



REPUBLIC OF KENYA

**TWELFTH PARLIAMENT - (FOURTH SESSION)
THE NATIONAL ASSEMBLY**

COMMUNICATIONS FROM THE CHAIR

_____(No. 53 of 2020)_____

ON

**UNLOCKING FUNDS TRANSFER TO COUNTY GOVERNMENTS FOR
FY 2020/2021 AND IN THE FUTURE**

Honourable Members,

I wish to inform the House that we are in receipt of a letter from the Cabinet Secretary for the National Treasury and Planning seeking approval of the House for the release of fifty percent (50%) of the **equitable share** of the National Revenue that was allocated to the County Governments in the Division of Revenue Act, 2020 to the Forty Seven (47) County Governments. In the letter, the Cabinet Secretary notes that the request is based on a legal opinion from the Hon. Attorney-General which advised that a proposal by the National Treasury to release fifty percent (50%) of the equitable share of revenue allocated to County Governments in the Division of Revenue Act, 2020 pending the passage of the Annual County Allocation of Revenue Act may only be done with the express authority of the National Assembly as the same is a withdrawal of funds from the Consolidated Fund. The advise of the Hon. Attorney General draws largely from the Advisory Opinion of the Supreme Court in Reference No. 3 of 2019 which guided both Houses of Parliament on the appropriate course of action in the event of an impasse over the passage of a Division of Revenue Bill, as was the case during the last Session of this 12th Parliament.

Hon. Members, It is notable that, the Advisory opinion of the Supreme Court was specific to the Division of Revenue Bill, 2019, in which case the Court allowed the National Assembly to authorize the disbursement of monies to the Counties in specific circumstances being whenever there is an impasse over the passage of a Division of Revenue Bill. Consequently, as indeed observed by the Hon. Attorney-General, the binding Advisory Opinion of the Supreme Court in Reference No. 3 of 2019 may not be applied to a scenario other than that which was contemplated by the Court at the time.

Hon. Members, In view of this and the request by the Cabinet Secretary, the question that therefore arises is- ***what decisive steps can the National Assembly take to address the situation noting that the delay in the passage of the County Allocation of Revenue Bill, 2020 due to the stalemate on the Third Formula on Allocation of Revenue to Counties is likely to stifle the operations of the County Governments?***

Hon. Members, In answering this question, one must examine the law, in particular, the Constitution, the Public Finance Management Act, 2012, the Public Finance Management (National Government) Regulations, 2015 and the Supreme Court Advisory Reference No. 3 of 2019. Article 206(2) of the Constitution requires the express authorization of withdrawals from the Consolidated Fund either by the Constitution or an Act of Parliament. It provides that, and I quote, —

*206(2). "Money may be withdrawn from the Consolidated Fund **only** (I put emphasis on the word "ONLY")—*

(a) in accordance with an appropriation by an Act of Parliament;

(b) in accordance with Article 222 or 223; or

(c) as a charge against the Fund as authorised by this Constitution or an Act of Parliament."

Hon. Members, for clarity, on its part, Article 222 of the Constitution authorizes the withdrawal of funds from the Consolidated Fund for the operations of the National Government in the event that an Appropriation Bill has not been assented to or is not likely to be assented to before the commencement of a financial year. This is the process that is referred to as "Vote-on-Account" in Parliamentary parlance. It is a direct authorization and does not require the passage of any additional legislation to effect the withdrawal. Article 222 of the Constitution is the basis for Standing Order 242 of the National Assembly Standing Orders which outlines the procedure for a "Vote-on-Account". The Constitution however does not expressly provide a similar mechanism to intervene for the counties when faced by a similar predicament. **The Speaker of the Senate and I have been deliberating on this matter and we have reached a common considered view that, replicating the "Vote-on-Account" procedure for the county governments would therefore require appropriate legislative grounding in the Constitution or an Act of Parliament.**

Hon. Members, As you are aware, Parliament passed the Public Finance Management Act, 2012 to operationalize Chapter Twelve of the Constitution by providing for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; and the different responsibilities of government entities and other bodies. Section 17(4) of the Act embodies the provisions of Article 206 of the Constitution by requiring that where a withdrawal from the Consolidated Fund is authorized under the Constitution or an Act of Parliament for the appropriation of money, the National Treasury must make a requisition for the withdrawal and submit it to the Controller of Budget for approval.

Further, **Hon. Members**, section 205(1) of the Act empowers the Cabinet Secretary for the National Treasury to make regulations, not inconsistent with the Act on any matter that is necessary or convenient to be prescribed under the Act or for the carrying out or giving effect to the Act. In exercise of these powers, the Cabinet Secretary made the *Public Finance Management (National Government) Regulations, 2015*.

Hon. Members, I am constrained to note that the rest of the provisions of section 205 of the Public Finance Management Act, 2012 require the express approval of any Regulations made under the Act by both Houses before their coming into force. Notably, subsections (4), (5) and (6) of the section provide, and I quote—

(4) Regulations under subsection (1) shall not take effect unless approved by a resolution passed by Parliament.

(5) Regulations approved under subsection (4) shall take effect on the day after the date on which both Houses approved them or, if a later date is specified in the regulations, on that later date.

(6) If a House of Parliament does not make a resolution either approving or rejecting any regulations within fifteen sitting days after submission to it for approval, the House shall be deemed to have approved those regulations.

From the available records of the House, the Hansard of the afternoon Sitting of Tuesday 31st March, 2015 notes that the Regulations were *Tabled* before the House by the then Leader of the Majority Party and subsequently committed to the Committee on Delegated Legislation for scrutiny. I did direct the Committee to consider the Regulations jointly with the Budget and Appropriations Committee and the then Committee on Finance, Planning and Trade and make appropriate recommendations to the House. Thereafter, it appears that, by attrition of time, the Regulations stood approved by dint of the provisions of subsection (6) of Section 205 of the Public Finance Management Act, 2012.

Hon. Members, Regulation 134 of the said Regulations provides for the transfer of the equitable share of national revenue to the counties before the approval of a County Allocation of Revenue Bill. In particular, it provides that, and I quote,—

"if the County Allocation of Revenue Bill submitted to Parliament for a financial year has not been approved by Parliament or is not likely to be approved by Parliament, by the beginning of the financial year, the Controller of Budget may authorize withdrawals of up to fifty (50%) percent from the Consolidated Fund based on the last County Allocation of Revenue Act approved by Parliament for the purposes of meeting expenditure of the county governments for the financial year."

At face value, it may be argued that this Regulation effectively allows the Controller of Budget to disburse fifty percent (50%) of the equitable share allocated to the counties in the previous years' Division of Revenue Bill to the counties pending the approval of a County Allocation of Revenue Bill. Conversely, it may also be argued that the Regulations are not the "Act of Parliament" necessary to authorize withdrawal of funds from the Consolidated Fund as contemplated by Article 206(2) of the Constitution. In light of the request made by the Cabinet Secretary for the National Treasury and the advice given by the Hon. Attorney General, the second argument seems to carry more weight. **If the Regulations were indeed an adequate mechanism, the Cabinet Secretary and the Attorney General would not need recourse to Parliament, and the National Treasury's request for approval would not have been with the House today.**

Hon. Members, Indeed, at around the same time that the Regulations were *Tabled* before the House in 2015, during the 11th Parliament, a Bill from the National Government which was prepared by the then Hon. Attorney General at the request of the National Treasury was introduced in this House by the then Leader of the Majority Party, seeking to insert a new section 42A into the Public Finance Management Act, 2012.

Clause 14 of the then Public Finance Management (Amendment) Bill, 2015 (National Assembly Bills No. 4 of 2015), effectively sought to authorize a "Vote-on-Account" for County Governments in the event that a County Allocation of Revenue Bill is yet to be passed or assented to before the commencement of a financial year. These proposed amendments clearly affirm the need for the express authorization of withdrawals from the Consolidated Fund either by the Constitution or an Act of Parliament. Though the Bill lapsed with the 11th Parliament, it is noteworthy that the Budget and Appropriations Committee had recommended the deletion of the proposal as **contained in that particular Bill** on account of its obscure nature and its failure to properly provide for the operative basis for the proposed disbursements to counties.

Hon. Members, At this stage permit me to note that my Office is also in receipt of a Notice of Motion from the Leader of the Minority Party, the Hon. John Mbadi, EGH, MP, seeking a resolution of the House for the disbursement of funds to the county governments amounting to fifty percent (50%) of the monies allocated to the counties by the County Allocation of Revenue Bill, 2019. The Motion draws on the provisions of Regulation 134 of the Public Finance Management (National Government) Regulations, 2015 and effectively seeks to invoke the "Vote-on-Account" process for county governments. The concern which the Leader of the Minority Party seeks to resolve is extremely valid, but as I have noted in this Communication, a "Vote-on-Account" in respect of funds for County Governments is not tenable at the moment

Hon. Members, In guiding Parliament on how to cushion County Governments while resolving any impasse over the passage of a Division of Revenue Bill, the Supreme Court also urged the Speakers of the Houses of Parliament to entrench its decision in law by initiating appropriate legislative action.

Fortunately, well before the determination of the Supreme Court in the Advisory Opinion Reference No. 3 of 2019 was issued, the Budget and Appropriations Committee of the National Assembly introduced the **Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019)** to put into place interim measures to allow county governments to access their minimum share of revenue to enable them offer services to the public pending enactment of a Division of Revenue Bill. The Bill was considered and passed by the National Assembly on **18th September 2019** and forwarded to the Senate for consideration. This Bill however only sought to deal with a scenario where there is an impasse in the passage of the Division of Revenue Bill. Presently, of the two Annual Revenue Bills, only the County Allocation of Revenue Bill is pending.

Hon. Members, In view of the strict requirements of the law and in order to put in place a credible mechanism to address the concerns of the county governments on the disbursement of funds pending the passage of the County Allocation of Revenue Bill both now and in the future, two options now present themselves to the House. On one hand, the Budget and Appropriations Committee may introduce a Bill proposing amendments to the Public Finance Management Act, 2012 to anchor in law the "Vote-on-Account" option for disbursement of funds to County Governments, in case of future delays in the passage of the County Allocation of Revenue Bill. Alternatively, having already deliberated on and passed an amendment to the Public Finance Management Act to cater for any delay in the passage of a Division of Revenue Bill, the House may opt to await the consideration, amendment and passage of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No. 63 of 2019) by the Senate and expedite its conclusion and presentation for Assent.

Hon. Members, noting that the proposed amendments to the Public Finance Management Act, 2012 shall require consideration and passage by the two Houses, the second option offers a more convenient avenue of averting a financial crisis at the counties within a shorter timeframe. To this end, I have requested the Leader of the Majority Party and the Leader of the Minority Party to urgently engage the Senate Majority and Minority Leadership with a view of fast-tracking the consideration and passage by the Senate of the Public Finance Management (Amendment) Bill, (National Assembly Bill No. 63 of 2019) **with appropriate amendments** providing in law, the requisite withdrawals from the Consolidated Fund in the event of any delays in the passage of the annual County Allocation of Revenue Act. This will ensure that Counties continue to function whether or not there is a stalemate or delays in the passage of either of the two Annual Revenue Bills both **now and in the future**.

Hon. Members, I remain confident that the Senate will rise to the occasion and dispense with the Bill with its usual diligence on matters integral to the protection of devolution. On the part of the National Assembly, the House Business Committee and the Budget and Appropriations Committee are already seized of the matter. As the Chairperson of the House Business Committee, I do undertake that the Committee will prioritize the consideration of the Senate's Amendments to the Bill in accordance with Standing Orders 145 to 148, once the Schedule of the Senate's Amendments is received in this House. In the unlikely event that there is inordinate delay in the consideration and passage of the Bill by the Senate, the Budget and Appropriations Committee further stands directed to urgently cause the publication and introduction of a Bill proposing amendments to the Public Finance Management Act, 2012 to cater for interim disbursements to County Governments pending the enactment of a County Allocation of Revenue Bill.

Hon. Members, In conclusion, I wish to thank the Leader of the Minority Party for his laudable effort in seeking to address an issue that certainly threatens to cripple the effective functioning of our devolved system of government. Though I note that his Motion may indeed be admissible in the event that the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) **is passed with appropriate amendments and assented to**, it is my considered view that the “Money-Bill nature” of such a Special Motion would call for it to be moved by the Budget and Appropriations Committee. Indeed, this is the current arrangement with regard to the Special Motion for a Vote-on-Account moved under Article 222 of the Constitution and Standing Order No. 242.

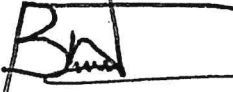
In summary, **Hon. Members**, my considered guidance is therefore as follows—

- 1. THAT** after consultations, the Speaker of the Senate and I have reached a common considered view that, replicating a “Vote-on-Account” procedure to allow disbursement of funds to County Governments pending the passage and assent of a County Allocation of Revenue Bill requires legislative grounding in the Constitution or an Act of Parliament;
- 2. THAT**, in absence of a proper legislative grounding under the Constitution or an Act of Parliament, the intended Notice of Motion by the Leader of the Minority Party, the Hon. John Mbadi, EGH, MP, noble as it is, is premature at the moment;

- 3. THAT**, the Leader of the Majority Party and the Leader of the Minority are hereby requested to urgently engage the Senate Majority Leader and the Senate Minority Leader to fast-track the consideration and passage by the Senate of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) **with appropriate amendments** to entrench the procedure for the withdrawals from the Consolidated Fund in law in the event of any delays in the passage of the annual County Allocation of Revenue Bill;
- 4. THAT** the House Business Committee and the Budget and Appropriations Committee shall prioritize the consideration of the Senate's Amendments, (if any) to the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) over any other business, once the Schedule of Senate's Amendments is conveyed to this House by the Senate; and,
- 5. THAT**, in the unlikely event that there is inordinate delay in the consideration, amendment and passage of the Public Finance Management (Amendment) Bill, 2019 (National Assembly Bill No.63 of 2019) by the Senate, the Budget and Appropriations Committee shall urgently cause the publication and introduction of a Bill proposing amendments to the Public Finance Management Act, 2012 to cater for interim disbursements to County Governments pending the enactment of a County Allocation of Revenue Act.

The House is accordingly guided.

I thank you!

A handwritten signature in black ink, appearing to be 'Justin B.N. Muturi', written over a horizontal line.

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

Tuesday, September 08, 2020

