



**REPUBLIC OF KENYA
TWELFTH PARLIAMENT – (FOURTH SESSION)**

**THE NATIONAL ASSEMBLY
COMMUNICATIONS FROM THE CHAIR**

_____ *(No. 063 of 2020)* _____

**ON
THE PROCESSING OF LEGISLATIVE PROPOSALS AND
INDIVIDUAL MEMBERS' BILLS IN THE HOUSE**

Honourable Members,

You will recall that on Thursday, 8th October 2020 during the afternoon sitting, the Member for Mathare, the Hon. Anthony Oluoch, MP rose on a Point of Order seeking my direction on a number of issues. The gist of his Point of Order revolved around the processing of legislative proposals originated by individual Members and their eventual consideration once published into Bills, if at all. The Member lamented on the slow manner in which Members' legislative proposals are processed, and took issue with the apparent stifling of the legislative mandate of Members and the House by the Budget and Appropriations Committee and Departmental Committees which are required to scrutinize Members' legislative proposals and recommend to the Speaker whether the proposals should be proceeded with or published into Bills..

Honourable Members, having considered the substance of the issues raised by the Hon. Oluoch, I have isolated three (3) key questions that would require my direction. These are—

1. Whether the House has authority in respect of a decision on whether or not to proceed with or publish a Legislative Proposal ;
2. What Value does Money-bill certification and authorization stage and Pre-Publication Scrutiny add to the legislative process and whether the Committee's decision on a legislative proposal upon pre-publication scrutiny is final; and ,
3. Whether a Member may reintroduce a Legislative Proposal after a negative decision by a Committee of the House.

Honourable Members, before I respond to the issues raised, it should be noted that the process of drafting a Bill involves several steps. The first stage is the **drafting stage** which entails the legislative proposal being prepared by the Directorate of Legal Services and reviewed in consultation with the respective Member. It is here that the Member confirms the draft proposal *vis-à-vis* his or her initial idea. Once drafted, the legislative proposal is submitted to the Parliamentary Budget Office for **money Bill certification**. Proposals that are found to have money Bill aspects are committed to the **Budget & Appropriations Committee for its recommendation** in accordance with Article 114 of the Constitution. Where the Parliamentary Budget Office certifies that a legislative proposal **does not** contain any money Bill aspects, the proposal is committed to the relevant Departmental Committee for **pre-publication scrutiny and relevant sectoral input**. Ordinarily, the recommendation of the relevant Committee is key in guiding the Speaker to make a determination on whether to publish a legislative proposal or not.

Honourable Members, statistics before me indicate that **a total of three hundred and thirteen (313)** individual Members' legislative proposals have so far been proposed in the Twelfth Parliament. Of these, **ninety (91)** are currently

at the **drafting stage** while **nine (9)** have been submitted to Parliamentary Budget Office for Money Bill certification.

Forty-two (42) Legislative proposals which were determined to contain money Bill aspects are currently pending before the Budget & Appropriations Committee. On the other hand, **sixty-nine (69)** Legislative proposals are being considered before the relevant Departmental Committees after either being considered by the Budget and Appropriations Committee and recommended to be proceeded with or after having been determined as not containing any money Bill aspects. In the course of considering the Legislative proposals, the Budget and Appropriations Committee and the various Departmental Committees have recommended that **thirty-one (31)** proposals should either not be proceeded with or published on the considered advice of the National Treasury or on account of relevant sectoral concerns. Finally, **Sixty-three (63)** Legislative proposals have so far either been recommended for publication, approved for publication by my office, or published as Bills that are now at different stages of consideration by the House. **Eight (8)** of the proposals initially approved for processing have been withdrawn by the Members concerned. As you will note from the above statistics, Honourable Members, a total of **one hundred and eleven (111)** legislative proposals are before the Budget and Appropriations Committee and the various Departmental Committees. This represents **nearly half** of all the personal legislative output of individual Members to date.

Just for your information, **Honourable Members**, of the proposals that have been published into Bills, **one (1)** has been assented to; **two (2)** have been passed and are undergoing preparation for assent; **four (4)** have been concluded by the House and are currently undergoing consideration in the Senate; **five (5)** are awaiting Committee of the whole House; **forty-five (45)** are awaiting or

undergoing Second Reading; **four (4)** have been lost; and **two (2)** have been withdrawn by the Members who introduced them.

There has been some progress in consideration of Members' Bills, and the House Business Committee has resolved to continue prioritizing them in coming weeks, have gone as far as moving a Motion to allow that Thursday morning sittings during this part of the Session be reserved specifically for individual Members' business to clear the backlog.

Honourable Members, on the first issue relating to whether the House has authority in respect of the processing of a legislative proposal, Members will recall that before the Tenth Parliament, Members wishing to introduce a Bill had to "*seek leave of the House*" by way of a motion. The House would then take a vote on whether the proposal was to be proceeded with or not. This procedure was done away with during the review of the Standing Orders in 2008. A new procedure was then introduced that gave the Speaker the power to determine whether a legislative proposal was to be proceeded with or not based on the recommendation of the Clerk as to conformity to format and style. However, after several years in operation and with the new Constitution, a need arose for the establishment of a mechanism to sieve legislative work before its consideration by the plenary of the House. This was especially with regard to the confirmation of the money Bill aspects of a legislative proposal, its constitutionality or otherwise, and its conformity with the drafting format and style of the House to ensure consistency in legislative output. The Standing Orders were accordingly reviewed and during the Eleventh Parliament, the current system of **pre-publication scrutiny** that I have described was introduced.

Honourable Members, allow me now to respond to the second and third matters raised by the Hon. Oluoch. To begin with, on whether the Committee's

decision on a legislative proposal upon pre-publication scrutiny is final, I wish to categorically state that it is not. Why do I say so?

First, where the attention of the House Business Committee is drawn to the fact that the Budget and Appropriations Committee has recommended that a significant number of legislative proposals to be proceeded with and the proposals remain stuck in Departmental Committees, the House Business Committee has always risen to the occasion and sought the resolution of the House to cause the proposals to be published. Members may recall that on 21st February 2019, the then Leader of the Majority Party, the Hon. Aden Duale, MP moved a Motion, on behalf of the House Business Committee, that sought the resolution of the House for the publication of thirty (30) legislative proposals whose consideration was inordinately delayed by various Departmental Committees. The motion was approved and saw the publication of the Bills, some of which have since been passed by the House. Therefore, the recommendation of Departmental Committees in respect of a legislative proposal is not final or binding as to the fate of a proposal.

Second, **Hon. Members**, a cursory reading of Standing Order 114 readily reveals the discretion that the House has granted the Speaker with regard to any recommendation made by a Departmental Committee on a legislative proposal. The Speaker has the discretion to agree or not to agree with the recommendations of the relevant committee. Indeed, on few occasions, and for considered reasons, I have disagreed with the decision of a Departmental Committee on a legislative proposal. As an example, in the Eleventh Parliament, the then Member for Baringo County, the Hon. Grace Kiptui, sought to amend the Basic Education Act, 2013 to provide for the distribution of free sanitary towels to every girl child enrolled in a public basic education institution upon

attaining puberty. Whereas the Budget & Appropriations Committee recommended that the legislative proposal be proceeded with, the Departmental Committee on Education, Research & Technology recommended that it should not be published.

This was ostensibly on the basis that the Government had already established a sanitary towels programme in the country. Having considered the matter, I directed the publication of the proposal against the recommendation of the Committee. At the time, my determination was informed by, among other things, the fact that the proposal did not offend the Constitution or contradict or duplicate any existing law. It was also my view, which view I still hold, that rejecting a proposal by a Member without relevant and weighty reasons amounts to curtailing the Member's constitutional right to legislate. The recommendation by the Departmental Committee on Education, Research & Technology to shelve the proposal on account of the Government's programme would only leave the matter at the mercies of government policy which is unpredictable and can be terminated at any time as opposed to legislation. I felt that the Committee was becoming a roadblock as they had raised no constitutional or legal issues but rather were making administrative arguments for the administration. Similarly, during the Eleventh Parliament, it is on record that my determination on the fate of the *Persons with Disabilities (Amendment) Bill, 2013* sponsored by the then Member for Nyandarua County, Hon. Wanjiku Muhia, *the National Employment Authority Bill, 2015* sponsored by then nominated Member, Hon. Johnson Sakaja, *the Banking (Amendment) Bill* sponsored by the Member for Kiambu Constituency, Hon. Jude Njomo, MP and *the Engineering Technologists & Technicians Bill* sponsored by the then Member for Bomet County, Hon. Cecilia Ng'etich, countermanded the recommendations made by the respective Departmental Committees. All of these proposals were subsequently passed by the House and

assented into law.

Honourable Members, The practice world over is that whenever Speakers are faced with a situation where they have to decide between a policy and a proposed legislation, they tend to rule in favour of legislation since it asserts the **authority of the House**.

The above two scenarios exemplified by the actions of the House Business Committee and of the Speaker conform to a long held parliamentary tradition that, whenever the Speaker is confronted by a choice between the House, a Committee or an individual Member of the House, he always chooses the House for resolution.

Honourable Members, I hasten to caution that the discretion that the House has lent the Speaker ought not to be construed by Members as a convenient avenue of circumventing the carefully woven fabric of the Committee system under the Standing Orders. Majority of the work of the House is conducted in Committees which have at their disposal relevant sectoral experience and expertise in their respective mandates and the assistance of competent technical officers both from within and outside Parliament. Accordingly, a decision to countermand the recommendation from a Committee of the House should be viewed as an exception and not the rule.

Honourable Members,

Consequently, in the exceptional circumstance where a Member is genuinely aggrieved by the recommendation of a Committee or the manner in which his or her legislative output is being processed by a Committee, two secondary avenues for seeking direction or redress exist. First, and with regard to inordinate delays in the consideration or processing of a legislative proposal, the Member may

move the House Business Committee to seek a resolution of the House for the advancement of its legislative mandate. Secondly, where a Committee has made an adverse recommendation with regard to a legislative proposal, the Member may provide the Speaker with relevant information to inform his consideration of the Report and recommendation of the Departmental Committee.

Hon. Members, from the foregoing, you will note that the discretion granted to the Speaker by Standing Order 114 is only with regard to the recommendation made by the Departmental Committees. Honourable Members, as you are aware, the pre-publication scrutiny in our current legislative process has two steps^s namely – money Bill certification and consideration by the relevant Committee. If a legislative proposal is determined to have money Bill aspects contemplated under Article 114, it is forwarded to the Budget & Appropriations Committee for consideration and recommendation in consultation with the Cabinet Secretary for the National Treasury. On the other hand, if the proposal is determined not have any money Bill aspects, the Standing Orders require the Speaker to forward it to the relevant Committee for initial consideration. In considering a legislative proposal, the relevant Committee checks on such issues as constitutionality, existing provisions in law or conflict with existing law without proposed amendment or repeal.

As to whether that process adds value, I wish to state as follows. Firstly, the 114 consideration is a constitutional requirement. It is not a procedure or step that the House has a decision over as the House may proceed '**only in accordance with the recommendation of the Budget & Appropriations Committee after taking into account the views of the Cabinet Secretary for the National Treasury**'. There is therefore no question as to whether the process is necessary or not. Indeed, Article 114 of the Constitution expressly requires the House to only proceed with the consideration of a Money Bill in line with the

recommendation of a Committee mandated with that task and after taking into account the views of the Cabinet Secretary responsible for finance. This House has, in its Standing Orders, mandated the Budget and Appropriations Committee as the "relevant Committee" contemplated by the Constitution. Consequently, the Speaker has no discretion with regard to the recommendation made by the Budget and Appropriations Committee on a proposal that has been certified to contain "Money Bill" aspects.

Honourable Members, on the third question of whether a Member can reintroduce a Legislative Proposal after a negative decision by the relevant Committee, I note that the Standing Orders do prohibit the reintroduction of a legislative proposal in the same or an enriched form. The US Congress publishes approximately 2000 Bills every year.

The practice is conscious of the fact that not all the published Bills will be considered by the House, or be concluded if at all considered. However, it is the duty of the processes of any legislature to not only facilitate Members to undertake their duty, but also to facilitate the display of the performance of that very duty. Undeniably, not all Bills that are published become law. Some Bills are published to cause an action, resolve issues of concern to the people or elicit national debate on the subject. For instance, in the Ninth Parliament, the then Member for Konoin, the Hon. (Dr.) Julius Kones sponsored the Tea (Amendment) Bill with the intension of causing the Executive to take certain actions in the tea sector. No sooner had the Bill been published than the Executive not only went ahead to take administrative actions to address concerns in the tea sector at the time, but also introduced a concurrent Bill. No wonder, no sooner had Senator Cheruiyot published his Tea Bill and action started in both Houses, than the Executive is now pushing changes in the tea sector. Similarly during the Eleventh Parliament, the then Member for Mukurweini, the Hon. Kabando wa Kabando

proposed an amendment to the Central Bank Act to require the Central bank to put in place mechanisms to enable the public to participate in Government securities through electronic means and in lower minimum denominations. Soon thereafter, the Central Bank instituted measures that saw the reduction of the minimum investment in government securities from Kenya Shillings 50,000 to 3,000 and the introduction of phone-based trading in these securities. Therefore, I am convinced that we should make our processes less difficult and ensure that they are facilitative to Members. As the Speaker therefore, I will not hesitate to disagree with a Committee where a Committee is being unnecessarily obstructive.

Honourable Members, whereas the Member has raised valid questions that have constitutional grounding particularly in respect to Articles 94 and 95 of the Constitution on the role of Parliament, the processes in question are ingrained in the Standing Orders and derive from constitutional requirements. At present, no catastrophic or terminal failure has revealed itself with regard to the functioning of the Committee system and the pre-publication scrutiny procedure established by the House to sieve the legislative work submitted for consideration by the plenary. Despite appreciating that the structure of the Committee system is firm, I am constrained to admit that the statistics of the legislative work of individual Members pending before the Budget and Appropriations Committee and the various Departmental Committees are worrying and, if left unchecked, may indeed disillusion the affected Members and discourage others from exercising their constitutional mandate to legislate. It is my finding that some Departmental Committees are misapplying the provisions of Standing Order 114 on pre-publication scrutiny. The intention was not for the Departmental Committees to curtail the legislative authority of the House or to stop Members from publishing Bills but rather to facilitate Members in this endeavour. I am indeed concerned by the high number of legislative proposals that have been laying in Departmental Committees for far too long. Some of them have been before Committees for

over a year. For instance, on 17th October 2019, the Committee deferred making a decision on a legislative proposal by the Hon. George Kariuki, MP titled *the Constitution of Kenya (Amendment) Bill, 2019*. That decision is still pending one year down the line. This is a blatant abuse of the parliamentary process and should not be allowed. In any case, should the Committee find difficulty in getting views of the Cabinet Secretary as required, the same should be reported to allow the House to make an appropriate resolution in the circumstances.

Honourable Members, to ensure the processing of these proposals one way or the other, and to safeguard the authority of the House, I hereby direct as follows–

- 1. THAT,** that all Departmental Committees have until 3rd November 2020 to consider all legislative proposals before them, whose 21 days have expired and make their recommendations known to me on or before 3rd November, 2020;
- 2. THAT,** failure to comply with the above mentioned directive will leave the House Business Committee with no other option but to follow the precedent set in 2019 by immediately seeking an order of the House for publication of the legislative proposals;
- 3. THAT,** the Procedure & House Rules Committee relooks at Standing Order 114 and related provisions of the Standing Orders in respect of the value especially with regards to the role of Departmental Committees in pre-publication scrutiny. This is bearing in mind that once published, the same Bills are still committed back to the same Committees for consideration including conducting public participation. In making its recommendations, the Procedure & House Rules Committee should consider providing for an

appellate mechanism during the pre-publication stage and before a recommendation is made to the Speaker; and,

4. THAT, at least once a week, the Clerk does publish on the parliamentary website, the list of Member's legislative proposals which have been drafted and are awaiting the money-bill recommendation or are undergoing prepublication scrutiny in Committee and brief the House Business on regular basis on the same;

I thank you.



THE HON. JUSTIN B. MUTURI, E.G.H., M.P.
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, October 15, 2020