

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 12th November, 2019

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

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

PRAYER

PETITION

Sen. Olekina: Thank you, Mr. Speaker, Sir. I also rise to support the Statement by Sen. (Dr.) Ali.

The issue of pending bills is something that baffles me. In real sense, there should be no single pending bill if county governments follow the law. Each county is required to come up with a five year development plan and there are priorities that are set out of the five year development plan. There is something called annual development plan and we should not have any pending bills if the counties follow the annual development plan.

Earlier, I heard my colleague say that the Committee should summon the Controller of Budget for him to give an explanation but I do not think that the Controller of Budget can help in this case. It is the county assemblies that should take the lead. This House should come up with a piece of legislation that will hold those county governors accountable.

I am of the view that the county assemblies should be the ones to approve the budget and they should confirm that the budget falls under their five year plan and any budget that does not fall under their five year plan should be considered as going against the County Governments Act that Sen. Wetangula spoke about.

The County Government Act, 2012, prohibits any money that has not been budgeted for, from being spent. I sit in the Committee on County Public Accounts and Investments (CPAIC) and governors come there and say that they have pending bills. Some of them are actually confused. They say that Treasury has not given them money. When we went to Samburu County, the Governor said that the Controller of Budget was holding Kshs6 billion of his funds which was baffling to us.

Sen. Olekina: Mr. Speaker, Sir, I thank my colleague for informing the House on the developments. However, my problem is: Why should county governments continue accumulating these pending bills, yet every year they sit and plan on how they will fund development in their counties?

Yesterday, I called a friend of mine and asked him whether he could hire his trucks. He said: “My brother, three of my trucks were taken by the banks because I could not afford to pay them. This is because a certain governor refused to pay me.”

I do not believe that the Controller of Budget (CoB) will solve this problem; I believe that it is this House. I was consulting with Senior Counsel, Sen. Orengo, whether this House can now be scrutinizing budgets from the assemblies to find out whether when they are passed, they have considered pending bills as the first charge in their account. There is no way we will make any progress if we will keep on talking about pending bills.

We now hear that IBEC has said that it has come down to Kshs113 billion. That is not a solution in my view. The solution is simple; we look at the issue of the accounting system used by these county governments. We should look at whether we can move away from cash base to the accrual system. For us to help our citizens in this country, we should restrict ourselves to looking at the annual plan and come up with legislation that will bar county assemblies, if it is possible, from passing budgets that do not consider the pending bills. Otherwise, we will continue sending people to Mathari Mental Hospital because we are not bold enough to send them to Kamiti Maximum Prison.

I support this Statement, and other than that, I want to encourage the Chairperson, who is a very competent Senator, to look into all these budgets and say: “Have we considered this?” This is particularly for counties like Nairobi that have billions of shillings. This applies to even my own county, Narok, Mombasa and all other counties.

There is no reason we should be approving money going to county assemblies, yet the people who are doing work for county governments for them to get money to send their children to school or pay their medical bills cannot do so because county governors are not paying.

I support.

Proceed, Sen. Olekina.

Sen. Olekina: Thank you, Mr. Deputy Speaker, Sir. I rise to support this Motion on the extension of time for the *ad hoc* Committee to investigate the MES. The reason why I support the extension of time is solely so that we can fully understand the difference between leasing and owning. When I sat at the Mediation Committee, that term was a little bit confusing to most Members. It will, therefore, be important for us to know who is at fault, in terms of this contract; is it the contractors or the national Government? Now that the Committee has requested for more time, I would expect them to look at the entire contract so that we can ensure due process of the law in terms of core responsibilities.

Sometimes one of the challenges that we face is that when we travelled to Samburu County, we found some medical equipment in boxes. I believe that it was probably not one contractor who supplied that equipment; maybe they are from different contractors. It will, therefore, be important for us to be given a proper report that will clearly outline what each contractor supplied. That way, we can be seen to be the House of reason by how we will analyse whatever is brought to us. Similarly, we can give a proper explanation to Kenyans, particularly on the difference between purchasing consumable equipment versus purchasing a service.

Thank you, Mr. Deputy Speaker, Sir.

Sen. Olekina: As amended. When I conclude---

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, Sen. Olekina! I am 100 per cent sure that you do not know what I am about to say. However, I can see some paper trail here. You have actually amended your Motion without saying so, which is irregular.

Sen. Olekina: After I had moved---

The Deputy Speaker (Sen. (Prof.) Kindiki): You should say, 'I beg to move the following Motion in an amended form.' That should have been the opening sentence. That is number one.

Number two, that amended form, irregular as it was moved, is not supported by the version approved by the Speaker, which poses a technicality. As you are aware, the Standing Orders provide that if you want to amend your Motion after it has been put on the Order Paper and notice has been given, that shall be approved by the Speaker.

The version approved by the Speaker is not the one you have read. Therefore, you have two options. Option number one is to move the Motion as approved by the Speaker. Two, is to seek approval of the Speaker, which will not be instantaneous because it requires the Speaker to reflect on the amendment, and move your Motion once approved by the Speaker at a later time, including tomorrow. So, the choice is yours.

Sen. Olekina: Mr. Deputy Speaker, Sir, I appreciate your intervention. One of the challenges that I face is that the version that I signed is not the one that was brought here. So, I was actually at a loss. When I signed the document and it was sent, if there was any amended format, I could at least have been told that, that had been changed. That is what confuses me.

Mr. Deputy Speaker, Sir, I would like to seek your indulgence in moving the Motion in an amended format. If it is possible for me to do so from where I am standing. The challenge is that tomorrow I will be attending another function, where the Speaker has requested me to represent him.

(Sen. Olekina stood in his place)

The Deputy Speaker (Sen. (Prof.) Kindiki): As you know, Sen. Olekina, the approval of the amendment has to be consistent with the law, Standing Orders, practices, *et cetera*. Resume your seat for a moment; I will give further directions in a short while.

(The Deputy Speaker consulted with the Clerk-at-the-Table)

Sen. Olekina, as I said, the implication of your amendment requires reflection by the Speaker. However, I am looking at the Standing Orders which allow the Chair to allow a Senator to move a Motion in an amended form if the amendment does not materially alter the crux of the Motion.

Therefore, whereas your amended Motion, which actually amends one word, changes the implications of the Motion, I am convinced that it does not materially alter the crux of the Motion. However, this determination is particularly on this Motion as crafted, and does not apply to all Motions where similar words and amendments shall apply. Such other proposals for amendments, where the words involved are similar, shall be determined by the Speaker on a case by case basis.

Having said so, I direct that you can move your Motion in an amended form as proposed. Kindly proceed. Since you had done so, you do not have to repeat it.

Sen. Olekina: Thank you very much, Mr. Deputy Speaker, Sir. I really appreciate you allowing me to move this Motion in an amended form.

The genesis of this Motion is really on what is happening with the development of different court rulings which are coming up in this country. We are at a time where this House is developing legislations which are supposed to protect particular offices, but somehow, we forget that there are other consequences. It is said that choices have consequences. Article 179(5) of the Constitution of Kenya states as follows: -

“When the county Governor is absent, the deputy county governor shall act as the county Governor”.

Subsequently, Article 180 of the Constitution is very clear. It clearly states that a governor and a deputy governor are elected on the same ticket. In this country, we find ourselves in a situation where the courts - which is one arm of the Government – come up with very clear orders that a governor who has been elected by the people cannot have access to the office.

Mr. Deputy Speaker Sir, this governor is the same governor who appoints County Executive Committee Members (CECs) and chief officers (COs). We are in an environment where politics dictate and loyalty also rules in this country. If we find that the citizens of Kiambu County and Samburu County are suffering; it would be very wrong for us in this House, who are the people elected to defend the counties and their governments, to just sit and watch.

When the County Governments Act was enacted, I am of the view that certain things were overlooked. Although the Constitution prohibits the deputy governor from carrying out certain functions like firing CECs or those people who are appointed by the governor when he is in office, nothing else stops him from reshuffling them.

Currently, we have many problems in this country. There are so many pending bills; procurement laws and the Public Finance Management Act (PFM) have been violated. When a substantive governor is in office, some might even argue that everyone who is given business is someone who is close to that governor. All of a sudden, when the deputy governor now takes charge, because of the illness of the governor, that acting governor cannot do anything.

Mr. Deputy Speaker Sir, I decided that it is time we clarified this. People are suffering on the ground because the deputy governor is powerless. The deputy governor, having been elected on the same ticket as the governor, is not a flower-girl or flower-boy. He represents the people who elected him or her to office. We saw very well in Bomet, when the Lord decided to take the substantive Governor who had been elected, the Deputy Governor came in and took charge.

In this country because of challenges either with the Judiciary or the budget, sometimes some matters in court will not be decided expeditiously. It will take a very long time. Should we wait for five years to lapse before a matter can be determined? At the same time, should the people of Kiambu and Samburu counties continue to be dictated upon by a Governor who is sitting on the fence? I think that this House has a very good opportunity to do something about this.

I sit in the Committee on County Public Accounts and Investments (CPAIC). Whenever we ask the Controller of Budget to explain about certain things, they are

always quick to say the Governor should be the one to give us the right answers to this. However, when you have a deputy governor who is acting as the county governor and is not able to give us the answers because he is seen as a flower-girl or flower-boy, then we are really putting this country in jeopardy.

Mr. Deputy Speaker Sir, I do not wish to belabour this matter, however reading the Constitution and also the County Governments Act, nothing prohibits a deputy governor from carrying out functions which were being carried out by the governor except those which were clearly indicated in the Act.

Mr. Deputy Speaker Sir, I beg to move this Motion in an amended form and request Sen. Madzayo to second it.

Sen. Olekina: Mr. Deputy Speaker, Sir, I respect my colleague but it is wrong for a colleague to jump into a matter without reading the Motion. This Motion is relying on the Constitution 100 per cent and not the substantive legislation.

I was very clear in my submission. I said that the difference that we have is situations where the deputy governors have not been restricted by the Constitution to carry out certain functions apart from those which are clearly indicated in the Act. My Motion, which I hope my dear brother read, states that: -

‘ACKNOWLEDGING THAT, section 32(4) of the County Governments Act places limitations on the exercise, by the Deputy County Governor while acting as Governor, of the powers to nominate, appoint or dismiss that are assigned to the Governor under the Constitution or other written law;’

There are certain limitations which are very clear, and I have acknowledged them. The deputy governor has not been limited or restricted from reshuffling the Cabinet. The Constitution under Article 179(5) gives the deputy governor the power to act as the governor when a substantive governor is not in office.

I am not suggesting that we now have more powers than the court of law when it has made a ruling. The court of law has already barred these two gentlemen from accessing the office. Therefore, should we just sit and watch as they run the county governments from outside? We live in a country where a telephone can make all the decisions. When the governor is not in office as is the case in Samburu and Kiambu counties, those people are suffering.

Mr. Deputy Speaker, Sir, I would like to clarify to the distinguished Senator for Nandi that I am not in any way attempting to bring a deputy governor as the governor through the backdoor. All I am saying is this; now that the court has barred them from accessing their offices, they cannot purport to be running the county governments from outside their offices. We need services to continue. Since both the county governor and the deputy governor were elected on the same ticket by the people and the Constitution gives the deputy governor powers to act as a governor, of course, with limitation, nothing else have they been restricted from carrying out.

Proceed, Sen. Olekina, as briefly as you can.

Sen. Olekina: Mr. Deputy Speaker, Sir, I have listened to the contributions by my colleagues and I am baffled because we are the House that is tasked with protecting the interests of the counties and their governments. Devolution being a new baby which is crawling, there are so many things which are unique in their characteristics. This is what

in law is defined as *sui generis*. This is a situation where we have found ourselves; that a court of law which is another arm of Government has barred these governors from accessing their offices.

If you read the decision by Justice Mumbi Ngugi, she equates it to these governors having been accused of committing a moral illegality. The term she used is 'moral ill-health.' She is not saying that she is barring these people from accessing their offices entirely, but for the duration of the trial; what they have been accused of.

We are seeking to find a solution, where we have a county governor barred from accessing his office. This is where I differ with the Senate Majority Leader when he says that governors can perform their functions outside the office. They cannot do so because when you look at the circumstances that led to that governor to be barred from accessing that office, it is what the judge called 'moral ill-health.' But in this case, I am not focussing---

The Deputy Speaker (Sen. (Prof.) Kindiki): That is okay, but those words by Justice Mumbi were *obiter dictum*, meaning they had not been canvassed and are not binding in law, to be honest with you. It is just to provoke thought. You can rely on them in that persuasive manner, but they are not binding.

Sen. Olekina: Mr. Deputy Speaker, Sir, that is true. However, my issue is that a governor could be admitted in a hospital somewhere in this world and they stay there for a period where it is not defined or determined---

The Deputy Speaker (Sen. (Prof.) Kindiki): As was the case in Bomet County.

Sen. Olekina: Mr. Deputy Speaker, Sir, as was the case in Bomet County. What about the public interest and services to the people? Apart from a governor, even the President is not referred by the Constitution as a Chief Executive Officer (CEO). Every legislation looks at the governor as the CEO. If you look at other parastatal bodies that we have in this country where a CEO has been asked to step aside during criminal proceedings, that person has not been removed from that office.

In the case of Kenya Pipeline Company or Kenya Power Company, those two CEOs were asked to step aside from their offices and temporary CEOs were put in place, so that we do not interfere with the services being provided to the citizens.

Mr. Deputy Speaker, Sir, I request my colleagues that because of public interest and given that this is a House of reason, I want us to divorce politics from public service--

The Deputy Speaker (Sen. (Prof.) Kindiki): Order, Sen. Olekina! You should not impute improper motives, unless you have proof that there has been politics by any particular Senator. This is because I have not heard any politics.

Sen. Olekina: That is true, Mr. Deputy Speaker, Sir. I take that back.

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

Sen. Olekina: Mr. Deputy Speaker, Sir, the key issue here is that this is a unique situation that we have found ourselves in. I plead with the Senate Majority Leader to think about the merits of this matter. Hypothetically, suppose we change the words "being barred from accessing the office by a court order?" What about if a person is out there ill and they cannot access the office?

The Senate Majority Leader (Sen. Murkomen): On a point of order, Mr. Deputy Speaker, Sir.

Sen. Olekina: You will get your time. I think you should be patient enough because---

The Deputy Speaker (Sen. (Prof.) Kindiki): Let him finish.

Sen. Olekina: Mr. Deputy Speaker, Sir, this is a matter of public interest and has nothing to do with the position of a governor. Maybe in future some of us might aspire to be there, but we are looking for continuity. People in Kiambu and Samburu counties are suffering. Maybe another governor somewhere may fall sick. Even though the law does not spell out what should happen, I think it behoves us, as the House of reason, to come up with something that comes in between.

We have heard even from the submissions from my colleagues that the deputy governor is not supposed to either dismiss or appoint a new County Executive Committee (CEC) Member. All I am asking is for you to see the logic behind continuity and public interest.

Mr. Deputy Speaker, Sir, I request that this Motion proceeds and then we can vote for it, even if calls for county governments to vote for it, so long as all of us would have been given an opportunity to try and ensure that this country maintains fiducial responsibility. It is very sad to see deputy governors out there arguing that now that the substantive governor is out--- I have been watching the Deputy Governor of Kiambu County speaking and other people talking in the media. I have heard the Deputy Governor for Samburu saying that whatever changes they want to effect, the CECs are taking orders from the governor out there.

A couple of days ago when we were debating the issue of raising the national debt ceiling to Kshs9 trillion I quoted the President. The Chief Justice should go and sit down with him and discuss. I think it will get to a point where even the Speaker of this House would find some time to sit with the Chief Justice and the President, because they are the leaders of the three arms of Government. They should discuss and ask: "What happens in a situation like this." This is a unique position. We, as the House of reason, must come up with a unique solution to it.