

COUNTY GOVERNMENT OF NAIROBI CITY



SECOND ASSEMBLY

THE NAIROBI CITY COUNTY ASSEMBLY
(FOURTH SESSION)

COMMUNICATION FROM THE CHAIR

No. 08 of 2020

RULING ON THE CONSIDERATION OF THE GOVERNOR'S MEMORANDUM ON REFUSAL TO ASSENT THE NAIROBI CITY COUNTY SUPPLEMENTARY APPROPRIATIONS BILL, 2020, (ASSEMBLY BILL NO. 1 OF 2020)

Hon. Members,

As you can recall, in my message that I have just conveyed to this Assembly regarding the Governor's Memorandum on refusal to assent the Nairobi City County Supplementary Appropriations Bill, 2020, (Assembly Bill No. 1 of 2020), I indicated that I shall be giving guidance to the Assembly on how we shall proceed with this business. Accordingly, **Hon. Members**, I now wish to guide the Assembly as follows:-

Hon. Members,

As you are aware, the overriding provision on the powers of the County Assembly to amongst other things, make and pass Bills, including amendments to enacted County Statutes **is provided for under Article 185 of the Constitution** which provides as follows:-

"185. (1) the legislative authority of a county is vested in, and exercised by, its county assembly.

(2) A county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule."

This provision is further restated under Section 8(1) (a) of the County Governments Act, 2012. As such, there can be no doubt on the power and outright duty of the Assembly as the supreme law-making organ of the County Government. The County Assembly can therefore make any law provided it is consistent with the Constitution. Only courts of law can vacate laws passed by this Assembly.

Hon. Members,

Consideration of the Governor's Memorandum to any Bill is guided by the provisions of Section 24 of the County Governments Act, 2012 and Standing Orders 145 and 146. **Hon. Members,** you are aware that, on a number of occasions during the term of both the First and the Second Assembly, the Governor has referred back Bills to this Assembly for reconsideration with memoranda outlining his reservations on those Bills and giving his recommendations thereon. Whenever this happens, the recommendations contained in the memoranda are subjected to the Committee of the whole Assembly for consideration and concurrence or otherwise.

Hon. Members, Pending before the Chair is an interpretation of the constitutionality and legality of the Governor of Nairobi City County's refusal to assent to the Nairobi City County Supplementary Appropriations Bill, 2020 (Nairobi County Assembly Bill No. 1 of 2020); which refusal was communicated to this Honourable Assembly in the Governor's Memorandum.

As the Speaker of this Honourable Assembly, it falls to me to weigh the Governor's Memorandum in the face of Objections raised by Honourable Members, on points of law only, as guided by precedent and my reading of the Constitution, Statute and our Standing Orders.

This mandate is an expression of the principles of separation of powers and that of checks and balances between arms of Government; principles that are at the

core of our Constitutional Order and the inherent sovereign authority of the People of Nairobi City County.

In this regard, therefore, I will only address one issue, which is the procedure for consideration of the Governor's reservations;

Procedure for consideration of the Governor's reservations.

Hon. Members, in most jurisdictions, the legislative process provides for assent the head of the Executive arm of Government whether at the National or Sub-National level. This is part of the principle of checks and balances. Indeed, our own system, through the provisions of Section 24 of the County Governments Act, 2012, requires that all legislation by the Assembly should be presented to the Governor for assent. When the Governor is presented with the Bill, he can either sign it into law or refer the Bill back to the County Assembly with a memorandum **outlining reasons for the referral**. At this juncture, I wish to remind H.E the Governor that the wording of the law is **referral** and not **refuse** as worded in his message.

Hon. Members, in terms of procedure, my guidance shall rely on the provisions of Section 24 of the County Governments Act, 2012, Standing Order 146 and precedent set by both this Assembly and Parliament with necessary modifications.

Hon. Members, Section 24 of the County Governments Act, 2012 provides, and I quote;

" (3) If the Governor refers a Bill back to the county assembly, the County assembly may, following the appropriate procedures under this section –

(a) amend the Bill taking into account the issues raised by the governor; or

(b) Pass the Bill without amendment.

(4) If a county assembly amends the Bill taking into consideration the issues raised by the governor, the speaker shall within fourteen days submit the Bill to the Governor for assent.

(5) If a County Assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the governor's concerns by a vote supported by two-thirds of members of the county assembly, the speaker shall within seven days re-submit the Bill to the Governor and the Governor shall within seven days assent to the Bill

Hon. Members, these provisions of Section 24 of the County Governments Act, 2012 do not contemplate the Assembly going back to the entire process of enactment, but only contemplates Assembly passing the Bill a second time. This second passage does not in any way negate the fact that the Bill was passed by the Assembly a first time after going through the entire sequence that culminates in passage, namely publication, First Reading, Second Reading and Third Reading. Indeed, **Hon. Members**, you are all aware that when Members are proposing amendments during the Committee Stage, those amendments are only considered during that stage, and are not subjected to other processes that a Bill goes through prior to that stage. Thus, **Hon. Members**, reservations or recommendations by the Governor should not be treated differently and therefore should only be considered at the Committee of the Whole Assembly stage.

Equally, **Hon. Members**, Standing Order 146 of our Standing Orders, which borrows heavily from Section 24 of the County Governments Act, 2012 and precedent set by the National Assembly provides;

“Whenever the Governor refers a Bill back to the County Assembly under Section 24(3) of the County Governments Act, 2012 and Standing Order 145(3), the Speaker shall convey to the Assembly a Message on the Memorandum pursuant to Standing Order 43 on ‘Messages from the Governor’ and where applicable, give any special guidelines.

Further, **Hon. Members**, the said Standing Order goes ahead to contemplate that the Memorandum shall stand committed to the relevant Committee and thereafter be subjected to the Committee of the Whole Assembly. The Committee of the Whole Assembly shall confine itself to the Clauses, Paragraphs, Schedule,

Title or any such other part of the Bill to which the Governor has raised reservations in the order set out under Standing Order 134 (Sequence to be observed on a Bill in Committee), and the provisions of Standing Order 145(3)

Furthermore, and the most significant, **Hon. Members**, Standing Order 146(4) provides that and I quote;

“Where the Governor’s Memorandum on any Bill raises a question of Constitutionality of the Bill or a provisions of the Bill, the Speaker shall notwithstanding the provisions of paragraph (2)(a) give a determination on the Constitutionality of such a question”.

In this regard, having reviewed the Memorandum by H.E. the Governor, I have determined that the said Memorandum entirely raises questions of Constitutional and Legal interpretations that require my determination. This finding is not only premised on the provisions of Standing Order 146(4) that I have just quoted but also precedent set by this Assembly. For avoidance of doubt, when **Governor Evans Kidero** referred back the Nairobi City County Office of the County Attorney Bill, 2017 with reservations, Speaker Alex Ole Magelo in his ruling delivered on 17th May, 2017, the then Speaker overruled six (6) reservations by the Governor and only referred one (1) reservation to the relevant Committee and subsequently to the Committee of the Whole Assembly. Indeed, Hon. Magelo in his ruling stated as follows, and I quote in part:-

“Hon. Members, the Chair noted that the Memorandum raises issues of a procedural and policy nature, as well as Constitutional and legal interpretations as far as certain highlighted provisions of the Bill are concerned, which issues demand that the Chair provide guidance.

“where the Memorandum raises a legal or Constitutional question, the Speaker must at once determine that question at the first instance and anyone with objections to the Speaker’s, and indeed the Assembly’s such determination, has the liberty to pursue further recourse in Court as provided for under Article 165(3)(d) of the Constitution.

Accordingly, therefore, Hon. Members, I direct the Assembly Select Committee on Justice and Legal Affairs to reconsider the Governor's Second Reservation only and report to the Assembly for debate and final consideration via committee of the whole. It is so directed. I thank you.

The implications of Speaker Magelo's ruling were that he vetoed six (6) of the Seven (7) reservations. The one (1) reservation relates to a drafting error. Equally, Speaker of the National Assembly has made directions that the Speaker, in the first instance, has the power to interpret questions that require Constitutional Interpretation.

Hon. Members, going back to the Memorandum before us, the Governor raises the following Constitutional issues:-

- i) That the proposed law tends to transfer certain functions from the County Government contrary to the Deed of Transfer of Functions agreement entered between the County Government and the National Government; and
- ii) That the Governor claims that the proposed law goes against various provisions of the Public Finance Management Act, 2012 particularly on the emergency fund and on consultation of the County Executive Committee (CEC) Member for Finance when considering Money Bills.

Hon. Members, before I make my determination on these questions, I wish to reiterate **that legislative authority of the County Government is vested in the County Assembly pursuant to Article 185 of the Constitution**. Thus, this Assembly has far-reaching mandate in enacting legislations concerning the County as long as they are consistent with the Constitution. In doing so, the Assembly cannot be under the direction of any quarters.

Consequently, **Hon. Members**, I determine as follows on the aforementioned issues:-

1. On the issue of Transfer of Functions, this matter is well addressed under Article 187 of the Constitution which provides as follows;
“187. (1) A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if –
 - (a) the function or power would be more effectively performed or exercised by the receiving government; and*
 - (b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.**(2) If a function or power is transferred from a government at one level to a government at the other level –*
 - (a) arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred”*

It is in the public domain that on **25th February, 2020**, the nation was informed, through a Press Statement by the Office of the Spokesperson, State House, Nairobi, that in an agreement signed at State House on 25th February, 2020, by Governor Gideon Mike Mbuvi Kioko Sonko and Devolution Cabinet Secretary Eugene Wamalwa, with the concurrence of His Excellency the President, Uhuru Kenyatta, certain functions of Nairobi City County Government had been transferred to the National Government pursuant to Article 187 of the Constitution of Kenya. The Press Statement further indicated that the National Government would take over the following functions of the Nairobi City County Government:

- i) County health services;*
- ii) County transport services;*
- iii) County public works, utilities and ancillary services; and*
- iv) County Government planning and development.*

Pursuant to Section 26 (5) of the Intergovernmental Relations Act, 2012, the County Assembly was on 27th February 2020 notified through a letter of the Attorney General about the agreement. The Assembly subsequently

approved the said agreement. It is also a matter in the public domain, that Service Level Agreements have been signed, as required under the Deed of Transfer of Function, to allow KRA to collect revenue in Nairobi and to allow the Public Service Commission to take-over staff of the transferred functions. Similarly, H.E. the President established the Nairobi Metropolitan Services (NMS) to implement the said functions.

Further, the Deed of Transfer provided for a twenty one (21) days period within which both the National Government and the County Government would raise any reservations and amend the Deed before it becomes effective. It is important to note that the Governor did not raise his reservations during this window. Consequently, prior to the commencement of the said agreement, the Governor was invited at Statehouse and signed an addendum to the said agreement, which in part gave effect to the transfer of the ancillary services. This was witnessed by among others the President, the Speaker of the Senate and the Attorney General. These ancillary services are meant to support the implementation of the transferred functions. For avoidance of doubt, the said ancillary services include:-

- i) The human resource*
- ii) Security and enforcement,*
- iii) Accounting and Finance,*
- iv) Legal Services*

Thus, I find that the proposed law by the County Assembly only **transfers resources for the aforesaid ancillary services** that support the transferred functions. This action fulfills the provisions of Article 187 of the Constitution which require that **resources must follow functions**. The opposite shall be setting the Nairobi Metropolitan Service for failure even before it commences its work. Similarly, it is my considered opinion that by appropriating funds to the transferred functions and their support functions, the County Assembly does not in any way attempt to transfer

functions that were not part of the Deed of Transfer agreement as averred by the Governor.

2. On the question of the violation of the Public Finance Management Act, 2012. I find that the proposed law does not in any way negate the provisions of the said act in the manner argued by the Governor. First, this Bill originated from the County Executive and was considered by the Select Committee on Finance, Budget and Appropriations who in accordance with our practices sought the views of the County Executive Committee Member for Finance. There are correspondences to this effect. It is important to also note that the Committee is not bound to agree with the views of the CEC Member neither is the CEC Members bound to respond. Secondly, **Hon. Members**, as to whether, the Bill violates the provisions of the PFM Act, 2012 with regards to the Emergency Fund, there I find the argument by the Governor fatally flawed since a plain reading of Section 113 of the PFM Act, 2012 doesn't give a limit/ceiling on the amounts that can be set aside by the Assembly for emergency. In fact, since we are operating under unprecedented situations occasioned by the out-break of the COVID-19, the Assembly in its own wisdom saw it fit to resource the Emergency Fund to cater for all the COVID-19 challenges which are not just limited to health matters.

Hon. Members, with the forgoing and considering the urgency of this Bill and the prevailing circumstances precipitated by the COVID-19 pandemic, I hereby give the following ruling:-

(a) That having found that the questions raised by the Governor in his Memorandum on refusal to assent the Nairobi City County Supplementary Appropriation Bill, 2020, raises questions of Constitutional in nature, and having determined that the Assembly did not breach the Constitution while passing the said Bill at the first instance, I hereby set-aside the said Memorandum in its entirety. Consequently, the said the memorandum shall not be committed to the Committee of the Whole Assembly; and

(b) That in accordance with Section 24 (5) of the County Governments, Act, 2012, the Nairobi City County Supplementary Appropriation Bill, 2020 be returned to the Governor forthwith for Assent in a manner it was passed by this Assembly on Thursday 2nd April, 2020.

Hon. Members, it is so directed.

I thank you

**HON. BEATRICE ELACHI, CBS
SPEAKER OF THE NAIROBI CITY COUNTY ASSEMBLY
APRIL 17, 2020**