



## NAIROBI CITY COUNTY ASSEMBLY

### OFFICIAL REPORT

#### Second County Assembly – Fourth Session

Friday 17<sup>th</sup> April 2020

The House met at 2.30 p.m.

*Hon. Speaker (Ms. Beatrice Elachi) in the Chair*

#### PRAYERS

#### COMMUNICATION FROM THE CHAIR

#### SPECIAL SITTING OF 17<sup>TH</sup> APRIL 2020

Hon. Speaker: Hon. Members, **May I take this opportunity to welcome you all to today's unprecedented special sitting, which is happening in a midst of a global pandemic that we are all now aware of i.e. the COVID – 19 pandemic. This has led to the manner in which the sitting arrangement of today's sitting has been fashioned. I encourage Members to cooperate with the orderlies and comply with the set guidelines. Accordingly, Hon. Members, for purposes of conducting today's sitting, the following protocols shall be observed:-**

- i) Members in the Lounge shall follow proceedings via video link;
- ii) **Should any of the Members in the Galleries and Members' Lounge wish to** debate on any matter under consideration in the Chamber, arrangements have been made to facilitate such Member(s) to proceed **to the Chamber and debate. In particular, the Members shall catch the Speaker's eye by requesting the Serjeant-at-arms to notify the Chair;**
- iii) The Chair shall before concluding any business ascertain from the Serjeant- at- arms that there is no Member in both the Galleries or Lounge desiring to speak; and
- iv) Members will not be allowed to **change seats during today's sitting.**

Hon. Members, **today's** sitting has been convened following a request by the Leader of the Majority Party pursuant to the provisions of Standing Order No. 30 (3) vide a Memo dated 15<sup>th</sup> April, 2020 and the subsequent publication of Gazette Notice No.3131 to consider the following Business:-

**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, I will be giving further guidelines as we proceed with the sitting on how we shall dispense this business.

Hon. Members, the Chair wishes to remind you of the provisions of Standing Order No. 30 (4) which provides that, and I quote;

*"Whenever the County Assembly meets for a special sitting, the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the County Assembly during the special sitting, following which the County Assembly shall stand adjourned until the day appointed in the County Assembly calendar".*

Equally, Hon. Members, in compliance with the Gazette Notice No. 33 on the Public Order (State Curfew) Variation Order, 2020 issued by the Cabinet Secretary for Interior and Coordination of National Government, this Assembly must adjourn at 4.00 pm. I therefore advise that we execute the business before us in the shortest time possible.

I also request Members to observe decorum during this sitting since I shall not hesitate to invoke the provisions of Standing Order 114 on Grave Disorderly Conduct. I thank you Hon. Members.

MESSAGES

MESSAGE FROM THE GOVERNOR

Hon. Speaker: Hon. Members, Standing Order 43 (1) relating to Messages from the Governor provides that and I quote:

*"The Speaker shall read to the County Assembly any message from the Governor or the Senator of the County delivered to the Speaker for communication to the County Assembly."*

In this regard, Hon. Members, I wish to report that I received a Message on Wednesday 15<sup>th</sup> April, 2020, from the Governor vide a letter dated 15<sup>th</sup> April, 2020.

Hon. Members, the Message regards the refusal to assent the Nairobi City County Supplementary Appropriations Bill, 2020, (Assembly Bill No. 1 of 2020).

Hon. Members, Standing Order 43 (2) further provides, and I quote:

***“If a message is received from the Governor or the Senator of the County, at a time when the County Assembly is not in session, the Speaker shall forthwith cause the message to be transmitted to every Member and shall report the message to the County Assembly on the day the County Assembly next sits.”***

In this regard, I wish to confirm that this message was received while the Assembly was not in session due to the Covid-19 crisis; however, the electronic version of this Message was circulated to all Members yesterday Thursday, 16<sup>th</sup> April 2020.

Accordingly, Hon. Members, I now wish to convey the following Message:-

REFUSAL TO ASSENT THE NAIROBI CITY COUNTY SUPPLEMENTARY APPROPRIATIONS BILL, 2020, (ASSEMBLY BILL NO. 1 OF 2020) PURSUANT TO SECTION 24(2) (b) OF THE COUNTY GOVERNMENTS ACT, 2012 AND STANDING ORDER NO. 145(2) (b)

Hon. Members, you may recall that on Thursday 2<sup>nd</sup> April, 2020, the County Assembly passed the Nairobi City County Supplementary Appropriations Bill, 2020(Assembly Bill No. 1 of 2020). Thereafter, I presented the Bill for assent to His Excellency the Governor on Monday 6<sup>th</sup> April, 2020 in accordance with the provisions of Section 24 of the County Governments Act, 2012 and Standing Order 145. However, on Wednesday 15<sup>th</sup> April, 2020, His Excellency the Governor, by way of a memorandum, referred the Bill back to the County Assembly for reconsideration pursuant to the provisions of Section 24(2) (b) of the County Governments Act, 2012 and standing order no. 145(2) (b).

Hon. Members, while refusing to assent to the Bill, His Excellency the Governor has raised a general concern on the Bill and expressed reservations on the provisions of the First and Second Schedules as follows:-

## i) General Concern

H.E. the Governor avers that the Bill has in effect transferred certain functions to the Nairobi Metropolitan Services (NMS) against the provisions of the Deed of Transfer of Functions entered between the County Government and the National Government. In particular, the Governor singles out the following:-

- (a) Accounting Services;
- (b) Supply Chain;
- (c) Human Resource;
- (d) Security; and
- (e) Legal Services.

It should be noted that these are the ancillary services contemplated under the Deed of Transfer of Functions.

## ii) First Schedule

The Governor raises the following reservations and recommendations:-

- (a) That the following programmes be retained by the County Government;

Programme Code and Name

0724005310: Security and Safety Management

0726005310: Disaster Management Coordination

0208000: Information And Communication Services

0701005310: Public Financial Management

0719000 P3: Economic and Financial Policy Formulation and Management

0710000: Public Service Transformation

0116005310: Animal Health, Safety and Quality Assurance

0117005310: Afforestation

0118015310: Food Systems and Surveillance

0214005310: Ward Development

0718005310: General Administrative Services

- (b) That the Bill contravenes the provisions of Section 113 of the Public Finance Management Act 2012.

- (c) That under the heading, Nairobi Metropolitan Service, under the Vote R5315, item 0401000 P.1 Preventive & Promotive Health Services, be amended by deleting Kshs245, 001,723 and replacing therefore with Kshs 745,001,723.

Hon. Members, Standing Order 43 (3) provides as follows, and I quote:

*“(3) When a message from the Governor or the Senator of the County is read, the message shall be deemed to have been laid before the County Assembly and the Speaker may either-*

- (a) Direct that the message be dealt with forthwith, or*
- (b) Appoint a day for the consideration of the message; or*
- (c) Refer the message to the relevant Committee of the County Assembly for consideration.”*

In view of the above, Hon. Members, I will shortly be giving directions on how the Assembly shall proceed with this business. I thank you.

### **RULING ON THE CONSIDERATION OF THE GOVERNOR'S MEMORANDUM ON REFUSAL TO ASSENT THE NAIROBI CITY COUNTY SUPPLEMENTARY APPROPRIATIONS BILL, 2020**

(Assembly Business no. 1 of 2020)

Hon. Speaker: 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 17<sup>th</sup> 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, 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 25<sup>th</sup> 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 25<sup>th</sup> 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 27<sup>th</sup> 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.

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.

#### DIRECTIONS FROM THE CHAIR

Hon. Speaker: **Hon. Members, having concluded today's business, I have the following directions to convey.**

#### ASSEMBLY'S LONG RECESS

Hon. Members, as you, may be aware, the Nairobi City County Assembly is scheduled to commence its long recess from Friday, 1<sup>st</sup> May to 1<sup>st</sup> June 2020 in line with the Assembly Calendar and Pursuant to the Provision of Standing Order No. 29.

Equally, Hon. Members, I trust that you are all ware of the COVID-19 pandemic the Country and the World is facing at large and the continuous measures and intervention deployed by the National Government to combat the spread of the virus and flattening of the infections curve.

In view of the above Hon. Members and Pursuant to the Provision of Standing Order No. 1, I direct that the Assembly proceed forthwith with the recess until Tuesday, 2<sup>nd</sup> June 2020. You will be notified should and when need arises for the assembly to have a special sitting.

As you break for the Long recess Hon. Members, I urge that you observe the measures set by the National Government to the latter.

May God bless you all and May God bless this Nation.

#### ADJOURNMENT

Hon. Speaker: There being no other business, the Assembly stands adjourned until Tuesday 2<sup>nd</sup> June 2020.

*The House rose at 3.30 P.M.*