



REPUBLIC OF KENYA

TWELFTH PARLIAMENT – THIRD SESSION

THE SENATE

VOTES AND PROCEEDINGS

THURSDAY, OCTOBER 17, 2019 AT 2.30 P.M.

1. The Senate assembled at thirty minutes past Two O'clock.
2. The Proceedings were opened with Prayer said by the Deputy Speaker.
3. **COMMUNICATION FROM THE CHAIR – RULING ON ISSUES RAISED BY SEN. MWARUMA REGARDING THE ESTABLISHMENT OF A COMMITTEE TO INVESTIGATE THE IMPEACHMENT OF GOV. SAMBOJA.**

The Deputy Speaker conveyed the following Communication from the Chair: -

“Honourable Senators,

On Tuesday this week, the Senator for Taita Taveta County, on a point of order which was supported by several other Senators, thereafter, brought to the attention of the Speaker that with regard to the Motion that was debated and passed on the same day regarding the establishment of a Select or Special Committee to investigate the allegations concerning the Governor of Taita/Taveta County, Hon. Granton Samboja.

The Senator of Taita/Taveta wanted to know whether it was in order for the House to continue deliberating on the Motion and taking further action while, according to the specified Senator, there were active proceedings. The Chair, after listening to the said Senator and other Senators who made interventions based on that point of order, ruled as follows-

- (1) The Senate was not aware of any active proceedings concerning the matter of the impeachment of the Governor of Taita/Taveta by that time.
- (2) The Senate was not party to such proceedings by that time.
- (3) The Senate had not been served with any court procedures by that time.
- (4) The position of the Senate and of the Parliament of the Republic of Kenya cannot be enjoined by any court of law.

That is the position we hold even in this instance. No court of any nature nor tribunal of any description can injunct a House of Parliament while discharging Parliamentary duties. Hon. Senators, this is not the case for only Kenya, but the case in the whole world, especially under the Commonwealth Legal System, under which our legal system is based.

Many Speakers of Parliament have articulated themselves on this matter repeatedly, and I concur with them entirely. Parliament is an independent arm of Government. It exercises sovereignty on behalf of the people. The intervention by judicial organs can only be entertained by way of reviewing legislation passed by Parliament, or processes that have been through Parliament.

The courts are mandated to determine whether those decisions are lawful with finality. When we enter the realm of judicial determination, that is the realm of the Judiciary, and they are free to determine an Act of Parliament or a certain process, including impeachment, as lawful or unlawful.

However, what the courts cannot do and what we cannot entertain, as Parliament, is a court or tribunal trying to interfere with the independence, sovereignty and integrity of Parliament. This should be reaffirmed, reemphasized and clarified. That is the position and it cannot, will not, and should not change.

Having said that, Parliament is also a responsible arm of Government which acts in the best interest of the people of Kenya. I also want to emphasize – it is also the position of myself and of Parliament – that we also act with utmost respect to the other arms of Government, because the independence is functional independence to allow arms of Government to function.

However, there is also functional interdependence, where one arm relies on the other arm. For example, that is why you see that Parliament passes the budget of the Judiciary.

That is why you also see that sometimes the Judiciary swears in certain Members of the Executive. There is also inter-arm relationships, which must be safeguarded jealously. So that am not biased in my examples, that is why you also you will find sometimes Parliament will approach courts to make certain judicial determinations, as we have done before and currently, as we speak.

It should be clear to all and sundry that we respect the Judiciary and the Executive. However, what we cannot entertain, even in the wildest of imaginations, is an idea than any court of whatever description or tribunal can try to paralyze the operations of Parliament by way of injunctions.

Therefore, without prejudice to what I am about to say, I repeat what I said on Tuesday; which is that I am not aware of any injunctions against this House regarding the matter of the impeachment of the Governor of Taita/Taveta. For argument's sake, even if there was such an injunction, it will not be honoured by Parliament.

We honour the Judiciary and its functions, we are closely intertwined and interdependent, but we will jealously guard our integrity and our independence the same way the Judiciary safeguards their own independence.

Hon. Senators,

You will recall that sometime back, there was a bit of exchange between Parliament and the Judiciary regarding whether or not active Judges who were serving or who had been appointed to serve in the Judicial Service Commission (JSC) required to be vetted as Commissioners of the JSC like the other Members of that JSC who were not Judges. I remember my Senior, Chief Justice (Rtd.) Willy Mutunga, firmly, unequivocally and unapologetically defended those Judges. In fact, they ended up being Members of that Commission without being vetted by the House. While I recommend the Judiciary when they want to defend their tough jurisdiction, I also call upon the Judiciary to respect the turf of Parliament. We need one another, and we will not want an institutional confrontation that is unnecessary, which can derail public service delivery.

Additionally, I have taken notice now – and that is after the Tuesday sitting – that there were some proceedings which were active, as alleged by Sen. Mwaruma and supported by Sen. M. Kajwang’ and others. What the Senators did not do on Tuesday – and this is encouraged for the future – is that they were trying to invoke the sub judice rule, but improperly so. They never provided any evidence; they just brought letters from town and there was no court order. The provisions of Standing Order 98 are very clear on the conditions that must be met; and the kind of evidence that must be produced for the invocation of the sub judice rule. They were completely out of order, although I entertained them for quite a while. After the Tuesday meeting, it has come to my attention that there were some proceedings. I want to specify that the Senate was not a party in those proceedings.

Hon. Senators,

I also want to specify on the alleged injunction, which Sen. Mwaruma and company were relying on and which I have verified, that there was, indeed, an injunction. That injunction was not addressed to the Senate, and so we had nothing to do with it. We are neither parties in the proceedings, now were we enjoined.

Hon. Senators,

In conclusion, I would like us to look at Standing Order 98 with a little detail, and I will allow a few observations and comments, because we have the best brains this country can ever have, both legal and non-legal. We have all the experience that we require in this House. I will allow a bit of that experience, because what we are trying to do is to create law which will be relied on, in posterity.

If you look at Standing Order 98, which Sen. Mwaruma and Sen. M. Kajwang’ had tried to use unsuccessfully, they did not succeed because they did not read the Standing Order. I think it was an afterthought or something like that. Standing Order No. 98 states:-

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

I can summarize the other paragraphs under that Standing Order. They tell you how to make a case for sub judice. You must tell us that, “This is the evidence; there is a criminal or civil matter, and these are the pleadings; it is before this court.” You must then also tell us whether the determination of that matter or rather the involvement of the Senate in deliberating on that matter may have an implication on the determination of that matter. All those conditions ought to be met, but they were never met when they were adduced on Tuesday.

As I turn to paragraph 5, which is the last paragraph in that Standing Order, I also want to say that Standing Order 98 has nothing to do with court injunctions. It has zero relevance to court injunctions. It is a Parliamentary Standing Order, where Parliament, on its own Motion – as the lawyer says *suo motu*; on its own motion – decides in deference and respect to other arms of Government, looks at a matter, evaluates the facts and assesses that matter and says, “The way we look at this matter, we can hold deliberations on it, allow the courts to finish this process and later on we can discuss it again.” My point is that the sub judice rule is suo motu; it is on volition and discretion of Parliament. It has nothing related to court injunctions.

Secondly, similarly, the Judiciary sometimes – and I have the authority of Senior Counsel, Sen. Orenge and other lawyers in the House – when Parliament is passing legislation, they also normally withhold making any determinations until the process is over. In the same spirit of saying if an arm of Government is dealing with the matter, allow the processes to continue and then the other arm can review. In our case, the Judiciary can review a decision of Parliament.

Hon. Senators,

It is in this connection on the specific matter of impeachment, that I want to determine that courts cannot injunct Parliament. They cannot and should not. I will not be that Speaker who supervises or oversees a process where Parliament is paralyzed by another arm of Government. That would be like suicide, and I am not a suicide bomber.

I also want to say that the Supreme Court, with tremendous respect to all the courts, has already given guidance on this jurisprudence and philosophy in the Wambora cases. I am, therefore, a bit concerned that, as much as we respect court decisions, we can disagree with them. I am a bit concerned when I see other courts not taking cue from the very explicit guidance given by Supreme Court in the Wambora cases, where the Supreme Court said that on matters impeachment, courts should be reluctant to intervene; they should allow the process to go through the Senate and, thereafter, they can get seized of that matter.

I am wondering why, for example, the Court of Appeal, the High Court and subordinate courts should not be guided by that. For the avoidance of doubt, that

decision is available and it can be verified. I think that is the right jurisprudence, which is binding on the subordinate courts.

Lastly, hon. Senators, the said Paragraph 5 on Standing Order 98, says: -
“Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee.”

Underline “any matter before the Senate or its Committees.” Despite all those legal and philosophical arguments, the Speaker may allow any matter to proceed.

Hon. Senators,

I have looked at the Standing Order, I have looked at the history around impeachment and the history of the relationship between the arms of Government, and I thought it is an opportunity for us to reclaim our space and reaffirm ourselves. We cannot be in the business of strangling Parliament. However, being the responsible institutional citizens that we are, I have directed to issue a Parliamentary stay for 30 days on the issue of the impeachment of the Governor of Taita Taveta, subject to further orders from the Chair. This means that the stay can be varied. At the moment, we have decided to issue a Parliamentary stay – our own stay – for a period of 30 days. The Committee stays in place, but no activities until we thrash out a few administrative issues. The Committee is in place, the process is in place; this is a Parliamentary stay and is not a judicial stay.

I thank you.”

4. **MESSAGE**

The Deputy Speaker conveyed the following Message from the National Assembly –

Honourable Senators,

I wish to bring to the attention of the Senate that, pursuant to Standing Order No.41 (3) of the Senate, a Message has been received from the Speaker of the National Assembly regarding the decision of the National Assembly on the Revised Debt Ceiling of the National Government. Pursuant to the said Standing Order, I now report the Message-

“PURSUANT to the provisions of Standing Order 41 of the National Assembly Standing Orders, I hereby convey the following Message from the National Assembly –

WHEREAS, the Cabinet Secretary for the National Treasury & Planning submitted the Public Finance Management (National Government) (Amendment) Regulations, 2019 as published vide Kenya Gazette Supplement No. 164 of 26th September 2019 (Legal Notice No. 155) whose objective is to revise the debt ceiling for the National Government as set by Parliament;

AND WHEREAS, the provisions of section 205(5) of the Public Finance Management Act, 2012 require such regulations to be approved by both Houses of Parliament;

FURTHER WHEREAS, the National Assembly considered and by a resolution passed on 9th October 2019 approved the amendment to the subject Regulations in the form published by the Cabinet Secretary;

NOW THEREFORE, in furtherance to the provisions of Standing Order 210 of the National Assembly Standing Orders, I hereby convey the said decision of the National Assembly to the Senate.”

Honourable Senators,

Section 11(1) of the Statutory Instruments Act provides that every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.

With reference to the Debt Ceiling for the National Government specifically, Section 205 of the Public Finance Management Act empowers the Cabinet Secretary, National Treasury to make regulations touching on the public debt limit. The Act further provides that such regulations shall not take effect unless approved by a resolution passed by Parliament and shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.

Honourable Senators, will be aware that the Senate is already seized of this matter as, at the sitting of the Senate yesterday, Wednesday, 16th October, 2019, the Senate Majority Leader tabled the said Regulations as received by the Clerk of the Senate from the Cabinet Secretary, National Treasury. I then made a determination that, this being a matter of national importance touching on the country's resources, including budgetary issues, they be committed to the Standing Committee on Finance and Budget as well as the Sessional Committee on Delegated Legislation. The Committees were directed to consider the Regulations within 14 calendar days.

Honourable Senators,

I reiterate and implore the relevant Committees to expedite the consideration of this matter so that this House can deal with the issue and make a pronouncement as required by the law and the Constitution.

I thank you”

5. **PAPERS LAID**

The following Papers were laid on the Table of the Senate: -

- 1) Report of the Auditor-General on the Financial Statements of Kisumu County Government Bursary Fund for the Year ended 30th June 2014;
- 2) Report of the Auditor-General on the Financial Statements of Kisumu County Government Bursary Fund for the Year ended 30th June 2015;
- 3) Report of the Auditor-General on the Financial Statements of Kisumu County Government Bursary Fund for the Year ended 30th June 2017;
- 4) Report of the Auditor-General on the Financial Statements of Homa-Bay County Government Education Bursary Fund for the Year ended 30th June 2017; and
- 5) Report of the Auditor-General on the Financial Statements of Vihiga County Assembly Car Loan and Mortgage Fund for the Year ended 30th June 2018.
(The Senate Majority Leader)

6. **STATEMENTS**

(i) Pursuant to Standing Order 48(1)

The Senator for Uasin Gishu County (Sen. (Prof.) Margaret Kamar, MP) sought a statement from the Standing Committee on Agriculture, Livestock and Fisheries concerning the financial and operational preparedness of the National Cereals and Produce Board (NCPB) to receive the 2019 cereals harvest.

(ii) Pursuant to Standing Order 52(1)

Pursuant to Standing Order 52 (1), the Senate Majority Leader issued a Statement on the business of the Senate for the week commencing Tuesday, 22nd October, 2019.

7. **MOTION – ADOPTION OF REPORT OF SESSIONAL COMMITTEE ON COUNTY PUBLIC ACCOUNTS AND INVESTMENTS ON ACCOUNTS OF COUNTY GOVERNMENTS FOR FINANCIAL YEAR 2014/2015**

(Chairperson, Sessional Committee on County Public Accounts and Investments)

THAT, the Senate adopts the Report of the Sessional Committee on County Public Accounts and Investments on the Inquiry into the Financial Operations of Baringo, Busia, Elgeyo Marakwet, Embu, Kajiado, Kericho, Kilifi, Kirinyaga, Kisii, Kwale, Lamu, Makueni, Marsabit, Meru, Nakuru, Narok, Nyamira, Uasin Gishu, Vihiga and West Pokot Counties for Financial year 2014/2015 (1st July, 2014 to 30th June, 2015), laid on the Table of the Senate on Wednesday, 9th October, 2019.

Order deferred.

8. **THE REGISTRATION OF PERSONS (AMENDMENT) BILL (SENATE BILLS NO. 14 OF 2019)**

(Sen. (Dr.) Isaac Mwaura, MP)

(Second Reading)

Order deferred.

9. **MOTION - ENGAGEMENT OF COMMUNITY HEALTH WORKERS BY COUNTY GOVERNMENTS**

Order read;

Motion made and Question proposed;

THAT, AWARE THAT county health facilities, and the promotion of primary health care are devolved functions, and each county government is striving to offer the best healthcare to the people of Kenya;

COGNIZANT THAT, the provision of healthcare services is continuously riddled with numerous challenges ranging from understaffing of personnel to inadequate facilities and equipment resulting in congestion in hospitals further restricting effective service delivery;

NOTING THAT every Kenyan has a right to affordable and accessible healthcare, and the President has launched a pilot universal health care program called "Afya Care" that will see many Kenyans access improved healthcare;

CONCERNED THAT, the diverse nature of counties and wanting infrastructural development is compromising the quality and accessibility of health centres especially during emergency situations, resulting in the loss of many lives occasioned by the failure by patients to reach health facilities in time;

FURTHER CONCERNED THAT, in each county there are numerous unemployed community health workers who are adept at working with communities in emergency situations, and have the requisite experience to support the medical practitioners in our country where, according to the World Health Organization 2014 report, there are two (2) doctors for every ten thousand (10,000) people;

NOW THEREFORE, the Senate resolves that the Council of Governors in partnership with the Ministry of Health –

1. Develop a policy for the training, certification and employment of community health workers to enhance the emergency health service delivery in the Counties, and
2. Facilitate the said community health workers with the necessary basic equipment for use during emergency cases.

(Sen. Rose Nyamunga, MP)

Debate arising;

And the time being thirty minutes past Six O'clock, the Temporary Speaker (Sen. (Dr.) Lelegwe Ltumbesi, MP) adjourned the Senate without Question put, pursuant to the Standing Orders.

10. **SENATE ROSE** – at Thirty Minutes past Six O'clock

MEMORANDUM

*The Speaker will take the Chair on
Tuesday, October 22, 2019 at 2.30 p.m.*

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