

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 4th December, 2019

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

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

PRAYER

COMMUNICATION FROM THE CHAIR

VISITING DELEGATION FROM KILIFI COUNTY ASSEMBLY

The Speaker (Hon. Lusaka): Order, Senators. I would like to acknowledge the presence of a delegation from the Kilifi County Assembly, who are seated in the Speaker's Gallery.

The delegation consists of Members of the Joint Sectoral Committee on Administration, Labour and Social Services, and the Committee on Culture, Public Entertainment and Amenities.

The delegation is undertaking an exposure visit on the mandate and operations of the Standing Committee on Labour and Social Welfare, and the general functions of parliamentary committees.

I request each Member of the delegation to stand when called out, so that you may be acknowledged in the Senate tradition.

They are -

- (1) Hon. David Kadenge Dadu – Chairperson.
- (2) Hon. Dickson Shaban – Vice Chairperson.
- (3) Hon. Pascal Tuva.
- (4) Hon. Humphrey Mwarandu.
- (5) Hon. Margaret Dama.
- (6) Hon. Radhia Omar.
- (7) Hon. Benson Chengo.
- (8) Hon. Humphrey Mkadi.
- (9) Hon. Yasin Noordin.
- (10) Hon. George Baya.

The delegation is accompanied by the following officers from the County Assembly -

- (1) Mr. Abdulrahim Chuba.

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- (2) Ms. Charity Mwarumba.
- (3) Mr. Ezekiel Linendi.
- (4) Ms. Peris Kache.
- (5) Ms. Salome Kasichana.
- (6) Mr. Samson Kasichana.

On behalf of the Senate and on my own behalf, I welcome the delegation to the Senate and wish them well for the remainder of the visit.

(Applause)

The Speaker (Hon. Lusaka): Proceed, Sen. Olekina. Okay, he does not have a card.

Proceed, Sen. Madzayo.

Sen. Madzayo: Asante, Bw. Spika. Kwanza ninakushukuru sana kwa sababu ya makaribisho yako mema kwa ndugu zangu kutoka Kilifi, ambao wanaongozwa na Mhe. Kadenge, akiwemo Kamlesh na wale ndugu zangu wote walioko kule juu. Nakuunga mkono na kukushukuru sana kwa makaribisho haya.

Jambo la pili ni kwamba, niko na imani kwamba yale ambayo wamekuja kujifundisha hapa ndani ya Seneti – kujua kanuni na jinsi gani kazi inavyoendelea ndani ya Seneti – wakirudi nyumbani, watakuwa wamejifundisha. Wakiwa wamejifundisha na kuelewa, basi wakirudi kwao, pia wataweza kutekeleza wajibu wao ambao walichaguliwa na watu mashinani ili waweze kuwasaidia ndani ya *County Assembly*.

Vile vile, natumai kwamba wale wafanyikazi wataweza kupata nafasi kwenda katika ofisi mbalimbali ndani ya Seneti, na kuweza kujifundisha.

Bw. Spika, kitu muhimu ambacho nawaeleza ndugu zangu, wakiwa hapa ni kwamba, ile Ripoti ya *Building Bridges Initiative* (BBI) ikija kwao, inatakikana kila mtu apate nafasi aipitie, aisome na aielewe. Ikiwa kuna vipengele fulani ambavyo mngependelea pengine virekebishwe ama muweze kuweka kanuni zenu pale ndani, ili kanuni zenu ziweze kusiskika, tuko na “baba” yetu hapa, Mhe. Haji, ambaye ni Seneta na Mwenyekiti wa hiyo Tume ya BBI.

Bw. Spika, nakushukuru sana kwa makaribisho hayo. Natumai kwamba watu wa Kilifi wamefurahi sana. Kumalizia, tutakapochukua Seneti Mashinani mwaka ujao, watu wa Kilifi wameniambia ya kwamba nikuombe kwamba Seneti Mashinani mwaka ujao iwe ndani ya Kaunti ya Kilifi.

Asante, Bw. Spika.

The Speaker (Hon. Lusaka): Basi, naona kwamba *Delegation* ya Kilifi iko na marafiki wengi sana katika Maseneta, kwa sababu naona kwamba wengi wao wanataka kuwakaribisha. Kwa hivyo, mtazungumza kwa kifupi ili nyote muweze kupata nafasi.

Sen. Olekina.

Sen. Olekina: Bw. Spika, nakushukuru kwa kunipa nafasi hii ili pia mimi niweze kukuunga mkono na rafiki yangu, Sen. Madzayo, katika kuwakaribisha *Delegation* kutoka Kilifi. Yangu yatakuwa ni machache.

Ningependa kuzingatia mambo mawili; kwanza, ni kuwahakikishia kwamba kweli, mko na shujaa hapa, ambaye anawatetea watu wa Kilifi. Yeye ni rafiki yangu ambaye tunaketi pamoja, Sen. Madzayo.

La pili ni kwamba, maneno ya mazingira ni maneno ya muhimu sana. Ningependa kuwasihi muyatilie maanani, kwanza ikiambatana na ule Mto wa Sabaki. Mara kwa mara, watu wanavamia ule mto na kutoa mchanga wa kujengea nyumba na kuharibu mazingira. Ninapajua pale kwa sababu niko na shamba ndogo kule. Kwa hivyo, lazima mtilie maanani na mpitishie sheria ambazo zitahifadhi mazingira yetu.

Ni vizuri kwamba mmekuja hapa ili muweze kuchambua Kanuni na maadili ya Seneti. Kwa hivyo, mkirudi Kilifi, mtawaelezea watu yale mmeona Kamati za Seneti zikifanya. Mambo ambayo inapitishwa na Kamati iko na nguvu katika Katiba ya Kenya.

Ninawasihii mchambue Ripoti ya Building Bridges Initiative (BBI) na mjulize kama watu wa Kilifi, ni mambo gani ambayo yamewakera kwa muda mrefu na mko na suluhu gani. Tumeona ya kwamba, kuna shida ndio maaana tunasema hiyo Ripoti haikutufurahisha. Kwa hivyo, ni lazima tutatoa maoni yetu ikipeleke Kenya mbele.

Sen. Haji: Asante, Bw. Spika, kwa kunipa nafasi hii. Ninajiunga na wenzangu kuwakaribisha ndugu zangu kutoka Kilifi. Nimefanya kazi na kuishi na watu wa Kilifi vizuri. Mtoto wangu ambaye ni *Director of Public Prosecution (DPP)* alizaliwa Kilifi.

(Applause)

Kwa hivyo, tunauhusiano mwema na watu wa Kilifi. Isitoshe, Seneta wa Kaunti ya Kilifi anaheshimika na ni rafiki wa kila mtu. Kwa hivyo, watu wa Kilifi walifanya vizuri kumchagua mara ya pili. Wakitaka kumchagua mara ya tatu, nitawaunga mkono.

Kwa hayo machache, ninawasalimia watu wa Kilifi kwa jumla.

Sen. Boy: Asante sana Bw. Spika kwa kunipa fursa hii ili niweze kuwakaribisha Waheshimiwa kutoka Kaunti ya Kilifi. Ninawakaribisha ili waweze kuona vile Seneti inaendesha kazi yake katika Bunge letu.

Ninawasihii Waheshimiwa kwa sababu hao ndio jicho letu katika kaunti zote 47 ambazo zinawakilishwa na Seneta mmoja ndani ya jumba la Seneti. Kwa hivyo, ninawakaribisha ili muone tunavyoendesha shughuli za Bunge.

Mko na bahati kuwa na Seneta ambaye ni jaji mstaafu katika Serikali yetu ya Kenya, Sen. Madzayo. Mara nyingi, yeye husimama kidete kuwatetea watu wa Kilifi.

Sen. Dullo: Thank you, Mr. Speaker, Sir. I join my colleagues in welcoming the County Assembly of Kilifi which is doing a good job especially in healthcare systems within the county. That is also through our colleague, the Senator for Kilifi. We have worked well with him in the last and current Senate and he is up to the task to steer the county government of Kilifi.

The Governor of Kilifi is also doing a good job. Recently, we have been to Kilifi on a mission to look at how the Managed Equipment Scheme (MES) is functioning. The county has done well to ensure that the equipment serves the people. However, we found a problem in Malindi. I am sure that the Chairperson of the Committee on Health will look into that and ensure that the power strength that is required for the equipment and a

radiographer for MRI is fixed. That is what is outstanding. Otherwise, the Kilifi team is doing a good job. I encourage them to do more.

We are praying for our brother, Sen. Madzayo. He is up to the task and will make sure that he steers the County of Kilifi come 2022 as a governor.

Sen. Outa: Thank you, Mr. Speaker, Sir. I join you in welcoming the delegation from Kilifi County. I thank them for being here this afternoon. This is the right place which has men and women of virtue who are respected in the Republic of Kenya.

It is my prayer that you spend your time in the Senate well so that you go back and empower the people of Kilifi County. We thank you for your wisdom of electing leaders, for example, my colleague, Sen. Madzayo and Gov. Kingi who are great men of this nation.

'Baba' might not be in this House but he is represented through our voices. Therefore, we want the people of Kilifi to know that 'baba' allows people to read and understand the BBI for themselves so that when the time comes, they can have their input and prosper this country.

We thank you for supporting 'baba' for years. We do not take it for granted.

Sen. Farhiya: Thank you, Mr. Speaker, Sir. I will not attempt to speak Kiswahili because mine is not advanced. I join you in welcoming the delegation from Kilifi.

The wage bill is high in most of the counties. It is supposed to be a maximum of 35 per cent but most counties have exceeded it. Therefore, I urge the County Assembly of Kilifi and other county assemblies to be vigilant about the wage bill.

We all know that devolution works and has brought services closer to the people. However, there is the element of corruption that makes our counties not to deliver. The county assembly understands where their funds go to and whether development has been delivered to the county. Therefore, your electorate will judge you based on that. We want to totally bring down this monster called corruption. So, we expect you to diligently follow up on issues of corruption.

The issue of pending bills is also coming up and is making small business men and women to lose their businesses. I went to school with one person from Kilifi and she told me that mechanics, who have a small amount of capital, have not been paid by the County of Kilifi. So, I urge you to look at these issues and make sure that businesses thrive. Without this, the county government will not have enough money to pay you. You should follow up on such things.

Sen. (Dr.) Milgo: Thank you, Mr. Speaker, Sir, for giving me this chance to welcome the Members of the County Assembly (MCAs) of Kilifi who have come to benchmark in the Committee on Labour and Social Welfare. I thank them for choosing to benchmark with our Committee which is one of the most powerful Committees in the Senate and has done a lot of work.

I also thank them for choosing the powerful Sen. Madzayo together with Gov. Kingi. We recently visited Kilifi County as the Committee on Labour and Social Welfare and we managed to interact with the governor and the Senator who are doing a good job.

As Senators, we play an important role to oversight counties in terms of management of both finance and human resources. Therefore, we encourage you, as the

first point of contact to ensure that human resource is managed. This is because any county with the best human resource will deliver.

Mr. Speaker, Sir, in addition, we have discovered that most of the counties are grappling with the issues of corruption and unpaid bills. I encourage the MCAs throughout the country to perform their oversight role to ensure that citizens get value for money.

The Senate is working hard to increase allocation of resources to the counties. Part of the Senate's proposal to the BBI Report is the increase of funds to counties. However, more resources to the counties will go to waste if they are not well managed. I urge the MCAs from Kilifi County to manage the resources of the county well so that the county develops.

Mr. Speaker, Sir, some of the Senators in this Chamber were MCAs before. I believe that the MCAs from Kilifi have the capacity to serve as Senators as well. I hope that some of the MCAs will be Members of this House or the National Assembly in the next Parliament.

I thank you.

The Speaker (Hon. Lusaka): Finally, Sen. (Dr.) Musuruve.

Sen. (Dr.) Musuruve: Mr. Speaker, Sir, I thank you for giving me the opportunity to join you in welcoming the MCAs from Kilifi County. I would like to inform the MCAs that Sen. Madzayo is their defender in this House because he is very keen on issues that concern Kilifi County. Sen. Madzayo is a true representation of Kilifi County because he is keen on coming up with policies and legislation that benefit not only Kilifi County but the entire nation.

I encourage the MCAs of Kilifi County Assembly to take interest in oversight because they are well rooted on the ground. It is prudent for them to visit project sites to assess what is taking place. Absorption of funds in the counties should be equivalent to the development taking place in the counties.

(Loud Consultations)

The Speaker (Hon. Lusaka): Hon. Senators, kindly consult in low tones.

Sen. (Dr.) Musuruve: Mr. Speaker, Sir, the MCAs should also be engaged in public participation. Sometimes, the local '*mwananchi*' is not aware of what is happening, but the MCAs can give them true information. I encourage the MCAs to come up with a development agenda for their counties which will help them in resource management and assessment of their goals.

I thank you.

The Speaker (Hon. Lusaka): Next order.

PETITION**REPORT ON PETITION: DELAYED COMPENSATION
BY NLC TO LAND OWNERS AFFECTED BY
ELDOROT TOWN BYPASS PROJECT**

The Speaker (Hon. Lusaka): I cannot see the Chairperson of the Committee on Roads and Transportation, so the report on the consideration of the Petition to the Senate on delayed compensation by National Land Commission to land owners affected by the construction of Eldoret Town Bypass Road Project in Uasin Gishu County is deferred.

(Report on Petition deferred)

The Speaker (Hon. Lusaka): Next order.

Hon. Senators, I cannot see the Chairperson of the Committee on Roads and Transportation, so we defer the laying of the Papers.

(Sen. Wamatangi walked into the Chamber)

The Chairperson of the Committee on Roads and Transportation has just walked into the House. Therefore, for the convenience of the House, we shall go back to Papers. Clerk-at-the-Table, kindly read out the Order.

PAPERS LAID

Sen. Wamatangi: Mr. Speaker, Sir, I beg to lay the following Paper on the Table of the Senate today, Wednesday, 4th December, 2019.

**REPORT ON THE VISIT TO THE MALABA
INTERNATIONAL BORDER POINT**

Report of the Standing Committee on Roads and Transportation on the visit to the Malaba International Border Point (OSBP).

**REPORT ON THE INSPECTION OF THE KIBWEZI-ATHI-
MUTOMO-KITUI ROAD PROJECT**

Report of the Standing Committee on Roads and Transportation on the inspection visit and familiarization of the Kibwezi-Athi-Mutomo-Kitui Road Project in Kitui County

(Sen. Wamatangi laid the documents on the Table)

The Speaker (Hon. Lusaka): Next order.

NOTICE OF MOTION

ADOPTION OF REPORTS ON VISITS TO THE MALABA INTERNATIONAL BORDER POINT AND THE KIBWEZI-ATHI-MUTOMO-KITUI ROAD PROJECT

Sen. Wamatangi: Mr. Speaker, Sir, I beg to give Notice of the following Motion:-

THAT, the Senate adopts the reports of the Standing Committee on Roads and Transportation on the visit to the Malaba International Border Point (OSBP) and the inspection visit and familiarization of the Kibwezi-Athi-Mutomo-Kitui Road Project in Kitui County laid on the Table of the Senate on Wednesday, 4th December, 2019.

The Speaker (Hon. Lusaka): Next order.

STATEMENT

STALLED ROAD PROJECTS IN NANDI COUNTY

Sen. Cherargei: Mr. Speaker, Sir, I rise, pursuant to Standing Order No.48(1) to seek a Statement from the Standing Committee on Roads and Transportation concerning stalled road projects in Nandi County.

In the Statement, the Committee should explain why:

- (i) the construction of Chemusus-Danger Road, Kaiboi-Chepterwai Road in Masab Sub-County, Nandi Hills- Imaki Road in Nandi Hills Sub-County, Kesses-Lessos Road in Kesses and Nandi Hills Constituencies are stalled;
- (ii) explain the reasons for the removal of contractors that were working on the said road whose construction works have stalled;
- (iii) explain the fate of the contracts awarded to contractors for road projects that have failed to take off; and
- (iv) State the intervention made by the Government to ensure the construction of stalled road projects in Nandi County continues without much delay.

Mr. Speaker Sir, you will note that all these are cross-cutting in Nandi County, for example, in Chesumei, Mosop and Nandi Hills which is three-quarters of Nandi County.

I would like the Committee on Roads and Transportation led by my good friend, Sen. Wamatangi, to follow up on this issue so that there is resumption of upgrading our roads in Nandi County to bitumen standards. I am cognizant of the fact that both the national and county governments have stalled projects. We want to reduce the number of stalled projects that we have in this country.

I know this problem is not only prevalent in Nandi County. I have heard many Senators complaining that most of their roads which were under construction have stalled. I wish to request further, may be as part of additional information that the Chairperson of the Committee on Roads and Transportation should tell us how many roads which have been upgraded to bitumen standards across the country have stalled.

This will ensure that my colleague Senators from Narok, Wajir and Bungoma all the way to Busia are part of the solution.

I know that the Chairperson of the Building Bridges Initiative (BBI), Sen. Haji and a certain Senator who is also a Member of the BBI Taskforce had these problems of stalled projects across the country. I have read their report and some of those things have been captured there. It is a national issue and it is good that the two Senators were sitting in that Taskforce although, they did not include issues concerning the Senate in that Committee.

(Laughter)

We respect senior elder, Sen. Haji, because he has had an illustrious career. We hope that in future, Members who are appointed to such taskforces should be able to remember where they are coming from; they should remember the Senate. I hope we will have a private *kamukunji* so that they can tell us what really happened so that we can know---

The Speaker (Hon. Lusaka): Sen. Cherargei, you are confusing your Statement with a lot of things that are irrelevant.

Sen. Cherargei: No, I am just concluding.

The Speaker (Hon. Lusaka): Do not introduce BBI through the backdoor.

(Laughter)

Sen. Cherargei: Mr. Speaker, Sir, I was just making final remarks. If you read the BBI Report, some of the complaints include stalled projects. I was just mentioning in passing that the goodness is that we have the Chair of---

The Speaker (Hon. Lusaka): Sen. Kabaka, what is your intervention?

Sen. Kabaka: Thank you, Mr. Speaker, Sir. Yesterday, Sen. Cherargei moved from prison to this Senate and he raised his hands and said:

“To all Kenyans, I am going to keep peace.”

So, he is now taking advantage, yet he is also the Chairman of the Committee on Justice, Legal Affairs, and Human Rights. Sen. Cherargei is a converted man and it is good to give him latitude of time to encapsulate all those issues.

The Speaker (Hon. Lusaka): What is your point of order?

Sen. Kabaka: My point of order is that Sen. Cherargei is a reformed man.

(Laughter)

The Speaker (Hon. Lusaka): Sen. Cherargei, can you conclude?

Sen. Cherargei: Mr. Speaker, Sir, I would want to encourage colleagues to read the BBI Report. I was just mentioning what I have read; that we have a problem of stalled projects. The Government of course---

The Speaker (Hon. Lusaka): Sen. M. Kajwang’, what is your point of intervention?

Sen. M. Kajwang': Mr. Speaker, Sir, I have been in this House for quite a few years now. The practice and convention is that when a Member is making a Statement request, the Member shall read out the Statement and the Member shall wait for the relevant Chair to commit on when the Statement shall be dealt with.

A Member cannot be on his feet reading a Statement, debating that Statement and introducing matters of jail, BBI and all sorts of peripheral matters.

Mr. Speaker, Sir, is the Senator for Nandi in order?

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Members. The Senator for Nandi is out of Order. You should have only read your Statement. I just gave you some latitude which you are now overstretching. You just need to read your Statement and let other people contribute.

Sen. Cherargei, are you through?

Sen. Cherargei: I am almost through.

The Speaker (Hon. Lusaka): Not almost, you read your Statement. I give you half a minute.

(Laughter)

Sen. Cherargei: Mr. Speaker, Sir, I was just assisting my friend the Chairperson of the Committee on Roads and Transportation to look to other sources of information so that they can revive the stalled road projects across the country.

I assure the House that I am a peace-loving leader. Despite the fact that I am being politically persecuted, I know we shall overcome.

I thank you.

Sen. Wetangula: Mr. Speaker, Sir, the distinguished young Senator from Nandi should be reminded that a tiger does not profess its tigritude; it pounces. However, welcome back. We understand that you were a guest of the State yesterday.

(Laughter)

I want to join the Senator for Nandi--- I can see the Chairperson of the Committee on Roads and Transportation here. First, I want to thank the Chairperson of the Committee on Roads and Transportation because I raised an issue here about the Malaba congestion where we had a stalled project. The Government had spent Kshs600 million with a balance of Kshs45 million; and the project was abandoned. As a result there has been congestion with trucks lining up from Malaba to Bungoma, a distance of 30 kilometres.

He visited Malaba and I have seen that he has already laid a report within a week; congratulations. As he prepares to respond to this Statement, there are stalled projects everywhere in the country. It is not just in Nandi. The Senator for Nandi has raised the issue and so it behoves all of us to mention that--- I also welcome Sen. Mwaura who is rarely here these days.

Mr. Speaker, Sir, the road from Misikhu-Ndalu-Brigadier which is in Bungoma where you and I come from is stalled. The road from Musikoma-Nambacha-Navakholo-Kakamega is also stalled. The road from Musikoma-Tumunga-Busia is stalled. The road from Kamukuywa-Kapsakwony-Namwela is stalled.

Could the Chairperson of the Committee bring a complete list to this House of all stalled road projects that were recklessly launched on the eve of election time, to dupe Kenyans to vote for Jubilee and after elections all the sites were abandoned? There is no road construction going on, to the chagrin of *wananchi*.

The Speaker (Hon. Lusaka): Proceed, Sen. Olekina.

Sen. Olekina: Mr. Speaker, Sir, I rise to support the Statement raised by Sen. Cherargei. I would like to request the Chairperson of the Committee on Roads and Transportation that while he is getting responses to the Statement raised by Sen. Cherargei, to include the road from Mai Mahiu to Narok. The contractor who has been given that road has decided to reduce the width of the road.

When you are driving on that road, if you have a big truck, another truck is approaching and for some reason you lose control, you will end up causing a very bad accident. The contractor building that road has decided to reduce the road on the left side by five feet and on the right side by five feet. I would really request that the Chairperson takes that matter seriously.

I actually called the Cabinet Secretary (CS) who assured me that he was going to look into that issue because this is a very serious crime.

Corruption is finding its way in many ways. We used to hear of people who were given the contract to build the Thika Superhighway and the money which was spent in building that Thika Superhighway could have actually built two or three Thika Superhighways. Whatever is happening now by reducing the size is really not right.

I support and I hope that the Chairpersons have noted that.

Sen. (Dr.) Ali: Thank you, Mr. Speaker, Sir, I wish to support the Statement by Hon. Cherargei not for Nandi County but for the whole country as he stated earlier.

Those of us who come from areas with no tarmac road or bitumen standard, recently we got one or two roads and they are all failing because they are not paying the money. There is a road from Moyale to Thanatha in Wajir County which is along the Ethiopian border and for the last four years, that road has been crawling. That project is not being done because they are not paying the contactors. When the rains came recently, everything they had put in place has disappeared. How were they going to be managed?

Mr. Speaker, Sir, I hope the Chairman of the Committee on Roads and Transport is aware. He should include the Moyale-Thanatha Road because there is a big problem there.

Thank you.

Sen. Madzayo: Asante Bw. Spika. Pia mimi ninataka kumshukuru ndugu yetu Sen. Cherargei kwa kurudi na kuamka leo vizuri akitoka nyumbani kwake.

(Laughter)

Jana alikuwa mahabusu. Karibu sana ndugu yangu. Vile vile, nilikuwa nataka kusema ya kwamba, katika hilo swala ambalo limeulizwa kuongezwe; ni lini ile barabara ya kutoka Mombasa hadi Malindi itamalizika. Kwanza ile sio barabara. Ni barabara ambayo inasafirisha watalii wengi, lakini utaona kwamba, ile barabara imeachwa ni kama pwani sio Kenya.

Kwa hivyo, mimi ninataka kujuwa ni lini; hasa kile kipande cha kuanzia pale Mtwapa mpaka kule mwisho wa *weigh bridge*; ni kipande cha mita 300. Utashangaa kwa sababu inachukuwa masaa mawili, mawili na nusu au matatu kuvuka pale katikati. Unaweza kutafakari kwamba, masaa matatu ama mawili na nusu kupita kiwango cha mita 300 pekee yake. Hiyo imeleta shida kubwa sana. Hata afadhali ingewachwa vile ilivyokuwa kuliko kuiharibu mkisema kwamba mtatengeneza halafu haitengenezwi. Hilo ni swala ambalo nilikuwa ninataka liwekwe kupaumbele.

Bw. Spika jambo la mwisho ni, ile barabara ya kutoka Kilifi hadi Bamba. Mheshimwa Rais alikuja akasema ya kwamba hii barabara ya kutoka Kilifi mpaka Bamba itafanywa na hata akaimba nyimbo kwamba safari ya bamba ni machero. Aliimba nyimbo ya kigiriama hata mimi nikashangaa. Lakini ninataka kuuliza; tangu Rais aseme hivyo, wale watu wanambwaga Rais ni wale watu ambao wanamfanyia kazi; mawaziri wake.

Kwa hivyo, mimi ninataka mwenyekiti wa mambo ya barabara ndani ya Seneti aweze pia kunakili na kujuwa hii barabara ya kutoka Kilifi mpaka Bamba itaanzishwa lini na itamalizwa lini, kadri ya vile Rais wa Jamhuri ya Kenya alivyoamrisha.

Asante sana.

Sen. (Prof.) Ekal: Thank you, Mr. Speaker, Sir, for giving me a chance to also contribute to the roads debacle in the entire country. I used to think that it was only Turkana that has these problems but now I realize that the entire country is having these unfinished projects.

In the case of Turkana, I would like to say that - I know places like Misikhu, Ndalul and all those places, but I do not know the condition of the roads – the roads are in a bad shape and yet there are contracts that have been given. Some of those companies are owned by Chinese who are working on the main road, going into Southern Sudan but there are other roads, like the road from Lodwar Town to Nadapal which has stagnated for the last three years. Even before I became a Senator, they were working on the little piece of that road just barely half a mile. It is still unfinished.

There is also a road that goes from Lodwar Town to Kalokol which is also not finished. In fact, they put materials that destroy tires of vehicles, motorbikes and people are unhappy about this. Therefore, it is not clear to me why those who were given contracts do not phase their roads. I am calling upon those concerned to start to give money to construct these roads so that people can travel without problems.

Thank you.

Sen. Shiyonga: Thank you, Mr. Speaker, Sir, for giving me this opportunity to support the Statement by Sen. Cherargei. As my colleagues have said, when it comes to the challenge of roads, every other part of this country is experiencing this problem. It is not only in Nandi; it is across the country. These are the main challenges that the people of Kenya are facing.

I raised this issue in this House when it comes to the Mombasa Highway, where a contractor is supposed to build flyovers on the main highway. We had a Principal Secretary and a Minister who promised that they were going to look at the Mombasa Highway but up to now, they have not done the flyovers that we requested, instead we have zebra crossings---

(Loud consultations)

The Speaker (Hon. Lusaka): Senators, let us consult in low tones. I can see the Chair and the co-Chair consulting, but they should do it in low tones.

Proceed, Sen. Shiyonga.

Sen. Shiyonga: Thank you, Mr. Speaker, Sir, for your indulgence. I was saying that on Mombasa Road, near Panari Hotel, we have people crossing the road in that area. We have a very dangerous steep and we have people crossing in large numbers yet that is a highway. On such a road, if a vehicle has a problem with its breaks, it can kill a large number of people and we can experience a very big challenge when it comes to accidents in this country.

Therefore, I am urging the people who are involved in the construction of roads in this country, let them---

(Loud Consultations)

Mr. Speaker, Sir, I do not know what is happening to my colleagues.

The Speaker (Hon. Lusaka): Order, Senators. Proceed.

Sen. Shiyonga: Thank you, Mr. Speaker, Sir. In conclusion, let the people who get involved in construction of the roads, especially the contactors, abide by what they put on paper versus the money they get and the service to the people in our country.

The Kisumu-Kakamega Road has stagnated for years. We have a small portion of the road that is supposed to be completed. I support Sen. Cherargei because when people are doing campaigns that it the time they bring construction equipment that we have never seen in this country, promising that they are going to do those roads, but they never do them.

I would like to urge the Committee that will deal with this Statement to make sure that those roads are completed. They should also reveal what they had how much money they had quoted to do the roads so that we do not get a raw deal. We deserve the services and we are there to receive the services that the national Government has promised through the leaders that are working with those contractors.

Thank you.

Sen. Halake: Thank you, Mr. Speaker, Sir, I rise to support the Statement by Sen. Cherargei on the stalled roads in Nandi. I would like to mention that, this Senate, not so long ago through my good friend, Sen. Kibiru, highlighted projects to of almost Kshs400 billion that have collapsed both in counties and national Government.

As a Senate, this is a very important Statement by Sen. Cherargei. It speaks not just to the roads that have been mentioned here in Nandi; the Danger, Kaiboi, and Cheptawai roads, but also this could be replicated by roads in our counties. We do not wish to do that. We do not want to steal the thunder from the Senator but that said, we

can all attest to the fact that stalled projects are also forming a major part of the unpaid bills that we are facing today.

I know the Building Bridges Initiative (BBI) report spoke to these issue as well. For those of us who have read, the fact that there are so many stalled projects that move from one resume of a governor to another, it is about time the Committee--- I should also commend the Committee because they are dealing with some of the issues I raised. The water projects, road projects and energy projects are all becoming a big dent on our budgets.

The Senators in this Committee should use this as an example of what is outstanding and they should also look at the other areas in the region to come up with the number of white elephants in our country. Those white elephants are a source of our debt. We have talked of unsustainable external debt and we might just end up with Kshs7 trillion if we are to add the local debts.

I support this Statement and I look forward to the Committee executing it in a professional way. I congratulate the Senator for Kiambu County, who is the Chairperson of the Committee, for taking these things seriously. I am happy with what he is doing with my issues.

The Speaker (Hon. Lusaka): Hon. Senators, for the convenience of the House, we will go to Order No. 23.

BILL

Second Reading

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL
(NATIONAL ASSEMBLY BILLS NO. 13 OF 2018)

(Sen. Murkomen on 3.12.2019)

(Resumption of debate interrupted on 3.12.2019)

Sen. Mutula Kilonzo Jnr.: Thank you, Mr. Speaker, Sir. I rise to contribute to the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018).

The Chairperson of the Committee on Legal Affairs and Human Rights is here and we have approved this framework but I must say that this framework of doing legislation is wrong. I am proposing that the chapter on Public Finance Management Act and Procurement should not be part and parcel of our miscellaneous amendment in the manner that it is suggested here. I will highlight a few points that tell you that without the benefit of the Act, we will end up passing very many things that are ambiguous.

On page 417, we have Clause 30 that talks of the health service providers. These are detailed proposals that should not be in a Statute Miscellaneous Amendment Bill. On page 418, we have amendments to the Urban Areas and Cities Act where they have

proposed to insert a new section on the establishment of the Directorate of Urban Development and Management.

The amendment on Clause 3A is an attempt to return what would have been the Urban Development Authority which has been objected to by Nairobi City County and other counties. That is a backdoor attempt to take over the work of the county governments in terms of urban planning.

On page 421, we have amendments to the Public Private Partnerships Act 2013 (No. 15 of 2013). Clause 64(1)(b) is an amendment on variation of agreements.

Part of this Clause states that:

(b) In the case of county level projects, obtain the concurrence of the Cabinet Secretary where the relevant project is supported by a letter of comfort or such other risk mitigation instruments from the national Government.

(2) The Cabinet Secretary shall by written notice issue thresholds on what may be deemed material amendments.

This is an attempt to claw back on private partnership arrangements by county governments through the Cabinet Secretary. The same thing is happening with the Crops Act, 2013 (No. 16 of 2013). Sen. Orengo raised the issue of increasing the fines yesterday which is on page 424.

We also have the amendment to the Public Procurement and Asset Disposal Act, 2015 (No. 33 of 2015) of somebody called a 'local contractor'. Overleaf, we have an amendment to Section 43 and introduction of Subsection 8 and 9 where they state that any authority may enter any premises of a procuring entity.

The amendments to the Public Procurement and Asset Disposal Act, 2015 (No. 33 of 2015) is possibly the reason as to why we have a Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) and this is where they are hiding things.

I am persuaded that the amendment to the Public Procurement and Asset Disposal Act, 2015 (No. 33 of 2015) should be deleted from this Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) and a proper amendment Bill be filed.

We have the second one on page 428 which is the amendment to Section 87.

It states that:-

'payment 87A. The procuring entity shall pay a successful tenderer within ninety days from the date of receipt of invoices and certificates for works, goods or services executed or delivered.'

Ninety days is three months. A certificate must be paid promptly. This Senate must reject some of these amendments.

We have amendment to Sections 126(3) where they have deleted the expression of 'twenty-one' days to 'fourteen days' and they have not given people justification.

There is also amendment to Section 145(1) which states that the performance security referred in Section 142(1) shall not generate interest and it shall be determined in accordance with the form provided in the tendering document. Interest is always due even when someone is not paid.

Section 157(9) introduces a very interesting term. The contractors should know that there is a new term called ‘citizen contractor’. Who is a citizen contractor? The proponents of this Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) are introducing issues that cannot be in a Bill like this one.

Section 157(9)(B) states that:

A procuring entity shall pay directly for the supply of goods, services or works to the citizen contractors under subsection (9).

I have just highlighted that a local contractor is supposed to be paid within ninety days. A citizen contractor is supposed to be paid promptly and immediately. It is mischievous to introduce two terms of people. One is a citizen contractor and the other one is a local contractor.

[The Speaker (Hon. Lusaka) left the Chair]

[The Deputy Speaker (Sen. (Prof.) Kindiki) in the Chair]

In view of the several things that are highlighted here, we have Kenya Fisheries Department and they have said that the whole section should be deleted together with the Advisory Committee.

If we cannot remove the chapter on Public Procurement from the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) and if we cannot link the Public Procurement and Asset Disposal Act to the Public Finance Management Amendment Bills, then this Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018) should be rejected by this Senate because it is not an amendment to what would be corners, typographical errors or very small things.

There are substantive amendments that have been introduced to substantive law as the Statute Law (Miscellaneous Amendments) (No. 2) Bill (National Assembly Bills No. 13 of 2018).

I am a Member of the Committee on Legal Affairs and Human Rights but my vote is a not on this Bill unless we amend and delete some of those chapters. I would particularly want us to delete the chapter on Public Procurement. If we cannot delete it, then my submission is that we should reject it.

I oppose.

(Interruption of debate on the Bill)

CONSIDERED RULING

THE EXERCISE BY DEPUTY COUNTY GOVERNORS OF THE POWERS AND FUNCTIONS
VESTED IN THE OFFICE OF THE COUNTY GOVERNOR IN THE ABSENCE OF THE
SUBSTANTIVE HOLDER OF THE OFFICE BY REASON OF
ILL HEALTH OR COURT ORDER.

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, hon. Members. It is now 3.30 p.m., time for the ruling, as directed yesterday. Immediately after the Communication, we will proceed with the debate on this matter. Those Members who are retreating should do so, because it is not a short ruling.

(Loud consultations)

Order, Sen. (Dr.) Musuruve and your senior sister, Sen. Beth Mugo. Order means resume your seat.

Hon. Senators, I have the following Communication to make. This Communication is my considered ruling on the exercise by deputy county governors of the powers and functions vested in the office of the county governor in the absence of the substantive holder of the office by reason of ill health or by reason of a court order.

Hon. Senators, on 12th November, 2019, the Senator for Narok County, Sen. Ledama Olekina, moved a Motion in this House, whose effect was to direct certain government offices, officials and institutions at the national and county levels to work with deputy county governors who exercise the functions of the county governor due to the absence of the substantive county governor occasioned by ill health, incapacity or court orders barring the substantive county governor from assessing office.

The text of the Motion relies on and cites the roles of county governors and their deputies as laid out in Articles 179(4), 179(5) and 180(6) of the Constitution; as well as Section 34(4) of the County Governments Act. The last cited provision being on limitation of the powers a deputy county governor can exercise while performing the roles and functions of the county governor in the latter's absence.

The Motion, moved in an amended form, reads as follows:-

“THAT, COGNIZANT THAT, Article 179(4) of the Constitution designates the county governor and the deputy county governor as the chief executive and deputy chief executive of the county respectively;

FURTHER COGNIZANT THAT, pursuant to Article 180(6) of the Constitution, a county governor and deputy county governor are elected on a joint ticket, with Article 179(5) providing that whenever the county governor is absent, the deputy county governor shall act as the county governor;

AWARE THAT, in several counties, deputy county governors have had to serve as county governors due to the absence of the substantive county governors, arising from ill health, incapacity or orders

emanating from the courts barring the substantive governor from accessing office;

ACKNOWLEDGING THAT, Section 32(4) of the County Governments Act places limitations on the exercise, by the deputy county governor while acting as governor, any power of the governor to nominate, appoint or dismiss that are assigned to the governor under the Constitution or other written law;

NOTING THAT, other than the said limitations under Section 32(4) of the County Governments Act, no other restraints are placed in law on the exercise by the deputy county governor of the powers and functions of the governor whenever the governor is absent;

AWARE THAT, in exercising the powers and functions of county governor, pursuant to Article 179(5) of the Constitution, deputy county governors face a myriad of legal, operational and administrative challenges which hinder the effective functioning of county governments and the efficient delivery of services to the public;

NOW THEREFORE, the Senate recommends that the national Treasury, the Controller of Budget, the Auditor General, the respective county assemblies and County Executive Committee Members to work directly with the deputy county governor while exercising the functions of the county governor, in order to facilitate the effective functioning of county governments and the efficient delivery of services to the public.”

Hon. Senators, in his remarks while moving the Motion, Sen. Olekina informed the House that the Motion was aimed at addressing the challenges faced by deputy county governors in their role as acting governors in cases where the substantive governors had been barred by courts from accessing office or otherwise constrained by infirmity or sickness.

Sen. Olekina said that at the moment, there is confusion in the affected counties of Kiambu and Samburu, and that residents in those counties are not effectively getting services as they should. He argued that the only powers of the governor that such deputy governors cannot exercise are those on nomination, appointment or dismissal of the governor’s appointees, as laid out in Section 32(4) of the County Governments Act.

The Seconder of the Motion, Sen. Stewart Madzayo of Kilifi was very brief. His view being that although it is plausible to argue that a county governor in respect of whom there is a court order against him or her accessing the county office, can actually exercise the powers and perform the functions of his office from outside the physical premises of the office, thanks to technology. It is also true that the legal and constitutional responsibilities of deputy governors ought to be recognized, respected and enforced to avoid making deputy governors mere flower boys or girls.

After the Motion was seconded and the question proposed, it was now time for debate. The Senator for Nandi County, the Hon. Samson Cherargei, rose immediately on a point of order seeking a ruling from the Speaker on whether the Motion was consistent with the Constitution and the law and, therefore, if the Motion is admissible for

contravening several provisions in the Constitution, which he cited with significant emphasis.

Sen. Cherargei's view, that this Motion was inadmissible, generated further points of order from the Senate Majority Leader and Senator for Elgeyo-Marakwet County, the Hon. Kipchumba Murkomen, as well as Senators Moses Kajwang' of Homa Bay County, and Kimani Wamatangi of Kiambu County.

Other than the Mover, none of the Senators who spoke on this point of order was categorical that the Motion was constitutionally sound and should, therefore, be admissible. This is an understandable situation, because the legal issues raised are somewhat weighty and the gaps in the applicable law aggravating.

I shall not regurgitate all the legal issues raised in challenging admissibility of the Motion, as the entire proceedings of the sitting of the Senate that afternoon of 12th November, 2019, are publicly available from the HANSARD. Suffice it to say, the Senators contesting the admissibility of this Motion argued, in so many words, that the Motion:-

- (1) Has the effect of endorsing the "erroneous" view that a county governor can be removed from office outside the provisions of Articles 180, 181 and 182 of the Constitution, read cumulatively;
- (2) Goes against the constitutional principle of presumption of innocence to the detriment of county governors charged before courts of law;
- (3) Will enable deputy county governors to unconstitutionally and illegally claim or demand performance of the roles and functions of county governors as well as exercise of functions reserved in law for county governors through the backdoor;
- (4) In material part, the Motion reveals that it is aimed at enabling the deputy county governors of Kiambu and Samburu counties, whose bosses were charged with criminal offences and subsequently barred from accessing their offices, to perform some or all of the roles of the county governors, yet the question of whether they can do so is already pending before court; and,
- (5) It was argued that the Motion erroneously assumes that a court, by ordering that a county governor shall not access their office during the pendency of the criminal suit against them, effectively suspends such county governor and that the governor is deemed "absent" within the meaning and context of Article 179(5) of the Constitution, thereby automatically triggering the immediate assumption of the roles, functions and powers of the county governor by the deputy county governor until the criminal suit is heard and determined; or until the court order is lifted, whichever is earlier.

(Loud consultations)

Order, Sen. Wako. I know that you have just started the project of building bridges. You can still build them here, but after the ruling.

- (6) In defense of the Constitutionality and, therefore, admissibility of his Motion, Sen. Ole Kina argued that the Motion -

- a) Aims at addressing current, live challenges in some counties, where court orders bar certain county governors from accessing their offices following arraignment of those county governors before Courts for criminal prosecution.
 - b) Seeks to enable deputy county governors who assume the functions of the office of the county governor, following a court order, as described in the foregoing paragraph, to perform those functions without any constraints, hindrances or challenges whatsoever, with the only limitations being those specified in Section 32(4) of the County Governments Act; specifically on nomination, appointment and dismissal.
 - c) He argued that the Motion is admissible because it considers that the limitations on the powers that a deputy county governor can exercise provided for under the aforesaid Section 32(4) of the County Governments Act do not include power to reshuffle County Executive Committee (CEC) Members. That limitation, according to Sen. Olekina, does not limit the county governor from shuffling CEC Members as well as Chief Officers, or other appointees of the governor.
 - d) He also argued that the Motion is inspired by the reality that in cases where deputy county governors are acting the roles and functions of the county governor after the county governor has been barred by Court from accessing office, the said deputy county governors have been rendered powerless and are being frustrated by the appointees of the governor in the respective county governments, or by other agencies.
 - e) Finally, he argued that the Motion is not unconstitutional because the deputy county governors who are acting in the absence of the substantive county governor can exercise all the powers and perform all the functions of the county governor by a proper reading of Articles 179(4), 179(5) and 180(6) of the Constitution; and that the only limitation is that contained in Section 32(4) of the County Governments Act.
- (7) Before I determine the issues canvassed in favor or against Sen. Cherargei's point of order, it is important to highlight briefly what our Standing Orders say about admissibility of motions. Standing Order 55(3)(b) provides as follows, and I quote:-

“If the Speaker is of the opinion that any proposed Motion is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament; the Speaker may direct either that, the Motion is inadmissible, or that notice of it cannot be given without such alteration as the Speaker may approve.”

Determination:-

- (8) Having carefully reviewed the text of the Motion as well as the contesting arguments made on the admissibility of the Motion, I have examined the Constitution, the County Governments Act, as well as the materials forming the *travaux préparatoires*. That is the background documents forming the negotiation and drafting history of the Constitution as well as the County Governments Act so as to get an understanding on the roles and powers of governors and their deputies from that drafting history, as well as the drafting history of the County Governments Act.

Powers of Governor/Deputy Governor:-

- (9) Article 176(1) creates a county government in each of the 47 Counties. The county government consists of a county assembly and a county executive. Regarding the county executive, Articles 179(1) and (2) of the Constitution provides that the executive authority of the County is vested in, and exercised by, the CEC comprising of the county governor, the deputy county governor and the CEC Members. In the exercise of this executive authority, the governor and deputy governor are designated as the chief executive officer and deputy chief executive officer of the County respectively by Article 179(4) of the Constitution.
- (10) Pursuant to Article 183 of the Constitution, as read with Section 36 of the County Governments Act, the functions of the county governor as the Chief Executive Officer (CEO), is to lead the CEC in:-
- a) Implementing County legislation;
 - b) Implementing, within the county, national legislation, to the extent that the legislation so requires;
 - c) Managing and coordinating the functions of the county administration and its departments;
 - d) Supervising the administration and delivery of services in the county and all decentralized units of the county; and,
 - e) Performing any other functions conferred on the CEC by the Constitution or national legislation, including functions incidental thereto.
- (11) Those functions are assigned to the CEC which, as we have seen, is led by the governor. However, the Committee as a whole, has those five functions. Then there are more functions which are specifically assigned to the governor, as an officer and as the CEO of the county; and these are contained in Sections 30, 44 and 45 of the County Governments Act. They include the following:-
- a) Represent the county in national and international fora and events;
 - b) Nominate, appoint, with the approval of the County Assembly, members of the CEC, the County Secretary and Chief Officers;
 - c) Submit County plans and policies to the County Assembly for approval;
 - d) Assent to Bills passed by the County Assembly;
 - e) Chair meetings of the County Executive Committee;
 - f) Submit to the County Assembly annual reports on the implementation status of county policies and plans;

- g) Sign and cause to be published in the County Gazette, notice of all important formal decisions made by the Governor or by the CEC;

I do not know whether this is happening.

- h) *By a decision notified in the CEC, assign responsibility to each member of the CEC;*
- i) *Deliver an annual state of the county address containing such matters as may be specified in county legislation;*
- j) *Provide leadership to the county's governance and development;*
- k) *Provide leadership to the CEC and administration based on the county policies and plans;*
- l) *Promote democracy, good governance, unity and cohesion within the county;*

In other words, to build bridges.

- m) *Promote peace and order within the county;*
- n) *Promote the competitiveness of his or her county;*
- o) *Be accountable for the management and use of county resources;*
- p) *Promote and facilitate citizen participation in the development of policies and plans and delivery of services in the county; and,*
- q) *Exercise such other powers as may be necessary for the execution of the duties of the office of the governor.*

Those are the powers of the governor.

For the deputy governor, other than stating in general terms in Article 179(4) that the deputy governor is the deputy chief executive officer of the county, the Constitution provides no specific functions or roles for the deputy county governor. Those of you who want to be deputy governors or you have friends and relatives who have an interest, tell them to read the Constitution first, the way a customer reads a menu in a restaurant. If one does not understand the recipes in the menu, you then need to call the waiter or the chef to explain the responsibilities so that you understand. Otherwise, once you order the food, you must eat it; and you are condemned to eat it. If you do not, you pay and leave.

As I have said earlier, other than in general terms in Article 179(4), which says he is the deputy chief executive, there are no other functions described in the Constitution. Therefore, the governor has nearly 40 functions. The County Governments Act extends this Constitutional ambiguity by describing the functions and roles of the deputy county governor in Section 32(2) as simply to deputize the governor in the execution of the governor's functions.

However, the same Section 32 empowers the governor to assign his or her deputy any other responsibility or portfolio as a County Executive Committee Member. However, in doing so, the governor cannot assign or delegate functions of the governor relating to nomination, appointment or dismissal, which are conferred by the Constitution or any other law.

I now turn to two important terms, which will be the determinant of my conclusion. This is vacancy in the office of the governor versus absence of the governor.

(The Deputy Speaker paused to allow Sen. (Prof.) Ongeru to enter the Chamber)

(Sen. (Prof.) Ongeru entered the Chamber)

Vacancy in the Office of Governor /Absence of Governor:-

1. There is a clear legal distinction between occurrence of a vacancy in the office of the governor, versus the absence of the governor. Those are two different things.
2. The Constitution, in Article 182, provides for the circumstances under which the office of the governor shall be deemed to be vacant; namely, when the governor:-
 - a) Dies;
 - b) Resigns in writing to the Speaker of the County Assembly;
 - c) Ceases to be eligible to be elected a county governor.

In other words, the governor no longer has the eligibility qualifications for election. For example, if it is discovered that some of the eligibility qualifications do not exist; and we have had cases like this. Please note also that the qualification criteria for county governors for election is equivalent to those of MCAs, of course, as upgraded by the Elections Act in terms of the degree.

- d) The vacancy also occurs if subsequent to the election, the governor is convicted of an offence punishable by imprisonment of at least 12 months.

Meaning that a governor who is convicted and is serving a jail term for 11 and a half months is still deemed to be in office. He must be convicted and serving, meaning he has even appealed and all appeals have not yielded fruit. Therefore, he remains the governor. I do not know how he will sign papers from prison, but that is the Constitution for you.

- e) If the governor is removed from office under the Constitution by way of impeachment under Article 181.

There is clear guidance from the Constitution as to what shall happen once a vacancy arises in the office of the governor. According to Article 182(2) of the Constitution, if a vacancy occurs in the office of the county governor – in the circumstances I have just cited – the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.

If such remainder of term is more than two and a half years from the date of the next scheduled election, the deputy governor who assumes the office of the governor shall be deemed to have served a full term for purposes of applying the two-term limit for governors provided for in Article 180(7) of the Constitution. The deputy governor so assuming the office of the governor in these circumstances of Article 182 shall perform all the functions – there are no limitations because he is actually a substantive governor – and exercise all the powers of the office as a substantive governor, without any constraints.

Hon. Senators, there are no ambiguities when it comes to a vacancy arising in the office of the governor. For that reason, we have had seamless assumption of deputy

governors to the office of the governor in event of death. In Nyeri on two occasions; that was in 2015 and in 2017; and in Bomet in 2019.

I suspect the process would be seamless and would not suffer any legal hitches in event of resignation, impeachment or other grounds listed in Articles 181 and 182 of the Constitution, as supplemented by Section 33 of the County Governments Act and the Standing Orders of the Senate; and further by Article 144 of the Constitution, which is on the removal of the President of Kenya from Office on grounds of mental or physical infirmity, and which Article applies to county governors *mutatis mutandis*, with necessary modifications.

Thus, there is no law that suggests that where a Governor is facing criminal charges, a vacancy has arisen. This is because it does not fall into any of those categories; there is no vacancy. There is no law to suggest that such governor ceases to hold office. Therefore in the respective matters of the Kiambu and Samburu counties, the governors are still in office. The only instances that give rise to a vacancy is the instances that I have already provided for.

In sharp contrast, however, the law is not very direct or clear on the powers and functions of a deputy county governor who is acting in the absence of the governor; neither is the concept of “absence” defined in any law. Article 179(5) of the Constitution simply states that “when the county governor is absent, the deputy county governor shall act as the county governor.” It does not say absent from office, absent from the territory of the county or absence from the country or the jurisdiction of Kenya. It does not say absent from where.

However, it is my view, and I will give my reasons at the tail end, that what was intended was to allow a deputy governor to act when the governor is at least outside the county. This is because you cannot imagine that anytime the governor is not in the office, then the deputy governor is acting, even if the governor is two kilometres away presiding over a function.

My view is that what was intended was to allow deputy governors to act when the governor is, at the minimum, out of the jurisdiction of his county or outside the territory of the Republic of Kenya for a significant period of time – I will explain that as well – to enable seamless flow of services to citizens. The whole idea of allowing the deputy to act is not to provide an avenue, as we have seen in some cases, for competition and trying to jostle for prominence. It is to allow seamless service provision.

Therefore, when the governor is away for some considerable time, the deputy governor is able to serve the citizens of that county.

The legal provisions in the foregoing paragraph are not elaborated any further. In other words under Section 179, other than saying, “In the absence of the county governor, the deputy shall act,” it has not elaborated any further, except for the limits placed on the deputy governor in section 32(4). Any other elaboration is Section 32(4) of the County Government Act which says that when the deputy governor is acting, he cannot touch the issues of appointment, dismissal or nomination of officials, neither can the governor decide to delegate. Even if the governor delegates, the deputy is prevented from acting.

What then is the meaning of the word “absence,” as used in Article 179(5) of the Constitution? How does that meaning apply to the situation of a governor against whom

there is an un-vacated court order barring him or her from setting foot in the office until his or her criminal trial is heard and determined? Does barring of the governor from accessing the county office render the governor absent, within the meaning and context of Article 179(5) of the Constitution?

Neither the Constitution nor the County Governments Act or any other national legislation I am aware of defines or otherwise elaborates what constitutes absence of a governor. The Black's Law Dictionary defines the word absent as "being away from;" "at a distance from;" or "not in company with." The Oxford English Dictionary, on its part, defines the word absent as an adjective to mean, "Not present in a place, at an occasion, or as part of something," and as a verb to mean "go away" or "remain away."

The word absence is used in Article 179(5) of the Constitution as an adjective, describing the noun county governor as being not in a certain place; the place is not defined at a given time, not present or missing from such a place. To my mind, although there has been no further clarification by the Constitution, the County Government Act or any other law that I am aware of, as regards to the time of absence, a contextual interpretation of the term as used in Article 179(5) of the Constitution supports a conclusion that the provision refers to physical absence of the governor, such as the governor being physically away from the county they serve for a considerable period of time.

According to these definitions above, there appears to be no basis for interpreting the adjective "absence" as used in Article 179(5) of the Constitution, to refer to a situation where a governor is unable to access the county office as a result of a Court order, as is currently the case with the respective Governors of Kiambu and Samburu counties, who are undergoing criminal prosecution.

If a governor facing criminal charges is barred by court to access the county office, it is because the office has become a scene of crime, which is made out of bounds for suspects and also to preserve evidence and to protect the scene of crime from interference from a suspect of the crime in question. The governor has not ceased to hold office and also is not absent, because such a governor is in the county, except that he cannot enter the office. As I will say later, in fact, he can enter that office daily so long as he has permission in the court order we are talking about. The Ethics and Anti-Corruption Commission (EACC) can allow the governor, on a daily basis, as many times as possible for a supervised access to the office.

By the courts prohibiting the respective governors from accessing the respective county government offices, the respective governors have been asked not to go to the physical locations of their respective offices in Kiambu and Maralal towns respectively. This is because Section 6A of the County Governments Act provides that for each of the 47 county governments, their headquarters will be located at certain places, if you remember the law we passed on county headquarters. For Kiambu, it is Kiambu Town; and for Samburu, it is Maralal Town. So long as the Governor does not go to the office in Kiambu and Samburu respectively, they can hang around the county and the town, but not access the office unless they have permission, concurrence and supervision.

They still hold office of the governor and they may be present anywhere in the county. They may perform the functions and exercise the powers of their office from

anywhere within the county, as long as they do not access the physical location of the county government office. A governor needs not be at the physical location of the county office to perform the functions or exercise the powers of that office. In other words, a governor does not need to be in the office to be governor. He or she can make a decision from anywhere. Otherwise, many of the decisions governors make would have to be given geographical limits.

Where, however, such governors face practical constraints in performing any of their official functions or exercising any of their powers, they may voluntarily delegate to the deputy governor the functions and powers that the law allows to be delegated to the deputy governor. However, no law compels a governor against whom there is a court order not to access the county office to delegate.

The Motion by Sen. Olekina erroneously assumes that a court order barring a governor from accessing a county office means that such a governor is technically absent and, therefore, the deputy governor automatically becomes the acting governor, pursuant to Article 179(5) of the Constitution. That kind of interpretation would imply that the governors in such situations are technically absent. It is my view that those governors are not absent, but they face certain difficulties. Towards the conclusion, I will tell you my view about Justice Mumbi Ngugi's judgment, because it somewhat introduces a new term, which is suspending a governor from office.

Assumption by a deputy governor to the office of the governor or such deputy governor purportedly performing any of the functions, or exercising any of the powers of the governor simply because the substantive governor has been charged in Court and slapped with a court order not to access the county office, is unconstitutional, illegal, null, void and of no legal consequence, unless and until the substantive governor legitimizes such performance of functions or exercise of powers in writing by appointing the deputy governor to act as governor.

I have read the much relied on, but recent decision of Justice Ngugi M. in Criminal Revision No.25 of 2019, Moses Kasaine Lenolkulal vs Director of Public Prosecutions, 2019, relating to the Governor of Samburu County, whom the judge went on in her *obiter dicta* remarks to bar from accessing the county office during the pendency of the trial.

I observe that the judge did allow the governor to access the county office, but with permission and concurrence of the investigating agency, the Ethics and Anti-Corruption Commission (EACC) and its Chief Executive Officer (CEO) to be the focal point for that purpose. She upheld the order dated 15th May, 2019, given by the magistrate in the Anti-Corruption Court to the following effect. The order says:-

“The Governor of Samburu County is barred from accessing the Samburu County Government offices without the prior written authorization of the investigating agency, EACC, who shall put measures, if any, in place so as to ensure that there is no contact between the Governor and the prosecution witnesses and to preserve the evidence until further orders of this Court.”

The learned judge appreciated that such permission would hypothetically have to be sought and given on a daily basis, presenting practical difficulties. That is why she said

that the deputy governor can then fill that gap and that is why there is a deputy in that county. However, nowhere has the learned judge said that the Governor of Samburu County should not henceforth perform his official functions.

In fact, she emphasizes that the Governor is not being removed from office, meaning that no vacancy in the office of the governor has been created by the judgment; neither does the learned judge expressly pronounce herself that failure by the Governor to access the office by operation of the conditions in the order would constitute absence from office. Therefore, by operation of Article 179(5) of the Constitution, enable the Deputy Governor to act automatically.

For those who have the view that such an order creates the absence of a governor, what the judge ought to have done was to declare the implications of the order to constitute absence within the meaning Article 179(5), which as I am going to see, will trigger the automatic acting of a status of the deputy governor.

She does not say that this order creates an absence within the meaning of Article 179(5). She simply states that the governor may go to the county office with the permission and supervision of EACC. Should there be any practical challenges at any time in seeking or obtaining the permission for supervised access to the office, the deputy governor should be able to fill the gap by performing the functions and exercising the powers of the governor in an acting capacity. That is what she said.

From the logic in the judgment, it is clear to me that the learned judge does not see the governor's lack of access to the county office as constituting absence, as contemplated in Article 179(5) of the Constitution, to trigger the deputy governor's right to be the acting governor automatically. If the judge's intention was to apply and bring into effect Article 179(5), nothing would have been easier than to say so.

A governor slapped with such a court order not to access the county office is in full compliance, by simply avoiding unauthorized and unsupervised access to the county government office. However, such a governor may make decisions from elsewhere, other than the office; sign documents from anywhere and hold meetings with County Executive Committee (CEC) Members from anywhere, so long as it is not in the county government office. They can hold meetings with other officials of the county government, visitors and citizens anywhere within the county, but outside the county government office.

They can also inspect projects, co-ordinate, superintend or preside over events outside the office and so on, and so forth. He or she may make telephone calls, use social media accounts to communicate, correspond via electronic mails, ensure procurement, human resources and other critical departments are running well, on condition that he or she does not tamper with evidence touching on matters being investigated, or contact witnesses. Witnesses would have been disclosed anyway by the time of commencement of the governor's criminal trial.

Therefore, the order according to the learned judge neither creates a vacancy by removing the governor from office, nor does it deem the governor's bar from accessing the county office to constitute an absence, therefore triggering the acting status of the deputy governor. To do so would run afoul of the constitutional principle of presumption of innocence.

The order simply designates the county government office for Samburu County in Maralal Town, and for Kiambu County in Kiambu Town, a scene of crime and, therefore, out of bounds for the governor as a suspect. Only allowing him supervised access to the office to ensure the governor has no contact with any prosecution witnesses working there, and generally to prevent the governor from interfering with evidence at the office. Instead, the learned judge appears to technically suspend the governor from office without saying so. Why? It is because she finds Section 62(6) of the Anti-Corruption and Economic Crimes Act, which exempts governors, among certain other State officers, from suspension from office when they are charged in court. She finds this section unconstitutional. Therefore, technically, that suspends the governor from office, which is a new term not within the realm of Article 179(5) of the Constitution.

(Sen. Kihika and Sen. Shiyonga stood up in their places)

We are almost there. Sen. Kihika and Sen. Shiyonga; take the nearest seat. You do not have to go to your habitual place of abode.

Hon. Senators, the learned judge is of the view that Section 62(6) of this Act-- This is important because it also applies to Members of Parliament (MPs), as I am going to say.

(Sen. Wetangula spoke off record)

I took a lot of time to read, because I wanted to make sure the ruling I make is one that is constitutionally sound, and protects whoever needs to be protected by law. However, whoever is exposed has no recourse. They have to face the consequences of fate.

The learned judge is of the view that Section 62(6) of the Anti-Corruption and Economic Crimes Act is unconstitutional because it perpetuates discrimination. Some State and public officers can be suspended from office once they are charged, while others cannot. She, therefore, says that is discrimination.

Secondly, she says that it runs contrary to the values of Chapter Six on integrity, and the much touted values, as well as national values in Article 10, which includes integrity as a national value. That is the view from Justice Mumbi Ngugi in declaring this sub-section unconstitutional.

While Justice Ngugi's judicial activism and purposive interpretation of the Constitution is laudable, if not admirable, I respectfully disagree with her views on Section 62(6) of the Anti-Corruption and Economic Crimes Act. It is noteworthy that a full application of her views on this Section would mean that State or Public officers, including Members of County Assemblies (MCAs), MPs, including Senators and Governors, Judges like herself and members of Independent Constitutional Commissions, once charged with corruption or economic crimes, shall be suspended from office until when the criminal process abates or the charges are otherwise terminated.

The learned Judge is, respectfully, wrong. Subsection 6 of Section 62 exempts state or public officers from suspension during a criminal trial, in respect of whom the Constitution has provided an alternative mechanism for their removal.

Particularly exempted from suspension – and for good reason – are Judges and Members of Independent Constitutional Commissions, who may be removed through tribunals established under the Constitution. This mechanism for removal using tribunals is not applied to so many state officers, including CSs. The tribunal route is one used on other state officers; and that does not create discrimination.

Therefore, the distinction which is placed, whereby certain state or public officers cannot be suspended by being charged, is a distinction that is permissible. That is because it is reasonable, and it based on the functional environment under which the state or public officer works. Therefore, for a Judge or members of the Independent Commissions, if they are charged, that might even constitute a ground for their being removed through a tribunal.

Now, the civil servants, like the CSs, Principal Secretaries (PSs) and ambassadors do not suffer the tribunal route. Does that mean that there is unconstitutionality there? No! Does it mean that there is discrimination there? No!

Therefore, the reason, for example, Judges and members of Independent Commissions are exempted is because of the nature of functions they do. It is the same with elected leaders. Members of Parliament (MPs) and governors are elected leaders, and the way they can be removed from office is provided for. There are several ways for the removal of an MP. It can be through the operation of recall under Article 104; it can be through operation of Article 99(2)(h), where for example, they are removed under the disqualifications there. Thirdly, they can be removed by operation of Chapter Six. A state or public officer who contravenes Chapter Six, the consequence is removal from office.

Therefore, because of those alternative mechanisms, Subsection 6 says that these people against whom there is a way of removing them, an alternative way should now be suspended, unlike the other civil servants and public officers who do not face similar consequences.

Governors, for example, now that we are talking about them, are susceptible for removal under Article 181 through impeachment. If you look at the grounds of impeaching a governor, Article 181(1)(b), says:-

“Where there are serious grounds to believe that the county governor has committed a crime under national or international law;”

Simply put, if you ask me, being charged is a serious reason to believe. Therefore, this mechanism is available, and it not available to other public servants.

My bigger problem, especially now that we are talking about governors, is because of our role as protectors and defenders of devolution. I consider allowing the suspension of elected leaders from office – in this case a governor – who are facing criminal charges susceptible to abuse. This is specially so whereby the criminal justice system may – I am not saying it has been misused, but there is potential for it being misused politically – have a political leader charged and removed from office.

For Governors, I find suspending them a frontal attack on the distinct nature of county governments and their independence from the whims of the national Government. This is because the national Government exclusively somewhat controls the appointments to, funding and even, to some extent, operations of State investigative and prosecutorial agencies, thereby emasculating and weakening devolved governments.

This threat, however hypothetical or remote, is the threat of a rogue, centralist leaning national Government administration misusing national criminal justice institutions within the Executive. This threat, however remote or hypothetical, must be warded off by ensuring that governors who are charged can only be removed from office, if need be, through the mechanism provided for in the Constitution, of impeachment.

The national values of good governance, integrity and non-discrimination relied on by Justice Mumbi Ngugi in her judgment above cannot be applied in isolation. They ought to be balanced with equally important national values of sharing and devolution of power; the latter being the basis of protecting, respecting county governments and keeping them independent from whimsical attack by a national Government administration, hypothetically.

Therefore, the emerging habit of deputy governors declaring themselves as the governors or acting governors when the respective substantive governor has been charged and barred from accessing the county office is *prima facie* unconstitutional, illegal, null and void. A governor who cannot access the county office due to a court order has the liberty and discretion to appoint the deputy governor as the acting governor, but such appointment cannot be forced on the governor.

As I close, I hasten to caution, however, that it appears to me from a reading of Article 179(5), that if “absence” of a governor is objectively established as opposed to subjective; if it can be objectively established that the governor is absent, as defined in the definitions that we---

*(Sen. Linturi walked into the Chamber when
The Deputy Speaker was on his feet)*

Order, Sen. Linturi! Order! You are out of order.

(Loud consultations)

Order! You are out of order.

*(Sen. Linturi walked to the door
and bowed to the Chair)*

I know that you are a Njuri Ncheke elder, but the forum was on Saturday, not today.

Order, Members!

I, therefore, hasten to caution that it appear to me that a careful reading of Article 179(5) will reveal that if absence is objectively established, the assumption of the deputy governor to the office of governor in an acting capacity is automatic, but absence must be objectively established. It does not depend on the governor’s action of appointing the deputy governor to act.

The use of the word “shall” in that provision triggers the action *suo motu or sua sponte*; automatically. Indeed, the mandatory phrase “shall act” in reference to the

deputy governor, relating to the deputy governor becoming the acting governor, is similar to the meaning and implication in the phrase used in Article 182(2) in relation to a vacancy occurring in the office of the governor. In other words, the way that Article 179(5) is phrased is similar to how Article 182(2) is framed.

Article 182(2) is on a vacancy occurring in the office of governor, let us say by death, resignation, *et cetera*. The assumption of office for a deputy governor in such circumstances of Article 182(2) are in mandatory terms. In other words, the deputy governor does not need to be prompted or aided, other than being sworn in automatically. If death or resignation is established, the deputy governor assumes office as governor. It is the same word used in Article 179(5), and so governors should be careful.

It follows that as was specifically raised by Sen. Kajwang' in reference to the Governor of Homa Bay County who for a long time was absent from office and perhaps from the county due to physical infirmity in the form of temporary blindness, the deputy governor of that county could have acted as governor with or without the substantive governor's appointment, subject to establishing objectively "absence".

I mean that somebody has to go to court and have that interpreted. You cannot declare that this amounts to "absence" then act. So, the deputy governor of Homa Bay could have automatically done that subject to establishing "absence" for the full duration the governor was away from the county or the jurisdiction of Kenya and not away from office. However, when the governor remained out of office but within the county, that would not be the case.

The situation in respect to the Governor of Homa Bay County could also have triggered, in my view, legitimately if not lawfully, impeachment proceedings on grounds of physical incapacity occasioned by infirmity as anticipated in Article 181(1)(d) as read together with Section 33 of the County Governments Act and Article 144 of the Constitution applies *mutatis mutandis*.

Similarly, as cited by Sen. Kajwang', where as was the case in 2018 when the Governor of Migori County was barred by a criminal court from setting foot anywhere within 20 kilometres from the border of Migori and Homa Bay Counties; that would not denote "absence" of the governor. However, if the court order required the said governor not to set foot anywhere in Migori County, the governor's "absence" could, in my view, have been established objectively and trigger the automatic assumption of the deputy governor to act as governor as long as the court order remained active.

The material part of the Motion by Sen. Olekina is the third paragraph which reads as follows:-

"AWARE THAT, in several counties, deputy county governors have had to serve as county governors due to absence of the substantive county governors arising from ill health, incapacity or orders emanating from the courts barring the substantive governor from accessing office;"

The Motion is unconstitutional to the extent of its disclosed intention, namely, to legitimize and formalize the "acting" status of a deputy county governor who may have erroneously assumed office as a result of court orders barring the substantive governor from accessing the county office, in the mistaken belief that:

- (a) A vacancy has arisen in the office of the governor as contemplated by Articles 181 and 182 of the Constitution, or
- (b) The governor has been rendered “absent” by being told not to go to the office.
- (c) The court order has “suspended” the governor from office and rendered him absent, a notion inapplicable to county governors, including those facing criminal charges.

Additionally, I find the last paragraph of the Motion, which contains the resolution that the House shall be making, superfluous, unless if the aim of the Motion, as I have said, is to empower deputy governors to assume the roles of an acting governor outside the law. It states that the Senate directs:

“The National Treasury, the Controller of Budget, the Auditor-General and the respective County Assemblies and County Executive Committees Members, to work directly with the deputy county governor, while exercising the functions of the county governor, in order to facilitate the effective functioning of county governments and the efficient delivery of services to the public”.

The wording of this resolution betrays the existence of a problem; that the deputy governors who are acting as result of the substantive governors being barred from accessing the county offices are not getting full cooperation from the national Government or county government agencies, or at all. Why should the Senate direct or order the national Government and county government agencies to extend cooperation to a deputy governor who is acting as a county governor lawfully? Would the legal consequences of non co-operation not be the same if the lack of cooperation was extended to a county governor? The answer is yes.

Besides, the use of the term “direct” in the resolution paragraph leads me to ask if, assuming this Motion was not unconstitutional, the Senate has the wherewithal to ensure that the agencies named in the Motion comply with the directives of the House Resolution. While the Senate may give directives to the named agencies when the House is exercising parliamentary oversight responsibilities under Article 96(3) of the Constitution, the House, in my view, has no such powers to direct the listed agencies to execute their respective routine, day to day functions.

To say the Senate can direct so would amount to subversion of the doctrine of separation of powers, which this House strongly waves at the Judiciary or the Executive whenever any of them tries to encroach on our functional realm. The Senate must not just invoke the principle of separation of powers to assert the authority of Parliament. It must defend it by complying with it and restraining from venturing into the functional turf of the Executive or the Judiciary. What is good for the goose must be good for the gander, as Sen. Mutula Kilonzo Jnr., likes to remind us. Thus, assuming the Motion was constitutional, which it is not, it should have, at least, recommended or urged the listed agencies but not to direct them.

In consideration of what I have determined herein, the Motion sponsored by Sen. Ole Kina is unconstitutional and *ab initio* inadmissible within the meaning and context of Standing Order No.55(3)(b) for being contrary to the Constitution, without expressly proposing appropriate amendments to the Constitution.

Accordingly, no decision shall be made on it. The Mover, or any other Senator is, however, at liberty to re-draft the Motion to conform to the ruling and submit it for consideration afresh at any time. Standing Order No. 58(1) shall not apply to this Motion because although the Motion had been debated, the House had not, and shall not make a decision thereon, either in the affirmative or in the negative.

I, thank you.

(Applause)

Order, Senators. For your information, this ruling has taken a bit long because the issues were a bit lengthy and weighty. I know another ruling has been sought on what we must do on Article 110(3). So, next year be prepared for this kind of thing.

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

The Deputy Speaker (Sen. (Prof.) Kindiki): What is it, Sen. Olekina?

Sen. Olekina: Thank you, Mr. Deputy Speaker, Sir, for your lengthy ruling which was 1 hour and 37 minutes. I will take up the role of making sure that I re-draft the Motion. One of the main reasons why I brought that Motion is because of what is indicated in our prayers.

When you begin the session, you normally say that “We seek guidance to treat and consider all matters that shall come under our deliberation in so just and faithful a manner so as to advance the peace, prosperity and welfare of our country and of those interests you have committed to our charge”.

When we are elected as leaders, we are given the responsibility to ensure that every citizen in this country gets a chance to access services which sometimes, based on rulings by the Judiciary or action by this House, certain citizens fail to get them.

Mr. Deputy Speaker, Sir, I listened carefully to your ruling. It makes me think that the relationship between the Judiciary and the Legislative arm of Government is very interesting. Your interpretation of Article 179(5) of the Constitution has been lengthy and elaborate. However, the same Article has been interpreted differently by the Judiciary. I would like to assure you, the House and the people of Kenya that I was very objective when I brought the Motion to this House. The Motion was not influenced by any personal feelings or opinions. I am concerned about the issue of continuity so I appreciate your ruling.

I would like you to clarify the last sentence of the ruling where you have indicated that we should respect the separation of powers between the two arms of Government. However, earlier on, in your submission, you used a term which all of us wondered whether it is right---

(Loud Consultations)

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, Members! We are making observations of the ruling that I have just made. I urge the Senators who are retreating to do so in dignity.

Sen. Olekina: Mr. Deputy Speaker, Sir, I thank you for protecting me. I would like to reiterate that this Motion was brought in the spirit of being objective. I have no personal interests or reasons to believe that certain things must be done.

I would like you to interpret what you meant in your ruling by saying that the ‘learned judge was wrong’. However, later on, you said that we must respect the separation of powers between the two arms of Government.

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, Sen. Olekina! Judges are wrong every day; that is why appealing is allowed. There is nothing disrespectful about having an opinion. In fact, in my former life as an academic, one of the roles of an academic is to critique judgements. I am actually very polite in my critique. Some critiques are extremely brutal but Judges take it in stride.

Sen. Olekina: Mr. Deputy Speaker, Sir, I will be guided by you. However, it boils down---

The Deputy Speaker (Sen. (Prof.) Kindiki): What is your point of order, Sen. Wetangula?

Sen. Olekina: Mr. Deputy Speaker, Sir, I am on a point of order.

The Deputy Speaker (Sen. (Prof.) Kindiki): Kindly proceed, Sen. Olekina.

Sen. Olekina: Mr. Deputy Speaker, Sir, your learned friend, Sen. Wetangula, should go back and read procedures of this House. I am on a point of order so I should be allowed to finish.

The Deputy Speaker (Sen. (Prof.) Kindiki): Absolutely. We have heard you. I do not impute that you were acting for someone or something.

Kindly proceed, Sen. Olekina.

Sen. Olekina: Mr. Deputy Speaker, Sir, when certain things are brought to this House, we ask ourselves what informed the decisions of the drafters of the Constitution at the time. I am happy that you have elaborated Article 179(5) by bringing up the issue of objectivity versus subjectivity. Looking at the Oxford Dictionary, the term absence is defined differently from your definition. I am at a loss because I no longer know what it means to be absent.

I really appreciate that you elaborated the Governors of Samburu and Kiambu counties can access their offices with permission from the EACC. Therefore, when we bring up matters before this House, it is not for our personal consumption but to help build continuity in this country. When services cannot be rendered to the people, it behoves us to ask ourselves serious questions to what we must do to ensure that the people of Kiambu and Samburu continue receiving services.

Mr. Deputy Speaker, Sir, I am completely against deputy governors imposing themselves as governors. As you have rightly stated, the governors are still members of the executive. However, there are roles that are clearly defined and delegated to the governors. We cannot re-delegate those duties to the deputy governors.

I appreciate your ruling. I would also like to assure you that my Motion was intended to ensure that the people of Kiambu and Samburu Counties continue to receive services. I hope that the two governors are watching these proceedings so that they can proceed to the EACC and seek permission to access their offices. If the governors were barred from accessing their offices in Samburu and Kiambu Counties, they can use the Council of Governors (CoG) offices in Nairobi’s Delta House where they pay a lot of money.

Mr. Deputy Speaker, Sir, lastly, part of the reason I brought the Motion is because when I sit at the County Public Accounts and Investments Committee (CPAIC), where governors appear before us to respond to audit queries, I have always wondered what would happen if the Governors of Kiambu and Samburu Counties appeared before our Committee and are subjected to answer questions on how funds were utilized during this financial year. How would they respond yet they were not allowed to access their offices? How would they respond to the audit queries?

I raised weighty matters in the Motion which this House has to define clearly. Legally speaking, the Governors of Kiambu and Samburu Counties are not liable in what happens in those counties at the moment because they are not privy to the day-to-day running of the counties.

Mr. Deputy Speaker, Sir, I appreciate your ruling. I will redraft the Motion.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. Olekina for the kind remarks despite the fate of your Motion.

(Laughter)

It is gracious of Sen. Olekina to comment on the ruling. The Constitution and the law have presided over the funeral of Sen. Olekina's Motion. I was only an undertaker.

(Laughter)

I urge Senators who would like to speak to the ruling to do so briefly.

Let us hear from Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Deputy Speaker, Sir, you were not just an undertaker. I have performed the funeral rites to this Motion. I would like to encourage Sen. Olekina not to be discouraged. Some of us who have practiced as advocates, will tell you that half the time when we go to court, we get our motions and pleadings dismissed. More importantly, we get a chance to tell Judges to their faces that they are wrong.

I am happy about the ruling that the Chair has made because as we were walking into the Chamber today, we met Sen. Wako and told him that we only got a small paragraph of the BBI report whilst your ruling has reinforced the jurisdiction of the Senate in terms of protection of the counties. I would have loved to see a better paragraph in the BBI report about what you have said.

Mr. Deputy Speaker, Sir, kindly give us signed copies of the ruling you have made so that we can share with some of the courts, especially where you stated that Justice Mumbi Ngugi issued her ruling *per incuriam*. That portion is important because you have elaborated their access to the offices. It should be understood that the office of the governor, for purposes of the person who has been charged is a crime scene and therefore, he cannot access it. However, that direction does not remove the governors from office.

For the avoidance of doubt, I would like to repeat that a ruling such as yours should find a way to come to the dispatch box where we can have a file on all the rulings

of the Speaker. I have been in this House for a long time but I have never heard a ruling that long and well-researched. I thank you for that ruling and wish you well in your endeavours.

Mr. Deputy Speaker, Sir, I thank you.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. Mutula Kilonzo Jnr.

Kindly proceed, Sen. Wamatangi.

Sen. Wamatangi: Thank you, Mr. Deputy Speaker, Sir. I also want to take the opportunity, first to congratulate you for the well-reasoned and well-researched ruling. On the same breath, I also wish to congratulate my colleague Sen. Olekina for having thought about the problem that is being encountered in some counties which are facing this scenario, Kiambu County being one of them.

I am also glad that you have availed an avenue through which the same Motion can be revived though amended to conform to your ruling but it can still find its way to the Floor of this House for discussion. Hopefully, Sen. Olekina through the Deputy Speaker, will eventually achieve the objective that he had when he brought the Motion to the House.

Kiambu is one of the affected counties in such a way that as we speak, we have two impeachment Motions which are in the County Assembly of Kiambu. One Motion has been filed to impeach the Governor who is already facing court charges and another has been tabled by a section of the MCAs to impeach the deputy governor. In the next one week or so, it is envisaged that the same House will be voting, deliberating and determining the fate of the two officials; the governor and his deputy on whether the two should be impeached.

Your ruling has been a long time coming. It is very necessary that these matters be clarified such that county governments can stop having a space of leadership that is so confused. I want to, not only congratulate you but also request, as Sen. Mutula Kilonzo Jnr. has said, that you give us signed copies of that ruling so that we can be able to pore through it, see that reasoning and hopefully be able to have a detailed and proper engagement with the leadership of our counties. This will ensure that there is clarity on what should be done.

The best medicine that can be prescribed for the Judiciary is for them to be expeditious in determining the matters brought before them. It should not become a bridge - today we are speaking about building bridges - or it should not become a special purpose vehicle that a delayed determination of a matter then can find a gray area whereby other orders will be given that will be assumed to stay in place of a determination. I believe when that is done, we will have order.

How I wish that - especially like in the case of Kiambu - the court can sit and determine that matter tomorrow, such that the county can have a clear leadership and people are able to know that this is the person that they will be calling their governor. The kind of confusion we have right now in Kiambu has brought the county to a gridlock. The situation has promoted infighting and divisions amongst the MCAs, some who are deemed to be loyal to the governor and others loyal to the deputy governor. Indeed, this

situation is not only promoting confusion but unfair and unnecessary competition. Work cannot be done.

I want to laud you for giving the ruling so that we are able to move forward.

Mr. Deputy Speaker, Sir, I support.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you. Proceed, Sen. Wetangula.

Sen. Nyamunga, please approach the Chair.

(Sen. Nyamunga approached the Chair)

Sen. Wetangula: Mr. Deputy Speaker, Sir, I want to congratulate you and also salute Sen. Cherargei for raising the point.

When Justice Mumbi Ngugi delivered her judgement, I remember telling Sen. Mutula Kilonzo Jnr. that that is a judgement *per incuriam* and you have come to restate the same.

On Wednesday, the week when the BBI report was tabled in Bomas, the Chairperson of the CoG called out for the governors to stand up. I was amused to see Governor Waititu standing up and his deputy standing up as well. That is the level of confusion we have been having.

When Sen. Olekina moved his Motion - I am always very keen to speak on every Motion - but I was hesitant because I saw traits of un-constitutionality and unconstitutionality in it and you have come to state as such. I do not want to say too much. You have just acquitted yourself as you always do, that your professorship was not given in River Road. You have shown this House and the country that you really merit to be what you are. I feel proud that I played a role in your formative years by being your boss in my practice.

(Laughter)

The Deputy Speaker (Sen. (Prof.) Kindiki): It is not contested, Sen. Olekina. Proceed Sen. Wetangula.

Sen. Wetangula: Thank you Mr. Deputy Speaker, Sir. I share the sentiments of Sen. Mutula Kilonzo Jnr., this ruling should be published and circulated. In your delivery of this ruling you have been performing a *quasi judicial* function. That ruling is of serious persuasive value to any court proceedings and can be used anywhere within the Commonwealth. In fact, it should go into the publications of the Commonwealth that are normally circulated through the Commonwealth Parliamentary Association (CPA) publications. I am happy that Mr. Njenga Ruge is here. He is the co-ordinator of the CPA activities in this Parliament.

More importantly is the fact that we make it very clear that in a Presidential system, the President and his Deputy; the governor and his deputy are a package. You go in and take your victim as you find him. If you disagree, that is up to you.

Sen. Orenge, you remember the case of Ghana when Jerry Rawlings could not agree with his Deputy President; being a presidential system they were both tied at the hip like congenital twins. Jerry Rawlings as the president could only box his deputy in

Cabinet meetings because he could not sack him. That is exactly the reason why governors are concerned with regard to their deputies and vice versa; the same applies to the President and his Deputy. In any situation where the governor is in office and there is a deputy governor pretending to be a governor, that is totally untenable.

Equally and more important is that the office of the Director of Public Prosecution (DPP) and of the Director of Criminal Investigation (DCI) and those of us who have practiced at the criminal Bar where Sen. Orenge is very active, we encourage these offices that there is no point of taking someone to court and say we are investigating, or we are waiting for something. If you look at comparable jurisdictions in the USA, Australia and the United Kingdom, when the DPP takes a case to court, subject to availability of court time, he starts the hearing the same day and proceeds.

You cannot take somebody to court and declare a whole county a crime scene and paralyze the operations of a county and that of an office that is so critical to the provision of public services. This ruling should again be sent to the DPP and the DCI for them to know and understand that if they are not ready, they should not file cases in court. They can take people to court when they are ready and start the case immediately. In fact, we would not be having, strange stories like somebody called Jowie who is applying for bail today yet his ruling will come in February. Those are unconstitutional processes that just hurt people for nothing.

I want to salute you, Mr. Deputy Speaker, Sir, and I also salute young Sen. Cherargei that at your age with little experience, you are doing very well in this House as the Chair of the Committee on Justice, Legal Affairs and Human Rights. This House must continue being what it is. You must lead by example and this ruling must also be furnished to the Speaker of the “Lower House” so that they can also be able to understand the processes of running a House of this nature.

Thank you, Mr. Deputy Speaker, Sir.

(Applause)

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you very much, Sen. Wetangula, my former boss.

As requested, I will, immediately I rise from the Chair and sign the ruling and return it to the House for production and it can be distributed to all the Senators if they like.

I will direct that the ruling be produced and availed to the Senators by tomorrow because we are proceeding on recess.

(An hon. Senator spoke off record)

We are continuing, I was just trying to dispose of that issue. That leads me to the next speaker who is none other than Sen. Orenge, the Senate Minority Leader and Senator for Siaya County, Senior Counsel.

The Senate Minority Leader (Sen. Orenge): Thank you, Mr. Deputy Speaker, Sir. I want to thank you for this very well-considered ruling.

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Sometimes I wonder why in the very many years of this Parliament, we have not published a compendium of the rulings of the Speakers. There was a time when an issue arose in the “Lower House” and we were able to get published rulings of the Speaker of the Parliament in New Zealand. I cannot say that they are doing any better because our Houses of Parliament have come out with very good rulings. I think this is one of the very best.

First, thank you for demystifying the fact that it is only the courts that interpret the Constitution or the law. In fact, if you go by Article 10 of the Constitution, it talks about State organs or any person applying or interpreting the Constitution.

This is something that we do on a daily basis. As the Speaker sits on the Chair, all the time he is thinking, applying and interpreting Statutes and Regulations so that some order can prevail in our debates and nothing goes out of the parameters of the law.

More importantly, the ruling that you have made in respect of, or your comments on the *obiter* comment in Judge Ngugi’s ruling are very fundamental and very important, particularly when we have elected in our system of Government, the centrality of human rights. Article 19 says that the Bill of Rights is an integral part of Kenya’s democratic system. Although, sometimes when we make a lot of noise about what has happened or somebody has been given bail, they forget that this Bill of Rights, more than any other one has elevated the Bill of Rights to a level that we had never heard before compared to other jurisdictions.

It says that the rights and fundamental freedoms contained in the Constitution are not the full amplitude or limit of rights and fundamentals of freedoms. The ones that are in the Constitution are not the only ones because these rights are in here; they are not given by Government. Therefore, the first point is that you have made the point that it is not in the premise of the courts exclusively to interpret the Constitution.

Secondly, the doctrine of judicial precedent does not apply in cases where it can be proven that a judgement was made in error or in ignorance of the law. They have gone through the reasons why some of the comments *obiter* in Judge Ngugi’s ruling are plainly wrong and unconstitutional.

In fact, she may have forgotten about the debate that took place because in order to protect some of these independent offices and commissions that independence can be interfered with by a trumped up charge being brought to court and by the time it is brought, you lose office and your case can be in court for five years.

In fact, your term can expire before the case is over. I was having a discussion with some of my colleagues; I was telling them that if what Judge Ngugi is saying is right, then, Members of Parliament, you are in for a very rough time. In fact, Sen. Cherargei will also---

(Laughter)

This is the second time that he is a candidate for suspension or removal. Most of the time - let us be honest to ourselves - when we have some of these laws, the first targets are always politicians and parliamentarians, not even Judges. When they being made, be very careful. Your political life can be brought to an end.

There are people who are elected here and never really serving because they were busy in the courts, like they have started with the Senator for Nandi. This is just the beginning. You need to be made of steel. In this, it does not depend on which side you belong. On this issue, there are no sides. It can land on you any time. With bridges or no bridges, it can land on you.

Mr. Deputy Speaker, Sir, what you have done--. In fact, I was the first to make it known to you that I need a copy of that ruling. It is extremely persuasive. For example, in our Constitution, the President enjoys absolute immunity. If today the President shoots somebody, like President Trump was saying he can shoot anybody on Times Square and nothing will happen to him, the law is such that you cannot remove him because that is what the law says. You cannot even institute civil cases and there is a reason for it.

Similarly, for offices; these are only applying to independent offices or offices where somebody is elected but exercising executive authority, the Anti-Corruption and Economics Crimes Act, Section 65, says that, in instances where there is a specific provision for removal, the provisions contained in that Act will not apply because there is already provision for removal and the threshold is actually lower. It is serious reasons to believe that an offense has been committed. That is a lower threshold.

If you have trouble with the governor and you want him removed, all that you need to do is to convince the county assembly to come to the Senate with Articles of impeachment. If your constituency thinks that you are not doing a good job, they can collect signatures, there is a process for removal. Otherwise to come one day – you know in politics there is no sense, even as we love our Whip for the Minority, somebody can just come up with the most heinous even salacious---

(Laughter)

What you imagine you can never do in your life and you have yourself charged in a criminal court like the former Member from Nakuru, Hon. Mark Mwithaga who was charged for assault on his wife.

Before the charge was instituted in court, the wife said: “I have not been beaten and you can take me to the doctor”. However, he was charged without evidence from the wife, was convicted and sentenced to serve three years in Naivasha Maximum Prison for simple assault. These things can happen.

I know that it is not easy to read the Standing Orders, the Constitution, a whole judgment and do cross reference. It is possible for one to actually have a tunnel vision where they only look at the Standing Orders and forget about the other things but you did not do that. You have made a comprehensive ruling and it shows the reason as to why this House is the “Upper House” because I doubt--- Allow me to stop there.

(Laughter)

The Deputy Speaker (Sen. (Prof.) Kindiki): You have ended up saying what you have not said.

Thank you, Sen. Orengo. We might have to reflect further. I have alluded to this but not deep enough. The instruments, apparatus and institutions of criminal prosecution reside with the national Government. Governments all over the world compete and struggle for jurisdiction. A country can have bad administration and we have even had one in this country. One way of emasculating devolution is through the use of the apparatus of criminal justice system and power of devolution. We do have the mechanism for removal of a governor or a deputy governor from office if he is not doing well in the Constitution. However, as noted by the Senior Counsel, the threshold is so low. It is actually enough to meet the threshold in Article 181 of the Constitution if one suspects a governor of doing something.

Finally, I think the learned Judge Ngugi made her judgement in haste. I have read it several times; and I believe she could have been busy. She was dealing with an application at that given time and from the language, she was trying to say that she is not sure but was just reflecting on this issue. She was more or less just posing questions. I am saying this because one of the decisions that she refused to admit which had been submitted was the decision about the Deputy Chief Justice. I know that this is not relevant to this but for the same reasons, I believe that it is unconstitutional and against the independence of the Judiciary to submit a sitting Judge whose mechanism for removal is provided for through the process, like what the Deputy Chief Justice is going through. This is because it actually violates the entire architecture of the Constitution and the independence of Judiciary.

My argument is that the information regarding a Judge who has committed a crime should be taken to the Judiciary Service Commission which is the proper mechanism for removal. After that, the Judge can be prosecuted when they have vacated office. To bring a Deputy Chief Justice of the Republic to appear before a magistrate, is like violating the entire judicial structure and making it look like a mockery. What do you expect that magistrate to say or do?

Sen. Cheruiyot: Thank you, Mr. Deputy Speaker, Sir. This is a sagacious and well-thought out ruling. It is measured in every aspect of your findings and it is extremely deep. I have listened to my colleagues raise very valid points.

It is said that to whom much is given, much more is expected. Kenyans insulated the Judiciary from any outside influence and you have alluded to that. It is, therefore, expected that as they go about their duty, they will protect the rights of the citizens above and beyond any other influence. This is one such instance and you have given good examples as to why you think that the good Judge may not have given her best thoughts to some of her rulings.

I know that you do not do carry your phone when you are on the Chair but how I wish that you were online. You would have seen the interest that this debate has generated amongst the deep thinkers of our society who have requested for a copy of the ruling that you have made. This is not your ordinary Kenyan news stuff. Kenyan media prefers the story of a Senator who has abused the other. This is a challenge to our Clerks-at-the-Table. It is good that Carolyne Kinyua is here because she does a good job of feeding us with that kind of information. That ruling will be good for circulation. Kenyans should read that ruling and they should be alive to some of these issues. If we

leave it to the media to inform the public, we can be assured of having a very misinformed society.

I recognize the issues that Sen. Olekina has addressed himself to. He has said that there are things that need to be answered when a governor is absent and you have provided a good way forward. You have explained how the person, who is supposed to take over when one is absent, should do it.

We have two issues here. The first one is the absence and the second one is how to secure the absence of a governor if they are suspicions of crimes that he has committed. You have stated that there is a mechanism on how to do it. In the impeachment case of the Governor for Embu, Governor Wambora, the Supreme Court held that an impeachment process is sequential and that one thing has to lead to the other before one gets to the point of impeachment. In your ruling, you felt that there was a violation of the sequence and you are of the view that there ought to be a sequence. That does not mean that the two governors who have been asked to step aside are guilty or not guilty. However, you are saying that there is a procedure to be followed that will help in determination of how to get them out of office.

As Kenyans, we must not forget our history. We know that people were tried for all manner of reasons in the period between 1963 to 2010 and some of those people are Members of this House. Most of them were tried for political persuasion. If one does not like the Deputy Speaker, they can initiate any kind of proceedings against him.

The current political situation in this country has taught us that men are susceptible; that between men and an institution, trust the institution more. That is the essence of what our Constitution has done. It has built and given powers to specific institutions. Parliament is one such example. We sort of enjoy our independence with so much variation.

Mr. Deputy Speaker Sir, reading Article One of our Constitution, the first institution where citizens donated their sovereignty is Parliament, even before the Judiciary. It is because of instances like today, where one can give direction and say that we think this is the proper route that the country needs to focus on in addressing some of these issues. Of course we understand the concerns and the mood of the country.

Somebody cheekily read the mood of the country, saying that citizens are tired. We come here and debate the Division of Revenue Bill and the County Allocation of Revenue Bill, but you find that things are different when you move to the ground. Out of that hype, somebody said that we need to set an example. However, we must be careful not to set a wrong example; it must be the right one. We must be thorough and systemic in how we achieve that exercise.

Mr. Deputy Speaker Sir, I believe that between sending a signal and actually giving a signal, you need to go for the latter. Give the actual signal. Let the process begin at a county assembly and let it come to Senate so that we can confirm that governor "X" has, indeed, pilfered public finances. Let it be confirmed. If it moves to court, as is envisioned in our Constitution, let the court also look at the evidence. If we can go through such a process and complete it to the end, we would have set a good example. In essence, that is what you were advising the House to do.

Today you were in your 1:59 mood; if I may put it that way.

The Deputy Speaker (Sen. (Prof.) Kindiki): It is 1:59:40.

Sen. Cheruiyot: 1:59:40, Mr. Deputy Speaker, Sir. I do not want to leave out the 40 seconds. I may shape it because I think that it is better because it will stay for longer.

Mr. Deputy Speaker Sir, allow me to respond to something that Sen. Orengo has said. Apart from being a Senator in this House, I am also a Commissioner. One of the things that we are trying to do in this current Financial Year is to go digital with all our records. Sen. Orengo reflected – you can imagine with almost 40 years of being this House. Unfortunately, when people try to retrieve such rulings like the one you have given today, it is sometimes difficult. It is said that there are very few rulings such as the one you have given.

I want to comfort you. Be assured that when we finally achieve that process, this will be among the very first to go there. This is not just because you and I are friends or because you spent three nights away from your House trying to bring me into this House in 2015, but because of the content of what you have given this House.

The Deputy Speaker (Sen. (Prof.) Kindiki): Sen. Cheruiyot, if anything, they were seven nights!

(Sen. Wetangula spoke of the record)

Very well. Thank you so much colleagues.

Finally, Sen. Cherargei.

Sen. Cherargei: Thank you, Mr. Deputy Speaker Sir. I congratulate you for the well-researched and concrete ruling that you have given today afternoon. You have reasserted the intention, spirit and the letter of the Constitution.

Article 181 of the Constitution has espoused the grounds in which a county governor can be removed from office. I am happy that you have stated that the people of Kenya still have the power to elect or not elect their leaders. Many people would have thought they can use courts of law to elect or select leaders to their offices, especially the governor.

I agree with my colleagues that since devolution is facing a lot of challenges because of lethargy, ineffectiveness, moribund issues, corruption and graft that is affecting most counties many people thought that the only way to remove governors was by using the courts. This is one of the ways of disrupting the implementation of devolution. I agree that many Kenyans were not happy, but that is not a justification to try to disrupt the implementation of devolution in this country.

Mr. Deputy Speaker Sir, your ruling is welcome. I hope that the agents that are necessary are--- The Director of Criminal Investigations (DCI) and the Director of Public Prosecution (DPP) should conduct investigations. I am one of the victims of such, less than 24 hours ago. The DCI and DPP must conclude investigations of the case before charging anybody before a court of law.

When this ruling was made, it is important that the people be made to understand that there are constitutional ways of electing and removing a leader. According to Article 181 on the removal of governors, one of them is not through the courts of law. In as much

as we anticipate the challenges that are in Samburu and Kiambu counties, that does not give justification or license for anybody to disrupt the implementation of devolution.

Mr. Deputy Speaker, if you allow the courts and such individuals to push the agenda through any way, I can tell you that we will be removing the power of the people that has been given in Article 2 of the Constitution, where the sovereignty of the people can be practiced only through elected representatives.

Secondly, it is important that you have reassured and instilled confidence in the future of devolution. This is because as the “Upper House” and the protector of the interests of the counties as provided in Article 96, we need to reassure Kenyans and instill confidence in them that devolution will work for our people.

As I have said, when my colleagues were doing the supplementary budget the other day, some of them said that the Judiciary should not appear before the Senate. It means that we have a shortage or disability of reasoning and understanding. I hope that this illustrious ruling – I can equate it to the Solomonic ruling – should be supplied for academic, political discourse and people who are trying to build bridges, so that they can understand the dynamics of running an “Upper House”.

Mr. Deputy Speaker Sir, I thank Sen. Olekina, because his intention was to ensure an efficient running of our country governments. It is good that you have given him an option of redrafting that Motion, so that we can ensure that our county governments run smoothly. I understand his frustrations.

Today, we were sitting with the governors in regards to pending bills. I have had occasions where I sat in the County Public Accounts and Investment Committee (CPAIC) when governors appeared before them. It is high time that we protect devolution by all means as a country. As you have said before, there is a way they can try and kill some of these institutions.

Thirdly, as a celebrated academician and a leader, I always tell you that your future is bright and luminous. When history will be written, you will have a special chapter in the history of Kenya, because you are steering the legislative arm of Government in the right direction. I want to tell Kenyans that as a Senate, we are interested in protecting the independence of all arms of Government. We are interested in ensuring that the interests of counties are protected. We are looking into the future even in terms of allocation resources. We are aiming for one man, one vote, one shilling, so that everybody can be allocated based on their issues.

We ask the courts to be very careful when making decisions especially, those that have a far-reaching effect on the issue of this---

Mr. Deputy Speaker, Sir, we saw the Building Bridges Initiative (BBI) Report, which has 156 pages of proposals. One of them is that Kenyans are happy about devolution. In fact, Kenyans propose that we need to move from allocations of 15 per cent to even 50 per cent.

Mr. Deputy Speaker Sir, I thank you graciously because you gave the BBI the baby that I raised. Unfortunately they threw the baby and the birth water away, but we still have that drafted Bill. Our main issue was on how to strengthen devolution in order to ensure that more resources go to Narok, Kisumu or any other county. That has always been the agenda of this House. I am happy that Kenyans came out in large numbers to

give their views to the BBI Taskforce. They fully support devolution, and they want it to work. However, the agencies that fight corruption in these countries should be careful as they investigate and prosecute. Let them not rush to the dailies to publish stories and put it in the media before having a concrete case.

We agree that our counties have a problem with issues of corruption. However, that is not a justification to use it as blackmail or with the aim of using it for political gain or the weaponisation of corruption. I agree that those are some of the challenges. Even when the Constituencies Development Fund (CDF) started in 2003, it faced a lot of challenges. However, as we speak, it is one of the celebrated successes today. Why do we not give devolution the benefit of the doubt? In future, we would want 50 per cent of the latest audited accounts channeled to *mashinani*. This is where we need roads, bursaries and medicine for our people. The youth should also ask and be given employment opportunities, and all other things.

Mr. Deputy Speaker, Sir, I thank you for that ruling. I also hope to drink from that fountain of legal wisdom that you have espoused today in the afternoon. I hope that it will assist us in making future decisions and reenergize us, as protectors of devolution. This will ensure that even as we preside over the second generation of devolution, by the time it comes to an end, everybody will be happy. That way, we will ensure that the country moves forward for the benefit of all of us.

I hope that the “Lower House” will be reading some parts of this ruling so that they can be assisted on how they also make their decisions and on how they reason. Even the Speaker of the “Lower House” and the leadership should be given opportunity so that they do not just say that the Senate is not needed, or what-have-you. However, they have seen that we have a resounding support from devolution.

Mr. Deputy Speaker, Sir, I thank you and I appreciate that when I raised that point of order on a constitutional aspect, you have given it life. We now have a different perspective, so that in future when we are developing Bills, amendments, Motions, statements or any matter that comes to the House, we will have a compass that will lead us to the right direction; to the full steps of Jesus Christ.

Thank you, Mr. Deputy Speaker, Sir, for giving me this opportunity.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. Cherargei for those beautiful remarks.

What is your point of order, Sen. Olekina?

Sen. Olekina: Mr. Deputy Speaker, Sir, thank you for allowing me to speak twice on a question, but this is something which is very---

The Deputy Speaker (Sen. (Prof.) Kindiki): Because you are on a point of order, you can own it severally.

Sen. Olekina: Mr. Deputy Speaker, Sir, I am a little bit confused in terms of the amended County Governments Act, where--- I was just consulting with Sen. Mutula Kilonzo Jnr. in terms of the physical location, and I wish I could have your attention a little bit.

The Deputy Speaker (Sen. (Prof.) Kindiki): Proceed, Sen. Olekina.

Sen. Olekina: I just wanted you to clarify this, because you said that we have to be objective. In your ruling, you alluded to the fact the court barred these governors from

accessing their offices. When you look at the County Governments Act that you alluded to, the county headquarters are designated. Therefore, does it mean that when you now sit, for instance, in Kiambu and you then decide to sit in Ruiru, are you not going to be violating that County Governments Act? This is just for purposes of clarity, because this is an issue that is intended to ensure that it advises jurisdictions. It helps us to show continuity in terms of service delivery to the people. If you could clarify further, because you referred to Section 6(A) of the County Governments Act in terms of where each has its headquarters.

I remember that earlier on, when I was reacting to the ruling, I had suggested that these county governments or rather these county governors can be able to set offices in Delta House in Nairobi. Since this is a House of record, I want to see whether that goes hand in hand with your ruling. However, now that you have said that they have been barred from entering their offices, that absence does not necessarily mean that the deputy governor can take over the position. It is a very good ruling, but I am a bit skeptical because it is also very dangerous in terms of Article Six of the Constitution. We really have to find a balance.

I hope that Article 179(5) of the Constitution can be further elaborated, because you also used the word “shall.” When you use the word “shall,” it is mandatory. It is not a “maybe;” rather, it is something which is mandated by the Constitution. I wish you can clarify that aspect of it so that even if it comes to redrafting that Motion, it can make sense.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. Olekina.

There are a number of things; first of all, Section 6(A) of the County Governments Act, one of the amendments – I think this year or last year – you will remember that when we passed the law on where the headquarters of each county governments is--- Well, this amendment is very recent, the Dr. Khalwale Act made the headquarters. What this Bill does it to say that; “the county government shall be located at the headquarters.” The Dr. Khalwale Act said, “The headquarters is at place “X.” This amendment of 2019 says, “At that designated headquarters, that is where the county government will be located. The implication is that the county government cannot be established elsewhere.

(Sen. (Eng.) remained up standing)

You can sit down, Sen. (Eng.) Maina; I am not on my feet. I am seated.

Now, you cannot establish a county government office outside the location of the county government office, which is at its headquarters. However, the Constitution and the County Governments Act says, “County governments can have decentralized units” meaning that they can have other smaller offices, but the main headquarters shall be in the town that has been gazetted.

Secondly, what that means is simply the location of the county government. It does not say that the governor must function from there; it does not say so. The governor can function from anywhere. They make decisions, inspect projects, have meetings and do public participation from anywhere, but the office is that gazetted one. Therefore, you cannot establish another county government office outside the headquarters. However,

you can open a decentralized unit or another subsidiary office which is inferior. The functioning of a governor is not limited to a physical office; so, he can function.

I can give the example of Kiambu. The Governor of Kiambu has the headquarters of Kiambu county located in Kiambu town, but he can make decisions, act and do whatever his office is supposed to do from anywhere within Kiambu County. He does not have to do it in the office. He can even establish a decentralized small office somewhere, but the headquarters will be in Kiambu Town.

Thirdly, Article 179(5) says that in the absence of the county governor, the deputy county governor shall act as the county governor. It is mandatory, and that is the question I gave. However, absence must be established, because it is not defined. How do you determine absence? It has to be objective. The only place an objective determination of absence can be done is in a court of law.

Therefore, a governor who does not want to delegate, because I have said that delegation must be voluntary, by reading the law, and it cannot be coerced. However, if the deputy governor wants to enforce Article 179(5) automatically *suo motu*, regardless of the opinion of the governor, then they have to go to court and have the circumstances around the governor declared as an absence. After that, automatically it happens with a court order. Therefore, it is not that easy. A deputy governor cannot sit down and say, "From the way I see my governor, because he has not been in the office for ten days, that is an absence and, therefore, I am the acting governor."

Proceed, Sen. Olekina.

Sen. Olekina: Mr. Deputy Speaker, Sir, I am glad that you have further elaborated. However, the part that gives me hope in terms of service delivery continuity is the word "objective." The absence has to be objective.

I am happy that you have clarified that the people of Kiambu and Samburu who feel that the absence of the governor is objective, can go to court and establish that so that the deputy governor can be able to act as the county governor. I hope you appreciate that when I sit in these committees, we deal with a lot of issues.

Yesterday, we had the deputy governor of Bomet who appeared before us in CPAIC Committee. He argued that the pending bills that they had were only amounting to Kshs143 million. However, the documents that we have from the National Treasury show that the pending bills for Bomet were Kshs1.1 billion. When you think about it, the problem was that he was only concerned about the pending bills that he and the deceased former governor accumulated.

The contractors who had offered services to the County of Bomet during the term of Governor Isaac Ruto were now on their own because the current governor could not be able to recognise that. I think the fact that the governor and the deputy governor are sponsored on one ticket, it is a responsibility that both of them should carry.

Mr. Deputy Speaker, Sir, I am happy that you have further elaborated that the people of Kiambu and Samburu can now go to court and have Article 179(5) interpreted further within the terms that you have given of objectivity.

Thank you, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, very much. That brings us to the end of that matter.

Sen. (Eng.) Maina, are you on the same issue of deputy governors?

Sen. (Eng.) Maina: Mr. Deputy Speaker, Sir, I listened to your wise words as you went through this. What I would like to touch on very briefly is that there is authority of the Speaker, the President, the governor and the Chief Justice.

When the republics were being formed during the Roman Empire from which we borrowed from, it was found that authority has to do with the seat of office. The seat that the Speaker sits on and the robes that he wears signify his authority. The impression that *wananchi* have about the office of the governor is that they can operate from anywhere. For example, I am the Governor of Meru, but since right now I am in Mathare, I can carry out my roles there because documents can be brought to me to sign. That is an instance which I would have wished it was made clear that authority has to do with office.

We have disbursed Kshs1.8 trillion to counties, but looking at the counties in this whole Republic one wonders why we are not seeing how that money has been utilized. We want to see big hospitals and good schools put up everywhere we go.

Mr. Deputy Speaker, Sir, when I listened to Judge Mumbi Ngugi make her ruling, I must say I was inclined to agree with her. She talked of hygiene of the Constitution. I understood her to be saying that if your behavior is polluting the hygiene of the Constitution, then that behaviour cannot be constitutionally right even if you could defend it somewhere.

The rulings that we make in this House should not just be geared towards protecting counties; we must protect the counties and the hygiene of the Constitution. The hygiene of the Constitution has to do with devolving services to *Wanjiku*; services down there where medicine is brought to the dispensaries. The situation as it is today desires to be looked into seriously.

I am sorry, Mr. Deputy Speaker, Sir. I believe that is all.

The Deputy Speaker (Sen. (Prof.) Kindiki): It is okay, Sen. (Eng.) Maina. Those are important views. They are alternative views and you know nobody has finality in terms of wisdom and knowledge. Wisdom and knowledge is infinite.

You have raised two issues. The first one about authority is partly true, but also given the example you have used of the Speaker of the Senate, there are some powers and functions that the Speaker of the Senate cannot exercise unless they are seated officially in the Senate Chamber. There are other powers which the Speaker of the Senate exercises daily either from his office or elsewhere like approving Motions. The Speaker does not need to come here and approve Motions. You will not say that since that Motion was approved by the Speaker from somewhere else, it is not an approval.

However, the Speaker also cannot conduct the sitting of the Senate from town. He has to be here or another gazetted place. In fact, when we move out of here, we have to gazette in the *Kenya Gazette* where that sitting of the Senate will be.

Therefore, I agree with you that authority is geographic and locational and has to do with the office. Therefore, borrowing the argument to the issue of governors, I agree that there could be some functions that the governors in question may not be in a position to discharge. That is why I said Justice Mumbi was saying, "A good governor who minds about the people and respects the Constitution should not punish his people because of

his personal circumstances. They should be able to tell their deputies to fill those gaps so that people do not suffer”.

On the second issue of hygiene, I totally disagree. Hygiene is a political term; it is not a legal term. There are things Sen. Orenge keeps on repeating here and I do not think we have understood them well. I think Sen. Orenge is one of the longest serving politicians and lawyers. He has represented all manner of people.

There is a reason an accused person is presumed innocent. In fact, there are many cases where innocent people are dragged to court. You cannot, therefore, imagine that as soon as somebody is charged, they are dirty and are not hygienic. They are presumed innocent; in fact, they are clean. As a good Judge will tell you, it is better to give the benefit of the doubt to a guilty man than to convict and punish an innocent man.

In fact, I have even misquoted it. It is a judgement which said: “It is better to set free a thousand guilty people than to convict and punish one innocent person.” Therefore, there is a reason why there is a presumption of innocence. The fact that you are dragged to court could be due to politics; it could be erroneous or malicious things. You would rather have guilty people benefiting from that than an innocent person suffering the consequences of the so-called “doctrine of hygiene” which I do not find anywhere in the Constitution, anyway.

Order, Senators, having said that, we have come to the end of that.

I think we were on Order No. 23. I do not see any other request.

Let us go to Sen. Olekina.

Before Sen. Olekina takes the Floor, I want to give the following direction: Once we finish debate on this matter, we will go to Order No. 25, time permitting, which is the item by Sen. (Eng.) Maina.

Sen. (Eng.) Maina, I hope you have a seconder.

Very well. Proceed, Sen. Olekina.

(Resumption of debate on Bill)

BILL

Second Reading

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL (NATIONAL ASSEMBLY BILLS NO. 13 OF 2018)

Sen. Olekina: Mr. Deputy Speaker, Sir, I rise to make my contribution, not to support, but oppose the National Assembly Bill, the Statutes Law Miscellaneous (Amendment) Bill.

Last year, there was an omnibus amendment Bill from the National Assembly that introduced Section 9(a) on the Registration of Persons Act which ended up introducing the famous *Huduma Namba* that has never proven to be anything.

I have gone through the National Assembly Bill and I think this is a very bad way of trying to develop legislation in this country. What I have come to learn is that in all

these miscellaneous amendments, they come in either to create jobs, which in most cases end up being given to only one ethnic group and this brings a lot of divisiveness in this country.

Mr. Deputy Speaker, Sir, I have gone through this Bills and starting from the first one which is on the Dairy Industries Act, one of the things that shocks me is that the National Assembly would sit down and come up with amendments to punish young dairy farmers in Kenya who probably have not even been enlightened on the need to register their industries.

Currently in the Act, one of the things that I thought was punitive is that these amendments on this Dairy Act, Section 33 now want to delete the expression Kshs2,000 and substitute therefore, the expression Kshs1 million or imprisonment for a term not exceeding one year or both. In fact, this has a lot of typos that need to be taken care of.

Mr. Deputy Speaker, Sir, it is wrong. I do not know whether we have become so broke in this country such that we are looking at every avenue to be able to tax and punish people. You cannot impose so many taxes on Kenyans. There are people who have got one cow. They milk the cow and sell the milk. It is not like the likes of my good friend, the Senator for Kirinyaga who probably has got 1,000 cows. People should be treated differently. We should not support such amendments in this House. We should try and create wealth.

The drafters of the Act saw it wise to make these penalties affordable. If we are talking about coming up with penalties to penalize people who adulterate milk, I will support that. If this Miscellaneous Amendments Bill proceeds - that debate we had yesterday notwithstanding in terms of the status of our Bills which we send to the National Assembly - then we would come up with various amendments.

It would be important for us to come up with amendments that mandate all big dairy farmers; one that classifies the different levels of dairy farmers. For instance, if a dairy farmer is able to produce 200 or 300 litres of milk, it mandates them to have technology or equipment that can measure the fat and protein content and can detect if there is any water added.

Mr. Deputy Speaker, Sir, if you go to the industry - I am quite versed in that industry because I am in it - you will find that if you take milk from all those vendors, manufactures or the processors of milk and you subject it to a lactic test, you will find the protein and fat content which we are supposed to rhyme together, vary.

I am not going to mention the name of the company, but if you look at the fat content you will find that it will be 0.429. The protein content is 0.24. Any scientist or any person who processes milk will tell you that milk has been adulterated. When you look at the water added, you will be able to see that they have added about 0.257 or 0.3 per cent in the milk.

Mr. Deputy Speaker, Sir, the amendment that we should be seeing coming from the National Assembly to amend the Dairy Act, is not to create authorities or to penalize dairy farmers, but amendments that will ensure that whatever products we give to our people are of high quality.

The reason a lot of people are dying of cancer in this country is because the Kenya Bureau of Standards (KBS) has not taken their job seriously. I support young

farmers selling milk, but it is wrong when people decide to adulterate to preserve the milk for a longer period. When we have an Act of Parliament, there is nothing that protects the consumers.

Mr. Deputy Speaker, Sir, I oppose this punitive law in this Bill and I hope that we can be able to bring more sound amendments to the Act; some which are meant to encourage young farmers to be able to create young business, but not to decide that it is only a few people who can start the dairy industry.

There are other Bills which the Miscellaneous Amendment Bill tends to amend that I will comment on. They are Bills that deal with the issue of public finance management. I saw an amendment which is sought. When you read it carefully, this one on the Public Procurement and Disposal Act (PPDA), I do not suppose that this is an amendment that should be brought in through an omnibus Bill.

I agree with Sen. Mutula Kilonzo Jnr., that there are three Bills which should be looked at carefully. One is the one that deals with procurement. The second one is the one that deals with the public finance management. Any amendments that come in, I can bet you it could be somebody trying to sneak in something. I keep on saying that sometimes we go out there and start complaining that the Government is not doing this or that, or it is punishing its citizens, but you will find that in most cases, we the elected legislators are not usually here to scrutinize such amendments, and then we come and complain later when they become Acts of Parliament.

I know all of us are busy, but it is about time that we took our jobs seriously to look at these amendments that are coming up. Somebody is trying to sneak in an amendment through this omnibus Bill to ensure that any job that they do, they are paid directly. There is a place I read here that money is paid directly to the contractors.

Mr. Deputy Speaker, Sir, I oppose this Bill and I hope that subject to your ruling on the status of this Bill, we can be able to really sit down and send the Bill back to National Assembly and demand that any amendment that has to do with dairy the industry, has to do with the issue of quality control and protecting farmers, but not to create jobs for certain individuals.

On the issue of public finance management, we should never entertain in this House an omnibus Bill that brings in free Acts of Parliament and amends different provisions that you would find, if they are well scrutinized, they are not good for this country.

I oppose.

The Deputy Speaker (Sen. (Prof.) Kindiki): Very well, I see no other request. Mover, please reply.

Sen. Kihika: Mr. Deputy Speaker, Sir, I beg to reply.

The Deputy Speaker (Sen. (Prof.) Kindiki): You beg to move.

(Sen. Kihika spoke off the record)

The Deputy Speaker (Sen. (Prof.) Kindiki): By begging to move, you end up to reply. The consequence of begging to move is to reply. Please reply Sen. Kihika.

Sen. Kihika: Mr. Deputy Speaker, Sir, I beg to move.

The Deputy Speaker (Sen. (Prof.) Kindiki): Very well.

Sen. Kihika: Mr. Deputy Speaker, Sir, I have taken notice of all the comments that have been made by Senators. From the ones that are in favour of the Bill as well as those who are not. This includes all the concerns, objections and the critical issues of being alive to the fact that 11 laws are being amended. So, we must be very careful as we go this direction so that we make sure nothing is sneaked in there.

Mr. Deputy Speaker, Sir, I beg to move.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you. You can have your seat.

Sen. Kihika, I just want to offer some guidance. When you are called upon to reply, you start by saying; “Mr. Deputy Speaker, Sir, I beg to reply.” Then you talk and when you finish, you say: “I beg to move.”

Further to my direction yesterday, there shall be no Division on this Bill on the Second Reading until I give a ruling on the point of order raised by Sen. Sakaja of Nairobi City County yesterday. It raised a substantive constitutional issue.

I also want to clarify again, in my view, concerning this particular Bill. It is not the number of Bills being amended that would perhaps raise issues, it is the substance of those amendments. In fact, the more the Acts of Parliament being amended, the better because that then qualifies to be a miscellaneous amendment Bill which amends various laws instead of bringing one by one. However, the amendments should not be so substantive as to defeat the object of a miscellaneous amendment Bill.

We will wait. I have promised to give a ruling on the first day of the Fourth Session which is sometime in February, 2020 considering that we rise tomorrow for recess.

(Putting of the Question on the Bill deferred)

Hon. Senators, just to repeat the earlier direction which is that today’s ruling be reproduced in hard copy and put in the pigeon holes of every Senator by noon tomorrow. This is on the understating that we will be proceeding for recess.

We now proceed to Order No.25.

BILL

Second Reading

THE ELECTION (AMENDMENT) BILL (SENATE BILLS NO.18 OF 2019)

Sen. (Eng.) Maina, proceed. If you want the Bill moved and seconded, then you must look at the clock because we have 30 minutes in total to do that.

Sen. (Eng.) Maina: Thank you, Mr. Deputy Speaker, Sir. I rise to move that The Election (Amendment) Bill (Senate Bills No.18 of 2019) be now read a Second Time.

In brief terms, let me explain the purpose of this Bill. During elections, as most Senators may be aware, the electorate may give you a name that they generally identify

you with. It may be a name or character out of their making, but that is the name that is in their mind.

As Senators and lawyers in this House may know, when you want to use that name, it is an extremely tedious exercise. It is actually something that also touches on other constitutional matters of the freedom of the candidate. I am trying to say that for example, the people of Meru County could easily adopt the name “Mr. Speaker” or they may call you “Order” because they hear you saying; “Order”. It is just the way we were calling Hon. Kaparo in the “Lower” House. If hon. Kaparo, was to vie, he may wish to be referred to as “Order”. I have a personal experience on this. The world today requires that you go through the rigorous process of changing your name in your Identity (ID) card and all documents. This invades your constitutional freedom.

Mr. Deputy Speaker, Sir, for example, you might have married as a young man and that name will not appear on the marriage certificate. If you are not there tomorrow, your family could be taken through rigorous motions of proving that you are a relative because the ID shows something different. All these becomes necessary because you want to serve the people and people have come up with a name that they feel they want you to use.

This scenario is in other countries in the world. In the United States of America (USA) in the states of Nevada, Texas and California, they actually allow people to include their nicknames or names they are referred to during elections. One can even have it in the ballot. In Canada, they have a system where they allow you to use your name.

Therefore, Mr. Deputy Speaker, Sir, mine is to try and bring the necessary amendment in the Elections Act, to allow the candidates choose whichever name they may wish to be identified with. One can go through the normal legal framework of affidavit and after that, the Independent Electoral and Boundaries Commission (IEBC) should be able to adopt that name. It should truly be the name that should be used to identify you.

As the case is now, some people are forced to use the name on the ID and they lose many votes. This again infringes on the will of the people. A person will go and say that he wants to elect Ephraim Mwangi Maina, as I am known. Somebody will then look through the list of candidates and pretend they do not know what you are saying. Somebody else will come and say they want Eng. Kirinyaga which does not appear anywhere on the ballot. They could be led to mark for another candidate. This mischief can and has occurred.

Mr. Deputy Speaker, Sir that is what this Bill is trying to prevent. It wants to give the candidates their freedom of identity and also give the public an easy way of identifying them. When the matter went to the IEBC and all other bodies including the public, they had no objection. Therefore, I feel that this is a matter that is timely as we advance and nourish democracy in this country.

With those remarks, I beg to move and invite Sen. Olekina to second the Bill.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. (Eng.) Maina. That is very straight forward.

Kindly proceed, Sen. Olekina.

Sen. Olekina: Mr. Deputy Speaker, Sir, I rise to second the Elections (Amendment) Bill (Senate Bills No. 18 of 2019). From the onset, I would like to state that this Bill is a good idea. I will start by posing the question: ‘What is in a name?’ I remember when I first met Sen. Wamatangi, I was told that he is referred as such because he has donated water tanks to so many people. Similarly I used to refer to Sen. (Eng.) Maina, as Sen. Kirinyaga. I thought he was the Senator for Kirinyaga County hence the name.

Sen. (Eng.) Maina has given examples of what happens in other jurisdictions like the United States of America (USA). I lived in the USA for many years and there were many instances where candidates were known by their nicknames. During the 2017 Elections, I was refereed as ‘*Olchekut*’. That was the name everyone used to refer to me. That experience made me wonder what would happen to my vote if someone went to a polling station and said that they want to vote for *Olchekut* only to be informed that there is no candidate by that name.

Mr. Deputy Speaker, Sir, we use nicknames to increase votes or score more points because people relate to us to extent of composing songs. From the onset, I would like to state that I support this Bill. However, I wonder whether we should amend this Act. Maybe we should follow the practise as is done in the State of Louisiana in the USA. I would like to invite Sen. (Eng.) Maina to think about either moving this Bill as it is or amend the elections codes. If we go for the latter option, I suggest that candidates should have their names written in full, but add the nicknames in quotes for example, Ledama Olekina ‘*Olchekut*’. That method would allow candidates to maintain their legal names, but have their nicknames for the purpose of elections.

I am aware that Sen. (Eng.) Maina was forced to swear a deed poll for him to use the name Kirinyaga. I believe that we do not have to go to that extent. I invite Sen. Kirinyaga to think about amending the elections codes that gives every candidate an opportunity to use their legal name as well as their nicknames so that in every ballot paper, will bear a candidates official name as well as the nickname. That move will help us to avoid reducing nicknames into pieces of legislation.

Mr. Deputy Speaker, Sir, I strongly support this this idea. But I would like us to compare our situation to what happens in the USA. In the USA, one’s legal name is important because it is associated with the social security number. I am sure Sen. Kihika who schooled and practiced in the USA as an attorney will tell you the importance of a legal name being used in an election. Nicknames are good. However, it would be practical to have it in election codes so that it allows creativity. If we make it an Act, people can become very mischievous.

Mr. Deputy Speaker, Sir, time is running out and I am sure that other Senators would like to contribute to this Bill. I therefore beg to second.

The Deputy Speaker (Sen. (Prof.) Kindiki): There are two other Senators who want to speak; I request them to be brief. Administratively, they do have their time, but I would like us to dispose of this item. It has been here for a very long time because the Senator was absent with permission. I am noting the terms and context of Article 179(5) of the Constitution. We can have the Mover reply then we dispose of this Bill. It is also a

straight forward issue. It is about including people's nicknames into the electoral documents.

(Question proposed)

Sen. Kihika: Thank you, Mr. Deputy Speaker, Sir. I rise to support the Elections (Amendment) Bill (Senate Bills No. 18 of 2019) by Sen. (Eng.) Maina.

I agree with him that it is necessary and important to include people's nicknames in their electoral documents because there are people who have been known by certain nicknames for years. Many people in the villages may not know the legal names of a person other than their nickname. Another aspirant can actually benefit when the voters do not know the legal name of their candidate. I believe that this will go a long way in allowing people to exercise their rights by voting for the person that they want. We can enable them do that by helping them identify their candidates on the ballot.

I am not sure if there are limitations to the nicknames that one can have. I do not know how we will handle a situation where one has three nicknames. When the Committee on Justice, Legal Affairs and Human Rights held a public participation on this Bill, the Independent Electoral and Boundaries Commission (IEBC) raised a question on how they will handle a situation where 70 aspirants, who have nicknames, vie for the position of Member of County Assembly. The question was whether the many nicknames will affect the layout of the ballot paper having in mind the expenses involved.

However, I do support this and I believe that it is timely. It will help entrench the rights of the people by helping them vote for the right candidate.

Sen. Cherargei: Thank you, Mr. Deputy Speaker, Sir. I congratulate the Chairperson of the Committee on Energy who is the Senator for Nyeri. This Bill is a clear indication of innovative thinking. I am lucky because my legal name is also my nickname and it worked to my advantage. Nicknames are unique unlike the legal names. We should give people the option of knowing who their leaders are just as they have the option of choosing their leaders.

Most Members of Parliament have nicknames that can easily be associated with them. Therefore, even the leadership at the national and county level, Members of County Assemblies (MCAs) and everybody has a unique name.

Mr. Deputy Speaker, Sir, the Committee on Justice, Legal Affairs and Human Rights deliberated on this issue, which is our purview. We thought that it was a very innovative idea; like Sen. Olekina said, his Maasai name is ole Cheput. I do not know how you pronounce that Maasai name, but it can be included so that people know that Sen. Olekina is now Sen. ole Cheput. It even becomes easy as he runs for any seat in the future. Legally, of course, it has been tedious to change a name, especially after marriage. When you change to another name, sometimes it must be gazetted and it becomes very tedious. However, I think when we bring this amendment, as the key players in the political arena, we will see---

I do not know, Mr. Deputy Speaker, Sir, because as Sen. Kihika has said, I wish that the owner of the Bill, Sen. (Eng.) Maina, could be very careful. This is because I can have three or four names that are known. I could be having a Swahili name because I

might be coming from a cosmopolitan region. I could also have a nick name in town, and another name in the village that is associated with lightning and thunder. In another area, I may be known by a different name. How will you marry all those? Those are take home notes for the Mover of the Motion, Sen. (Eng.) Maina.

This is a brilliant idea, and I hope that it will be included in our time so that it becomes easy, since names travel fast. As a politician, you do not know the pain you undergo when you have a similar name, especially in the ballot. When I was doing my nomination, it happened that another person had a name almost similar to mine. His name had “be” and mine had “ch.” He, therefore, went away with a chunk of my votes, and I have not forgiven him up to now. Therefore, when we have unique names in the ballot paper, it will be a very good, brilliant and innovative idea.

Finally, Mr. Deputy Speaker, Sir, it is my prayer, and I have even requested your office, to try and ensure that we start the electoral process and justice so that we can see how to bring an omnibus of electoral laws. We even have an amendment of the IEBC Act that has come from the National Assembly. I wish we could look for a way of coming up with a singular omnibus law of ensuring that all election law proposals are done within--- The Kriegler Report says that within two years, we should put up a running IEBC. That way, in 2022 when elections will be done, we should have an IEBC in place and all the necessary electoral laws. If we do that, then the country can trust the electoral integrity and process.

Thank you, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you.

Let us have the Mover. You can just say you beg to move, and if you want to request---

(Sen. Olekina spoke off record)

Order, Sen. Olekina! You have no power to do what you are doing. You have no power to talk across the aisle.

Sen. (Eng.) Maina: Thank you very much, Mr. Deputy Speaker, Sir. I have listened to the few ideas posed here and there. On the issue of putting names in brackets, I leave that to the drafting and the Commission to see how best that should be done.

On the choice of name, if you have many nicknames, it is upon you to choose one name. You cannot have your freedom throughout, because it will inconvenience the world. Pick one name, and whichever name you pick, that is your fate.

(Laughter)

Finally, Sen. Cherargei has moved the issue of the omnibus kind of legislation. Okay, it may be there, but I would prefer that the Bill is put through for something that is already infringing on democracy, like this issue of the name.

Therefore, Mr. Deputy Speaker, Sir, now that we are where we are, I request that pursuant to Standing Order No.61(3), you may defer putting the question to a later date, dependent on your judgment.

Once again, I thank Sen. ole Lenana.

(Laughter)

The Deputy Speaker (Sen. (Prof.) Kindiki): It is Sen. Olekina!

Sen. (Eng.) Maina: Yes, Mr. Deputy Speaker, Sir; but I am used to Lenana. I wish---

(Laughter)

The Deputy Speaker (Sen. (Prof.) Kindiki): Order! That one is for out there, not here. Is it a nickname?

Sen. (Eng.) Maina: No, Mr. Deputy Speaker, Sir. He was a paramount chief in Maasai land, and it is also the name of the top most point of Mt. Kenya.

I also thank you, Mr. Deputy Speaker, Sir, the Whip and the Clerks-at-the-Table.

The Deputy Speaker (Sen. (Prof.) Kindiki): Thank you, Sen. (Eng.) Maina. You have done a good job. If you have many names, like *Baba, Jakom* or *Karumaindo*, you should choose one.

(Laughter)

I direct that Division on this issue be done tomorrow because we do not have the numbers.

(Putting of the Question on the Bill deferred)

Hon. Senators, I have looked at the Order Paper, I see we do not have any of the sponsors of the rest of the business.

It is now around 6.26p.m. and I would like to interrupt the business of the House.

ADJOURNMENT

The Deputy Speaker (Sen. (Prof.) Kindiki): Hon. Senators, it is now 6.26 p.m., time to interrupt the business of the Senate. The Senate, therefore, stands adjourned until tomorrow, Thursday, 5th December, 2019 at 2.30p.m.

The Senate rose at 6.26 p.m.