sen. Orengo and Sen. Mutula Kilonzo Jnr., have spoken about; the issue of the auditing of national security organs. Members, we must delete this one. The mega scandal that you heard about called Anglo Leasing was about security contracts. So, had the Auditor-General been given an opportunity to pursue this, probably, we would have been wiser. The Kshs2.5 billion that led to the disbandment of the Public Accounts Committee (PAC) Chaired by hon. Ababu Namwamba in the National Assembly was about security. Therefore, security must be opened and be audited just like any other Government expenditure.

Finally, I would like to draw the attention of the House to Article 51 which speaks to the implementation of reports by accounting officers. Clause 51(2) provides that failure to comply with provisions of subsection (1), the accounting officer shall be punished. That is the route to go because what PACs have been doing for the last 50 years plus, is to make recommendations which go on the shelves and continue gathering dust but now that we are now putting this-----

The Temporary Speaker (Sen. Ongoro): Your time is up, Senator.

I also want to take note that you have brought very good suggestions and proposals but it would have been in order if you had moved them procedurally as amendments. Otherwise, we are going to lose them and treat them as proposals and suggestions. You could still talk to one of the Senator who has not talked, to introduce them to the Floor as proposals.

Sen. (Dr.) Khalwale: On a point of order, Madam Temporary Speaker.

The Temporary Speaker (Sen. Ongoro): What is your point of order?

Sen. (Dr.) Khalwale: I was contemplating that during the Committee stage, I would then make a written amendment which I will give to the office of the Clerk. I think I still have an opportunity.

The Temporary Speaker (Sen. Ongoro): That is still in order.

Sen. Karaba: Madam Temporary Speaker, thank you for giving me this chance to say something about this Bill---

The Temporary Speaker (Sen. Ongoro): Sen. Karaba, you had risen on an intervention according to my screen. I was giving you the Floor not to contribute because you are not even appearing on the screen for contribution, you had requested for intervention.

Sen. Karaba: Madam Temporary Speaker, these machines are not working properly, you should reckon that we are still learning.

The Temporary Speaker (Sen. Ongoro): Senator, take it to the attention of the Clerks or the Serjeants-at-Arms to help you. Otherwise, you are still not on my screen and I will give the Floor to Sen. Ndiema.

Sen. Karaba: So, in view of the problems we are facing---

The Temporary Speaker (Sen. Ongoro): Senator, take your seat and you will be assisted by one of the orderlies.

Sen. Ndiema: Madam Temporary Speaker, thank you for giving me this opportunity to contribute to this very important Bill, which I support provided that the necessary amendments are brought into place at the appropriate time.

The role of the audit office cannot be overemphasized in this time and era. A financial system cannot be effective without an efficient and capable audit office. The task of the auditor is enormous especially now, because previously the Auditor-General was dealing with limited funds to audit, he was also auditing one Government but we now have 48 governments and it is the same Auditor-General who is supposed to audit.

In addition, there are so many other new commissions that have been established under the Constitution and their audit again largely lies on that office. Compounding that is a complicated situation that we are in currently, in terms of rampant theft of Government property, misappropriation and fraud which previously was not at the level it is but it is something that we have admitted and it is a threat to development of our country which we must tackle. The only office that is mandated by law or is expected to address abuses by public servants or offices is that office of the Auditor-General.

Therefore, it is necessary that they are facilitated in terms of necessary and proper legislation to empower them to carry out their functions and also be provided with adequate resources, considering the amount of work that they have now and the funding level that they get. Sometimes when we meet the Auditor-General, we get the feeling that

they do not move because they are limited in finances, which means they cannot get equipment, motor vehicles and qualified personnel to carry out their duties effectively.

Madam Temporary Speaker, we have also talked about decentralization in view of devolution but again, this cannot be done without adequate funding. I suggest that the audit office must be protected in terms of budget. Their budget should be ring-fenced such that as they plan and proceed with their work, they are sure of what their budget is, just like their counterparts in revenue collection, the Kenya Revenue Authority (KRA). The Act that established the KRA stipulates that, of the revenue that is collected, they are entitled to at least 2.5 per cent by the law. I also think that the audit office should have their budget pegged on a percentage of whatever funds they are auditing.

I have talked about the added responsibility that they now have. I know that they have been of much assistance to Parliament because Parliament cannot oversight without the reports of the Auditor-General. Previously, it was just the National Assembly, now we have the Senate. So, it has to service the two Houses and that is additional responsibility. For the Senate to be effective in playing its oversight role, the assistance or quality of the work of the Auditor-General is very important because without their reports, oversight is not possible.

Previous speakers have talked about decentralizing audit services. I also doubt, just as Sen. (Dr.) Khalwale, whether decentralizing will help because familiarity may not work very well. If you assign specific officers to specific counties, possibilities of compromise can arise. We could consider that. Let that be the discretion of the Auditor-General.

Madam Temporary Speaker, the issue of outsourcing is put here in the law. I do not know whether previously they were prohibited. It may not be necessary that it is spelt out in any legislation that they must outsource. In any case, if you are auditing, you can use any means to get information. Otherwise, if we legislate, there is a danger that all the work of the Auditor-General may go; it may be outsourced or contracted out. This will have a negative effect on the officers because they will feel demoralized and untrusted. Outsourcing should be done on rare occasions where, for instance, the officers have done their job but they are limited somewhere or you suspect that they have been compromised. The procurement of the firms to audit the accounts should also be done competitively and transparently to ensure that those in position do not favour their friends to do the audit for any purpose because compromise can also arise in that process.

Madam Temporary Speaker, any audit system cannot succeed without the cooperation of the organisations that are being audited. I know that most organisations have internal audit departments. However, I think that it is very important that the internal audit to some degree be guided by the Auditor-General in terms of: What are the qualifications of those people who are working there? Are they conforming to the ethics? Are they doing their work of internal audit properly? If the internal audit departments were doing their job, then the work of the Auditor-General would be less but we are now seeing from time to time that the Auditor-General is more or less performing internal as well as external audit in most firms. It should be a requirement that all Government institutions have working internal audit departments that to some degree also answer not just to the management there, but they have a link with the Auditor-General.

Madam Temporary Speaker, the Auditor-General should be able to audit all public institutions without any restrictions whatsoever. They are also Kenyan. I do not think that there is any department today that can say in this digital era, that its activities are so secret and confidential, that it will not be known. Even if it is procurement of arms, before they even land here, we know; the bills of landing, shipping and so on, are everywhere. What we have, what we do not have and how much they cost are known. So, there is no confidentiality. We should trust them also; that in terms of confidentiality, that they are also confidential. They can be vetted; they can swear. I believe they also took the oath of secrecy when they were employed.

The Auditor-General has in the past, always been doing what I may call the “postmortem” audit; after the events. This means that they are trying to find where a fault has occurred. If we have to succeed, then that office should be looking more at how to establish systems to prevent loss or theft of Government property. From time to time, it should audit not just finances but the systems as well.

Madam Temporary Speaker, for instance, if we talk about Government revenue, the receipts that are printed by the Government Printer for a long time; the yellow ones, we were given for land and anything regardless of the amount - the road license, *et cetera*, they are always yellow or something like that. Those are easy to print. Crooks are printing them and the clerks are running parallel systems; one for the Government and another one for their own purposes. In the morning, he uses one and in the afternoon he uses another one running with same serial number. This has been going on and nobody has ever corrected it. Systems must be changed. Use and introduce secure electronic documents and, perhaps it may not even be necessary that payments for services are done in Government offices. We should move to the banks and pay there directly so that we reduce the expenditure and the risk of handling cash.

I have also looked at the issue of the advisory board. The Auditor-General has been given a responsibility under the Constitution and the buck stops with him. We should not create a situation or a legislation should not be put in place to enable him run away from responsibility or to shift that responsibility to somebody else. In terms of recruitment, he should recruit the staff he feels can perform. If they do not perform, then it will be upon him because he is the one who will have recruited them. However, if you give that role to somebody else who is a third party, then next thing you will hear is that those people came in because they were politically correct. I have not heard of any Auditor-General who has said that he needs assistance from other parties to do his job. It may not be necessary to do so.

I support.

Sen. (Prof.) Lonyangapuo: Thank you Madam Temporary Speaker. Just as my previous colleague, I also stand to support this Bill, the Public Audit Bill (National Assembly Bill No.38 of 2014).

As suggested by Sen. (Dr.) Khwalwale, some amendments may be introduced because of some very glaring issues that need correction so that the Bill can assist Kenyans. Clause 4(2) talks about the establishment of the Office of the Auditor-General in ensuring reasonable access to its services in all parts of the Republic. That means that today, as proposed and created by the Constitution 2010, we have 47 county governments

plus the national Government making a total of 48 governments and various departments and parastatals.

This Bill must move further to create 47 units dedicated to the service of the people of Kenya. Currently, we are told that we are served in regions. In West Pokot, we are served by officers stationed in Eldoret who cover about six or seven counties. That is not good service to the people of Kenya because services should be taken closer to the people. No wonder the malpractices we keep on hearing about in counties are very glaring. This is because the Auditor-General's officers are not spread in counties.

We recently invited the Auditor-General to attend our meeting of the Committee of Finance, Commerce and Budget. He confessed that he has a big challenge of staff that are trained and educated as indicated here. We hope that this Bill, once enacted into law, will assist that office to be strengthened.

Clause 5 talks about who should be recruited to the position of Auditor-General. However, I am interested and attracted to look at Clause 5(i)(b) which indicates that the Auditor-General holds respective qualifications for the office specified in Article 229 of the Constitution which says;

“To be qualified to be the Auditor-General, a person shall have extensive knowledge of public finance or at least ten years experience in auditing or public finance management.”

This Bill should not only mention that but also highlight and bring out what is in the Constitution clearly. The Bill suggests that the person should hold a degree in finance but does not state how many years of experience that person should have. In the current age, everybody is in school. We have parallel programmes where after 5.00 p.m everybody walks into some buildings which are offering degrees. Why are we saying that the Auditor-General should have one degree? We should be talking about a second degree or a PhD or with some specialized training. You can walk into any university and pick a degree. We must change this clause to say that on top of a degree in finance, which was mandatory those days, somebody should have something else. We should fine tune this so that we get the results required. I want to see that highlighted here so that people do not go looking for the Constitution whenever they read the Bill.

In Clause 5(e), the Bill says that this person should be a practicing member of good standing of a professional body of accounts which is recognised by law. In Clause 7(1)(b), it says that this person will undertake audit activities in state organs, public entities to confirm whether or not public money has been applied lawfully and in an effective way. What do we do with money that is already past tense? For the past two years, every Senator has sat here to scrutinize and fight for their counties respectively. Remember, at the beginning of 2013/2014, we sent some money which was minimum to counties. Today, every county has an allocation. Some allocations have risen to over Kshs1 billion, two years later. We hope that some of the issues of misappropriation that have been highlighted will be audited.

I do not know who we can trust now that this Bill has not yet become an Act. As I mentioned, the whole of Nyanza, five or six counties, is being audited by some people stationed in Kisumu and this is also happening in our place. Peculiar behavior has come up which we have mentioned to the Auditor-General today to the extent that we hear that

some auditors in some regional stations in courts are being “compromised.” What do we do with the reports they have done when we know that there are claims to the extent that they have been compromised? This may require that as we move on and as the office is established fully, even if we backdate audits to very many years back for the sake of the people of Kenya, that will be great.

Further additional powers have been cited in Clause 8(b). The Auditor-General has the powers to recruit and promote competent staff to perform the functions of that office. This means that the current scenario we see where incomplete work obtains will be a thing of the past. How will we pay? I hope that additional documents will be provided to show the payment levels and salaries for the staff. You cannot pay employees of the Auditor-General the same rate we pay the rest. I hope that the Bill will propose that we pay them better than the others. This will give us a guarantee that the people we have sent there are capable. The Bill also proposes that he will establish committees as necessary including executive committees in counties and elsewhere which will introduce checks and balances. I support this.

Madam Temporary Speaker, Clause 9(1)(b) of the Bill also talks about the Auditor-General or any other authorized officer going to obtain professional assistance, consultancy or advice from any other body. This is important because like in the case of Narok County, when there was a petition, there was a time when there was a complete shortage of staff which required that the Auditor-General was supposed to go and look for consultancy outside. This provision is necessary so that when there is an acute need and a crisis arises that requires to be solved, then there must be room for the officer in charge to engage consultants that have been registered and have high standing in the field of audit.

Clause 10 says that the Auditor-General shall not be subject to direction or control of any other person. This independence is key so that he is not at the whim of anybody or somebody who may want to alter and mess up with things. It is important that some of these offices be given their due independence, so that they can be relied on in the discharge of their duties. In the recruitment of some of their key officers, they must always be subjected to the public for people to see how they have been recruited.

Madam Temporary, Speaker, Clause 15 talks about the Senior Deputy Auditor-General who shall be the accounting officer in the Office of the Auditor-General. I thought that the Auditor-General is the boss. Why are we then saying that there is another one who is accounting yet he is answerable to him? These are some of the things that we have to look at critically at the Committee stage in order to remove ambiguity and not to undermine the officer in charge at the Office of the Auditor-General.

Moving ahead, in the recruitment of the Auditor-General, it says that there may be need to establish an Audit Advisory Board. I agree with that but it also says in Clause 25(1), that the Board must meet at least four times in a year and it goes further to name who is supposed to sit on that board. This is key because some boards have turned to be permanent and pensionable. They meet nearly every week in order to attract and get money. If you do the total calculation of the amount of money that they are paid in the name of sitting allowance, it even supersedes the payment given to a person employed permanently including the Auditor-General himself.

Madam Temporary, Speaker, this Bill further says that the Senior Deputy Auditor-General in the Office of the Auditor-General shall be the secretary of the Audit Advisory Board. This is absurd. It should be the Auditor-General himself. How would you bring somebody junior from somewhere to become the secretary, yet the board has been established with seven members? In this Bill, I have not seen how the chairperson will be identified, unless I have completed reading it. It is not indicated how the chairperson will be identified in the meetings that they will have at least four times a year.

Madam Temporary, Speaker, it is essential that this Bill be cleaned and we operationalize it as soon as it is passed, so that most of the malpractices that we see are checked. It may be important for Members to hear that the Committee on Finance, Commerce and Budget visited Kiambu County where we found drama that I have never heard of in other counties. In Kiambu County, everything is taxed except air. Even an egg is taxable there. How do you even count how many eggs have been released per day? It is very strange. We do not know how they are doing it. Milk is taxed at the door of the milking parlor.

Counties were supposed to enable the people to develop but not to milk them to the extent that they run out of business completely. The people of Kiambu County depend on businesses. Some of them are small scale farmers but their major source of income is trading. What role are the national Treasury, the Auditor-General and all the other organs supposed to play? Why are they allowing new units that have been released to become tax collectors? We sometimes wonder whether that money is audited. It may be of interest for us to know whether the money collected in the counties is audited or it is only the money released by the national Government.

Article 96(3) of the Constitution says:-

“The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.”

Is this the money that the Auditor-General audits or he also audits the money that I have just talked about that is taxed, including eggs? If that is the case, we must then be able to see a completely new look in some of these counties all together. However, the scenario in some counties is that, the people who were employed in 2013 have changed bodies---

The Temporary Speaker (Sen. Ongoro): Your time is up Senator.

I now call upon the Mover to reply.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Madam Temporary, Speaker. I take this opportunity to thank Senators for the rich debate on this important Bill which will improve the efficiency and accountability of public money at the national and county governments. I think that during the Committee Stage, we will enrich and debate on this Bill. I am sure that most of the critical comments will come at that level because we will look at the Bill clause by clause.

Madam Temporary, Speaker, without much ado, I beg to move.

The Temporary Speaker (Sen. Ongoro): Is there any specific request you want to make?

The Senate Majority Leader (Sen. (Prof.) Kindiki): Yes, Madam Temporary Speaker. Given that we do not have the numbers to vote, I rise on Standing Order No.54(3) to request the Chair to defer voting on this Bill.

The Temporary Speaker (Sen. Ongoro): Voting is deferred to tomorrow because it has a constitutional deadline.

(Putting of the Question on the Bill deferred)

Next order!

Second Reading

THE FAIR ADMINISTRATIVE ACTION BILL (NATIONAL
ASSEMBLY BILL NO. 10 OF 2015)

The Senate Majority Leader (Sen. (Prof.) Kindiki): Madam Temporary Speaker, I beg to move that the Fair Administrative Action Bill (National Assembly Bill No. 10 of 2015) be now read a Second Time.

This is another Bill that has a constitutional deadline of 27th May, 2015. It is, therefore, a Bill that this House must pass with utmost urgency, considering that we expect the Committee Stage next week. As much as we would want to enrich or contribute to this debate, at this Second Reading stage, I beg that we concentrate on the general spirit of the Bill.

Madam Temporary Speaker, this is a very short Bill. However, its brevity must not be confused with its importance. This Bill is so important and if I were asked if there is one Bill that touches on the lives of each and every Kenyan in every part of this country, it is this Bill. It gives effect to a very important human right which is found in Article 47 of our Constitution; that is the right of every Kenyan to get fair administrative action. The Bill deals with powers, functions and duties exercised by authorities or *quasi-judicial* institutions. When a public institution makes certain administrative decisions that affect the rights of Kenyans, what must they ensure? That is simply put.

The question this Bill is trying to answer is; what are the procedural guarantees that every Kenyan enjoys from an administrative body, institution or public official who have decision-making power? These are the decisions that impact on the right of Kenyans in question. We are talking of issues to do with employment; when a decision is taken to employ or not to employ somebody, that is an administrative action. What guarantees does somebody whose request to get employed is not favourable have? What procedural guarantees are they entitled to?

Other discretionary administrative actions like licensing also should be considered. If you want to get a licence to operate a business or you want to undertake a certain activity, there would be a body that licenses that public activity. When they make a decision one way or the other, what must they ensure to protect the rights of Kenyans? These include promotions at work places and so forth.

Madam Temporary Speaker, in a nutshell, this Bill enshrines in our law the often quoted principles of natural justice. Natural justice must apply when institutions and public officers are making decisions. The principles of natural justice are two. So, this Bill is about two principles which collapse together to constitute the principle of natural justice. The first leg of the principle of natural justice is that everyone has a right to be heard. In other words, if you are applying for employment, you must be given an opportunity to say why you want the job. If you are being sacked from a job, you must be told why. If a disciplinary action is being taken against you by the county government or the national Government, you are public servant and you must be afforded an opportunity to explain yourself before the decision to discipline you has been taken.

Madam Temporary Speaker, the next leg of the principle of natural justice is the principle that no man or woman may be a judge in their own cause. If you like, it is the rule against bias. This is the legal principle that says that if I am a public official and I have certain discretion to make certain administrative decisions, I should not sit in that capacity of making a decision if in doing so, there would be conflict of interest between my personal interest and the public interest. In other words, if, for example, if I am a chief executive officer of a public institution and we are hiring people and my daughter is one of the applicants, I should not sit in that panel that is hiring those people due to conflict of interest. Other than the right to be heard, there is the doctrine that no person may be a judge in their own cause in a matter where they have an interest in.

Madam Temporary Speaker, I want to summarize the principles that stem out of this general principle of natural justice. First, when there is an administrative action that is imminent and this action might affect a person's human rights, the person being affected by the administrative action must get prior and adequate notice that they have an opportunity to be heard. The notice must also be given that in case they are dissatisfied by the administrative action, they can appeal. The timeline for such an appeal must be provided for. In the event that the decision does not favour the person, he is entitled to reasons why the decision is not in their favour. You cannot say we have not given you this tender but we will not tell you why. You must be told that you did not meet certain technical or financial requirements for the tender.

Other than that, there must be a notice that you can bring an expert like a legal representative especially in *quasi-judicial* matters like disciplinary proceedings. The other thing is that you must be informed about the evidence against you; where there is an adversarial administrative action or a disciplinary process, you must be told what you are accused of so that you can prepare your own defence ahead of the right to be heard. You do not give somebody a right to be heard but you have not told them what they are accused of, you have not given them adequate time to prepare against those accusations. There must also be an opportunity to be represented by an expert and, in particular cases, a legal representative.

If the administrative action is going to affect the general public, there must be a public notice of the action and the invitation for the public to give views on what they think about that action. The views must be considered before the action is taken. The reasons for the decision which has been taken must be given. The notice of any existing

internal mechanism of appeal must be given and the period for making such an appeal must be provided for.

Madam Temporary Speaker, the Bill proposes that if an individual is affected by an administrative decision or action or whatever and they want to appeal against it, they are entitled to information including the proceedings of the Committee or body that deliberated and took that decision so that they can use that for purposes of appealing against an unfavourable decision.

In Part III, allow me to highlight Clause 7 which gives the High Court or any other tribunal the right to exercise judicial review over administrative bodies. In other words, if somebody does not get the job or is getting disciplined in a public institution, the High Court can be approached to make certain decisions as to whether proper rules of natural justice were followed and whether the administrative action is within the law. Such administrative action may be quashed if it is rendered *ultra vires* or outside the powers of the law given to that administrative body.

As I finish, the judicial review process which will be exercised by the High Court or any other tribunal that may have competent jurisdiction--- I say so because, for example, if somebody has been sacked in a parastatal or a Ministry, in labour matters, it will be the industrial court which will have powers to exercise this kind of review. The orders that may be got there include; declaration that the rights have been violated or not, there will also be orders of prohibition to prevent, say, an organization from sacking somebody or refusing to give them a tender or a license.

We have orders of *mandamus*, which are compulsory orders to compel an administrative body which has refused to take certain public decisions to do so. Other than the order of *mandamus*, we have other orders like the *certiorari* which are orders of quashing or nullifying illegal decisions that have been taken by administrative bodies or officers in their public function.

Injunctions may also be issued by the High Court, whether mandatory injunctions forcing certain administrative bodies or officers to do certain things. Interim or temporary injunctions may also be issued to restrain certain activity from taking place until the decision or until the court which is exercising judicial review can make a final determination.

Madam Temporary Speaker, if this Bill comes into force, it will repeal Section 89 of the Law Reform Act Cap. 26, which has been the law that is currently applying on matters of administrative justice judicial review. In a nut shell, this Bill is about ensuring that when the people of Kenya are interacting with Government officials – whether national or county governments – looking for tenders, employment or licenses, they can receive fair administrative actions. By that, we are not saying that every person who is approaching a Government body must get the decision that they consider favourable. This Bill says that the decision must be fair so that if I do not get a favourable decision, I should know that fairness has been applied.

How do we assure fairness by following the principle of natural justice? What is the principle of natural justice? One, if you are going to make a decision that will affect my rights, give me an opportunity to be heard and give me adequate time. Do not just tell me we received your application for a job this afternoon and we are calling you for an

interview in 20 minutes. At that time you know very well that I have posted my application from 700 kilometres away. Two, do not, as a public officer, sit in decision making when you have a personal interest. That would constitute conflict of interest. It reminds me of my days in the university.

Madam Temporary Speaker, I beg to move that the Fair Administrative Action Bill, 2015, be read a Second Time. I can see the Minority Chief Whip is here but they can consult. He was not here when I was moving the Bill.

(Sen. Muthama nodded at Sen. Sijeny)

I can see the he has agreed that Sen. Sijeny will second the Bill.

Thank you.

Sen. Sijeny: Thank you, Madam Temporary Speaker, for giving me the chance to contribute to this Bill and second it. This is a very important Bill as the Mover, the Senate Majority Leader, has stated and it should be disseminated to the entire country. It protects the human rights of Kenyans and everybody must know that they have a right to be heard, and to access all important documents that affect them. The Bill seeks to protect Kenyans from their rights being violated. I would have used the word “abuse” because it is still abuse but let it be “from being violated.”

Madam Temporary Speaker, this issue of being sacked through the media, for example, you hear about it on the radio, see it on television, receive a text message on your phone or through the famous social media; that can really tear you apart and hard; some people may even commit suicide and others give up and suffer for no good reason, just because they were not given fair trial. Fair trial means ample preparation. You are given all the information, called and given the chance to participate and hear all the allegations against you and all the things you are being accused of disobeying. In a nutshell, it protects the rules of natural justice.

Madam Temporary Speaker, if there is anything that I have learnt in legal practice, it is the rule of natural justice. My former boss, now Justice Lee Muthoga, would always fight for anybody and everyone and insist that the rule of natural justice must be obeyed. Even our Coalition for Reforms and Democracy (CORD); its co-principals have always preached this law of the rule of natural justice that must be given to every Kenyan. That is why in many instances, they have been heard to say that this issue of being accused, arrested and put behind bars for 90 or 30 days without knowing what is happening, is what this Bill seeks to protect.

This morning, we had a public hearing on this issue. The public gave us their contributions. There are many issues that need to be amended and a few administrative repetitions that we shall sort out at the Committee stage. There have been contributions that judicial review should be a preserve of the High Court. We have laws which are already in existence. We have the Civil Procedure Act, and the civil procedure rules that govern judicial review. We also have the Chief Justice Rules that also take into account the issue of the judicial review. What I am trying to say is that by the end of the day, all the relevant laws will be harmonised. Once they are harmonised, then Kenyans will not be confused at all.

Madam Temporary Speaker, the Fair Administrative Action Bill gives an opportunity and clear guidelines on what procedure ought to be followed when someone is aggrieved; all the stages that someone may not have known. There are some administrators who behave in a “local *Kamukunji* way” without proper guidelines, rules and regulations. This Bill will definitely solve all the confusion and unprocedural actions by administrators. For those who may not have had clear guidelines, this is their Christmas. It is a time that they knew what to do and follow clearly.

Madam Temporary Speaker, at the Committee Stage – as a Member of the Committee on Legal Affairs and Human Rights – we shall propose certain amendments.

Generally, this is a good Bill. All Kenyans should hear about it. Therefore, it should be disseminated.

I, therefore, Madam Temporary Speaker, beg to second.

(Question proposed)

Sen. Muthama: Madam Temporary Speaker, I stand to support this Bill.

Madam Temporary Speaker, I listened to the Senate Majority Leader and the issues he raised. Listening carefully, I looked at where this country has come from and tried to compare it with where we are today. Kenya has travelled through difficult terrains in terms of leadership and administration.

Madam Temporary Speaker, it is unbelievable that we can have such a Bill which goes deep inside to allow certain issues to be dealt with; whether passed by the Government, administrators or a group of people that has decided to mistreat a certain person or group of Kenyans anywhere in this country.

Madam Temporary Speaker, there used to be times where one could be arrested. If you asked why you were being arrested, you were told: “The authority has given instructions and that is all.” The other thing you would hear is that, “*utajibu mbele*” (You will answer when we get there). Therefore, this Bill provides an exit window for Kenyans to query from the top. When I say from the top, I mean from the top leadership in this country to the bottom-line. There will be no issue that will be raised to stop any Kenyan from seeking clarification or to be told why certain things have happened.

Madam Temporary Speaker, today, people will apply for jobs; applications will be presented. With the knowledge Kenyans have, they can line up candidates who qualified and the ones disqualified. Kenyans can read between the lines and know that there were 200 applicants and 110 did not qualify, only 90 qualified. Their qualifications are screened and they are shortlisted on the basis of “who is who” with no other reason whatsoever.

A university graduate who has just left university stands no chance. Whenever they ask why people with lower qualifications were taken, they are told that it was the decision of the board. That now will be a thing of the past.

Madam Temporary Speaker, if there is a dispute today, a group of people will sit and make a final decision. Most people who feel aggrieved have nowhere to go. They live with whatever decision has been taken. This Bill provides an opportunity for people to go to court and have all issues addressed administratively.

Madam Temporary Speaker, I congratulate the Mover of this Bill. At least, we seem to be heading somewhere.

I beg to support.

Sen. Kittony: Thank you, Madam Temporary Speaker, for giving me this opportunity. I rise to thank the Mover of this Bill. Having listened to what he has said, this Bill gives us direction in our deliberations as a country, because it allows one to be heard. You can also have the issue of your assets discussed amicably. I think we are headed in the right direction and the Mover of the Bill was wise to bring it.

Madam Temporary Speaker, I support the Bill.

Sen. Nabwala: Thank you, Madam Temporary Speaker. I would like to congratulate the Senate Majority Leader for bringing this Bill to the House, which seeks to protect the interests of the Kenyan citizens.

When you look at, for instance, the hiring of staff, sometimes it is done discriminatively. At one time, there was a case where a young man with a Masters and CPA III went for an interview. He passed and was asked to go for a medical checkup. But when he reported, he was told that there was no job for him. There are many other cases. There is also a case of a lady whom I tried to assist to get a job. She went for an interview and passed. She was told to report to work the following Monday. When she reported to work on the said Monday, the Managing Director looked at her passport and was taken aback. This is because initially they had thought that she was from a certain tribe. He told her that there was no job for her. So, this Bill seeks to bring fairness in the manner in which we have been doing things.

Also, if you look at the manner in which organizations have been dealing with staff, you will find that sometimes people are sacked or retired for no good reason. They are not given a fair chance to explain their cases. They could have paid their mortgages halfway and have children, but since somebody somewhere thinks that they are non-performers, they are sacked. So, this is a very good Bill. It is going to promote cohesion and unite us, as a country, as we move forward. It is very unfair for employers, for instance, who hold key positions to discriminate against our children who do not know the tribal boundaries.

The Temporary Speaker (Sen. Ongoro): Order, Senator! You will have 13 minutes to contribute when the debate on this Bill resumes.

ADJOURNMENT

The Temporary Speaker (Sen. Ongoro): Hon. Senators, it is now time to interrupt the business of the Senate. The House, therefore, stands adjourned until tomorrow, Thursday 14th May, 2015, at 2.30 p.m.

The Senate rose at 6.30 p.m.