

REPUBLIC OF KENYA

THE SENATE

THE HANSARD

Tuesday, 22nd September 2020

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

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

PRAYER

PETITIONS

The Speaker (Hon. Lusaka): Let us have the Chairperson, Standing Committee on Lands, Environment and Natural Resources.

He does not seem to be here, so, we defer it for now. We will come back to it later.

Proceed, Sen. (Dr.) Mbito.

PLIGHT OF SEED FARMERS IN TRANS-NZOIA COUNTY

Sen. (Dr.) Mbito: Mr. Speaker, Sir, this is a petition to the Senate concerning the plight of seed farmers in Trans-Nzoia County and lack of support by the Government resulting to psychological torture due to deficits and losses the farmers incur every other time.

We, the undersigned citizens of the Republic of Kenya and residents of Trans-Nzoia County representing 200 seed farmers, draw the attention of the Senate to the following-

- (a) That Kenya Seed Company Limited is the main seed producer in East and Central Africa.
- (b) That 99 percent of the seeds are planted by 200 seed farmers who then supply the Kenya Seed Company for commercial farmers to buy and plant for consumption and otherwise.
- (c) That the Trans-Nzoia Seed Farmers Association was formed to champion the seed farmers needs to the Kenya Seed Company and look at how to improve their operations for quality production.
- (d) That without seed production in Kenya, there will be no commercial production of maize in East and Central Africa.
- (e) That the last comprehensive review of seed prices by Kenya Seed Company was done more than seven years ago

The cost of production and risks involved

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- (1) That farm inputs are very expensive and subject the seed farmers to income loss.
- (2) That the risks of total loss due to diseases, natural disaster, degraded quality control at basic seed production and poor variety selection by Kenya Seed Company is borne by the seed farmers.
- (3) That the road networks are in a deplorable state and 90 percent of feeder roads are impassable.

Lack of Farmer Representation

- (1) That local farmers are never represented on all agricultural statutory organisations such as Kenya Seed Company, National Cereals and Produce Board (NCPB), Agricultural Finance Corporation (AFC), Kenya Cooperative Creameries(KCC), Agricultural Development Corporation (ADC), Kenya Agricultural & Livestock Research Organisation (KALRO) among others.
- (2) That is no seed farmer participation in the management of the relevant agricultural bodies.
- (3) That the staffing of the agricultural statutory organisations especially Kenya Seed Company is not representative of all communities in the region.

Seed Farmers Have Deficits in the Banks

- (1) That 99 per cent of seed farmers have deficits in various banks.
- (2) That the Government is not supporting them through subsidies and loan waivers
- (3) That seed farmers are getting no incentives

We have made the best efforts to have these matters addressed by the relevant authorities all of which have failed to give us satisfactory response-

That none of the issues raised in this Petition is pending in any court of law, constitutional or any other legal body.

Our humble Petitioners pray that the Senate-

- (1) Intervenes to ensure there is a specific policy for seed farmers.
- (2) That the Senate helps in creating an institutional framework to have local farmers represented in all agricultural statutory organisations
- (3) That the Senate ensures the introduction of the guaranteed minimum return policy for see farmers
- (4) That the Senate intervenes to ensure a comprehensive review of the crop insurance taken for seed production.
- (5) That the Senate intervenes to ensure that no maize importation until farmers have exhausted their stocks.
- (6) That the Senate intervenes to enable price increase of seed maize produce delivered to Kenya Seed Company by 60 percent due to inflation increased cost of production, uncertainty caused by climatic change and other factors.
- (7) That the Senate intervenes to ensure that there is a regulatory miller to help in regulation and add value to what the farmers are doing.
- (8) That the Senate intervenes to ensure that farmers are paid promptly by Kenya seed companies.
- (9) That the Senate intervenes to ensure that famers are properly identified for purposes of proper allocation of fertilizer based on their acreage.

Mr. Speaker, Sir, this Petition is signed by Mr. John Mikolela, Michael Lugalia, Davis Mabienga, Tom Nyairo, Antony Baraza and Karen Khawoya.

I thank you.

The Speaker (Hon. Lusaka): Hon. Senators pursuant to Standing Order No. 231, I will allow comments, observations or clarifications in relation to the Petition for not more than 30 minutes.

Proceed, Sen. Wetangula.

Sen. Wetangula: Thank you, Mr. Speaker, Sir. I am happy that Sen. Cheruiyot understands.

I strongly support this Petition. I know each of the five petitioners whose names have been read by Sen. (Dr.) Mbito. They are big farmers, seed multipliers and are very committed to farming.

Kenya is classified as an agricultural country. An agricultural country where continued policies say everything, but do not support the farmer. However, the farmer in this country is on his/her own.

When we talk of subsidies and you go to the countryside - hon. Senators can bear me witness on this - you find the governors giving a *gorogoro* of fertilizer subsidy to a family. What food production can you have from a *gorogoro* of Diammonium phosphate (DAP) fertilizer?

More importantly, it is the compromise of seed multiplication and production. In the old days, the Government used to pay a lot of attention to the management of Kenya Seed Company (KSC) which was producing seeds that were distributed in the entire East African region; that is Uganda, Tanzania, Rwanda, Burundi and Zambia.

Today, the KSC is a limping giant. They cannot produce enough seeds for Kenya. The seeds that they are producing are so compromised in quality that, at the end of the day, the farmers are not getting any yields at all.

In our maize inquiry *ad hoc* Committee where Sen. (Dr.) Mbito was a Member; we flagged out the dwindling fortunes of food production as one of the problems in the maize sector, reckless importation, lack of inputs and, above all, post-harvest losses and the lack of Government intervention to stabilize maize prices.

I have always exhibited a lot of confidence in Sen. Ndwiga who is the Chairperson of the Standing Committee on Agriculture, Livestock and Fisheries because I worked with him when he was the Minister of Cooperatives. His commitment to agriculture and its improvement in this country was extremely admirable. I want to urge his Committee to look into the operations of KSC, its funding, marketing and, above all, the zoning that we used to have on how to have maize seed multiplication without adulterating the crop by planting commercial maize alongside seed maize.

We want to see that even dry areas of Ukambani where *Katumani* maize is produced in three months are supported in multiplying seeds that help in growing maize in areas that have rain deficit.

Mr. Speaker, Sir, this Petition is timely. I salute the five farmers who I know very well. I have no doubt that this Petition will be given due attention. When it appears before the Standing Committee on Agriculture, Livestock and Fisheries, I urge Sen. (Dr.) Mbito and all of us who come from the maize basket areas of Uasin Gishu, Nakuru, Bungoma,

Kakamega, Busia, Vihiga, Trans Nzoia, West Pokot, Kericho and Bomet to be on standby to help prosecute it.

Thank you, Mr. Speaker, Sir.

Sen. Cheruiyot: Thank you, Mr. Speaker, Sir. I support this Petition. This is a very important issue that these petitioners want this House to give attention to. This is because we pride ourselves as being an agricultural-based economy. Yet, due to the neglect and poor policies in the agricultural subsector, we import onions and tomatoes from Tanzania and maize from Uganda. Is this not a cause for alarm to those of us in leadership?

I want to believe our colleagues who will get a chance to prosecute this Petition will not only give answers to the farmers, but must be able to come up with a concise report that will guide this House in giving recommendations as an answer to the Petition and also direct the Ministry of Agriculture on issues that have been raised.

I believe that once a Committee is charged with a Petition, despite giving feedback to petitioners, one of the things that we must strive to do is to invite the people who make decisions at the policy level, the Cabinet Secretary, the Permanent Secretary and all people charged with that responsibility. We must bring to their attention some of these concerns.

It is a shame that it has to take farmers in Trans Nzoia County to bring to the attention of the country via a Petition to the Senate. It is only a closed knit group of 200 farmers who nobody knows how they were chosen that supply seeds to the entire Republic. I have information and I know this for a fact that amongst the 200 farmers, there is a specific select group of about one or two that produce close to 70 or 80 per cent of the seeds. The rest are just an accompaniment to this bad arrangement that ensured that our farmers continue to buy seeds at exorbitant prices.

This country is a free market. Why not open it up so that KSC can prequalify even if it on the basis of one or two years. Let us have people compete. Let us have farmers who have new and modern technology. I know that there are farmers in this country who can produce these seeds at 30 or 40 per cent of the cost that this special select group of 200 are using to produce.

I know there are Members of the Standing Committee on Agriculture, Livestock and Fisheries who are listening to this Petition that apart from just giving response and answers to these petitioners, I request that they invite the Cabinet Secretary in charge of agriculture subsector. Let them give answers to Kenyans and understand the rationale and logic that they have this as a closed knit business that is being enjoyed by a select few.

Finally, these petitioners bring to the attention of this House the increasing cost of production for agricultural products in this country. We, as Senators, must give due attention as the Senate because all of us in one way or the other, are representatives of the farmers.

It is unfortunate that this Government makes decisions in a way that is not proper and in sync with the demands of the Constitution. There is discrimination in agricultural policies. I know Sen. Wetangula has spoken to this. You remember on the issue of coffee when we set up the Coffee Fund, the five factories that were picked as the pilot areas for that crop are from one region.

The former President Kibaki, God bless this old man, in his wisdom, he ensured that fertilizer was subsidized for all farmers in this country. However, the current administration looked at the list of the benefactors and considered those regions to be regions that are populated with people that they think are lesser Kenyans, they canceled that arrangement.

The Standing Committee on Agriculture, Livestock and Fisheries must give us the response. We must know what it is that informed the decision by this Government to cancel the fertilizer subsidy programme that ensured that the cost of fertilizer which had dropped to about Kshs2,500 per 50 kilogrammes bag has all of a sudden shot up to Kshs6,000. It is not something that we need to preside over as a House. Therefore, I hope that the Committee will do justice to these petitioners. We shall be looking forward to their report.

With those remarks, I support.

Sen. (Dr.) Musuruve: Thank you, Mr. Speaker, Sir, for giving me this opportunity to support this noble Petition that has been brought by Sen. (Dr.) Mbiti.

Kenya is one of the nations that signed the Maputo Declaration. It asserted that State parties allocate 10 per cent of the national revenue to go agriculture. Agriculture plays a big role in the economy of this country. As a Senate, we have to see how to encourage farmers because that is business.

This Petition is timely. The Kenya Seed Company should be a representative of all farmers in this Republic. We have to see how to stand with our farmers because they are self-employed and they create employment. Apart from creating employing, they use land, a factor of production, effectively. We see our women and youth working very hard on land and there must be returns.

We have to look for a mechanism of ensuring that there is a framework to help our farmers. It should not be a theoretical framework but a workable framework so that the farmers benefit. We should not have cases where maize is imported from outside the country when our farmers have maize in their stores. We have to see how to create an exit for our farmers produce.

As I support this Petition, I hope that when it goes to the right committee, they will expedite the process and ensure that we cushion our farmers. This is because just like anybody else, they have needs such as school fees. In fact, they do not have hospital insurance for their children. They have to get money from their farm produce. We should ensure that we help the farmers in Kenya.

Mr. Speaker, Sir, I support.

The Speaker (Hon. Lusaka): Hon. Senators, because of time, pursuant to Standing Order No. 232(1), the Petition is committed to the Standing Committee on Agriculture, Livestock and Fisheries which is the relevant Standing Committee for its consideration.

In terms of Standing Order No. 232(2), the Committee is required, in not more than 60 calendar days from the time of reading the prayer, to respond to the petitioner by way of a report addressed to the petitioner and laid on the Table of the Senate.

*(The Petition was committed to the Standing Committee
on Agriculture, Livestock and Fisheries)*

Let us go to the next petition by the Chairman of the Standing Committee on Land, Environment and Natural Resources.

REPORT ON PETITION: POOR ADMINISTRATION OF
LAND REGISTRIES COUNTRYWIDE

Sen. Mwangi: Mr. Speaker, Sir, I beg to lay the following Paper on the Table of the Senate today, Tuesday, 22nd September, 2020-

The Report of the Standing Committee on Land, Environment and Natural Resources on a petition to the Senate by Ms. Carole Karuga, Chief Executive Officer (CEO) of the Kenya Private Sector Alliance (KEPSA) regarding the state of land registries and frequent closure of the Central and Nairobi land registries.

This Petition was about issuance of notices of closure of Central and Nairobi Registries for purposes of conducting audit on land records in registries with most recent notice being on 12th February, 2020.

The KEPSA came up with this Petition because the Government was losing funds in terms of payments that are supposed to be made to the Ministry of Lands and Physical Planning. The arbitrary closure was resulting to enormous negative impact on the economy with regard to the overall global ranking on the ease of doing business and access to credit in Kenya.

We deliberated on this Petition before we invited the Ministry of Lands and Physical Planning and the KEPSA officials to interrogate this matter. We found out that it had a big impact on the economy of this country. After listening to the petitioners and the Ministry of Lands and Physical Planning, we made some recommendations.

The first recommendation is on the issue of closure of land registries for purposes of digitisation of records. The Committee recommended that digitisation of land records should be done in phases so that those affected remain operational during digitisation process. The plan should ensure that no land registry is fully closed at any one time and they should do it in phases. While doing so, the registries should remain operational.

We also recommended that digitisation should be published and publicised to all stakeholders and members of the public at least 14 days before the commencement of the phased digitisation in the respective registries. Stakeholders should be informed in advance so that they know when the process will be undertaken, so that they plan ahead of time and know when to go to land registries and when not.

The Ministry should ensure predictability in the operation of the registries by setting clear timelines for the phased digitisation process. The phases should be known. If they do it, those affected should know that there will be digitisation for example in March, June or September so that the stakeholders can plan how to do their work.

The Cabinet Secretary of the Ministry of Lands and Physical Planning should ensure that the notice for commencement of digitisation process advises stakeholders and the public on how the registry is to continue its operations during digitisation process. Where the Ministry of Lands and Physical Planning anticipates any delays in digitisation process, such delays should be brought to the attention of the stakeholders.

The Ministry should also work with the stakeholders. They should do their planning together so that stakeholders do not continue missing business. We had many

stakeholders when we held the discussions and they were complaining that the Ministry of Lands and Physical Planning is phasing them out of business.

Mr. Speaker, Sir. Without much ado, I now wish to table the Report on the Floor of this House.

I thank you.

(Sen. Mwangi laid the document on the Table)

The Speaker (Hon. Lusaka): Let us go to the next Order.
Sen. Olekina, kindly proceed.

NOTICE OF MOTION FOR ADJOURNMENT UNDER STANDING ORDER NO. 34

ADVICE BY THE CHIEF JUSTICE TO THE PRESIDENT TO DISSOLVE PARLIAMENT PURSUANT TO ARTICLE 261 OF THE CONSTITUTION

Sen. Olekina: Mr. Speaker, Sir, I rise pursuant to Standing Order No. 34 to seek leave to move an Adjournment Motion to discuss a definite matter of urgent national importance namely: The Chief Justice's advice to the President to dissolve Parliament under Article 261(7) as read with Article 27 (3), and (8), Article 81 (b) and Article 100 of the Constitution based on the grounds that Parliament has failed to enact the legislation required to implement the Two Thirds Gender Rule in accordance with cited Articles of the Constitution.

Amkeni.

(Hon. Senators stood up in their places)

The Speaker (Hon. Lusaka): I am satisfied with the numbers. I appoint 4:30 p.m. as the time to discuss that.

Sen. Dullo, kindly, proceed.

PROCEDURAL MOTION

ADJOURNMENT OF THE HOUSE TO ALLOW MEMBERS TO PROCEED TO *KAMKUNJI*

Sen. Dullo: Mr. Speaker, Sir, I am standing on Standing Order No. 1. I would request the House to adjourn for one hour to discuss Adjournment Motion by Sen. Olekina.

I thank you.

The Speaker (Hon. Lusaka): Okay. Yes, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr: Mr. Speaker, Sir, since the debate is going to be here, I propose that we do it at the *Kamkunji* in 20 to 30 minutes. It is more than enough, so that we can bring the debate here once we have caucused. One hour is too long to talk about what we are going to talk about. Twenty minutes is more than enough.

I thank you.

The Speaker (Hon. Lusaka): Order Senators.

Hon. Senators, I am aware of the matter that has been raised by the Hon. Senator and in order that Senators may be apprised further on the matter, I will use Standing Order No. 1 to suspend the proceedings and converge at a *Kamkunji* here in the Chamber for 30 minutes.

(The Senate adjourned temporarily at 3.03 p.m.)

(The Senate resumed at 4.28 p.m.)

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

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Members, for the two minutes remaining before the appointed time, I give this opportunity to Sen. Omanga to make her Statement. Hon. Senators, be patient and you will hear her.

STATEMENT

THE STATE OF PUMWANI MATERNITY HOSPITAL

Sen. Omanga: Thank you, Madam Deputy Speaker. I rise Pursuant to Standing Order 48 (1) to seek a Statement from the Standing Committee on Health regarding the State of Pumwani Maternity Hospital.

In the Statement, the Committee should-

(1) Outline measures the Nairobi Metropolitan Services (NMS) has put in place to ensure health workers at Pumwani Maternity Hospital are paid their dues and get improved welfare.

(2) State the health protocols the NMS is putting in place to ensure easy access of the health facility despite claims by patients that they are being turned away due to threats posed by COVID-19.

(3) Explain whether the Nairobi City County health workers should be treated as civil servants given that Nairobi City County health services were transferred to the national Government.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. Hon. Senators, it is now 4.30 p.m., the appointed time for the Motion. Let me give Sen. Sakaja one minute.

Sen. Sakaja: Madam Deputy Speaker, the issues at Pumwani Maternity Hospital, which I am glad Sen. Omanga has brought up, are deep. The last time there was a problem at the hospital, we went there with the Committee on Health and did not get a report. It was when babies were being dumped in paper bags without incinerators and other equipment.

We have serious human resource issues and other issues, which led to a woman giving birth on the street. We should all be ashamed and embarrassed. In as much as the NMS has issued a statement apologizing, it must be summoned to the Senate to answer on what is happening in Pumwani Maternity Hospital. Our mothers must be assured of the best quality of healthcare. It is not enough to say that health is free for them. They

need to know that they can access it even during this time of the COVID-19 pandemic. Pumwani Maternity Hospital has been on a go-slow.

On top of that, and I hope the Committee is hearing, they need to tell us about the outstanding National Health Insurance Fund (NHIF) and labour relations issues around Nairobi, generally, not just Pumwani Maternity Hospital, because we had a strike for a while. I was speaking to Dr. Thurairaja who is the head of the union in Nairobi and the issues have not been resolved. They are being taken round in circles.

I hope we have a real answer from the Committee on Health, and not what happened last time when Pumwani issues came up. Pumwani Maternity Hospital is dear to many of us, many of whom were born there.

Thank you, Madam Deputy Speaker, for your indulgence.

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Senators, if we get time we will come back to the Statements by Chairpersons of Committees. For now, let us go back to the Motion by the Senator of Narok, Sen. Olekina.

MOTION FOR ADJOURNMENT UNDER STANDING ORDER NO.34

ADVICE BY THE CHIEF JUSTICE TO THE PRESIDENT TO DISSOLVE PARLIAMENT PURSUANT TO ARTICLE 261 OF THE CONSTITUTION

Sen. Olekina: Thank you, Madam Deputy Speaker. Mr. Speaker, Sir, I beg to move the following Motion:

THAT, pursuant to Standing Order 34, the Senate adjourns to discuss a definite matter of urgent national importance; namely, the advice by the Chief Justice to have the President dissolve Parliament pursuant to Article 261 (7) of the Constitution.

Madam Deputy Speaker, this is a grave issue. It is a matter that I consider troubling in the sense that even those advocating for the two-thirds gender rule have no clear way on how it will be achieved. I blame this squarely on the Committee of Experts; the ones who drafted the Constitution.

I have read this Constitution from Article 1 to the last Article. I am at a loss as to how this Parliament, which has made several attempts to come up with a legislation, as required under Article 261 - particularly on Article 100 of the Constitution - but has failed because of difficult things.

In the Tenth Parliament, just to show you how this Parliament has attempted to deal with this matter. There was The Constitution of Kenya (Amendment) Bill 2011 by the then Cabinet Secretary for Justice, National Cohesion and Constitutional Affairs, the late hon. Mutula Kilonzo. The Bill sought to give effect to Articles 27 and 81 (b) of the Constitution by introducing a new paragraph in Article 97 and 98 to provide that the filling of the Special seats shall be determined after the declaration of elected Members from each constituency. The Bill lapsed at the end of term of Parliament.

Madam Deputy Speaker, the Eleventh Parliament made several attempts. These include an attempt by Hon. Samuel Chepkonga and Hon. Aden Duale. Sen. Judith Sijeny came up with The Constitution of Kenya (Amendment) Bill No.16 of 2015. The Bill had

proposed to amend Articles 97 and 98 to ensure the composition of Parliament complies with the requirement that not more than two-thirds of its members are from the same gender by election of Members.

Madam Deputy Speaker, in the Twelfth Parliament the son of the first man who attempted to introduce the Bill came up, my distinguished friend, Sen. Mutula Kilonzo Jr. and my sister Sen. Farhiya. In their Bill, The Constitution of Kenya (Amendment) Bill No.4 of 2018, through which they sought to give effect to the two-thirds gender rule. In the 'lower' House, Hon. Jeremiah Kioni attempted to do so in The Amendment Bill No.52 of 2019.

The Hon. Gladys Boss Shollei also attempted to do that on the Amendment Bill No.53 of 2019. This Parliament has made several attempts which now begs a big question: is the Chief Justice (CJ) forcing Parliament to implement the two-thirds gender rule against their will? I am sure that even women legislators voted against that. That is why we could not raise the two-thirds majority to pass it. We have to be alive to the fact that the Constitution was hurried.

Article 93 of the Constitution defines Parliament as comprising of the National Assembly and the Senate. If you go to Article 261, the Article he relied on, it refers to Parliament where the Senate is involved, but gives the powers to the National Assembly to extend the duration of time. At that time, the Senate is out of the picture. There are many things which are wrong in the Constitution.

Article 97 of the Constitution defines the constituencies to be set up in the country to be 290. Article 98 of the Constitution limits the elective positions of the Senate to be 47. The Constitution requires this Parliament passes legislation to ensure there is the two-thirds gender rule. However, if we go and tell people in Narok East Constituency that they must only elect a woman or a man, and cannot elect a woman to represent them---

If you look at Article 97 of the Constitution it has a disclaimer that regardless of the numbers set up, no one is prohibited from running for that position. That means that if you are a woman or a man, you can still seek elective position. I find that the Constitution contradicts itself in so many instances. I blame the Committee of Experts who hurried it. I also blame some Members who were in this House. I was having this conversation with the distinguished Senator for Bungoma who was in Parliament then. They hurried it because people were not interested in paying attention to details and understanding the consequences.

I am one of those people who believe that if the CJ could have taken time to consult widely; speak to the President, the two Speakers and have a way to deal with this, and not approach things like a lone-ranger, we would have had a solution. Article 261(8) says a new Parliament shall enact--- What is a definition of a 'new Parliament'? Does this not call for another general election? If Parliament is dissolved tomorrow, we have a general election and Kenyans elect 290 men or elect 47 women as Senators, would we be curing the issue?

Madam Deputy Speaker, this is a matter that requires sobriety. It is not a matter where we use force. We cannot force Kenyans to do it. This almost looks like when you are playing soccer and all of a sudden, you decide to return the ball back to the goalkeeper, but accidentally send it to the striker who now controls it.

What has happened in this country is that we have been doing so well in terms of democracy. We have been growing as a young democracy with the freedom of speech, but the action by the CJ really takes back all that power and gives it to the President. It is the President to decide.

Madam Deputy Speaker, I have looked at the Constitution again. It talks about the election of the President and Members of Parliament (MPs) being on the same day. What does this advisory by the CJ mean? Does it mean that once Parliament is dissolved, the President also goes home? It is the time of the COVID-19. Do we have money to run a general election and then come back to the issue of the Building Bridges Initiative (BBI)?

We need to be realistic because not everything is cast in stone. We will gain a lot more if we consult instead of taking a lone-ranger approach. This lone-ranger approach has taught some of us that it does not help. We have to consult here. Whenever a Member brings a Bill here, they need to sit down, discuss and build consensus.

Madam Deputy Speaker, there are things that really shocked me. As a Member of this Senate, I introduced two Bills to this House. They went to the National Assembly, but they were termed as Money Bills. If we blame both Houses for the actions of one House, what are we going to do in this country? Are we just going to create things?

My question is: Can the legislation contemplated under Article 100 of the Constitution be enacted without amending the ceiling on the number of MPs as provided by the Constitution? Many people would say you go back to the Constitution for the answer.

If we say that we should change the way Parliament works, we will be limited to the provisions of Article 255 of the Constitution that requires a referendum. In order to build a strong democracy in this country, we must look at the entire law and admit mistakes we made and correct them, moving forward.

Madam Deputy Speaker, as I wind up and request Sen. Mutula Kilonzo Jnr. to second, I just want to encourage all of us to read the Constitution and correct it through referendum very soon.

Sen. Mutula Kilonzo Jnr.: Thank you, Madam Deputy Speaker. The letter by the CJ raises serious constitutional issues which, ideally, we must debate them with the sobriety that it deserves.

Under Article 102 of the Constitution, a term of Parliament is defined as: "The term of each House of Parliament expires on the date of the next general elections." This clause alone suggests that there is a contradiction or apparent conflict between Article 102 and Article 261.

The second issue that raises serious concern is that it is contemplated under the jurisdiction of the Supreme Court that an appeal can be raised on any matter on interpretation of the Constitution. The reason why the drafters of this Constitution - and I participated in the research on the Supreme Court and its jurisdiction - is that we contemplated that the Supreme Court would have the power and jurisdiction to determine such critical issues as this one.

Why do I raise this issue? I am raising this issue because the President of the Supreme Court is the CJ. Therefore, in exercise of his jurisdiction, under Article 261, he should have exercised extreme caution because of the possibility that an appeal would be

raised to the Supreme Court on the interpretation of the exercise of jurisdiction under Article 261 (5), (6), and (7).

Thirdly, it is also a contradiction that the CJ is given what appears to be an administrative role under Article 261 to transmit a decision to the President to dissolve Parliament under Article 261 (7).

Madam Deputy Speaker, in my view, the transitional part of the Constitution under Chapter 18 will also require deliberate interpretation. I slightly disagree with the notion that the word “shall” has got two meanings. The word “shall” is mandatory. However, in the exercise of jurisdiction by the President under Article 261(7), I am not persuaded that the President does not have a *quasi judicial* jurisdiction to check whether the process under Article 261 has been followed.

Madam Deputy Speaker, we hope that the Attorney-General who is mentioned in Article 261 (6) (b), which says; “transmit the order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted.” This part of the Constitution was not complied with. It is an issue of constitutional concern. In my view, I humbly submit that the President cannot exercise jurisdiction under Article 261 (7) if Article 261 (6) (b) has not been complied with.

(Loud consultations)

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Senators, this is a Statement under Standing Order 34. Every Member, except the Mover uses only a maximum of five minutes. You have one minute. The bell is showing you one minute.

Sen. Mutula Kilonzo Jnr.: Madam Deputy Speaker, according to the mandatory terms under Article 261(7) for the President to exercise jurisdiction, he must check that an order was transmitted to Parliament. We want the President to check in the communication by the CJ that an order was directed to Parliament and the Attorney-General, and served to the Speaker of the National Assembly and the Speaker of the Senate in order for Article 261 (7) to apply.

Lastly, in terms of practicality, the Constitution under Article 260 says that we are supposed to breath life into it. It is supposed to be interpreted in such a way that it is not a contradiction. If you dissolve Parliament today and go on an election in 90 days, chances are there will be a further default if those mechanisms that are contemplated under this Constitution are not put in before that dissolution.

Madam Deputy Speaker, it is my view that the CJ acted prematurely, in a hurry and without ensuring that certain minimal things were done. It almost appears as if he has become an activist while he is supposed to be a President and the Chief presiding judge of the highest court of the land.

I support.

(Question proposed)

The Deputy Speaker (Sen. (Prof.) Kamar): Hon Senators, I see that the list is very long. May I repeat that this a Motion under Standing Order 34; you only have a maximum of five minutes. May I request that if Sen. Omanga is not under intervention,

she should switch off that button and move to the right request because she is in the wrong place.

Sen. Wako: Thank you, Madam Deputy Speaker for giving me this opportunity to speak on a matter which is raising very fundamental complex constitutional issues.

Since I only have five minutes, I will be very brief. The structure of this Constitution removed from the President the power to prorogue and dissolve Parliament. The terms of Parliament are clearly set out in our Constitution which resembles the Constitution of the United States of American. Article 101 (1) of the Constitution states that: -

“A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.”

The definition of a general election is not anywhere else in the Constitution apart from what we now read here should be held every fifth year. That provision in the Constitution was deliberate because the former Constitution gave the President all the powers to dissolve Parliament. I agree with Sen. Mutula Kilonzo Jnr. that there is a basic contradiction under Article 101.

Article 102(1) of the Constitution states that: -

“The term of each House of Parliament expires on the date of the next general election.”

Madam Deputy Speaker, Article 101(1) is clear that a general election will be held on the second Tuesday of August in every fifth year. Consequently, there is a contradiction between the provision of Article 101(1) and 102(1) and the powers being exercised by the President under Article 261(7). It has not been provided whether the election to be called is a general election or not. If it is not a general election, there would have been further amendments on the effect of that on sitting Members; does the term expire or whether it shall be less than five years? There is no provision on what should happen if Parliament is dissolved under Article 261(7). What happens under those circumstances? Do they still continue to serve for the balance of the terms; two years in this case?

Madam Deputy Speaker, there is a very fundamental contradiction under Article 261(7) that the President cannot just act on it before the loopholes that have been identified on this matter have been rectified. Article 261(7) applies to the Fourth Schedule which consists of many legislations to be enacted.

Most of the legislations under the Fourth Schedule will not cause a fundamental problem. However, where a decision to dissolve Parliament will affect other provisions of the Constitutions, which led to the election then I submit that those contradictions must, first of all, be ironed out and clearly stated before Parliament can be dissolved.

The proper avenue to iron out the differences in the Constitution will be through a referendum because the sovereignty of the people of Kenya is vested in the people. The Judiciary is acting on behalf of the people. The President is acting on behalf of the people and we are acting on behalf of the people. We are now telling people that there are very fundamental contradictions in the Constitution and loopholes which require to be closed up. Can the people of Kenya decide on these matters? Before the Present gives his assent to the directive by the CJ, I hope that he can wait until the fundamental pitfalls in the Constitution are closed completely.

Madam Deputy Speaker, I would also like to mention that---

The Deputy Speaker (Sen. (Prof.) Kamar): Sen. Wako, Attorney-General *emeritus*, your time is up.

Kindly proceed, Sen. Farhiya.

Sen. Farhiya: Madam Deputy Speaker, I would like to go on record thanking CJ Maraga for the decision that he took. If it will take all of us going back for election for the two-thirds gender rule to be realized, so be it.

I believe that gender equity is a human rights issue that the elected leaders should take care of. I believe that over 50 per cent of the Kenyan brain is not on the decision making table. Women make up 51 per cent of the Kenyan population, yet their brain and ideas are not on the decision making table and that is why we are making a lot of blunders politically. We will never achieve the much needed economic or social development because over 50 per cent of the brain is not on the decision making table.

Sen. Mutula Kilonzo Jnr. and I sponsored a Bill on the two-thirds gender rule. However, before the Bill was even brought to the Floor of this House for debate, the then Chairperson of the Committee on Justice, Legal Affairs and Human Rights was on record stating that the Bill should be thrown out of the window. The women of Nandi County should start collecting signature to impeach Sen. Cherargei for violating their rights.

I thank the current Chairperson of the Committee on Justice, Legal Affairs and Human Rights who has ensured that the Bill advances.

Sen. Cherargei: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): What is your point of intervention, Sen. Cherargei?

Sen. Cherargei: Madam Deputy Speaker, with all due respect to my sister, the Deputy Majority Whip, is she in order to say that the position I took as the then Chairperson of the Committee on Justice, Legal Affairs and Human Rights is my own and not that of the Committee? I only communicated the decision of the Committee before the House considering the provision of the Senate Standing Orders that the Chairperson of a Committee will be the spokesperson. Sen. Farhiya should not hang me considering that Sen. Mutula Kilonzo Jnr. was also a Member of that Committee.

I wish Sen. Farhiya would only restrict herself to saying that I gave communication from the then Committee on Justice, Legal Affairs and Human Rights, and not my own decision, on the two-thirds gender rule.

The Deputy Speaker (Sen. (Prof.) Kamar): Sen. Cherargei, that is well noted.

Kindly proceed, Sen. Farhiya. You have two and half minutes left.

Sen. Farhiya: Madam Deputy Speaker, if the advisory given to the President by CJ Maraga was on any other constitutionality other than the two-thirds gender rule, most of us would have respected that rule. As Sen. Halake mentioned, most of the Bills that would have led to the dissolution of Parliament for non-passage have already been complied with, except the two-thirds gender rule. Therefore, that shows that there is a problem in terms of our understanding. More than 51 per cent of the population of this country is not adequately represented in both Houses. At least in Senate we are just minus one, but the other House they are around 23 per cent.

Madam Deputy Speaker, as Houses who are a creation of the Constitution, it is incumbent upon us to ensure that we respect and protect the Constitution. The Bill

sponsored by Sen. Mutula Kilonzo Jnr. and I, is about just filling in the gap. Kenyans are made to feel as if it is going to bring in another 290 seats back to the House. That is far from the truth.

Gender rule is not about women, but about both genders.

Sen. Sakaja: On a point of Order, Madam Deputy Speaker. Our standing orders are clear on the issue of relevance. The Motion we are discussing is not about the merits or demerits of having two-thirds, but about the actions taken by the court. Would I be in order to say that this discussion is not on the relevance of the Motion because we have a lot of thoughts and we support two-thirds? However, we are discussing the action of the CJ in advising for the dissolution of Parliament.

Could you guide us because many other Members are also going to continue, but we are not discussing a Gender Bill today?

The Deputy Speaker (Sen. (Prof.) Kamar): Yes, Sen. Sakaja although in practice when you are given your five minutes, you have the right to also talk to your constituents. This is the practice we have had.

Sen. Farhiya, you have only 40 seconds.

Sen. Farhiya: Madam Deputy Speaker, this is still relevant because the CJ took this action as a result of the Gender Bill not being passed. That is what I am discussing in terms of its relevance to what we are discussing now.

Let us look at how we can balance because there are a lot of things that are against women in terms of the elective position. They face a lot of challenges in this country in terms of election violence, parties not giving them nomination and so many other impediments. Apart from gender disadvantage, we also have disadvantaged groups such as youth and people living with disabilities.

Sen. (Dr.) Ochillo-Ayacko: Thank you, Madam Deputy Speaker, for giving me an opportunity to make remarks regarding this very serious matter of national importance.

To me, the CJ did something that may appear to be a desire to be trending in social media and news, but a responsible person would not do so. The CJ is a holder of an office that must not make advice that is pedantic; advice that cannot be implemented and that has the potential of causing chaos. He says we must rise to the pain of making difficult decisions.

I do not think we should be excited about difficult decisions. We should be excited about resolving the consequences of our decisions. If one looks at why we are where we are standing, it is not because of legislation, but because of Kenyans who vote. In 2007 before the enactment of the Constitution, Kenyans had been voting like that. In 2013 and 2017 when they went to the polls, they voted like so. The CJ or somebody says that we go back to the polls; have Kenyans changed?

If the reasons and the pattern by which they vote have not changed, they are likely to return the same thing. What needs to happen is, perhaps, the Presidency to look at the situation and look at this as a moment that calls for reform. Asking Parliament to go home when we come back and I am likely to come back - I will be the same Sen. (Dr.) Ochillo-Ayacko and Sen. Farhiya will be the same. What will have changed?

Basically, we need to have those laws so that when we go for elections in 2022 - not now - we will have a situation that will deal with it. Going for an election because the

CJ in his proximity to retirement has made some pronouncement that is trending will not solve this. This will be solved if we are allowed to continue and try to negotiate and resolve this in the same manner that my cousin, Sen. Wetangula and my nephew Sen. Sakaja resolved the Revenue Formula issue.

We cannot just go home and expect magic to happen that the legislators who may come after us will solve it. We need to solve it now and to have time. We will not change. That is why sending home this team to bring another that will be constituted in terms of atoms and molecules the same way will not yield the results. The CJ must seriously think about offering solutions, but not making a decision that trends.

Madam Deputy Speaker, as I conclude I will just look at what the law says. I agree with Sen. Mutula Kilonzo Jnr. and Sen. Wako that this Constitution has contradictions. Article 81 says-

The electoral system shall comply with the following principles—

(a) freedom of citizens to exercise their political rights under Article 38;

The one that is problematic (b) and you can see the ranking. It says-

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender.

That follows the first one.

Article 38 (1) (3) (c) of the Constitution says:

(3) Every adult citizen has the right, without unreasonable restrictions—

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

If the first right under political rights in Article 81---

The Deputy Speaker (Sen. (Prof.) Kamar): Unfortunately, your time is up! Proceed, Sen. (Dr.) Mwaura.

Sen.(Dr.) Mwaura: I am very excited, Madam Deputy Speaker, when I hear my fellow nominated Senators led by Sen. Omanga talking about discrimination. When I started making those statements immediately they came here they looked at me as if I was a man from Mars. That is the problem of having a Constitution that creates sinecure positions that do not necessarily hold the gravitas that they are supposed to result to.

Even in this Senate we vote by delegations. When you are a Senator representing the PWD; a man and a woman – and I think there is equality of gender there - you are relegated to your home county and pigeonholed there. That is a contradiction. I think I heard the Attorney-General *emeritus* talking about the contradictions in this Constitution.

It is envisaged that even when there is balance of power, checks and balances, it is not a basis for anarchy. I agree a lot with Sen. (Dr.) Ochillo-Ayacko that we have an activist CJ who wants to go down the annals of history as having made two key rulings that made the country to even go to the edge of a precipice.

The problem with this is that, you will suffer historical revisionism because people will look at what the motivation of your action was. It is not just because you did it. You will be mentioned, but people will dismiss your legacy by saying it was not well thought out.

Madam Deputy Speaker, this is the case because if you look at the chronology of events, there are two things that stand out. There was a case or cases at the High Court,

maybe they were consolidated - I stand guided - after the ruling of the High Court by Justice Mativo, where the appeal was dismissed. So, what was to follow?

It appears that the Chief Justice was moved by the six petitioners. Did they petition the High Court or the Supreme Court? That needs to be clear. In that regard, when you go and declare that a court order is as good as served because the parties were present when it was being issued, what kind of jurisprudence are you establishing there? Does it mean that you go and get the HANSARD or whatever records of the court proceedings and use them as a court order? What constitutes a court order?

One of the things that comes out clearly here is that you cannot look at the law in its purest form and say that it only exists by itself. Legislation is positive law as Hyatt speaks about it in terms of the rule of law. However, the Chinese have moved ahead and argued that the rule of law is not enough. They talk about self-discipline and recently moved from self-discipline to self-purification.

I think Chief Justice David Maraga should have self-purified by looking at this issue and saying that if you are to dissolve Parliament, you must look at the effect of that dissolution. One of the things that it does is that it separates elections.

Therefore, the six elections that happen in a day in terms of a general election will be staggered. It may be good for the Independent Electoral and Boundaries Commission (IEBC), but what is the import of that in terms of our governance?

Further to it, this is a monumental question that has not been responded to. Is it true that Parliament failed to pass a law? My answer is, no. There were not less than three attempts to ensure that the provision of Article 81(b) and (c) and Article 100 have come into effect.

When we were passing the Security Amendment laws, I proposed to delineate the 12 nomination seats in the National Assembly to occasion six of them to be men and six of them to be women and four people with disabilities. We were trying to fill this provision of the Constitution to breathe life into it.

Going further, the question would be; what would be the best option of ensuring the promotion of representation of women or people with disabilities? Is it by facilitation so that they go fast past the post or do we resort as a country to go the proportional representation way so that we have the party list? These are fundamental questions that we need to talk about.

Sen. Wetangula: Thank you, Madam Deputy Speaker. I feel very worried sometimes when I see a holder of an office like the Chief Justice taking this nihilist approach to issues. The President should be advised that before he considers the advice he has been given, he must seek the highest legal advice from other quarters because the Chief Justice has acted in a manner that is not reasonable.

First, the advice of the Chief Justice must have been born out of the process contemplated under Article 261(6) that Sen. Mutula Kilonzo Jr., talked about. There is no reference to it at all.

We will respect the Chief Justice as lawyers if he had given a judgement in court. As lawyers we say, we do not agree with you but we respect it because you are acting as a judicial officer. This one is *quasi*-judicial, he is offering an advice without any regard to the process that is envisaged in the Constitution.

When the President will be looking at this, he must consider the following; that under the same Constitution, Article 27(3), there is an outlaw of discrimination. People elect who they want. Secondly, once people are elected to Parliament, you cannot walk in to this Chamber and condition the Senator for Makueni to vote in a particular manner.

Every Member has a right to vote. That is in parts 4 and 5 of Chapter 8 of the Constitution. In this House, Members vote according to their conscience and according to the issues before the House. Nobody can say go and vote in a particular manner.

Thirdly, every citizen in this country has a right to make political choice. It is guaranteed in the Constitution. You cannot force them to make a choice in a particular manner.

Madam Deputy Speaker, it is an act of universal suffrage under the Article 81(d) of the Constitution. When you go to the elections, people present themselves to the electorate and they are voted for. What we should be looking at - I want to encourage Sen. Omanga and those who are taking an activist approach to this issue that this is not about activism, it is about realism.

How do we achieve the gender parity without throwing the country into turmoil? What the Chief Justice has done can easily create a serious crisis in the country.

The Deputy Speaker (Sen. (Prof.) Kamar): Sen. Omanga, what is your point of order?

Sen. Omanga: Madam Deputy Speaker, is Sen. Wetangula in order to call me an activist and that I am not real? We are talking about real issues and human rights in the Constitution. As you know, women rights are human rights.

Sen. Wetangula: Madam Deputy Speaker, I never called anybody an activist. I said do not take an activist approach. Those are two different things.

In fact, my credentials and my party are very clear. My county of Bungoma has the record of the highest elected women, courtesy of me. Out of 45 wards, I have 13 elected women, only two (2) shy of the two thirds majority because I gave them affirmative action and supported them.

There is a young girl who left university and went on to defeat 16 men. She is a Member of the County Assembly (MCA) because the party gave her a ticket and supported her. We will continue doing this. Change the psyche of your parties. Do not queue on lists to be nominated. Ask your parties to support you. In areas where parties are strong, when they give you a ticket, 50 per cent of your election is done. That is what we should be encouraging.

As Sen. (Dr.) Ochillo-Ayacko has said, we can go home tomorrow and many of us will come back the same people. We will not have changed our gender. We will be the same. How do we achieve this? We need a national conversation. If it requires a referendum, let us go to it.

However, I want to caution the President that it will be an extremely dangerous misadventure to try and dissolve Parliament. Parliament has a fixed term and nobody can interfere.

The bad old days when you would be on the Floor speaking the way I am speaking and there is a news flash that the President has dissolved Parliament and your speech ends there, are gone. Parliament determines its calendar.

We support our women folk. We want you to be leaders. I want a woman president if she can make it. However, find a better route than going through this nihilist approach by Chief Justice David Maraga.

Sen. Halake: Madam Deputy Speaker, let me start by saying that the constitutional rights of women of Kenya cannot wait another minute. For that reason alone, I support and affirm the decision by the CJ to render advice to the President that this House is unconstitutional.

If there will be any constitutional crisis or pandemonium that will happen, it is not because of the CJ. It is because of lack and failure by this House to do what it should have done 10 years ago.

My friend Sen. Wetangula said that he has been philanthropic and charitable to women. We do not need charity of party leaders. We need constitutionalism that will ensure that we exercise equal rights to legislative representation.

To be a CJ of this country is to be a laughing stock; to be abused, threatened and intimidated. However, I applaud the CJ because he is a legal fundamentalist and he should continue to be true to the laws of this country. This country is blessed to have CJ Maraga at the helm of the Judiciary.

Failure by Parliament to enact legislation on the Two Thirds Gender Rule is tragic. It has been said by Hon. Muturi that it is not part of the mandate of Parliament. If the implementation of the Constitution is not the mandate of Parliament, whose mandate is it?

It has also been said that there is no mechanism to implement this provision. Why do we have Schedule Four if there is no mechanism? It has also been said that it is too costly to implement the Two Thirds Gender Rule. Why is it that we can do all the other things?

We implemented devolution, we can have a referendum and commissions upon commissions and we can repeat a presidential election but we cannot implement the Two Thirds Gender Rule. Is it expensive or just blatant denial of the rights of women in this country?

I said it in the *Kamukunji* and I will say it again. It is no longer about legislation. It is about impunity and refusing to uphold the rule of law for which we legislators are responsible. The constitutional rights of women of this country must be respected and implemented. We must not wait.

I do not agree that the CJ did not follow the mechanisms provided. We have been told that he has written letters to this House and there have been petitions. He has acted within the law to ensure Article 261(7) of the Constitution is followed.

Article 102 is about the Term of Parliament. I am not a lawyer but I would like an interpretation of what is more important. What happens in cases of contradictions? Do we just jump to the one that suits us? We should not run to Article 102 that talks about the Term of Parliament. We must exist before our calendar exists. If we are legit under the law, so be it. We cannot have a calendar when we are not legitimately constituted.

It is amazing how sometimes we look at ourselves. Those of us who are nominated should have been more scared. We have been ridiculed that our lists will disappear. Stay with your lists and go back to the ballot.

I support the CJ and celebrate him for his brevity and courage. When he nullified the presidential elections, the people sitting on the other side who are now literally abusing him were the ones crying. Today---

(Sen. Halake's microphone went off)

Sen. Wetangula: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Since her time is over, we will not have that point of order. Let us listen to Sen. (Dr.) Musuruve.

Sen. (Dr.) Musuruve: Thank you, Madam Deputy Speaker, for giving me this opportunity to give my thoughts. I want to start by saying that I do not support the pronouncement by the CJ because it was not well-thought out. He needed the three arms of Government to come together to have a conversation for the sake of this nation before that pronouncement was made. No arm of Government should work alone.

In as much as I support that we need to ensure the Two-Thirds Gender Rule, I want to say on the Floor of this House - I will not blink even if there is an interruption - that when women talk about the Two-Thirds Gender Rule, they never think about women with disabilities.

Sen. Mwaura and I have said on the Floor of this House many times that in 17 county assemblies, there was no representation of PwDs. Where was the CJ? Why did he not comment on that?

Article 54 (2) of the Constitution has been flouted many times in many organisations when it comes to elective and appointive positions right from the top, middle and the lowest points because the PwDs are under-represented. Where has the CJ been? The CJ should be candid not just for the sake of making a name by making pronouncements. Where was he last year and last year but one? Why should it come at a time when he is supposed to exit? There is need to have a conversation on the Floor of this House.

We had a heated debate on the issue of revenue sharing but because of a team and the conversation at State House, the issue was resolved because the President and "Baba" were involved. This issue can be resolved.

The CJ should stop politicking. He should be candid to Kenyans. If there is any change that should happen, let us have a referendum so that our roles can be corrected.

I thank you.

Sen. Sakaja: Madam Deputy Speaker, I would like to have on my menu whatever Sen. (Dr.) Musuruve had for lunch. I will ask her to share.

The first thing I want to say is to urge Senators who said that they support the dissolution of Parliament to do the honourable thing because you must put your money where your mouth is and resign immediately. If you support the dissolution, you should actually resign.

This is not necessarily about the content of the Petition. We are discussing the process. We support gender issues. However, even if it was a Bill on another matter done within a certain timeline, we would have made the same decision.

I want to start by saying that there is something happening and amiss for this reason. There are two Petitions before the court to be heard on 7th October on the

determination on whether Justice Mativo's order made on 29th March, 2017, to the Eleventh Parliament refers to the Twelfth Parliament. Where is the rush coming from for the CJ to plunge us into a potential constitutional crisis? I say this for the record and for people to know.

Just like my colleague Sen. Omanga said, we are ready for an election at any time. However, if you look at the rules, right now there is no framework for an election. Parliament has a sole legislative responsibility in this country.

If Parliament is dissolved and the next election can only be held in 2022, what happens in the intervening period, who does budgets and who will play the role of representation, which is in Article 1 - provision of the supremacy of the Constitution as well as sovereignty of the people of Kenya? There is no other mechanism that is provided.

Madam Deputy Speaker, it points to mischief and 'Samsonite' kind of politics. The Chief Justice (CJ) knows that he is leaving and decided, just like Samson in the Bible, to hold both pillars of the temple, where they were and go down with everybody.

[The Deputy Speaker (Sen. (Prof.) Kamar) left the Chair]

[The Temporary Speaker (Sen. (Dr.) Mwaura) in the Chair]

Mr. Temporary Speaker, Sir, there was a point that was made by Sen. Olekina, which is very important. Number one, if you look at the Constitution, the requirement of certain laws to be passed by a certain time points to the Fifth Schedule of the Constitution. The Fifth Schedule has a number of laws listed and the timelines. There is no Two-Thirds Gender Law on the Fifth Schedule stipulating that it should be passed within five years. It is not there. Sen. Wetangula, if you look, it does not exist.

Parliament can argue that even The Political Parties Act of 2012 that was passed is a law that has been written to help women achieve this. I support what Sen. Wetangula said, and I have been a party leader. As Chairman of my party, where you were a Member at some point, because I knew that it takes a lot to get women elected, I made sure that there is a level playing field.

Of the 16 women who were elected in 2013 in single member constituencies, eight of them – half - were from The National Alliance (TNA). Some of these issues can be solved within political parties. That is a discussion we must get into. I support what Sen. Wetangula said; that let us not be poetic about it. Let us go to the root cause of this issue and address it.

However, I would advise the State House Controller to change the Post Office Box number of the State House, so that the written advisory does not reach there, and it is returned to sender with immediate effect.

I thank you.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, Sen. Sakaja, Seneta wa Kaunti ya Nairobi. Nampa fursa Sen. Petronilla Were.

Sen. Were: Thank you, Mr. Temporary Speaker, Sir. I would also like to join my colleagues to add my voice to this issue in relation to the dissolution of Parliament, an advisory that was given to the President by the Chief Justice, Hon. Maraga.

Mr. Temporary Speaker, Sir, my main interest and why I am happy today is that the country is having a conversation on this issue of women, especially women in leadership. My focus is mainly on why we are in this position in the first place. For a long time, the country has not been able to elect women into Parliament. That is where the problem is and our focus should be; how should we deal with the cultural issues that prevent fellow women from voting for women leaders? What cultural issues prevent men from voting for women leaders? That is where our focus should be.

Our second focus should be on political parties, which is the primary source where leaders are nurtured and given to us. What should political parties do? What should political party leaders do? In areas where political parties have strongholds, like Jubilee in the former Rift Valley and Central provinces, Amani National Congress (ANC) in Western, and then Orange Democratic Movement (ODM) in Nyanza, the party leaders of those parties in those areas should make sure that we have women, who are strong, given direct tickets and many other ways or mechanisms of making sure women are elected to come to this Parliament.

Forcing parliamentarians to vote for women or for the women agenda is a tall order because they have to answer to their cultural encumbrances back in their homes. They have to respond to the needs of their elders. They also have their hands tied on this issue. We should look beyond what the Chief Justice, Hon, Maraga has raised and look at the key issue on why women are not voted for and look for solutions.

Even as we look forward to enacting laws to meet this Two-Thirds Gender Rule, we should focus on amending the Elections Act, the Political Parties Act and the Independent Electoral and Boundaries Commission (IEBC) Act to reflect that fact, to ensure that women come by right to this House. This is so that when they come to this House, they also have voting powers and not what we experience now with nominated Members.

I thank you. I support the Motion.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana kwa kujieleza vizuru kabisa. Sasa hivi nachukuwa fursa hii kumpatia Sen. Millicent Omanga nafasi ya kuzungumza.

Sen. Omanga: Thank you, Mr. Temporary Speaker, Sir. First, I want to applaud the 14th Chief Justice of Kenya, Hon. David Kenani Maraga, for his advisory to the President. It is in order.

Lawyers in this Chamber and colleagues are using a lot of jargon. The Constitution is very clear. Colleagues want to behave like commercial preachers that we have in the streets, who read the Bible verses in isolation, so that it fits their situation. When they want money from their followers, they read some specific chapters, like 'when you give, you get more.' I do not know the lady in the Bible who gave a cent and received more. That is how the lawyers in this House are behaving.

Mr. Temporary Speaker, Sir, the Constitution is very clear. Article 27---

Please, hold my time.

The Temporary Speaker (Sen. (Dr.) Mwaura): Sen. Okong'o Omogeni, jambo la nidhamu ni lipi?

Sen. Omogeni: On a point of order Mr. Temporary Speaker, Sir. You have heard Sen. Omanga, a Senator that I respect a lot, not once or twice, but three times equating

lawyers in the House to commercial preachers in the streets of Nairobi. Is that language that is befitting debate in this House?

The lawyers in the House now are Sen. Cherargei and I. Is she in order to use such derogatory language against us, especially that some of us who have toiled in this legal profession to the level of becoming senior counsel? I am the only Senior Counsel from a region. Is she in order?

The Temporary Speaker (Sen. (Dr.) Mwaura): Sen. Omanga, kabla ya kuzungumza, unakumbushwa kutumia lugha ya heshima ambayo inawapatia hadhi mawakili ambao ni wa kutajika, kama vile Sen. Omogeni na wengine ambao wamewakilisha Bunge hili katika kesi nyingi.

(Sen. Cherargei crossed the Floor without bowing to the Chair)

Kabla ya kurejea kwenye mjadala, Sen. Cherargei, uliweza kukiuka maadili kwa kuvuka sakafu bila ya kwenda pale kwenye foleni. Tafadhali fanya vile kuheshimu Nyumba.

Sen. Omanga, tafadhali endelea.

Sen. Omanga: Thank you, Mr. Temporary Speaker, Sir. I am most obliged. I have heard colleagues use a lot of skepticism, saying that the 2010 Constitution was hurriedly passed.

You know that the journey of the new Constitution started way long ago, from 1997 to 2000. In 2005, we went to a referendum where we did not pass the Constitution. In 2009, the new Constitution was passed. It was overwhelmingly voted for. It was six million people who voted for it and two million people voted against. For colleagues to claim that the Constitution was hurriedly passed, is not true.

Mr. Temporary Speaker, Sir, in our county assemblies, the Two-Thirds Gender Rule is complied with. Why is it that in the National Assembly and the National Parliament is where we have a problem? Most of the time, when we come to the Two-Thirds Gender Bill, most of the colleagues are egocentric and selfish.

They do not want to hear anything to do with gender because they have taken gender to be a woman affair. What they do not know is that the ball might be in their court next time because it will come a time where women will be elected to Parliament and the boy child or the male gender will be pleading to be included in the numbers in Parliament.

There is also an argument about the calendar. Article 102 is about the election of the President. We went for a repeat election, where our President was elected again in November, 2017. Members of Parliament were elected on 8th of August, 2017. There is a difference of three months.

They want to put it like the five years is cast in stone. Does it mean that when our term ends, the President will still continue with his term for three months, so that he finishes his term? That does not suffice.

Mr. Temporary Speaker, Sir, I want to urge colleagues that since Sen. Farhiya has got a Bill on the Two-thirds Gender Rule, we need to fast-track it. I urge my colleagues to support the Bill by Sen. Farhiya and Sen. Mutula Kilonzo Jnr., so that we are compliant. Otherwise, we cannot support the dissolution of the House, so that we go back

to the drawing board. The new Members elected to this House would be thinking right and straight to pass this legislation, to have women included in decision making.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana Seneta Mteule, Sen. Omanga. Ni vizuri pia niseme kwamba mimi na wewe ‘tulichora’ vizuri kuwa katika Bunge la Seneti. Sasa hivi nampa fursa Sen. Cherargei.

Sen. Cherargei: Thank you, Mr. Temporary Speaker, Sir. I congratulate you. The advisory given to the President under Article 261 (5), (6), (7) and (8) is a threat to democracy and the social fabric of this country. Having worked closely with the Chief Justice when I was the Chairperson of the Committee on Justice, Legal Affairs and Human Rights, he would have borrowed a few things. The law does not exist in a vacuum. Under Article 261 (6) (b) of the Constitution, the order should have been transmitted to Parliament, which was never done.

As you declare the Parliament unconstitutional, we need to ask ourselves whether there has been an audit to know whether the Judiciary meets the threshold of the Two-thirds Gender Rule, the Presidency and other organizations.

The aim is to have a progressive achievement on this issue of gender. When I chaired the Committee on Justice Legal Affairs and Human Rights, we sat and tried to deliberate on the Bill brought before us. However, we realized that there are so many factors that I would wish women, people with disability and young people to realize. One is that there is need to create a level playing ground for fair competition in politics. The youth and people with disability need a pronouncement from the Supreme Court in terms of their representation. The affirmative aspect has been brought to life under Article 53 of the Constitution.

Mr. Temporary Speaker, the Chief Justice misadvised himself on the issue of declaring Parliament unconstitutional. Secondly, when you look at Article 101, the Constitution envisaged that every second Tuesday of August in every fifth year, we should have a general election. It did not envisage a situation where there would be dissolution of Parliament after the President is given advice to dissolve Parliament, so that People can vote.

Some of us are not worried about snap elections being called today or tomorrow; we are sure of coming back. However, where does it leave the country? We have issues of COVID-19, the economy is not doing well, there are over 16 million Kenyans in the informal sector, and others are unemployed. The majority of them are people with disability and women. I advise the women in this country that there will be no free things, just like there are no free lunches. There are no freebies.

In our democracy, we should not create a bad culture where we tell someone that there is a free seat. This is discrimination contrary to Article 27 of the Constitution of Kenya. If women know that there are free seats, they will not compete. There are women like Hon. Phoebe Asiyo, Hon. Chelagat Mutai who is from my county and the current Deputy Speaker of the Senate. There are women who have fought hard with men. I have a Member of the County Assembly from Kilibwoni, namely, hon. Cynthia Muge. She floored over 20 men to win her seat. The women in this country, on the issue of gender, must know that there are no freebies.

Finally, the Chief Justice, who will retire soon, came to the Committee on Justice Legal Affairs and Human Rights severally, and we stood with him when the Executive

was doing budgetary cuts. He has forgotten. The other day when the Executive wanted him to retire, we defended him and said that he must stay up to December because we did not want to create a constitutional crisis within the Judiciary. Why is the Chief Justice not alive to all these issues?

There is the Building Bridges Initiative report coming. Is there a conspiracy to use this as a scarecrow against Members of Parliament? Therefore, I think it is misadvised and we are ready for elections anytime. I can assure you that if elections are done today, I am sure more men than women will come to Parliament.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, Seneta Chergei. Sasa hivi nampa fursa Seneta Omogeni, Seneta wa Nyamira, ambaye ni wakili mkuu aliyepewa hiyo hadhi na heshima na Mheshimiwa Rais.

Sen. Omogeni: Thank you, Mr. Temporary Speaker, Sir. I first want to state categorically that I am not an enemy of the women of Kenya. I am a son of a mother, married for the last 23 years and have a daughter aspiring to be a lawyer like me; she is doing her final year. As a matter of fact, I have no hatred against the women of this country.

I believe that the best we can do to our women---

The Temporary Speaker (Sen. (Dr.) Mwaura): Samahani Mhe. Seneta, leo nimeitwa *Madam Speaker* mara nyingi sana, nafikiri ni kwa sababu tunazungumzia mambo ya jinsia.

Sen. Omogeni: My wish for all the women of this country is to create an environment for our women to pursue their goals to their highest level they want. I was impressed to see the former Deputy Chief Justice of this country, Nancy Baraza, offer to run for presidency. In line with Article 38 of the Constitution, the best way to test your popularity among your people is to vie for elective posts.

I have tremendous respect for the Committee of Experts that drafted this Constitution. However, it has got a number of challenges. If you go to Article 81 (b) that talks about gender, it only makes a general statement. It says: -

“Not more than two thirds of Members of elective public bodies shall be of the same gender.”

If you go to the Fifth Schedule, there is no timeline given for the enactment of any law under that particular Article of our Constitution. The only article that has a timeline is Article 100, where Parliament was given a period of five years. However, it says that Parliament shall enact legislation to “promote.” If you say that in an election political parties will give both gender a chance to vie for nomination, that is promoting. If you state that women will not be harassed in campaigns, they will get an environment to do their campaigns freely, this is promoting.

Article 27 (8) says:

“In addition to the measures contemplated in Clause (6), the State shall take legislative and other measures---”

Therefore, the obligation is not on us, as parliamentarians. The obligation is on the State.

Therefore, the Chief Justice, who is a celebrated son of Nyamira, is human. He can err like everybody else; it is only God who cannot make a mistake. I think on this one, the Chief Justice has committed an error. The advice that he has transmitted to the

President can be challenged. I am happy that we, as Parliament, have made a decision to proceed to the High Court to challenge the advice that he has given to the President.

Finally, when we hold positions of responsibility, we must always warn ourselves not to act in vain. There is no end to Article 261 (6) of the Constitution. If Parliament is dissolved today, and we come back and do not attain the Two-thirds Gender Rule, it will be dissolved again. This will be a circus. I propose that as we go to the BBI, we do a comprehensive review on the Article dealing with gender, so that we do not create problems for the future generations.

Thank you, Mr. Temporary Speaker, Sir.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante, Sen. Omogeni. Sasa hivi nampatia fursa Sen. (Arch.) Kasanga kuchangia, na mwishowe, Kiongozi wa Walio Wengi atafunga Hoja hii.

Sen. Kasanga: Thank you, Mr. Temporary Speaker, Sir. I do not think I have presented before you. This is the first time. I thought I would be the last one, so that I would ask for a little more time, but now that the Senate Majority Leader is here, I will have to try to condense my thoughts.

Sen. Omogeni is a Senior Counsel. I would like to be guided because I am not a constitutional lawyer---

The Temporary Speaker (Sen. (Dr.) Mwaura): Samahani, zungumza tu kwa sababu bado tuko na muda. Hii ndio Hoja ya mwisho. Nitakupa dakika saba uweze kuchangia Hoja hii.

Sen. Kasanga: Thank you, Mr. Temporary Speaker, Sir. Starting from where Sen. Omogeni has left, this Parliament - both the Senate and the National Assembly - should enact these legislations to make sure that when we go to the next election, the envisioned legislations in the Constitution will be in place, so that we do not have a situation like this one.

I agree that, that should be the position. However, as of now, with the advisory that the Chief Justice has given to the President, I am celebrating it. This is a great constitutional moment, just like the one he gave us when he nullified the presidential election in 2017. The silence is to mull over it and realize that it is not the end. In my opinion, there is no quagmire that cannot be resolved.

Mr. Temporary Speaker, Sir, I am happy that the conversation of the Two-thirds Gender Rule is back on the table for discussion, hopefully, with a way out now, rather than what we have seen. Sen. Olekina has outlined the many attempts that have been made towards this Two-thirds Gender Rule. Why is it so elusive? As Sen. Omogeni has told us about the Constitution and the way it is written. You can poke holes here and there. When you read one clause after another, it is not quite saying---

In the end, as leaders, is it not our duty to help solve some of these challenges that our Constitution has? We have to acknowledge that what the Constitution envisioned as the principle of the Two-thirds Gender Rule is a beautiful thing. We have to respect this Constitution. After all, when we take our oath, we swear to defend it in God's name. Therefore, we have a duty to make sure that those loopholes are sealed and addressed. We have a duty to make sure that we actualize the vision that the drafters of the Constitution had.

Mr. Temporary Speaker, Sir, I was just going through some Articles here. World over, the issue of women and marginalized groups not being well represented in governance and leadership positions is the reason many countries have had to institute gender legislations and frameworks, to ensure that this is happening. We have seen it happen successfully in our neighbouring countries.

We like to say that in the larger East African region, we are very progressive. However, we consistently miss out on these opportunities to make us even more progressive. In any case, we are sometimes retrogressive. When we have leaders like the Chief Justice, who can say these things that we do not want said, or to bring up these difficult conversations to ensure that we get to do things the right way, then we must celebrate.

Let us take it upon ourselves to see what we can do. I liked the proposal that one of the Senators mentioned here. Going forward, maybe what we should do is have a delegation sit with the President to see what can be done immediately, to make sure we have legislation in place and get more women to come into Parliament and then we can proceed. Otherwise, let us go home. Let this be the first order of business for the next Members who will come, if that will be the case.

Mr. Temporary Speaker, Sir, I want to celebrate this. As you know, Kenya has been a signatory to so many regional, sub-regional and international instruments, such as the Universal Declaration of Human Rights, the Beijing Declaration and Platform for Action, the Africa Union, the Protocol on the African Charter for Human Rights and Peoples Rights, the Rights of Women in Africa, that is, the Maputo Protocol, and the Solemn Declaration on Gender Equity in Africa. We have signed up to all these things, yet since 2010 we cannot effect a mechanism to ensure that the Two-thirds Gender Rule is achieved.

Honestly, I am happy with what the Chief Justice has done. Let us be serious as a nation that is calling itself progressive. Let us be serious as leaders and actualize the Constitution, as has been envisioned. Let us give our children something to look forward to.

This has nothing to do with competition in the electoral field. It is a Two-thirds Gender Rule that should be seen, not just in Parliament, but in every other governing legislative body and anywhere where leadership is required. Let us give space to the Two-thirds Gender Rule.

Thank you, Mr. Temporary Speaker, Sir.

The Temporary Speaker (Sen. (Dr.) Mwaura): Wakati huu ninampa fursa Kiongozi wa Walio Wengi.

The Senate Majority Leader (Sen. Poghisio): Mr. Temporary Speaker, Sir, I want to thank you for this opportunity and also congratulate Members who have contributed to this Motion of Adjournment.

It is very clear now that even here, all the male Members are on one side and all the female Members are on the other side. I do not think that we have really gotten the gist of the consequences of the advice by the Chief Justice. For example, if you look at the Senate, it has come closest to meeting the Two-thirds Gender Rule. The Senate can, therefore, be said to have made the representation of both gender taken seriously. If we continue moving this way, it possible to reach that Two-thirds Gender Rule

progressively, as has been argued. However, it does not necessarily mean that Parliament is against this move. We know how many efforts have been made by Parliament to reach that particular threshold.

I do not know why the Chief Justice had to be the one to give this advice to the President. His term is coming to an end, and should have given this chance to the next Chief Justice to weigh in on this matter, with a new clear vision, insights and way of looking at things, after the referendum. This would have been a much better way to handle it.

Mr. Temporary Speaker, Sir, I do not know how much effort the Chief Justice has taken to consider that it is not just necessarily being a stickler of the letter of the law that is more important, but also the spirit of the law. Look at the country right now. If this, for example, were to be taken into consideration as an advice and action is taken, God forbid, look at the consequences and the chaos that this would throw the country into; just looking at the law itself without considering the spirit and the practicality of it.

It has been argued here by our lawyers and Senior Counsel, who spoke earlier. He has reminded us that the Chief Justice could have been advised better on this matter. However, now it is in the hands of the President and the Executive. We know that they have decided to appeal against it. Also the Senate and so religiously, the Parliament Service Commission, has also decided to appeal against it. We will wait and see.

However, we think that in determining some of these decisions, like this advice, the Chief Justice should have decided to skip this one and allow a new Chief Justice to weigh in. This is so that he can look at the totality of the situation in our country.

As we are looking at it, we were not even thinking about talking about the Chief Justice in his person as Justice Maraga. However, that office is so endowed with a lot of special advice and advisors. He is so endowed with specialists in matters law and Constitution. There are many who read differently.

Mr. Temporary Speaker, Sir, our excitement about the Two-Thirds Gender Rule is as good for the men as it is for the women in this country. It is just that the practicality of it is not there. We just cannot practically bring ourselves within the time limits that we have now to make it possible, unless, of course, we want to take the country into a direction where we force ourselves into these matters.

Progressively, it also prepares the women and gives them opportunity. Even if you look at the statistics, there are more women than men in terms of population. However, even if you look at the statistics of that gender rule in the world, there are very few countries that can attain this given the time. That is including great democracies that we have been told here, including the United States, United Kingdom and other places.

Mr. Temporary Speaker, Sir, I just wanted us to handle this matter as has been handled by just going to court against it and making sure that Justice Maraga does not get through with his advice; that the President does not allow that to happen because it is going to affect the whole country. Can you imagine a few months or even more than a year, preparing for an election and then another general election?

Look at even the timing itself of this advice. Even if we were to say now that we go home – we are not afraid to go home - some of us will come back and some will not, but what happens to the country? What happens to the economy of this country? Can you imagine that we would be thrown into a chaotic situation, with the Coronavirus (COVID-

19) pandemic at the same time? The economy is already suffering and then you think about that. Some of these things should have been taken into consideration.

Mr. Temporary Speaker, Sir, we, in this House, have already set the best example of coming very close to the perfect Two Thirds Gender rule. That is not possible elsewhere. The Senate had this given constitutionally. It can be done, but there are certain institutions where it cannot be done.

We say thank you to the Members. We are very considerate. Nobody has been adverse and has gone into name-calling. Nobody has gone into personal attacks. The Senate has handled this very well. I heard the discussions in the other House and know that some people have gone personal. I thank the Senate.

Let us not take this as if it is a personal attack. It is just that we need to deal with our Constitution. To some extent, we need to look at our Constitution and that particular area. We can improve it. I know that some people have said that we can delete it, but I think somehow, we can improve it.

With those few remarks, I just want to thank Members. I support.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana waheshimiwa Maseneta kwa sababu ya Mjadala mzuri ambao tumekuwa nao. Ni vizuri kuchangia na niseme kwamba kama wosia huu wa korti hautaweza kutiliwa maanani, basi utapunguza makali ya mkono wa sheria na hilo silo jambo nzuri.

Pia, kama itakuwa kwamba Bunge kwa ujumla liko katika huruma ya mkono wa utendakazi wa Serikali, basi itakuwa inapunguza uwezo wa Bunge. Lakini haya ni masuala ambayo yataendelea kuibuka pindi tunavyochangia huu Mjadala.

ADJOURNMENT

The Temporary Speaker (Sen. (Dr.) Mwaura): Waheshimiwa Maseneta, kwa sababu tumemaliza Mjadala huu wa kuhairisha kikao hiki cha Bunge, sasa kikao hiki kinahairishwa mpaka kesho siku ya Jumatano, Tarehe 23 Septemba, 2020, Saa Nane Unusu.

The Senate rose at 6.10 p.m.