



THE NAIROBI CITY COUNTY ASSEMBLY

FIRST ASSEMBLY - FIFTH SESSION

COMMUNICATION FROM THE CHAIR

- Direction on The Governor's Memorandum on The Nairobi City County Office of the County Attorney Bill, 2017

Honorable Members, the Chair yesterday Tuesday 16th May, 2017 conveyed a Message from the Governor regarding the Governor's Memorandum on his refusal to Assent to the Nairobi City County Office of the County Attorney Bill, 2016, passed by the Assembly on 24th November, 2016.

Honorable 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. Accordingly, the Chair committed to provide direction on the governor's memorandum today, Wednesday 17th May, 2017.

Honorable Members, firstly, it is imperative that the Chair reaffirms the place of the County Assembly in the Devolved governance framework, especially as regards law making, and the role of the Speaker of the County Assembly in providing procedural direction in matters such as this, in order to suitably place this guidance in its proper context. **Hon. Members,** 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. 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.

Hon. Members, similarly, the place of the Speaker in guiding and steering the County Assembly in achieving the foregoing mandate amongst others is properly anchored under Article 178 of the Constitution and the Standing Orders of the County Assembly made pursuant to Section 14(1)(a) of the County Governments Act, 2012. The effect of this provisions and prevailing parliamentary practice is that the Speaker is the ultimate authority on any legal, constitutional and procedural questions arising in the Assembly and as such ought to provide guidance on any matters before the County Assembly that require such guidance. Indeed, **Hon. Members**, the role of the Speaker in the law making process is such that no proposed County law can be published without the consent of the Speaker.

Further, **Hon. Members**, the import of Section 24 of the County Governments Act, 2012 is to the effect that the Speaker must give his authority by way of transmission of a Bill duly passed by the Assembly for the Governor's Assent. Equally, **Hon. Members**, and without prejudice, the same Section provides for the powers of the Governor to Assent or refuse to Assent to passed Bills and the procedure for dispensing with the same.

Now then, **Hon. Members**, how does the Assembly proceed in its consideration of the Governor's memorandum?

Well, **Hon. Members**, Section 24 of the County Governments Act, 2012 and Standing Order 135(3) provide for the procedure for the consideration of the Governor's memorandum. In other circumstances, the Chair would have directed that the relevant committee seize itself of this Memorandum and report to the Assembly on the same. However, after a review of the Memorandum's proposed amendments and the Governor's other reservations which have no proposals for amendment but merely highlight perceived unconstitutionality and illegality, I find it imperative that the Chair provide direction on how the Governor's proposals and reservations, especially on legality and Constitutionality of highlighted clauses, will be considered.

Accordingly, **Hon. Members**, the Speaker carefully reviewed the legal and Constitutional issues flagged out by the Governor in his Memorandum and wishes to direct as follows.

Hon. Members, the Memorandum raises no crucial issues as to occasion serious amendments to the Bill – instead, the reservations can be broadly categorized as highlighting (1) *Procedural deficiencies in drafting and Policy choices*, as well as (2) *Legal and Constitutional issues*. In my mind, the procedural drafting deficiencies can certainly be cured by amendments as proposed, while the policy choices must of necessity be subjected to the relevant Assembly select committee for

further review and a subsequent vote by the Assembly per Standing Order 134 paragraphs (3), (4) and (5) – mostly because the policy choices regard what the Governor wishes the Bill to contain against what the Assembly had considered and passed.

Indeed, **Hon. Members**, where the Governor's memorandum raises a key or contentious policy issue for consideration, the best bet would be for the Chair to forward such matter before the relevant committee for consideration at the first instance and subsequent consideration by Committee of the Whole Assembly at Plenary. However, 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, **Honorable Members**, the Speaker therefore directs as follows –

1. **On the Governor's RESERVATION 1 (CLAUSE 4(3))** - regarding unconstitutionality of the said clause in its lack of provision for Competition and Merit in Appointment of County Attorney in light of Article 232(1)(g) of the Constitution, the Chair sees no merit in the assertion of unconstitutionality. To be sure, it is not lost on the Chair that the Bill passed by the Assembly mirrors the *Office of the Attorney-General Act, 2012*, whose provisions for appointment of the Attorney-General were made pursuant to

Article 156(2) of the Constitution, which article provides that *the Attorney-General shall be nominated by the President and, with the approval of the National Assembly, appointed by the President.*

Hon. Members, in my considered view, where a Statute contemplates a political appointment, for example the appointment of County Executive Committee Members or Cabinet Secretaries, the law requires no competitive recruitment, only that persons nominated for such appointment meet certain set requirements. Therefore, the Speaker finds that this reservation fails on the basis of the clause being consistent with the constitution, practice and other enabling statutes as no merit has established as to support an otherwise conclusion.

- II. On the Governor's RESERVATION 2 (PART IV IN TABLE OF CONTENTS AND CLAUSE 19) – regarding inconsistencies between Part IV and Clause 19, the Chair indeed agrees with the Governor and forwards the same to the relevant Committee for further consideration and Reporting.
- III. On the Governor's RESERVATION 3 (CLAUSE 19) – regarding the establishment of the Office of the Solicitor and generally on establishment of County Offices and the role of the County Public Service Board (CPSB) in the same, the Chair similarly sees no merit in the assertion that only the CPSB can establish Offices in the County Public Service. Certainly, the County Governments Act, 2012 gives the CPSB wide powers to establish and abolish offices.

Even so, that power can only be exercised in accordance with Section 62(2) of the same Act, which provides that if the Board intends to establish or abolish an office *it shall submit its proposal to the county assembly for approval through the county executive committee member responsible for the county public service.*

Without a doubt, **Hon. Members**, the Assembly rightly enjoys the powers to establish offices in the County service by statute so long as those offices give life to devolved functions within Part II of the Fourth Schedule to the Constitution, as has been done through various Acts of the County Assembly, including this Bill which seeks to establish the Office of the County Attorney, which is not currently an office of the County Government established by the CPSB or otherwise. Equally, the Office of the Attorney-General at National level is established by Statute, and is not directly a product of the Public Service Commission. Allowing this reservation to prevail would greatly impair Article 185 of the Constitution on the legislative authority of the County Assembly.

IV. **On the Governor's RESERVATION 4 (CLAUSE 19)** – regarding the provision for Solicitor as Accounting Officer, it is my considered view that the reservation takes a selective interpretation of Section 148 of the Public Finance Management Act, 2012. The question then arises, in establishing County offices or entities can the Assembly by statute designate by title an *Accounting Officer*

for such entity? The answer to the foregoing is indeed in the affirmative.

Hon. Members, Section 148(1), amongst other things, also recognizes that accounting officers may be designated by '*other law*' other than as detailed under that part.


Specifically, Section 148(2) is quite clear to the effect that *the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity*. As such, this reservation would greatly hamper the spirit and letter of Article 185 of the Constitution as read together with other enabling statutes on the legislative powers of the County Assembly, especially as regards the designation of an accounting officer by enactment of a statute.

In any case, the Solicitor General at the national level is effectively the Accounting and administrative officer of the State Law office. Therefore, the amendment fails at that as it raises no ground for further consideration on the basis of constitutionality of the clause.


V. On the Governor's RESERVATION 5 (CLAUSE 34) – regarding that the bill makes an unconstitutional and illegal attempt on the removal of a Public Officer from Office, I find that indeed the Clause does not in any way offend the provisions of Article 236 of the Constitution. Firstly, **Hon. Members,** the Assembly under the County Governments Act, 2012, has never created the Office of the County Attorney. Therefore, no person can purport to

ascribe themselves title to a non-existent office, nor to claim damages for harm not inflicted. Even by dint of the Motion referred to as suggesting the creation of an Office of County Attorney prior to this Bill, the Assembly merely urged the County Executive to put in place measures towards the creation of the said office, which office would either way require the approval of the County Assembly, and which approval has never been granted. It is instructive that Section 62(2) of the County Governments Act, 2012 requires that the Assembly consent to such establishment of new County entity offices. Seeing as the Assembly made no such consideration of a proposal from the CPSB for the establishment of the office of the County Attorney prior to this Bill, I find it difficult to reconcile the fact of the non-existent office, and the injurious harm the purported holder of a yet to be established officer may suffer at the hands of the Assembly. It is impossible that the Assembly would target someone for unconstitutional removal when the office such person purports to hold does not yet exist.


On the Governor's RESERVATION 6 (CLAUSE 34) – regarding the impracticability of implementation of the requirement to appoint a substantive County Attorney within 14 days, I note that the law merely provides that if there is any person purporting to act as County Attorney as if already holding the proposed office, then such person should henceforth cease to act in such manner within 14 days of enactment of the Act. It doesn't require that the Governor appoint a



substantive holder of the proposed office within 14 days. Accordingly, the Governor has sufficient time to nominate and forward to the Assembly a substantive nominee for consideration and approval. I find the suggestion of impracticability to be disingenuous and rule against it.



On the Governor's RESERVATION 7 – regarding the lack of Public Participation during consideration and subsequent passage of the Bill, I find this reservation unfounded and without merit, given the elaborate procedures for committal of Bills to Committees and the mandatory requirement of twenty days to consider and undertake public participation as provided for under Standing Order 121. An advertisement was duly placed in the local dailies on 11th July, 2016 asking stakeholders to forward memorandum on the Bill, and those who wished to submit the same via oral submissions were welcome to appear before the Select Committee on Justice and Legal Affairs. Without evidence to the contrary, I find this reservation erroneous, meant to hoodwink the public and therefore invalid.

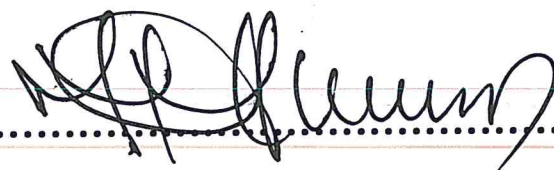


Accordingly therefore, **Honorable Members**, I direct the Assembly Select Committee on Justice and Legal Affairs to reconsider the Governor's *Second Reservation* only and report back to the Assembly for debate and final consideration via committee of the whole.

It is so directed.

I thank you.

SIGN.....



**THE HON. ALEX OLE MAGELLO, MCA
SPEAKER, THE NAIROBI CITY COUNTY ASSEMBLY**