



REPUBLIC OF KENYA

**TWELFTH PARLIAMENT - (FIFTH SESSION)  
THE NATIONAL ASSEMBLY  
COMMUNICATIONS FROM THE CHAIR**

*(No. 40 of 2021)*

**ON CONSIDERATION OF A PETITION ON THE IMPLEMENTATION OF  
THE COMPETENCY BASED CURRICULUM**

**Honourable Members**, you will recall that during the afternoon sitting of the House of Thursday, 23<sup>rd</sup> September, 2021, the Hon. Wilson Sossion M. P, presented a public Petition on behalf of parents and education stakeholders seeking the *Scrapping of the Implementation of the Competence Based Curriculum (CBC)*. The Hon. Member, while noting that the matters forming the subject of the Petition were not pending before a court of law, prayed for the House, through the Departmental Committee on Education and Research, to—

- (a) consider scaling down changes in the education system from the extensive reforms being undertaken to a review to ensure sustainability and smooth implementation of the Kenya School curriculum;*
- (b) intervene with a view to scrapping the implementation of the CBC and, further, subjecting it to forensic audit and replacing it with the previous well versed and tested 8-4-4 Education Curriculum that has served this country for 36 years;*
- (c) recommend for accountability and action to be taken against the State Officers and individuals for their susceptible actions through investigation and prosecution for the current failure and mess of the curriculum; and,*

(d) *make any other recommendations that may deem fit in the circumstances of this Petition.*

**Hon. Members,** You will also recall that an immediate question arose as to whether the matters sought to be addressed by the Hon. Sossion were active in court. Indeed, the Member for Rarieda, the Hon. Otiende Amollo also rose on a Point of Order under Standing Order 89(3) (c) and informed the House of a pending Constitutional Petition before the High Court of Kenya dealing with matters substantively related to those canvassed in the Petition. The Hon. Otiende Amollo cited the High Court case number as No.E371 and sought the guidance of the Speaker on whether the Petition ought to be committed to a Committee of the House in light of the pending and active court proceedings. The Leader of the Majority Party, the Hon. Amos Kimunya, M. P., and the Leader of the Minority Party, the Hon. John Mbadi also raised similar concerns, cautioning against the House being seen as unnecessarily interfering with the mandate of another arm of government or engaging in a process that may be rendered futile, and therefore a waste of parliamentary time and resources in the event the courts were to render a judgment that varies from the resolution of the House. The Leader of the Majority Party additionally noted that this House had approved *Sessional Paper No. 1 of 2019 on the Policy Framework for Reforming Education and Training for Sustainable Development in Kenya* effectively approving the policy on the Competence Based Curriculum.

Consequently, **Hon. Members** I directed the Hon. Sossion to avail copies of the pleadings in the cited Petition No. E371 for comparison as against the prayers sought in his Petition. I also undertook to guide the House on the fate of the Petition and how it should proceed.

**Hon. Members,** I wish to confirm that I have received copies of the pleadings in Petition No. E371 of 2021 *Esther Awuor Adero Ang'awa – Vs – The Cabinet Secretary responsible for matters concerning Basic Education & 7 Others* filed at the Nairobi High Court.

In the pleadings, the National Assembly is listed as a Respondent and various acts and omissions are attributed to the House in *challenging the implementation of the Competency Based Curriculum*. Notably, **Hon. Members,** the Petitioner claims that the National Assembly had abdicated its duty to enact legislation and regulations necessary to facilitate the development and approval of a curriculum for basic education and failed to oversight the Ministry of Education in the development and sustainability of an inclusive, equitable, quality, relevant and acceptable basic education curriculum. This, as stated in the Petition before the Court, has resulted in the denial, violation or infringement, or threat to deny, violate or infringe various provisions of the Constitution relating to the rights of children to education and free and compulsory basic education. Ms. Adero concludes by seeking an order of the High Court directed to the Cabinet Secretary and the Kenya Institute for Curriculum Development to formulate regulations in respect to policy and guidelines on curricula in accordance with Sections 73 and 74 of the Basic Education Act and Section 4 of the Kenya Institute of Curriculum Development Act, respectively, and to table the same before the National Assembly for approval within 90 days of the making of the order.

**Hon. Members,** I am further informed by the Clerk of the National Assembly, who was served on behalf of the House in the court matter, that the Petitioner had sought various orders from the Court pending the hearing and determination of the Petition to the effect that—

- (a) The Petition raises substantial questions of law under Article 165(3)(b) and (d) and (4) of the Constitution of Kenya.
- (b) The Petition be referred to the Chief Justice for assignment of an uneven number of judges, being not less than five to hear it.
- (c) An order of injunction restraining the Respondents from further implementing the CBC curriculum; and
- (d) A conservatory order staying further implementation of the CBC curriculum.

These orders were not granted and the matter is scheduled for the hearing of an application on the joinder of parties on 21<sup>st</sup> October, 2021.

**Hon. Members,** From the summary of the matter before court that I have given and the various orders it seeks, you will agree with me that the concern raised by the Hon. Otiende Amolo on the application of the *Sub judice* Rule as contemplated under our Standing Order 89 is valid. Standing Order 89 provides, and I quote—

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

*(2) A matter shall be considered to be sub judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.*

*(3) In determining whether a criminal or civil proceeding is active, the following shall apply—*

*(a) criminal proceedings shall be deemed to be active when a charge has been made or a summons to appear has been issued;*

(b) *criminal proceedings shall be deemed to have ceased to be active when they are concluded by verdict and sentence or discontinuance;*

(c) *civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance;*

(d) *appellate proceedings whether criminal or civil shall be deemed to be active from the time when they are commenced by application for leave to appeal or by notice of appeal until the proceedings are ended by judgment or discontinuance.*

(4) *A Member alleging that a matter is sub judice shall provide evidence to show that paragraphs (2) and (3) are applicable.*

(5) *Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the House or a Committee.*

**Hon. Members,** The Rule is premised on the constitutional principle of separation of powers in furtherance of which Parliament restrains itself from interfering in a matter that either falls under the purview of, or is actively under adjudication by a court of law. The House voluntarily imposes the *sub judice* Rule on itself depending on the circumstances of each case.

**Hon. Members,** As I see it, the following three questions must be answered in the affirmative for a matter to attract the application of Standing Order 89 to preclude the House or its committees from considering a matter—

(1) Does the matter refer to proceedings before the court?

(2) Are the proceedings before court active? i.e.—

(i) With regard to criminal proceedings, has a charge been made or a summons to appear issued?

(ii) With regard to civil proceedings, have arrangements for hearing of the case been made?

(3) Is the discussion of the matter by the House likely to prejudice the fair determination of the proceedings before court?

**Hon. Members,** Pursuant to the provisions of Standing Order 89(5), the Speaker would thereafter exercise his or her discretion on whether to allow debate to proceed in furtherance of the constitutional imperative imposed on the House by Article 95(2) of the Constitution to deliberate on and resolve issues of concern to the people.

The framers of the provision were alive to the fact that, a strict application of the Rule had the capacity to hinder discharge of the mandate of the House by allowing a mischievous person to file frivolous and dilatory matter before the court, obtain a hearing date, and effectively stall any parliamentary processes seeking to address the matter for years. Previous Speakers have guided as much. In fact, my predecessor, the Hon. Speaker Kenneth Marende is on record as having guided in his Communication on the Report of the appointment of the Director of the Kenya Anti-Corruption Commission issued on 10<sup>th</sup> September 2009 that, where the House begins to consider any matter before it that is the subject of litigation, the House will not give up jurisdiction of the matter unless for weighty reasons. Crucially, the Hon. Speaker Marende proceeded to caution that, and I quote—

*"the discretion given to the Speaker or chair [to allow reference to a matter actively before the court] **must be exercised with the utmost caution and must not be resorted to except where exceptional circumstances so require.** In a matter of immense public interest, where there is a doubt, unless sound grounds are advanced, a presumption should exist in favour of allowing debate in the House as opposed to the application of the rule to suppress debate."*

**Hon. Members,** I am cognizant that I have had occasion to guide the House in the *Communication on the Violation of labour laws and tax evasion by Bidco (Africa) Ltd* issued on 27<sup>th</sup> October, 2016 that the discussion of a relief sought from the House that is similar to a prayer sought in an active Court process is likely to prejudice the outcome of the Court process. An interrogation of the Petition before the House and the matters before the High Court, answers all (3) questions formulated to test whether a matter attracts the application of Standing Order 89 **in the affirmative** as follows—

- (1) The Petition by the Hon. Member does refer to proceedings before the court. Both the Petition before the House and Petition No. E371 of 2021 seek to either stay or stop the implementation of the Competency Based Curriculum by the Ministry responsible for Basic Education as their substantive prayer;
- (2) The proceedings in Petition No. E371 of 2021 are **active**. As a matter of fact, Petition No. E371 of 2021 was filed on 17<sup>th</sup> September, 2021. It is a civil matter and is slated for the hearing of an application on the joinder of parties in the case on 21<sup>st</sup> October, 2021;
- (3) Would the discussion of the matter by the House likely prejudice the fair determination of the proceedings before court? Since both processes seek a similar prayer and the National Assembly is listed as a Respondent in Petition No. E371 of 2021 and has also been served with the relevant court pleadings, **it would be impossible for the House or its Committees to deliberate on any or all of the prayers sought in the Hon. Member's Petition without touching on matters referring to matters canvassed in the Petition before court.**

What remains therefore **Hon. Members**, is the question of whether the Petition by Hon. Sossion should benefit from the discretion granted to the Speaker by Standing Order 89(5).

**Hon. Members**, In presenting his Petition before the House, the Hon. Sossion noted that he was doing so on behalf of "parents and education stakeholders". On their part, the pleadings in Petition No. E371 of 2021 describe the Petitioner as a "parent". In terms of the choice of forum, both Hon. Sossion (and the citizens on whose behalf he is acting) and the parent who elected to seek orders from the court are well within their constitutional rights. A fine balance must therefore be struck to allow the fair determination of a grievance that is common to the parties.

My considered opinion remains that the conduct of a parallel process in Parliament to consider a Petition in which the substantive prayer sought is similar to the prayer sought in a matter filed in court would definitely prejudice the outcome of the matter in court. The idea of sanctioning parallel proceedings becomes more unpalatable when one considers that the Petition before the Court was filed **earlier** than the Petition before the House, and that the House is listed as a Respondent and has been served with the pleadings.

**Hon. Members**, To my mind, the discretion given to the Speaker to determine the instances where Standing Order 89 applies is meant to shield the House from dilatory tactics adopted by a party intent on precluding a matter from being debated in the House for the simple reason that it is before the courts. Being a **fresh** matter filed by a public-spirited citizen and fellow parent directly affected by a policy decision made by the Executive, the court process does not appear to be a frivolous or dilatory attempt intended to stifle consideration of any business proposed or under consideration in this House. For these reasons I am minded not to exercise the discretion granted under Standing Order 89(5).

**Hon. Members,** In arriving at this decision, I wish to clearly distinguish the treatment of another Petition also before the House despite the existence of active court proceedings. You will recall that during the afternoon sitting of Tuesday, 21<sup>st</sup> September, 2021, I did report to the House a Petition by Mr. Antony Manyara and Mr. Joseph Wangai on the *Repeal of the Finance Act, 2018 to address increases in prices of petroleum products* ("The Fuel Prices Petition"). I did commit the Petition, the Petition presented by the Hon. Stephen Mule on the same matter and various Questions and Statements related to the matter to the Departmental Committee on Finance and National Planning with specific instructions to table its report within 14 days in view of the urgency of the matter of escalating fuel prices and to attach a draft Bill to its report for meaningful consideration by the House in the exercise of its legislative mandate.

Subsequently, a case was filed in court seeking the quashing of the provisions imposing the increased Value Added Tax on petroleum and petroleum products. The question that obviously arises is whether this scenario would invite the application of Standing Order 89 to preclude the House from proceeding with its consideration of the Petition.

**Hon. Members,** The circumstances of the *Fuel Prices Petition* differ significantly with those of the Petition presented by the Hon. Sossion when one considers **the ability of the House to resolve the prayers made with finality**. The Fuel Prices Petition sought the repeal of a law passed by this House which the petitioners claim is the root of the escalating prices of fuel and petroleum products that has a seismic effect on the cost of living. The enactment, amendment, and repeal of laws is at the core of the mandate of this Parliament to the **exclusion** of any other organ. As such, the House is able, when properly moved, to address the concern to a high degree of finality.

The Constitution places legislation within the exclusive authority of Parliament. **Conversely**, the Petition presented by the Hon. Member seeks to **stay or stop the implementation of a policy adopted by the Executive** on the manner in which it intends to fulfil its constitutional mandate of providing free and compulsory basic education.

In this regard, the House may proceed and deliberate such a matter of extreme concern to the people, but its power to resolve the matter with finality is circumscribed by the inescapable fact that the House **can only recommend** to the Executive what to adopt as a policy decision or urge it to rectify the policy one way or the other. Where a dispute arises between the citizenry and the Executive as to the propriety of a policy decision or its effects, such a dispute may only be resolved with finality by the judicial arm of government which may either agree with the direction taken by the Executive or quash the policy decision.

**In summary, Hon. Members** it is my considered view that-

- (1) Contrary to the provisions of Standing Order 223(g), the Petition presented by the Hon. Sossion, MP on 23<sup>rd</sup> September, 2021 on behalf of parents and education stakeholders seeking the *Scrapping of the Implementation of the Competence Based Curriculum (CBC)* failed to disclose that it contains matter that are pending in court;
- (2) It would be impossible, at this time, for the House or its Committees to deliberate on any or all of the prayers sought in the Petition presented by the Hon. Sossion without touching on matters canvassed in the Petition before court;

(3) The discussion in the House of the Petition presented by the Hon. Sossion is likely to prejudice the fair determination of the proceedings in the High Court Petition No. E371 of 2021 as the National Assembly is also a party in the case;

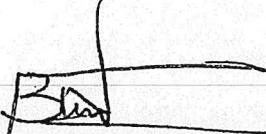
(4) In this regard, the Petition presented by the Hon. Sossion attracts the application of the *Sub Judice* Rule as outlined in Standing Order 89 and **cannot be proceeded with at this stage**; and,

(5) Whereas the Petition is a matter of public interest, it would be too early for the Speaker to invoke his discretion under paragraph (5) of Standing Order 89. However, should circumstances change that warrant the Speaker to invoke that discretion, including inordinate delays in its resolution, I will rise to the occasion to do so, if properly moved.

**Hon. Members**, as I conclude, it is worth noting that the door is not entirely closed to the Hon. Member in seeking to resolve this matter. In the event circumstances arise indicating an inordinate delay in the resolution of the matter by the Courts, the Member is at liberty to raise the matter for reconsideration by the Speaker. Additionally, as all Members are aware, any Member is at liberty to propose legislation prescribing the specific system of education he or she would want to apply to the country; or to require the approval by Parliament of any policy decision made by the Executive in that regard. Legislation presents Members with an option **exclusively within their authority** to resolve this matter of interest and grave concern to the people.

The House is accordingly guided.

**I thank you!**



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

Thursday, 29<sup>th</sup> September, 2021