

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 28th April, 2021

Special Sitting

*(Convened via Kenya Gazette Notice
No.4008 of 27th April, 2021)*

*The House met at the Senate Chamber,
Parliament Buildings, at 10.00 a.m.*

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

PRAYER

COMMUNICATION FROM THE CHAIR

SPECIAL SITTING OF THE SENATE TO CONSIDER THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

The Speaker (Hon. Lusaka): Hon. Senators, I welcome you to this Special Sitting of the Senate. On the request of the Senate Majority Leader via letter Ref. No. SEN/SML/CORR, dated 26th April, 2021, and with the support of the requisite number of Senators, I appointed today, Wednesday, 28th April, 2021 and tomorrow, Thursday, 29th April, 2021 as days for Special Sitzings of the Senate vide Gazette Notice No. 4008, dated Tuesday, 27th April, 2021.

In the Gazette Notice, I indicated that the business to be transacted at these Special Sitzings shall be -

(i)Tabling of the Joint Report of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights, on the Constitution of Kenya (Amendment) Bill, 2020; and

(ii)Consideration of the Constitution of Kenya (Amendment) Bill, 2020.

Hon. Senators, you will recall that in my Communication made on 3rd March, 2021, I stated that a Bill under Article 257 of the Constitution contemplates an expeditious process.

*(The Speaker took his seat to allow
hon. Senators enter the Chamber)*

I made reference to Article 257 (7) that states in part that such a Bill “*shall be introduced in Parliament without delay.*” I stated that this provision was drawn from the intricate process attached to the consideration of the Bill in terms of collection of signatures in support; verification of the said signatures; public participation undertaken by various county assemblies; and ultimately, approval by the Assemblies and subsequent submission of their respective resolutions to the Speakers of the Houses of Parliament.

For the avoidance of doubt, all county assemblies filed returns to the Speakers of the Houses of Parliament pursuant to Article 257(7) of the Constitution and paragraph (5) of the *Guidelines for Delivery by the county assemblies* in Legal Notice No. 175 of 2019. A total of 43 County Assemblies approved the draft Bill, three county assemblies rejected the Bill and one county assembly abstained.

Hon. Senators, in our consultations over the Parliamentary process on the Bill, the two Speakers and the leadership of the Houses were in agreement that the Bill was to be introduced simultaneously and as much as possible, follow a similar process. This paved the way for the introduction of the Bill in both Houses of Parliament by way of First Reading on Thursday, 4th March, 2021 and its subsequent committal to the Joint Committee of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Standing Committee on Justice, Legal Affairs and Human Rights.

The two committees considered the Bill, undertook public hearings and stakeholder engagements on diverse dates, concluded their deliberations and prepared a joint report on the Bill. The Chairperson of the Standing Committee on Justice, Legal Affairs and Human Rights, will shortly table the Joint Report, as indicated at Order No. 2 in today’s Order Paper.

Hon. Senators, with regard to the next steps, the Senate shall be guided by Standing Order No.141 as relates to the Second Reading, Standing Order No. 145 as relates to the Committee of the Whole and Standing Order No. 153 as regards Third Reading of the Bill. This procedure is necessary so as to socialize the Bill to the long-standing parliamentary procedure within the Commonwealth for considering Bills.

As is the practice, there is no Motion for consideration or adoption thereof of the Report of the Joint Committee on the Bill. What is permissible are arguments in support or otherwise of the Bill, at the various stages, with the benefit of the information contained in the Joint Report. This is another long-standing practice within the Commonwealth. However, the nature of the Bill before us is one that, although subjected through the Parliamentary procedures for considering Bills, may not be amended.

Hon. Senators, this is a momentous occasion as it is the first time that Parliament is considering a Bill to amend the Constitution by popular initiative as contemplated in the Article 257 of the Constitution. This being the case, I am aware that almost all Senators would wish to make their contribution heard in the debate. At a Special Meeting of the Senate Business Committee held on Tuesday, 27th April, 2021, the Committee deliberated on this matter and recommends to the Senate that, at the appropriate time, a Senator may move a Motion pursuant to Standing Order No.106(1) for limitation of time to 10 minutes for each Senator to speak, so that as many Senators as possible can contribute within the timeline specified in the Gazette Notice.

Hon. Senators, the default is that, pursuant to Standing Order No.106(4), each Senator has a maximum of 20 minutes to speak, except the Mover, who is the Senate Majority Leader, and the Senate Minority Leader, who have a maximum of sixty (60)

minutes each. I will however use my discretion under this Standing Order to give considerable time to the Chairperson of the Standing Committee on Justice, Legal Affairs and Human Rights when making his contribution in the debate.

At the conclusion of debate, the decision of the Senate on the Bill will be guided by Article 257(8) of the Constitution that states that “A Bill under this Article is passed by Parliament if supported by a majority of the Members of each House”. This provision applies to all the stages as outlined in the Order Paper.

Hon. Senators, in accordance with Standing Order 30 (5), the business specified in the Gazette Notice, and as outlined in the Order Papers; shall be the only business before the Senate during the Special Sittings, following which the Senate shall stand adjourned until Tuesday, 11th May, 2021, at 10.00 am, pursuant to the Senate Calendar.

I thank you.

PAPER LAID

JOINT REPORT OF THE JLAC ON THE CONSTITUTION OF KENYA (AMENDMENT) BILL, 2020

Sen. Omogeni: Mr. Speaker, Sir, I beg to lay the following Paper on the Table of the Senate today, Wednesday, 28th April, 2021-

The Joint Report of the National Assembly Departmental Committee on Justice and Legal Affairs and the Senate Committee on Justice Legal Affairs and Human Rights on the Constitution of Kenya (Amendment) Bill, 2020.

(Sen. Omogeni laid the document on the Table)

POINT OF ORDER

ADJOURNMENT OF THE HOUSE TO ALLOW SENATORS TIME TO READ THE JOINT COMMITTEE REPORT

Sen. Cheruiyot: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Sen. Cheruiyot, what is your intervention?

Sen. Cheruiyot: Thank you, Mr. Speaker, Sir, for your Communication. I have a concern on something that requires your guidance. You have given an elaborate guidance on how we will process the business that is before us this morning and in the entire duration of this Special Sitting. However, you missed something in your Communication which would have helped us as legislators.

As you know, this report has just been tabled. In your guidance, it would have been better if you would also advised on how we will get a copy of the same. We have seen some information online about this document but that is not the procedure of Parliament. Business is tabled before the House for it to be considered proper business.

I have just seen the voluminous document. So, guide the House on the time you will give for preparation. Will it be tabled and within five or ten minutes, we are expected, as legislators, to do proper justice to such an important Bill by speaking about it? Guide us on the proper route with regards to that.

The Speaker (Hon. Lusaka): I see other points of interventions. Let me listen to them before I give direction.

Sen. Khaniri: Thank you, Mr. Speaker, Sir. I was to raise the same.

This is an important Bill that we will be discussing. Our debate will be informed majorly by the report of the Joint Committee which has been tabled right now. I have also had the first look at the report just now. You do not expect me to make meaningful contribution having looked at the report just now. So, I propose further to the point raised by Sen. Cheruiyot, we break for an hour for Members to have a look at the report, then we can resume and go ahead with the debate.

Sen. Linturi: Mr. Speaker, Sir, it would be important for you to satisfy this House by guiding us on how to proceed. You have referred to Article 257(8) on how this Bill will be passed by this House.

I also listened to your Communication and you almost suggested that we will be limited. Our debate will be for purposes of record. We may not be able to amend this Bill. That being the case, I slightly differ because Article 109 of the Constitution of Kenya talks about how the exercise of legislative power which is done through Bills which are passed by Parliament and then assented to by the President.

That is the reason why Article 257(8) states-

“A Bill under this Article is passed by Parliament if supported by the majority of the Members of each House”.

The Constitution tries to stress the importance of participation of this House in any process of law-making.

Mr. Speaker, Sir, the question I want answered is, we have heard the direction that you have given us and we are sure of what the Constitution provides for. So, it would be important for you to tell us the position of the House of Parliament. Can this Parliament participate in the law-making process or in such a serious issue like that of amending the Constitution without its involvement and considering what our issues are? I acknowledge the fact that the Bill before us is being termed as a popular initiative. The truth of the matter is that the popular initiative, in my view---

The Speaker (Hon. Lusaka): Sen. Linturi---

Sen. Linturi: Mr. Speaker, Sir, I am on a point of order.

The Speaker (Hon. Lusaka): I want to intervene that there are two issues. One, is for suspension of the House so that Members can go through the report. You are now raising a substantial issue that we may not discuss now. So, I ask that you---

Sen. Linturi: Mr. Speaker, Sir, I can hold my horses until the next---

The Speaker (Hon. Lusaka): Hold your horses so that we get the mood of the House on the suspension so that Members look at the report.

Sen. Linturi: Mr. Speaker, Sir, I agree with my brothers, Sen. Khaniri and Sen. Cheruiyot. We do not want to be ambushed. This is a serious moment for this country. We require time. The Committee report on this Bill cannot be brought here in vain. It should guide us on how to process the Bill. We need to have a feel of the information that came to them from the public. The people have spoken about the Bill before us. So, I agree that we be given time so that we have an opportunity to interact with the report. This is because some of us have had the opportunity to look at it while others have not. That will enrich the thinking of the Members when contributing to the Bill. So, I support the suspension of the House so that we get more time.

Sen. Wetangula: Mr. Speaker, Sir, I join the distinguished Senators for Vihiga, Meru and Kericho on what they have said.

I walked in with the Co-Chair of the Committee, the Senator for Nyamira County, and he was carrying a big document.

(Laughter)

In fact, he was suffering under the weight of the document. That is the document that will guide us in this debate.

We must appreciate that our primary role of legislation on a part that touches on the Constitution is the most important role that a House can play. We want to do the right thing.

Mr. Speaker, Sir, for me as a lawyer to read that document that Sen. Omogeni tabled, I will require, probably two or three hours. I can expect my colleagues who are educated in other disciplines to take a little more.

(Laughter)

Mr. Speaker, Sir, I want to urge that we have hard copies of the documents circulated to hon. Members. If you look at the documents even the one Sen. Mutula Kilonzo Jnr. is holding, they are heavily underlined with highlighters and with all manner of documents attached. We are told that the documents have been placed on our iPads. However, we cannot underline them on the iPads. You need to highlight what you want to use to strengthen your arguments in debate.

I suggest that hard copies be circulated to all hon. Members immediately and that you give us at least this morning to read through this report and come back to debate.

Mr. Speaker, Sir, I want to agree with the statement that Sen. Orengo made on this Floor. It cannot have been the wisdom and intention of the framers of this Constitution that we intended to make Parliament either a conveyor belt or a rubber stamp. It cannot be. We should unset ourselves in our thinking, bisect and dissect this document, so that we give the people of Kenya something that is important and helps this country move forward.

I have casually looked at the report from the Director of the National Bureau of Statistics. It is very telling in a departure from what we are looking at. We, as a House, need to consider the national mood as much as we want to help the country. We must also remember that the foundation of the Constitution of Kenya 2010 and the philosophy therein was to right the wrongs of our history and to create absolute equity in the running and management of the affairs of this country; that benefits everybody regardless, from the El Molo, to me, the Luhya; to you, the Luo; to you, the Kikuyu; and to everybody. Equity is the bedrock of the foundation of our Constitution. Any departure from equity will undermine the cohesion, unity and future of our country.

The Speaker (Hon. Lusaka): Sen. Orengo.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I am a little worried that we will take a long time on this. Instead of us taking a long time on this, I think we should be given a little time. I came looking for this document, but I was told I can only be given a copy after it is tabled. Although I was a Member of the Committee, I

still felt the need of having a hard copy. This is the kind of document that cannot be read on the phone or the computer and you do justice to it.

Mr. Speaker, Sir, I ask you to make a decision because if we go on debating on this point, then it means we will need the afternoon. However, if you adjourn at this moment, we can take the whole morning going through the document.

There is some wisdom in saying so. Probably for a long time, we may be the only Parliament that has the opportunity for the first time to debate an amendment of a Constitution. If it comes and we deal with it as if it was some cup of tea we are having, that would be very wrong.

I humbly beg that you make a decision now; we go and get each a hard copy, with the annexures which are important.

The other thing that is making the document look big is the minutes, the reports and the annexures. If you want to understand this Report properly, you must also have the annexures.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): The Senate Majority Leader, do you have something different before I give direction?

The Senate Majority Leader (Sen. Poghio): Mr. Speaker, Sir, I want to agree with hon. Members that this a very important and special Sitting with far reaching impact. The only difference that I want to make is that when you allocate time for coming back, the lawyers can come back early and the rest of us can come later in order to give them a head start. I propose you go ahead and make a decision for us and we come back.

The Speaker (Hon. Lusaka): Sen. Mutula Kilonzo Jnr., so that I give direction.

Sen. Mutula Kilonzo Jnr.: Thank you, Mr. Speaker, Sir. The Senate Majority Leader suggested that the lawyers come back early, I am sure they can. However, Sen. Orenge has raised an important issue about the annexures. I raised this issue with you privately because I was concerned about this Report. I must confess that I asked you to allow me circulate a soft copy of it to the Senators which I did. I am surprised that Sen. Orenge was not allowed to access it because I have it. That direction is useful.

More importantly for me, is that the only way to debunk the things that have been going on in the media is to allow these Members to read it. The only way we will feel appreciated for the work we did is for them to read it. Give them time to read it. Some of the annexures mentioned by Sen. Wetangula will be useful for your information. Whether you amend this document or not, let the Members see the work that we laboured for to make sure that everything was taken care of.

The Speaker (Hon. Lusaka): I will allow Sen. Murkomen to contribute virtually. Please unmute.

Sen. Murkomen: Mr. Speaker, Sir. It is the administrators who should unmute me.

The Speaker (Hon. Lusaka): We can hear you now.

Sen. Murkomen: Thank you, Mr. Speaker, Sir. It is very challenging to be on this side of the Chamber, but I totally agree with the contributions of Sen. Linturi and Sen. Khaniri. This is a once in a lifetime opportunity for us to make important contributions to the changes in our Constitution. The country is following. The whole nation is at a standstill; they want to know what the Senate will say about this very important subject.

I do not think we should treat this process like the other processes we have had. Every Senator will use the 20 minutes that we have to give more contributions, for posterity. Therefore---

The Speaker (Hon. Lusaka): Sen. Murkomen, unfortunately, we cannot get you clearly, but we can guess what you are saying. Let me give you a last chance to see if we can hear you.

Sen. Murkomen: Mr. Speaker, Sir, maybe if you can send me a faster means of transport to land in a short while in Nairobi to enable me to contribute from the Chamber. This process is too important considering the weight of this matter. I support Sen. Khaniri, Sen. Linturi and Sen. Cheruiyot that we should have more time to read the document and make weighty contributions for posterity.

The Speaker (Hon. Lusaka): Finally, the Co-Chair, Sen. Omogeni.

Sen. Omogeni: Mr. Speaker, Sir, first, on behalf of the Members of my Committee, I would like to apologise for bringing such a voluminous report that has caused havoc to the House this morning. However, this is because of the importance of the task that was at hand.

I also apologise that we have not given Members enough time to go through the Report and internalize the issues arising. However, since I was the Co-Chair of the Committee and spent considerable time going through the contents of the Report, together with the annexures, I am willing to volunteer, if you order that we have a small *Kamkunji* once we adjourn, to briefly take Members through the contents of the Report and highlight the issues that have been pinpointed by the Committee. I know that it is not easy for Members to go through this Report, but if you direct, I can volunteer to take them through the contents.

Thank you, Mr. Speaker, Sir.

Sen. Cherargei: On a point of order, Mr. Speaker, Sir. I agree with my predecessor that he might have read the Report well. However, my point is that if we allow him to take us through the *Kamkunji*, he might want to share with us what he believes is right or wrong. The best way for us is to allow Members to read the Report. They can internalize and understand it. If there are issues that will need clarification, then my good friend, senior counsel, Sen. Omogeni, can be sought. However, saying that we be taken through a *Kamkunji*, we are worried that he might indoctrinate some of his beliefs on what the BBI should stand for. We should adjourn up to 2.30 p.m. after which we will come back. Let every Member read the Report and then we can come and discuss it.

Mr. Speaker, Sir, since I have the microphone, in your Communication, you said something about amendments. I do not know if you were giving directions or you were advising that we can amend the document. I seek your clarification on the issue of Article 257, if you are advising or directing.

Secondly---

The Speaker (Hon. Lusaka): Order, you are now mixing up issues. Please, hold your horses.

Sen. Cherargei: Mr. Speaker, Sir, this is on your Communication.

The Speaker (Hon. Lusaka): Go through the Communication, it is very clear.

Sen. Cherargei: Mr. Speaker, Sir, but I have not been supplied with a copy. Maybe finally?

The Speaker (Hon. Lusaka): I will give you a copy.

Sen. Cherargei: Finally, Mr. Speaker, Sir, since this is an important process, and every Member must be with the House, unless the promoters of this Bill want to go alone, if they want to go with us, it is important that we seek clarification.

Mr. Speaker, Sir, since we have seen a lot of things in the WhatsApp platforms, you can direct that every Member should be provided not only with the Report, but also with the annexures. I advise Members when reading the Report of the amendment Bill, to have with them the Constitution of Kenya 2010 so that it becomes easy to understand.

The Speaker (Hon. Lusaka): Let us have the final one. We do not have the luxury of time.

Proceed, Sen. (Dr.) Zani.

Sen. (Dr.) Zani: Mr. Speaker, Sir, I will be very brief. The two processes are not mutually exclusive. We can do both like we did during the revenue allocation process; it is just a presentation. We can then have a little more time to go through the Report, but we will know what is where. We would have had a bit of insight. The Committee is privileged to be more informed about this Report. Some of us are meeting it for the first or second time. Therefore, I think these two events are not mutually exclusive. We can have both of them; one to make the presentation and then the second one for us to go through the report and get ready for debate.

(Several hon. Senators stood up on points of order)

The Speaker (Hon. Lusaka): Order, Senators. I want to give direction.

Proceed, Sen. Kinyua.

Sen. Kinyua: Mr. Speaker, Sir, as a follow up to what the Senator for Vihiga and Sen. Cheruiyot said, we need more time. We also need the document. Once we have it, we should be given time during the morning hours to read it. From 2.30 p.m., we can have the *Kamkunji* for the Co-Chair to take us through the Report since he has more information about it.

The Speaker (Hon. Lusaka): Order, hon. Senators. I want to agree that this is a very critical moment for Parliament and the Senate for that matter. Therefore, following the request for time to read the report, using Standing Order No.1, I hereby allow the request.

ADJOURNMENT

The Speaker (Hon. Lusaka): Hon. Senators, the Senate, therefore, stands adjourned to today, Wednesday, 28th April, 2021 at 2.30 p.m.

The Senate rose at 10.35 a.m.