



---

---

**REPUBLIC OF KENYA**

**TWELFTH PARLIAMENT - (FOURTH SESSION)**

**THE NATIONAL ASSEMBLY**

---

---

**COMMUNICATION FROM THE CHAIR**

\_\_\_\_\_ (No. 29 of 2020) \_\_\_\_\_

**ON THE CONSIDERATION OF THE MEDIATED VERSIONS OF THE COUNTY GOVERNMENTS (AMENDMENT) BILL (SENATE BILL NO. 11 OF 2017) AND THE COUNTY GOVERNMENTS (AMENDMENT) (NO. 2) BILL (SENATE BILL NO. 7 OF 2017)**

---

**Honourable Members,** You will recall that during the morning Sitting of the House on Wednesday, 6<sup>th</sup> May, 2020, the Leader of the Majority Party, rose on a point of order before the Motion for the consideration of the *Mediated Versions* of the County Governments (Amendment) Bill (Senate Bill No. 11 of 2017) and the County Governments (Amendment) (No.2) Bill (Senate Bill No.7 of 2017) was moved, seeking the direction of the Speaker on whether it was appropriate for the House to proceed with the consideration of the mediated versions of the two Bills. In his view, the manner in which the Senate approved the two Bills contravened the provisions of Article 123 of the Constitution regarding *Decisions of the Senate*. To buttress his point, the Leader of the Majority Party tabled a copy of the *Hansard* report of the Senate proceedings for the afternoon of Tuesday, 21<sup>st</sup> April, 2020 and alluded to a portion of the proceedings where the Senate approved the mediated versions of the two Bills through a procedure that he referred to as "proxy voting".

It was therefore his contention that the procedure adopted by the Senate violated the Constitution and, as such, the House ought not to proceed and endorse such action by approving the *Mediated Versions* of the two Bills.

**Hon. Members,** The point raised by the Leader of the Majority Party elicited divergent views from Members including the Leader of the Minority Party, the Minority Party Whip and the Deputy Minority Party Whip, the Hon. Peter Kaluma, the Hon. Amos Kimunya and the Hon. Daniel Tuitoek. The main issue arising from the Point of Orders and the ensuing debate was two-fold -

- (i) whether the House ought to interrogate the procedure applied by the Senate in its passage of a Bill concerning County Governments and such Bill having been referred to this House for consideration and whether the procedure applied by the Senate in its approval of a *Mediated Version* of any Bill and the Senate has any implication on the consideration of that Version of the Bill in this House; and,
- (ii) what remedy would be available to this House, should it be claimed that the procedure applied by Senate to pass a Bill concerning County Governments or the procedure applied to approve a *Mediated Version* of a Bill was in contravention of the Constitution.

**Hon. Members,** At the outset, I wish to interrogate the provisions of Standing Order 87(5) which was alluded to during the debate on the matter and its effect on the issue raised by the Leader of the Majority Party. The Standing Order states, and I quote,—

*(5) It shall be out of order for a Member to criticize or call to question, the proceedings in the Senate or the Speaker's Ruling in the Senate but any debate may be allowed on the structures and roles of the Senate or Parliament.*

This Standing Order is replicated word for word in Standing Order No. 96 of the Senate Standing Orders. This rule of procedure seeks to safeguard parliamentary proceedings and decisions of the Speakers from possible indictment in either House of Parliament. Indeed, it was urged by some Members of this House that the point raised by the Leader of the Majority Party ran afoul of this Standing Order by calling into question proceedings that transpired in the Senate.

**Hon. Members,** As you may recall, from the Order Paper of that particular day, the Motion on one of the Bills which elicited the issues referred for my consideration read as follows—

***THAT,** pursuant to the provisions of Article 113 (2) of the Constitution and Standing Order 150, this House adopts the Report of the Mediation Committee on the County Governments (Amendment) Bill (Senate Bill No. 11 of 2017) laid on the Table of the House on Wednesday, April 22, 2020, and **approves** the Mediated Version of the County Governments (Amendment) Bill (Senate Bill No. 11 of 2017).*

I put emphasis to the phrase "*and **approves** the Mediated Version*". At face value Hon. Members, the Motion appears quite straightforward. However, when considered together with the point raised by the Leader of the Majority Party, it calls for the guidance of the Speaker on whether Standing Order 87(5) insulates any business arrived at through a mediation process or transmitted from the Senate from question or scrutiny on the basis of its constitutionality.



**Hon. Members,** Standing Order No. 47(3) (b) obligates the Speaker to exclude a motion from being debated or to direct an appropriate amendment of the motion where the Speaker finds that the motion offends the Constitution or an Act of Parliament. It states, and I quote,—

*(3) If the Speaker is of the opinion that any proposed Motion—*

*(a)----;*

***(b) is contrary to the Constitution or an Act of Parliament, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament;***

*(c) ----;*

*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 or that the motion be referred to the relevant committee of the Assembly, pursuant to Article 114(2) of the Constitution.*

**Hon. Members,** As I have previously upheld, Standing Order 47(3) (b) is an extension of the requirement placed on the Speaker under Article 3 and Article 10 of the Constitution to respect, uphold and defend the Constitution. Before any business is brought before the House, it is approved by the Speaker on the basis of its constitutionality (on the face of it), among other considerations outlined either in statute and the Standing Orders. I have also previously guided this House that a question or claim of unconstitutionality of a matter before the House may be raised by a Member at any stage, before, during or immediately after consideration of business by the House despite its initial approval. I am, therefore, of the considered opinion that Standing Order 47(3)(b) requires the Speaker to address any constitutional issues raised with regard to any business relating to the Senate which requires consideration by this House. Indeed, it would be irresponsible to expect the Speaker to simply fold his or her arms where his or her attention has been drawn to a matter before the House, whose consideration may lead to an unconstitutional or an absurd result, if it proceeded with in an unguided manner.

That said, interrogation of the concern raised has to be circumspect. It has to be limited to any constitutional issues raised or provisions of the Constitution relating to the business affected. Additionally, any interrogation of the concern raised has to be faithful to the spirit of Standing Order 87(5) and refrain from impeaching the proceedings of another House of Parliament or the decision of the Speaker of the other House.

**Hon. Members,** The Constitution clearly outlines the procedure applicable to Bills that are processed by both Houses, such as the County Governments (Amendment) Bill, 2017. The Article provides, and I quote—

- (1) If a Bill is referred to a mediation committee under Article 112, the Speakers of both Houses shall appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass;*
- (2) If the mediation committee agrees on a version of the Bill, each House shall vote to approve or reject that version of the Bill;*
- (3) If both Houses approve the version of the Bill proposed by the mediation committee, the Speaker of the National Assembly shall refer the Bill to the President within seven days for assent; and,*
- (4) If the mediation committee fails to agree on a version of the Bill within thirty days, or if a version proposed by the committee is rejected by either House, the Bill is defeated.*

**Hon. Members,** May I remind the House on part of the legislative journey of these two Bills, this far. The County Governments (Amendment) (No. 2) Bill, 2017 (Senate Bill No. 7 of 2017), seeks to amend the County Governments Act (No 17 of 2012) to provide for the completeness of the procedure for the disposal of a report of a Commission of Inquiry, established under Article 192(2) of the Constitution regarding suspension of a County Government. On the other hand, the County Governments (Amendment) Bill, 2017 (Senate Bill No. 11 of 2017), seeks to amend the County Governments Act to clarify on commencement and sitting of a County Assembly;



to put in place a legal framework for the establishments of the office of a Deputy Speaker of a County Assembly; to clarify on the procedure for removal of a Speaker of a County Assembly; to clarify on the recall of a member of a County Assembly; to put clarity on the powers of a Governor to appoint and dismiss a member of the county executive committee; to put in place a mechanism for the assumption of office of governor by the Deputy Governor and the appointment of a new Deputy Governor, amongst other provisions. Upon its passage by the Senate, the County Governments (Amendment) Bill, 2017 (Senate Bill No. 11 of 2017) was considered by this House and passed with amendments on 6<sup>th</sup> March, 2019. Similarly, the County Governments (Amendment) (No. 2) Bill, 2017 (Senate Bill No. 7 of 2017) was considered by this House and passed with amendments on 19<sup>th</sup> March, 2019. The Senate rejected amendments passed by the National Assembly to both Bills and precipitated the mediation process contemplated under Article 113 of the Constitution. It is the Mediated Versions of the two Bills as proposed by the two Mediation Committees that were subsequently formed that are presently before this House for approval.

**Hon. Members,** This begs the Question: What then is required of this House? It is my view that, what is required of this House by Article 113 of the Constitution is **ONLY** the approval or otherwise of the Mediated Version of the two Bills. As such, in applying Standing Order 47(3)(b), only questions on the constitutionality or legality of an action relating to the mediation process preceding it or the comparison of the version of the Bill before the Houses may be raised. The points raised by the Leader of the Majority Party do not question the process in which the mediation Committee on the Bill was established or the manner in which or time within which the Committee arrived at its Mediated Version of the Bill, or the comparison of the Version of the Bill presented in either House.

Instead, the Hon. Leader of the Majority Party called into question a voting procedure applied by the Senate in approving the *Mediated Version*, which is a separate matter at this penultimate stage. As a matter of fact, I do agree with the Members who opined that, unlike a Bill which is referred from one House to the other in a **sequential manner**, the process of approval (or otherwise) of a Mediated Version of a Bill by the two Houses is a **parallel process**. As such, the process does not have to start or end in any of the two Houses in a chronological manner. Actually, a Mediated Version of a Bill may be considered by the two Houses at the same time. Indeed, provided that the version of the Bill presented to both Houses is the same, the completeness of the approval process of a *Mediated Version* of a Bill converges at the stage of comparing the **results** of the parallel processes in the Houses, in the form of approval or rejection, in which case, unlike the case of a fresh Bill, the onus of verifying how each House voted lies in that House.

**Hon. Members,** To the extent that Article 113 (3) of the Constitution requires the Speaker of the National Assembly to refer the Mediated Version of a Bill that has been approved by both Houses to the President for assent, I appreciate the concern of the Leader of the Majority Party that the House may be enjoined in the unconstitutional passage of legislation. As Members are aware, the Constitution prescribes strict requirements on quorum and voting procedures for both Houses of Parliament. By allowing the two Houses to prescribe Standing Orders for the orderly conduct of parliamentary business, the Constitution expects each House to craft procedures that respect and accord with the thresholds on voting. In this regard, and pursuant to Standing Order 87(5), I am expected to accord the procedures of the Senate the same respect that I would expect the Speaker of the Senate to accord the procedures of this House.

As such, communication under the hand of the Speaker of the Senate transmitting a Bill that has been passed or signifying that a mediated version of a Bill has been approved by the Senate constitutes a guarantee that the procedures of the Senate and the requirements of the Constitution have been observed. In the event this House approves the *Mediated Versions* of the two Bills, I will engage the Speaker of the Senate to endorse the Bills before I present them to the President for assent as required under Article 110(5) of the Constitution, thereby causing the Speaker of the Senate to authenticate the propriety of the Bills with regard to the decisions of the Senate. I believe this will allay the fears of the Leader of the Majority Party on the propriety of the procedures adopted by the Senate. This also settles the initial questions on *whether the House ought to interrogate the procedure applied by the Senate in its approval of a Mediated Version of a Bill, whether the procedure applied by the Senate has any implication on the progression of that version of the Bill in the National Assembly, and what remedy would be available to the House in that case.*

**Hon. Members,** As I turn to the last part of the question, I am also constrained to address the issue of whether the point raised by the Leader of the Majority Party affects a Bill passed by the Senate which is referred to this House for consideration. The question that arises is whether the voting procedure adopted by the Senate in the passage of a Bill is a material issue for discussion in light of Standing Order 87(5). The Constitution outlines strict voting thresholds with regard to the passage of Bills by the Senate. Article 123 of the Constitution provides, and I quote—

*(2) When the Senate is to vote on any matter other than a Bill, the Speaker shall rule on whether the matter affects or does not affect counties.*

*(3) When the Senate votes on a matter that does not affect counties, each senator has one vote.*



*(4) Except as provided otherwise in this Constitution, in any matter in the Senate affecting counties—*

*(a) each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation;*

*(b) the person who votes on behalf of a delegation shall determine whether or not to vote in support of, or against, the matter, after consulting the other members of the delegation; and*

*(c) the matter is carried only if it is supported by a majority of all the delegations.*

**Hon. Members,** The practice in our bicameral set-up is to presume that, unless proven otherwise, a Bill passed by one House and transmitted to the other House for consideration has been passed in accordance with the provisions of the Constitution. In the unlikely event that the proceedings in one House of Parliament leading to the passage of a Bill reflect a departure from the strict requirements of the Constitution, consideration of the Bill by the other House would be an exercise in futility. If the Leader of the Majority Party had, for example, raised his point with regard to a Bill transmitted from the Senate for consideration by this House, I would be duty-bound to interrogate, at any stage, whether its passage met the requirements of Article 123 of the Constitution, if the question arose. In such instance, legislative comity would require me to formally reach out to the Speaker of the Senate to seek his verification or clarification on the issue before the Bill or other business progresses to a vote. Consequently, if the clarification was to reveal a procedural failure on the part of the Senate in passing the Bill, or such other business, I would be under obligation to preclude the House from considering the Bill until the failure was remedied.

That now settles the last questions with respect to *whether the House ought to interrogate the procedure applied by the Senate in its passage of a Bill concerning County Governments such Bill having being referred to this House*

*for consideration; and, what remedy would be available to the House, should it be claimed that the procedure applied by Senate to pass a Bill concerning County Governments was in contravention of the Constitution.*

**Hon. Members,** Having said that, it should not be lost that, standing down a Bill referred from the other House on account of a procedural failure is an extreme action, especially where such failure may be detected and arrested beforehand. It would, additionally, not promote cordial relations between the two Houses and the inter-Houses comity as expected of bicameralism. To my mind, any failure of procedure in a House of Parliament casts the entire institution of Parliament in negative light. Cognizant of the provisions of Standing Order 87(5), it therefore rests on each Speaker and the Clerk of the House to prevent any such failure, in the first instance, or seek to urgently remedy it upon detection without resorting to the floor of the Houses. In this way, the procedures of each House are protected from fractious debate that is entirely avoidable. Going forward, my office shall, as practicably as possible, seek to ensure that any question on a Bill touching on any procedure of the other House is arrested and conclusively resolved with the Speaker of the Senate prior to the transaction of any business relating to such Bill.

In this regard, Hon. Members, I thank the Leader of the Majority Party and other Members for raising these issues in the House for my guidance. My considered finding therefore is as follows-

- 1. THAT,** the claims raised by the Leader of the Majority Party and the other Members regarding the procedure in which the Senate may have applied to take a Vote on the Mediated Versions of the two Bills do not in any way impede on the admissibility or the consideration of the two Bills by the National Assembly since the processes in the two Houses is not sequential but a parallel process, provided that the versions of the two Bills presented in both Houses are the same;

2. **THAT**, contrary to the claims, by proceeding to consider the Mediated Versions of the two Bills, the National Assembly would not, in any way, offend the Constitution;
3. **THAT**, the House Business committee may henceforth proceed to prioritise the Mediated Versions of the two Bills, that is, *County Governments (Amendment) Bill, 2017 (Senate Bill No. 11 of 2017) and the County Governments (Amendment) (No.2) Bill (Senate Bill No.7 of 2017)*, for consideration by the House, soonest; and,
4. **THAT**, should this House approve the *Mediated Versions* of either or both Bills, I will engage the Speaker of the Senate to endorse the Vellums in respect of each of the two Bills, thereby seeking his authentication on the propriety of the Bills with regard to the decisions of the Senate, before I present them to the President for assent under article 113(3) of the Constitution.

The House is accordingly guided.

**I thank you Hon. Members!**



**THE HON. JUSTIN B. MUTURI, E.G.H., MP**  
**SPEAKER OF THE NATIONAL ASSEMBLY**

*Thursday, June 4, 2020*



