



## NAIROBI CITY COUNTY ASSEMBLY

### OFFICIAL REPORT

#### First County Assembly – Fifth Session

Wednesday, 17 May, 2017

The House met at 2.30 p.m.

*(Hon. Speaker (Mr. Alex Ole Magelo) in the Chair)*

### PRAYERS

**Hon. Speaker:** Hon. Members Order! I just want to inform you that [party] nominations are over so let's get go over this for the month then we go home and be with our families. There is no quorum Sergeant-At-Arm ring the bell for 10 minutes.

*(Quorum bell was rung)*

Hon. Members we have quorum, please take your seats. Order Hon. Members! You may start.

### COMMUNICATION FROM THE CHAIR

*(Loud consultations)*

**Hon. Speaker:** Order Hon. Members! Order Hon. Members!

#### **DIRECTION ON THE GOVERNOR'S MEMORANDUM ON THE NAIROBI CITY COUNTY OFFICE OF THE COUNTY ATTORNEY BILL, 2017**

Communication from the Chair: Direction on The Governor's Memorandum on The Nairobi City County Office of the County Attorney Bill, 2017.

Hon. Members, the Chair yesterday Tuesday 16<sup>th</sup> 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 24<sup>th</sup> November, 2016.

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. Accordingly, the Chair committed to provide direction on the Governor's Memorandum today, Wednesday 17<sup>th</sup> May, 2017.

Hon. 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 I will allow you to come in quickly. Hon. Members please! (*Loud Consultations*) Order Members!

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 at the entrance you can take your seats please. Thank you.

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 as 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, Hon. Members, the Speaker therefore directs as follows: – 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.

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.

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 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.

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.

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.

*(Loud Consultation)*

The Hon. Members who are out there they can come in please, I will give them two minutes. Hon. Members Order!

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 11<sup>th</sup> 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, Hon. 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.

*(Point of Order)*

**Hon. Speaker:** Point of Order on what?

**Hon. Jacqueline Nyangala** (Nominated Member): Mr. Speaker thank you very much, as you recall yesterday I got up when you had the communication about the County Attorney and I had issues with the procedural manner in which we were doing it and am standing on point of Standing Order 39 which reads:

*Messages from the Governor and the Senator*

*39(1) 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.*

*(2) 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.*

So Mr. Speaker I think this was already unprocedural; yesterday according to your communication the Governor wrote the message in December, I think that already...

**Hon. Speaker:** What did you say?

**Hon. Jacqueline Nyangala:** Standing Order 39

**Hon. Speaker:** When did the Speaker bring to us the memorandum?

**Hon. Jacqueline Nyangala:** I don't know, but yesterday you said.

**Hon. Speaker:** But you are supposed to be in...order, order Member. Hon. Member when you are giving information you need to have all the information so that I answer you back but when you say December, December then...

**Hon. Jacqueline Nyangala:** Mr. Speaker I think you mentioned the date in December but my point is, whatever date you mentioned we were not in session and I asked you yesterday that when the issue came we were not in session yet the procedure says '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.' We came back in February 14<sup>th</sup> and then we went back on recess again but that communication was not given. Again on Standing Order 135 which you mentioned:

*Assenting to Bills*



(1) *The Speaker shall, within fourteen days, forward a Bill passed by the County Assembly to the Governor*

(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 the 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 the 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.*

*(Loud consultations)*

**Hon. Speaker:** Order Hon. Member lets follow the procedures. Hon. Member I have already made a ruling and it is important you as members of the Legal Committee which I have already directed that the Assembly Select Committee on Justice and Legal Affairs consider the Governor's second reservation only. And when you bring the amendment here that is when you can come in and debate.

## STATEMENTS

### CONSTRUCTION OF BUILDING NEXT TO FAULU ACADEMY IN SOUTH C

**Hon. Speaker:** Hon. Adow?

**Hon. Member for Eastleigh North Ward (Mr. Osman Adow):** Thank you Mr. Speaker, pursuant to Standing Order 41 (2) (c) I wish to request for a statement from the Chairperson of Sectoral Committee on Planning and Housing regarding construction of a building next to Faulu Academy on Ole Shapara road and Mavulo Avenue in South C Ward. Hon. Speaker there is concern from the parents of children learning at Faulu Academy and residents of South C that there is a towering building being constructed next to the school and the debris are falling on to the school compound daily which is dangerous to the children and therefore a disaster is waiting to happen.

Hon. Speaker in the statement the Chairperson should inquire into and report on:

1. Measures that the County Executive is putting in place to safeguard surrounding building being constructed in the County to avoid as far as possible any damage, nuisance or annoyance to the owners of occupiers of the neighboring properties  
Thank you.

**Hon. Speaker:** Chairperson, Planning?

**Hon. Carolyne Muga** (Nominated Member): Mr. Speaker on behalf of the Chair I want to take an undertaking that we do it in three weeks since one week is impossible because we have other business that is as urgent that we are looking at now. Probably the best that we can respond is three weeks.

**Hon. Speaker:** Hon. Chair of Planning, how would you do in three weeks when a building is being constructed next to the school? You will find the building complete. Report in two weeks.

**Hon. Carolyne Muga:** Obligated, Mr. Speaker

### IMPLEMENTATION OF WATER TANK PROJECT IN KAYOLE

**Hon. Speaker:** Hon. Adow again, you have another statement. The Chairperson of Water and Sanitation will give a response to statement requested by Jackson Kiama regarding the implementation of water tank project in Kayole. Is the Chairman of Water in, Hon. Alex?

**Hon. Member for Sarangombe Ward** (Mr. Pius Otieno): Thank you Mr. Speaker, on behalf of the Chairman of Water Committee and its membership I would wish to inform this house that we had a meeting with the said Member Hon. Jackson Kiama and on Thursday 2<sup>nd</sup> March 2017 the said Hon. Member rose to the floor of the Assembly pursuant to Standing Order 41 (2) and requested the Chairperson of Water Committee to inquire and report on confirmation status of the said project on Kayole, reasons for delay in the realization of the project in the said Ward and measures being put in place by the CEC to ensure there is adequate water supply to Nairobi residents.

Mr. Speaker I wish to report the following,

1. Confirmation of implementation status of said project on Kayole Ward  
35 Wards identified and requested for water transmission, of the total are as attached on the list below. The tanks were procured and delivery of the initial 224 has been done.

2. Reasons for delay in realization of the project in Kayole 2  
The implementation of the project has been affected by delay in payment of the already delivered tanks due to cash flow problems.

3. Measures been put in place by the County Executive to ensure there is adequate water supply for the Nairobi residents

The County Executive has initiated the process of the procurement for current financial year in order to ensure that all the Wards benefit from the Ward Based Water and Sanitation projects including drilling of 40 bore holes in conjunction with Nairobi City Water & Sewerage Company, Athi Water and National Youth Service.

4. Installation of water dispensers in informal settlements



5. Construction of Northern water connection tunnel phase I to increase water levels in Ndaka-ini dam
6. Supply of water tanks to various Wards
7. Water extension projects for Wards to reach unserved areas
8. Drilling and equipping of 21 bore holes through Ward based water and sanitation programme
9. Reticulation of water distribution system to reduce on non-revenue water

Mr. Speaker I beg to respond and if you keenly look at the statement of the answer, there is a list; an extra providing what has been said. Thank you, Mr. Speaker.

**Hon. Speaker:** Thank you very much Hon. K'Otieno for the wonderful---

**Hon. Member for Mukuru kwa Reuben Ward** (Mr. Elkana Mauti): Point of Order on the same.

**Hon. Elkana Mauti:** Mr. Speaker on No. 6 where they have said supply of water tanks, I think this question we have asked very many times and was referred to the Committee of all Chairmen. We have not even gotten an answer. Today they are lying to us that they have supplied the water tanks to every Ward. Where? In Mukuru kwa Reuben we have not received the tanks. Mr. Speaker they also said there is a delay for payment, is it for us to follow the payment or it is the work of the Executive to know whether the payment has been made?

On the same Mr. Speaker, I also requested for a statement on the vehicle which was stolen from the Water Company. Up to now I have not been given an answer. Mr. Speaker I am worried with this Committee of Water, they are deviating from the answer. What is the logic behind when we ask for a statement and they don't give a clarification on it?

**Hon. Pius K'Otieno:** Thank you, Mr. Speaker. I would wish to inform the Hon. Member who is also a member of my Committee on County Delegated Legislation, that at no any time have we actually informed this House that we have delivered all tanks to the 85 Wards. And even in the statement, if you were attentive as any other member, I don't know even if probably we have been voted out but you must be very attentive because you are still earning salary from the tax payers' money and we said, the implementation of water tanks project has been affected by the delay in payment of the already delivered tanks due to cash flow. The import of the statement basically Mr. Speaker is that, to those few Wards that we have delivered tanks there is still a challenge, the supplier has not been paid. So there are some other Wards that have not been supplied with these tanks.

The second question he was talking about, issues of payment. If you clearly read the County Government Act, it is very clear on how members are supposed to behave. It says; we are not supposed to

behave as if we are service deliverers (as if we are members of the Executive). It is not upon the Committee of Water to start running up and down to the Executive side saying that pay this contractor, if there is any contractor who feels that he is being infringed and that his money has not been paid, he has got all the constitutional right to go and take a petition to the High Court of Kenya demanding that he be paid for the work that he has done and that is not the work of the Chairman or members of the Water Committee to start running up and down that so and so should be paid. That one amounts to conflict of interest, Mr. Speaker. Thank you.

**Hon. Speaker:** Hon. K'Otieno. Thank you very much. I agree with you that some matters are really of importance to us to know which way we pass. But now the way Hon. Elkana has rightfully put it, is that the water tanks and we have only about less than 60 days in these corridors, how then do we know that the water tanks will be supplied before we knock off. Whether they have been paid or not which is not our duty to know that, but then can we now say what the Committee of Water and what Hon. Elkana said. I understand the Chairman of all the Chairmen who is the Deputy Speaker and is in the House this afternoon. Can we ask him to diligently check on Water in order to know exactly when the tanks will be delivered? Because payment is not the work of the County Assembly Members, it is the work of the suppliers. So can we ask the Hon. Chairman of Liaison who is the Deputy Speaker of the County Assembly to please follow on this matter? I am aware that the Chairman of Water is extremely busy at this moment. Therefore as you said Hon. K'otieno we have a duty to the people of Nairobi until the midnight of 7<sup>th</sup> of August. So we have to work, we have to do our duties with due diligence. I thank you and ask the Hon. Chairperson to deal with it.

**Hon. Deputy Speaker:** Thank you Hon. Speaker. Good afternoon. I give an undertaking Hon. Speaker to make sure that the request of the member is responded to in good time. Thank you.

**Hon. Speaker:** Thank you Hon. Deputy Speaker of the County Assembly of Nairobi and Chairperson of the Liaison Committee. Members a response from the Chairperson Sectoral Committee on Children, Early Childhood Education and Vocational Training will give a response to a statement requested by Hon. Elkan Mauti regarding the processing of bursaries. Do we have the Chairperson? Since we do not have chairperson, I will seek advice. We can have it on the Order Paper of Tuesday next week and please ask the Chairperson for Children, Early Childhood Education and Vocational Training to be ready with the response. Hon. Members, we proceed.

Hon. Members good afternoon once again! Order Nos. 8 and 9 are deferred; 8 to 18<sup>th</sup> May 2017 and 9 to 25<sup>th</sup> May 2017 due to technicalities. I thank you.

## ADJOURNMENT

The House is adjourned until tomorrow 2.30 p.m. I thank you and good afternoon.

*(The House rose at 3.30 p. m.)*

