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13TH PARLIAMENT | 4TH SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND

HUMAN RIGHTS

PAPERS LAID	
DATE	28.5.2025
TABLED BY	Sen. Chimera
COMMITTEE	
CLERK AT THE TABLE	Belinda

REPORT ON THE CONSIDERATION OF A PETITION BY MR. LABAN OMUSUNDI ON THE INTRODUCTION OF A FRAMEWORK FOR RECALLING NOMINATED MEMBERS OF THE COUNTY ASSEMBLIES (MCAs)

Rt. Hon. Speaker
You may approve for tabling
J. M. Nyegenye, C.B.S.,
Clerk of the senate/secretary, PSC
Date: 26/05/25

Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI.

Clerk
Forwarded and recommended for approval
for tabling
26/05/2025 May, 2025

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*Mr. Hon. Speaker
National Assembly
Nairobi
Kenya*

TABLE OF CASES

- i) *Isaac Aluoch Polo Aluochier v. Attorney General & Another [2017] eKLR,*
- ii) *The High Court in Speaker Nairobi City County Assembly & another v Attorney General & 4 others [2021] eKLR*
- iii) *Katiba Institute & Another v Attorney General & Another [2017] eKLR,*

LIST OF ABBREVIATIONS/ACRONYMS

KLRC	- Kenya Law Reform Commission
MCA	- Member of County Assembly
MP	- Member of Parliament
ORPP	- Office of the Registrar of Political Parties
Sen	- Senator

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under the Standing Orders of the Senate and is mandated *‘to consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.*

Membership of the Committee

The Committee comprises -

- | | |
|--|--------------------|
| 1. Sen. Wakili Hillary Sigei, CBS, MP | - Chairperson |
| 2. Sen. Veronica W. Maina, MP | - Vice-chairperson |
| 3. Sen. Raphael Chimera Mwinzagu, MP | - Member |
| 4. Sen. Karen N. Nyamu, MP | - Member |
| 5. Sen. Andrew Omtatah Okoiti, MP | - Member |
| 6. Sen. (Prof.) Tom Ojienda, SC, MP | - Member |
| 7. Sen. Crystal Kegehi Asige, MP | - Member |
| 8. Sen. Daniel Kitonga Maanzo, EBS, MP | - Member |

Minutes of the Committee in considering the subject Petition are attached to this Report as ***Annex 1.***

FOREWORD BY THE CHAIRPERSON

Honourable Speaker,

On 8th October, 2024, the Speaker of the Senate reported that a Petition had been received from Mr. Laban Omusundi regarding the introduction of a framework for recalling nominated Members of County Assemblies (MCAs). This was on the premise that, while there exists laws and frameworks for recalling, impeaching or removing political leaders from their respective constitutional offices, such provisions do not apply to nominated Members of County Assemblies.

The Petitioner therefore prayed that the Senate amends the County Governments Act (Cap 265) to provide a framework for recalling nominated Members of County Assemblies through public initiative.

Honourable Speaker,

Following Committal of the Petition to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration, the Committee scrutinized the issues raised therein and invited comments from key stakeholders to enrich its consideration of the matter. The submissions received are detailed in Chapter Two of the Report, while the Committee Observations are set out in Chapter Three.

Notably, while the Petition was specific to the recall provisions for nominated Members of County Assemblies, it was our observation that the right of recall cannot currently be exercised with regard to both directly or specially elected Members of Parliament and Members of County Assemblies. This is following the Judgment by the High Court in the case of *Katiba Institute & Another v Attorney General & Another* [2017] eKLR¹ in which the Court declared sections 45(2)(3) and (6), 46(1)(b)(ii) and (c) and 48 of the Elections Act (Cap 7) and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the County Governments Act (Cap 265) unconstitutional.

Honourable Speaker,

The Committee therefore recommends that the Office of the Attorney General spearheads the development of a policy framework on the grounds and procedure for the recall of both elected and nominated Members of Parliament and Members of County Assemblies to, among others, inform legislation to be enacted by Parliament.

¹ Constitutional Petition No. 209 of 2016

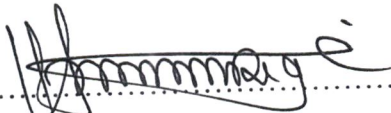
If the said policy framework is not submitted to Parliament on time, the Committee undertakes to draft and introduce before the Senate the requisite amendments to the Elections Act (Cap 7) and the County Governments Act (Cap 265) to enable the Kenyan people to exercise the right to recall their leaders in Parliament and the County Assemblies. This will be done not later than February 2026, at the commencement of the Fifth Session, to ensure that the legislation navigates both Houses of Parliament and is in place ahead of the 2027 general elections.

Honourable Speaker,

I take this opportunity to thank the Petitioner, the Kenya Law Reform Commission and the Office of the Registrar of Political Parties for their detailed submissions which assisted the Committee in its deliberations and determination on the subject Petition. I commend the Members of the Committee for their diligence in executing this assignment, and thank the offices of the Speaker and Clerk of the Senate for the support extended to the Committee which made the consideration of the Petition successful.

Honourable Speaker,

It is now my pleasant duty, pursuant to standing order 238(2) of the Senate Standing Orders, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on its consideration of a Petition by Mr. Laban Omusundi on the introduction of a framework for recalling nominated Members of the County Assemblies (MCAs).

Signed.......... Date.....20/5/2025.....

SEN. WAKILI HILLARY KIPROTICH SIGEL, CBS, MP
CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS
AND HUMAN RIGHTS

CHAPTER ONE: INTRODUCTION

1.1 Right to Petition Parliament

1. The right to present petitions to public authorities is provided for at Article 37 of the Constitution. Article 119(1) further provides that *'Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.'*
2. Parliament enacted the Petition to Parliament (Procedure) Act (No. 12 of 2012) to make provision for the procedure for the exercise of this right. Further, Part XXVII of the Standing Orders of the Senate also makes provision of how this right may be exercised.

1.2 Summary of the Petition

3. At a sitting of the Senate held on Tuesday, 8th October, 2024, the Speaker of the Senate reported that a Petition had been received from Mr. Laban Omusundi regarding the introduction of a framework for recalling nominated Members of County Assemblies (MCAs). A copy of the Petition is attached to this Report as *Annex 2*.
4. The salient issues contained in the Petition were that –
 - a) There exists laws and frameworks for recalling, impeaching or removing political leaders from their respective constitutional offices;
 - b) Such provisions do not apply to nominated members of county assemblies; and
 - c) While elected MCAs may be recalled by their respective constituents, there is no structure in place for the youth or Persons with Disability (PwD) to recall nominated members.
5. The petitioner therefore prayed that the Senate amends the County Governments Act (Cap 265) to provide a framework for recalling nominated members of county assembly through public initiative.
6. Pursuant to Standing Order 238(1), the Speaker committed the Petition to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

1.3 History and Development of Recall Provisions in Kenya

7. The recall of elected leaders can be traced to the Magna Carta of 1215 AD and the English Bill of Rights of 1689. Savigny² asserts that the laws of a nation, much like its language, stem from the collective spirit and shared sense of justice among its people.³ This common conviction of the people united them and was invoked when leaders went against the interest of majority.
8. Elisha Z Ongoya, in *“The Legal Framework on Resolution of Election disputes in Kenya”*⁴ defines recall as power vested in the electorate exercisable before the end of the term in relevant House of Parliament.
9. Several attempts have been made towards having a recall clause in Kenya. These are briefly discussed below.
10. Kenya's constitutional reform journey began in 1994 with the Citizens' Coalition for Constitutional Change (4Cs), following disputed elections. Early amendments, such as the repeal of Section 2A and the Inter-Parties Group (IPPG) reforms, sought to enhance democracy but did not introduce the recall clause, which was seen as unfavorable to MPs. In 1997, the National Convention Assembly (NCA) and the National Convention Executive Council (NCEC) pushed for further constitutional changes, leading to broader electoral participation. Although these efforts paved the way for the Constitution of Kenya, 2010, the recall clause remained absent.
11. The Constitution of Kenya Review Commission (CKRC) later gathered public input, culminating in the Bomas Draft Constitution. Citizens strongly criticized MPs' conduct, advocating for mechanisms to recall underperforming legislators. The draft outlined recall grounds such as incapacity, misconduct, and neglect of constituents, while also warning against its misuse. Despite widespread public support, MPs resisted the inclusion of a recall provision, leading to its omission from the Bomas Draft. Political disputes further derailed the constitutional review process, and President Moi's dissolution of Parliament in 2002 halted reforms. The Kibaki administration pledged constitutional changes, but internal political tensions ultimately led to the collapse of the Bomas process.

² LLOYD's *Introduction to Jurisprudence*, Columbia University Press, 9th edition.

³ Dr. Simeon Igbiniedion, *Jurisprudence and Legal Theory 11*, National Open University of Nigeria.

⁴ Elisha Z. Ongoya, *Handbook on Election disputes in Kenya: Context, Legal Framework, Institution and Jurisprudence*, Law Society of Kenya (2013).

12. Prof. Ghai stated that the Recall clause was introduced based on feedback gathered from public hearings conducted across all 210 constituencies in the Republic, including input from various targeted groups, and reflected the perspectives and concerns expressed by citizens during the extensive consultation process.⁵
13. The recall clause remained in the Wako Draft and subsequently in the Constitution of Kenya that was passed and promulgated in August 2010.
14. Article 10(2) (c) lists the national values and principles of good governance to include good governance, integrity, transparency, and accountability.
15. Article 104 grants the electorate for elections of the Senate and the National Assembly the right to recall their members of parliament. The Provision stipulate –

‘The electorate under Article 97 and Article 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.’

16. The implied term ‘*electorate*’ and expressed term ‘*constituency*’ appearing under *Articles 97 and 98* could be construed to mean that the right to recall applies to both to elected Members ‘in a single member constituencies’ and indirectly to elected party-list Members on condition that the provided mechanism for initiative such recall corresponds with the modalities in which the Member was elected that is either by voters or party Members.
17. Article 104 (2) of the constitution required Parliament to enact legislation providing the grounds and procedure for recall. This should be read with the Fifth Schedule of the Constitution which required parliament to pass such legislation within two years of promulgation of the Constitution.⁶ Parliament passed two pieces of legislation that is, the Elections Act (Cap 7) and the County Government Act (Cap 265).
18. Article 38 on political rights provides every citizen has the right to free, fair and regular elections based on universal suffrage.

⁵ Constitutional Petition 209 of 2017, eKLR.

⁶ Parliament shall enact legislation to provide for the grounds on which a member may be recalled and the procedure to be followed.

19. Article 177(1)(b)(c) provides for the election of nominated MCAs to represent special interests (youth, women, and PwDs), establishing them as full members of the County Assembly.

1.3.1 Recall of Members of County Assembly (MCAs)

20. Sections 27, 28 and 29 of the County Governments Act give guidance on recall of a member of county assembly.
21. The grounds for recall of a Member of County Assembly are similar to those for a Member of Parliament, namely, violation of Chapter Six of the Constitution, mismanagement of public resources and conviction of an electoral offense.
22. The procedure for recall mirrors that in the Elections Act and includes filing of a written petition with IEBC, collection of required signatures from ward voters, after which a recall election is conducted by IEBC if conditions are met. The Act further gives a nod to an MCA who has been recalled to run in the by-election⁷

1.4 Judicial Pronouncements on Recall Provisions

23. In *Isaac Aluoch Polo Aluochier v. Attorney General & Another* [2017] eKLR, the court held that while party list members are elected through nomination by parties, they exercise public authority and represent the electorate, hence should not be insulated from accountability.
24. The High Court in *Speaker Nairobi City County Assembly & another v Attorney General & 4 others* [2021] eKLR reaffirmed that all MCAs, whether elected or nominated, are bound by the values of Article 10 of the Constitution and Chapter Six on leadership and integrity.
25. In *Katiba Institute & Another v Attorney General & Another* [2017] eKLR, the High Court of Kenya addressed the constitutionality of the recall provisions for elected Members of Parliament (MPs) and Members of County Assembly (MCAs) as stipulated in the Elections Act and the County Governments Act. The following key findings were addressed by the Court:

⁷ 6 Section 29 (7) of the CGA, A member of the county assembly who has been recalled may run in the by-election conducted under subsection.

a) Ambiguity in Recall Provisions

Ambiguities were identified by the Court in the recall provisions, particularly between Section 47(5) of the Elections Act, which stated that a recall election would be decided by a simple majority, and Section 48, which required at least 50% of registered voters to concur for the recall to be valid. This inconsistency rendered the provisions vague and potentially unconstitutional.

b) Discriminatory Restrictions

The Court found that Sections 45(6) of the Elections Act and 27(6) of the County Governments Act which provisions prohibited individuals specifically who unsuccessfully contested in the preceding election from initiating a recall as limiting, in essence discriminatory and not justified under Article 24 of the Constitution.

c) Limitation on Voter Participation

The Court found seemingly unjustifiable the requirement that only voters registered in the election in respect of which the recall is sought could initiate a recall petition, in the sense that it excludes voters who registered after the election, thereby infringing on their political rights under Article 38 of the Constitution.

26. The Court made the following declarations –

- i) sections 45(2)(3) and (6), 46(1)(b)(ii) and (c) and 48 of the *Elections Act* and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the *County Governments Act* are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of the Constitution and to that extent are unconstitutional.
- ii) sections 45(1)(b)(ii) and 45(6) of the Elections Act and sections 27(6) and 28(1)(b)(ii) of the County Government Act discriminatory and therefore unconstitutional.

27. Whereas the primary focus of the case hinges on elected officials, the emphasis of the Court emphasis on the principles of equality, non-discrimination, and the right to political participation underscores the need for mechanisms that ensure all public officers, including nominated MCAs, are held accountable. The absence of recall provisions for nominated MCAs creates a disparity in accountability measures, which could be addressed by legislative reforms that align with the constitutional values highlighted in this judgment.

CHAPTER TWO: CONSIDERATION OF THE PETITION

2.1 Introduction

28. Pursuant to the Senate Standing Orders and the Petition to Parliament (Procedure) Act, 2012 the Committee proceeded to consider the Petition, and invited key stakeholders to submit comments on the Petition.
29. While the Committee invited comments from eleven organizations, it received submissions from two stakeholders, namely the Office of the Registrar of Political Parties, and the Kenya Law Reform Commission.
30. A summary of the said submissions is set out below.

2.2 Submissions by the Office of Registrar of Political Parties

31. The ORPP submitted comments on the Petition by way of a letter, Ref. No. RPP/ELE/13(17) dated 21st November, 2024. A copy of the letter is attached to this Paper as *Annex 3*.
32. In its submissions, the Office of the Registrar of Political Parties observed that –
 - i) Election to a county assembly in Kenya is either through the single-member electoral units during a general or by-election, or through proportional representation by use of party lists.
 - ii) Pursuant to Article 177(1) of the Constitution, single-majority MCAs are elected by voters in the respective wards. On the other hand, in terms of Articles 90(1) and 177(1)(b) of the Constitution, nominated MCAs are elected through party list elections by use of party lists as developed by political parties. Party list elections are therefore confined to political parties.
 - iii) In line with section 35 of the Elections Act (Cap 7), Kenya uses a closed party list system whereby political parties submit party lists to the IEBC at least 45 days to the date of the election. Closed party list system means that the lists cannot be opened or changed during the life of a county assembly.

- iv) According to section 37(2) of the Elections Act 9Cap 7), where a party list is exhausted during the life of a county assembly, the respective political parties are at liberty to submit an additional party list.
 - v) Articles 177(1)(b) and (c) of the Constitution illustrate that there are two categories of nominated MCAs, that is MCAs drawn from the gender top-up list and marginalized list, respectively.
 - vi) Paragraph 19 of the Second Schedule to the Political Parties Act (Cap 7D) envisages a party constitution to stipulate the rules and regulations for nomination of candidates to political party lists. Further, section 34(6) of the Elections Act (Cap 7) provides, *inter alia*, that the party lists submitted to the IEBC under that section shall be in accordance with the Constitution or nomination rules of the political party concerned.
 - vii) The methods of nomination for determination of candidates for elections under section 2 of the Political Parties Act are either direct or indirect nomination. These include the use of all-party members and use of delegates.
 - viii) Flowing from the above, the methods adopted by political parties to develop party lists give credence to the party members and not the various demographics within the party.
 - ix) In this regard, the electorate that elects party list nominees to county assemblies are party members through political parties.
33. On the recall of nominated Members of County Assembly (MCAs), the ORPP observed that –
- i) Article 104 of the Constitution grants the electorate for elections of the Senate and the National Assembly the right to recall their members of parliament. To quote –

‘The electorate under Article 97 and Article 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.’

- ii) The use of the phraseology ‘electorate’ and ‘constituency’ could mean that the provision intended for the recall to apply to single majority members only or, on the other hand, to apply to all members elected under Articles 97 and 98 by their respective electorate, being the voters in single majority constituencies and party members in party list elections.
- iii) The recall provisions under the Elections Act (Cap 7) illustrate that Parliament appreciated Article 104 of the Constitution as being applicable to single majority MPs only.
- iv) Likewise, section 27 of the County Governments Act (Cap 265) stipulates that the electorate in a county ward may recall their member of county assembly before the end of the term of the member. This provision only addresses the single majority MCAs and not the party list MCAs.
- v) The party list election is intended for representation of special interests. It is for this reason that some of the requirements for single majority elections are not replicated in the party list election. This did not however mean that the electorate that determines the party list members should be prohibited from exercising the recall rights.
- vi) Given that the election of party list members is by party members, the initiation and process of recall of party list MCAs could only be confined to party members.
- vii) Such recall provisions may be introduced through expanding section 9 of the Political Parties Act (Cap 7D) and the Second Schedule to the Political Parties Act on the content of the party constitution to the effect that party members, on account of various grounds, including a failure of the nominated MCA to represent a particular interest, may be recalled by the political party members.

2.3 Submissions by the Kenya Law Reform Commission

- 34. The KLRC submitted comments on the Petition by way of a letter, Ref. No. KLRC/8/86(42) dated 18th November, 2024. A copy of the letter is attached to this Paper as *Annex 4*.
- 35. In its submissions, the Kenya Law Reform Commission observed that –

- a) The right of recall on members of Parliament is provided for under Article 104 of the Constitution. The Article further provides that Parliament shall enact legislation for grounds on which a member may be recalled and the procedure to be followed.
 - b) The Elections Act (Cap 7) provides for the recall of a Member of Parliament, including the grounds (section 45) and procedure to be followed (section 46).
 - c) Similar provisions are contained in Part IV of the County Governments Act (Cap 265), which outlines both the grounds (section 27) and procedure to be followed (section 28).
 - d) In the case of *Katiba Institute & Another v Attorney General & Another* [2017] eKLR Constitutional Petition No. 209 of 2016, sections 45(2)(3) and (6), 46(1)(b)(ii) and (c) and 48 of the Elections Act and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the County Governments Act were declared unconstitutional on the grounds that the provisions –
 - i) are meaningless and superfluous;
 - ii) fall far short of the constitutional imperative in Article 104 of the Constitution; and
 - iii) are discriminatory.
36. The KLRC therefore observed that –
- a) The recall clause does not have grounds on which a member may be recalled since the purported grounds were struck out;
 - b) The procedure to be followed in a petition for recall is no longer clear since some requirements like ‘being a registered voter’ were struck out; and
 - c) The right of recall is incapable of being exercised through the remaining provisions in both the Elections Act and the County Governments Act since there are not only no grounds for recall but also there exists huge procedural gaps.
37. The Commission therefore recommended that policy direction be formulated on the grounds and procedure for recall and how it will be exercised for elected and

nominated members of Parliament and county assemblies. The policy would then inform the amendments to the law to replace the provisions which were declared unconstitutional.

CHAPTER THREE: COMMITTEE OBSERVATIONS

38. Having considered the Petition by Mr. Laban Omusundi on the introduction of a framework for recalling nominated Members of the County Assemblies (MCAs), and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights observes that –
- a) The County Governments Act (Cap 256) provides mechanisms for the recall of Members of County Assemblies elected to represent wards but is silent on the grounds and procedure for the recall of specially elected Members representing special interest groups. This creates a disparity in accountability mechanisms between directly and specially elected MCAs, despite the Members equally exercising the representative, legislative, budget-making and oversight roles of the county assemblies.
 - b) The absence of such provisions should not exempt nominated Members of County Assemblies from the Constitutional values and principles applicable to all public officers. Consequently, there ought to be in place a mechanism through which such leaders can be held accountable, including through the process of recall.
 - c) In *Katiba Institute & Another v Attorney General & Another [2017] eKLR Constitutional Petition No. 209 of 2016*, sections 45(2)(3) and (6), 46(1)(b)(ii) and (c) and 48 of the Elections Act and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the County Governments Act were declared unconstitutional on the grounds that the provisions –
 - i) were meaningless and superfluous;
 - ii) fell far short of the constitutional imperative in Article 104 of the Constitution; and
 - iii) were discriminatory.
 - d) The right of recall remains incapable of being exercised through the remaining provisions of the Elections Act (Cap 7) and the County Governments Act (Cap 256) since there are not only no grounds for recall but also there exists huge procedural gaps.

CHAPTER FOUR: RECOMMENDATIONS

39. Arising from its observations in the preceding Chapter, the Standing Committee on Justice, Legal Affairs and Human Rights recommends as follows –
- a) That, the Office of the Attorney General and Department of Justice –
 - i) liaises with the Independent Electoral and Boundaries Commission, the Kenya Law Reform Commission, the National Gender and Equality Commission, the Office of the Registrar of Political Parties, the Political Parties Liaison Committee and other relevant stakeholders to develop a policy framework on the grounds and procedure for the recall of directly and specially elected Members of Parliament and Members of County Assemblies, including undertaking public participation thereon, and to submit the policy framework and any draft Bills thereon for consideration by Parliament; and
 - ii) submits a status report to the Senate within **six months** from the tabling of this Report.
 - b) The Standing Committee on Justice, Legal Affairs and Human Rights to initiate amendments to the Elections Act (Cap 7) and the County Governments Act (Cap 256) to give effect to the right of recall in respect to both directly and specially elected Members of Parliament and Members of County Assemblies. The said legislation to be introduced in Parliament not later than 26th February 2026, whether the policy framework will have been submitted to Parliament or not.

LIST OF ANNEXES

- Annex 1:* Minutes of the Committee in considering the Petition
- Annex 2:* Copy of the Petition
- Annex 3:* Submissions by the Office of the Registrar of Political Parties
- Annex 4:* Submissions by the Kenya Law Reform Commission

***Annex 1: Minutes of the
Committee in considering
the Petition***



13TH PARLIAMENT | 4TH SESSION

MINUTES OF THE 223RD SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 20TH MAY, 2025 AT 8.00 A.M. ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Sigei, CBS, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Veronica W. Maina, MP | - Vice-chairperson |
| 3. Sen. Raphael Chimera Mwinzagu, MP | - Member |
| 4. Sen. (Prof.) Tom Ojienda, SC, MP | - Member |
| 5. Sen. Andrew Omtatah Okoiti, MP | - Member |
| 6. Sen. Crystal Kegehi Asige, MP | - Member |
| 7. Sen. Daniel Kitonga Maanzo, EBS, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|-------------------------------|----------|
| 1. Sen. Karen Njeri Nyamu, MP | - Member |
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SECRETARIAT

- | | |
|------------------------|---|
| 1. Mr. Charles Munyua | - Principal Clerk Assistant II |
| 2. Mr. Boniface Kiambi | - Senior Clerk Assistant |
| 3. Ms. Faith Wangui | - Legal Counsel II |
| 4. Ms. Angela Bonaya | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 5. Mr. Josphat Ngeno | - Media Relations Officer |
| 6. Mr. Zenton Williams | - Audio Officer |

MIN. NO. 630/2025

PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 631/2025

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Crystal Kegehi Asige, MP.

MIN. NO. 632/2025

**CONFIRMATION OF THE MINUTES OF THE
PREVIOUS MEETINGS**

- a) The Minutes of the 215th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Veronica W. Maina, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.
- b) The Minutes of the 216th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- c) The Minutes of the 217th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Veronica W. Maina, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- d) The Minutes of the 218th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- e) The Minutes of the 219th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- f) The Minutes of the 220th Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.
- g) The Minutes of the 221st Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Crystal Kegehi Asige, MP.
- h) The Minutes of the 222nd Sitting were confirmed as a true record of proceedings having been confirmed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Crystal Kegehi Asige, MP.

MIN. NO. 633/2025

**MATTERS ARISING FROM THE MINUTES OF
THE PREVIOUS MEETINGS**

Under Min. No. 594/2025 Work Plan of the Committee for May and June, 2025

The Committee was informed that Sen. Catherine Mumma, MP had since confirmed availability to accompany the Committee on 12th to 14th June, 2025 to conduct a visit to Homa Bay County to consider her Statement pursuant to Standing Order 53 (1) on the alleged defilement and incestuous impregnation of a minor from Kigoto Village in Suba South Sub- County, Homa Bay County.

Thereupon, Members resolved to undertake the visit to Homa Bay County on the proposed dates, i.e. Thursday, 12th June to Saturday, 14th June, 2025 to consider the Statement by Sen. Catherine, Mumma, MP.

MIN. NO. 634/2025

**PETITION BY MKUPUO NETWORK AWARENESS
REGARDING THE IMPLEMENTATION OF AN
AWARD BY THE ENVIRONMENT AND LAND
COURT FOR COMPENSATION AND
RESETTLEMENT**

Members were taken through the draft observations and recommendations of the Committee as contained in Chapters 3 and 4 of the Report.

Thereupon, the Committee adopted the Report having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

MIN. NO. 635/2025

**PETITION BY LABAN OMUSUNDI REGARDING
THE INTRODUCTION OF A FRAMEWORK FOR
RECALLING OF NOMINATED MEMBERS OF THE
COUNTY ASSEMBLIES**

Members were taken through the observations and recommendations of the Committee as contained in Chapters 3 and 4 of the Report.

During deliberations, Members proposed the inclusion of an additional recommendation at Chapter 4 of the Report, mandating the Committee to draft and introduce a Bill to amend the Elections Act (Cap 7) and the County Governments Act (Cap 256) to give effect to the right of recall. This would be done at the commencement of the Fifth Session, regardless of whether the policy framework will have been submitted to Parliament or not.

Thereupon, the Committee adopted the Report, with amendments, having been proposed by Sen. Veronica W. Maina, MP and Sen. (Prof.) Tom Ojienda, SC, MP.

MIN. NO. 636/2025

**INQUIRY INTO THE OPERATIONAL AND
LEADERSHIP CRISIS AFFECTING THE COUNTY
ASSEMBLY OF NYAMIRA**

Members were taken through a Brief on the Committee inquiry into the operational and leadership crisis affecting the County Assembly of Nyamira.

During deliberations, Members observed that while the Motion approved by the Senate on Thursday, 15th May, 2025 addressed some aspects that had been referred to the Committee, the Committee still needed to inquire into the question of who initiated and signed budget requisitions for approval by the Controller of Budget.

Thereupon, the Committee resolved to invite the Controller of Budget to appear before the Committee in a week's time to clarify on the county officials the Office was dealing with.

MIN. NO. 637/2025

**PROPOSED APPLICATION FOR REVIEW OF THE
JUDGMENT BY THE SUPREME COURT IN
PETITION NO. 19 (E027) OF 2021; THE SENATE &
OTHERS VS THE NATIONAL ASSEMBLY & OTHERS**

This agenda item was deferred to a later date.

MIN. NO. 638/2025

ADJOURNMENT

The Chairperson adjourned the meeting at fifteen minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 21st May, 2025 at eight O'clock.

SIGNED: 

DATE: 21. 05. 2025.



13TH PARLIAMENT | 4TH SESSION

MINUTES OF THE 208TH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 1ST APRIL, 2025 AT 8:00 AM VIRTUALLY ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Sigei, CBS, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Veronica W. Maina, MP | - Vice-chairperson |
| 3. Sen. Raphael Chimera Mwinzagu, MP | - Member |
| 4. Sen. (Prof.) Tom Ojienda, SC, MP | - Member |
| 5. Sen. Andrew Omtatah Okoiti, MP | - Member |
| 6. Sen. Crystal Kegehi Asige, MP | - Member |
| 7. Sen. Daniel Kitonga Maanzo, EBS, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|-------------------------------|----------|
| 1. Sen. Karen Njeri Nyamu, MP | - Member |
|-------------------------------|----------|

SECRETARIAT

- | | |
|-------------------------|---|
| 1. Mr Charles Munyua | - Principal Clerk Assistant II |
| 2. Mr. Boniface Kiambi | - Clerk Assistant I (<i>Taking Minutes</i>) |
| 3. Ms. Faith Wangui | - Legal Counsel II |
| 4. Ms. Angela Bonaya | - Clerk Assistant III |
| 5. Mr. Jackson Matheshe | - Research Officer III |
| 6. Mr. Josphat Ngeno | - Media Relations Officer III |
| 7. Mr. Zenton William | - Audio Officer |
| 8. Ms. Gloria Anyango | - Intern |

MIN. NO. 549/2025

PRELIMINARIES

The meeting was called to order at twenty-one minutes past eight O'clock and opened with a word of Prayer.

MIN. NO. 550/2025

ADOPTION OF THE AGENDA

The Agenda of the meeting was adopted having been proposed by Sen. (Prof.) Tom Ojienda, SC, MP and seconded by Sen. Crystal Kegehi Asige, MP.

MIN. NO. 551/2025

CONFIRMATION OF MINUTES OF PREVIOUS MEETINGS

- a) The Minutes of the 200th Sitting were confirmed as a true record of the proceedings having been proposed by Sen. (Prof.) Tom Ojienda, SC, MP and seconded by Sen. Crystal Kegehi Asige, MP.
- b) The Minutes of the 201st Sitting were confirmed as a true record of the proceedings having been proposed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- c) The Minutes of the 202nd Sitting were confirmed as a true record of the proceedings having been proposed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- d) The Minutes of the 203rd Sitting were confirmed as a true record of the proceedings having been proposed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. Veronica W. Maina, MP.
- e) The Minutes of the 204th Sitting were confirmed as a true record of the proceedings having been proposed by Sen. (Prof.) Tom Ojienda, SC, MP and seconded by Sen. Crystal Kegehi Asige, MP.
- f) The Minutes of the 205th Sitting were confirmed as a true record of the proceedings having been proposed by Sen. (Prof.) Tom Ojienda, SC, MP and seconded by Sen. Crystal Kegehi Asige, MP.
- g) The Minutes of the 206th Sitting were confirmed as a true record of the proceedings having been proposed by Sen. Crystal Kegehi Asige, MP and seconded by Sen. (Prof.) Tom Ojienda, SC, MP.
- h) Confirmation of the Minutes of the 207th Sitting was deferred to a later date.

MIN. NO. 552/2025

MATTERS ARISING FROM THE PREVIOUS MINUTES

- a) *Min. No. 527/2025 – The County Governments (State Officers Removal from Office) Procedure Bill, 2024 (Senate Bills No. 34 of 2024)*

Members observed that the Bill had been pending before the Committee beyond the set timelines, and that it required extensive consideration at a physical meeting. Thereupon, the Committee resolved that the Bill be considered during a working retreat of the Committee to be held in Kiambu County on 13th to 15th April, 2025, with 14th April, 2025 being the working day.

- b) *Min. No. 535/2025 – The draft Constitution of Kenya (Amendment) Bill, 2025, sponsored by Sen. Okong'o Mogeni, CBS, SC, MP*

The Committee resolved to resume consideration of the legislative proposal at the working retreat to be held on 13th to 15th April, 2025.

- c) *Min. No. 539/2025 – The Constitution of Kenya (Amendment) Bill, 2024 (Senate Bills No. 17 of 2024) and the County Governments Election Laws (Amendment) Bill, 2024 (Senate Bills No. 2 of 2024).*

The Committee was informed that the data sought on the number of PWDs eligible for elective positions was yet to be received. The Committee tasked the Secretariat to write to the National Gender and Equality Commission (NGEC) and the National Council for Persons with Disabilities (NCPWD) requesting that the data be furnished to the Committee to assist the Committee to make an informed decision on the proposed Bills.

The Committee further resolved to resume consideration of the two Bills at the working retreat to be held on 13th to 15th April, 2025.

MIN. NO. 553/2025

CONSIDERATION OF A PETITION BY LABAN OMUSUNDI ON THE INTRODUCTION OF A FRAMEWORK FOR RECALLING NOMINATED MEMBERS OF COUNTY ASSEMBLIES

The Committee was taken through a Paper on the Petition as well as the submissions received on the Petition from the Office of the Registrar of Political Parties (ORPP) and the Kenya Law Reform Commission (KLRC).

During deliberations, Members observed that –

- i) While the petitioner sought the enactment of a framework allowing members of the public to initiate the recall of a nominated member of county assembly, the submissions by the ORPP indicated that this process could only be undertaken by the members of the sponsoring political party, being the 'electorate' or 'constituency' in this case;
- ii) There was need to consider the implications of treating differently the elected and nominated members of Parliament and the county assemblies, including in the recall processes for each category; and
- iii) Following the decision of the High Court annulling recall provisions in the Elections Act (Cap 7) and the County Governments Act (Cap 265), there was a lacuna in the law that needed to be addressed through a policy framework on the recall of elected and nominated members of Parliament and county assemblies. This would then inform the amendments to be enacted to the Elections Act and the County Governments Act;

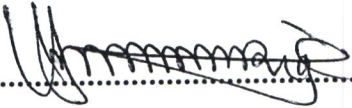
Members further observed that no submissions were received from the Political Parties Liaison Committee (PPLC), which brings together political parties, and that it was important to obtain their perspective before the Committee concluded on the Petition.

The Committee therefore resolved to invite written comments on the Petition from the PPLC, and thereafter to resume consideration of the Petition later.

MIN. NO. 554/2025

ADJOURNMENT

The Chairperson adjourned the meeting seven minutes past nine O'clock. The next meeting would be held on Wednesday, 2nd April, 2025 at eight O'clock.

SIGNED: 

DATE: 8/4/2025

***Annex 2: Copy of the
Petition***



**GRASSROOT CIVILIAN
OVERSIGHT INITIATIVE**

06 AUG 2024

P.O Box 9759-20100 Nakuru.

Tel : +254723159625

Email: omusundi200@gmail.com

5th Aug 2024

**TO THE
SENATE ASSEMBLY OF REPUBLIC OF KENYA
NAIROBI- KENYA**

**A PUBLIC PETITION
IN THE MATTER OF RECALLING NOMINATED MEMBERS OF COUNTY
ASSEMBLIES**

Under the strength of article 119 of the Constitution of Kenya 2010, I a resident of Nakuru County, a Citizen of the Republic of Kenya and a person of great interest in enhancing good Governance, rule of law and Constitutionalism, herein draw your attention to the following fronts:

1. **THAT** there are enabling laws to recall, impeach or remove political leaders from their respective Constitutional political offices by the initiative of the public, except the Nominated Members of County Assemblies.
2. **THAT** the Nominated Members of County Assemblies are not sacred individuals to be an exceptional from being recalled by the initiative of the Public. They enjoy the same privileges as other elected Members of County Assemblies and they should be subjected to the same fate of being recalled by the public when it deems necessary.
3. **THAT** while the elected MCAs can be recalled by their respective wards residents, whom they represent at their respective assemblies, there is no structure for the youth representatives to be recalled by the youth, PWD recalling their PWD representatives, Marginalized recalling their marginalized representatives, Gender top up recalling their gender top up representatives.
4. **THAT** unfortunately these 800 Nominated Members of County Assemblies are not subjected to principles of good governance enshrined in article 10 of the Constitution, in respect to public participation during the period of their nominations, yet they are nominated to represent critical sectors of groups in their respective Assemblies, for the entire process is done secretly and in skewed manner by political parties for lack of legal framework to involve the people they are intended to represent.
5. **THAT** there is no other efforts done to address this issue for it can only be addressed by the establishment of Senate.

Petition to recall nominated MCAs by Laban, 0723159625

IN THE MATTER OF RECALLING NOMINATED MEMBERS OF COUNTY ASSEMBLIES

6. THAT this matter is not pending before any Court in Kenya between the parties herein.

7. THEREFORE I SEEK TO BE GRANTED THE FOLLOWING PRAYERS:

A). The Senate to Amend County Government Act 2012, to insert clauses of recalling a nominated Member of County Assembly through people's initiative when it deems necessary.

B). Any other reliefs The Senate deems fit in advancing the quality in the subject matter.

Yours



Laban Omusundi

The Petitioner in the matter
An Active Citizen based in Nakuru

Copy to:

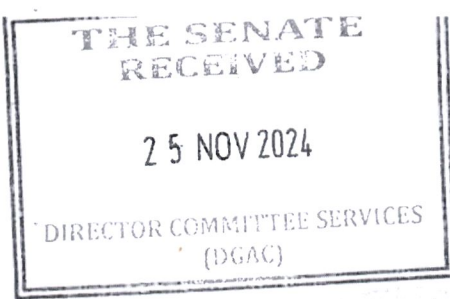
- COUNCIL OF GOVERNORS.
DELTA HOUSE NAIROBI KENYA
- COUNTY ASSEMBLY FORUM.

***Annex 3: Submissions by the
Office of the Registrar of
Political Parties***



REPUBLIC OF KENYA

Telephone: +254(0)204022000
Mobile: 0772281357
Email: info@orpp.or.ke
Website: www.orpp.or.ke
When replying please quote



Lion Place, 1st & 4th Floor
Off Waiyaki Way
P.O Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/ELE/13 (17)

Date: 21st November 2024

Clerk of the Senate
Clerk's Chambers
National Assembly, Parliament Buildings
P.O. Box 41842-00100
NAIROBI

Dear Sir,

① DGAC
② HOD - GOVERNANCE
SCA - JUSTICE

Kindly deal

Kindly deal

25/11/2024

RE: MEMORANDUM ON THE PETITION BY LABAN OMUSUNDI CONCERNING THE LEGAL FRAMEWORK FOR RECALLING A NOMINATED MEMBER OF COUNTY ASSEMBLY

Reference is made to the above subject matter.

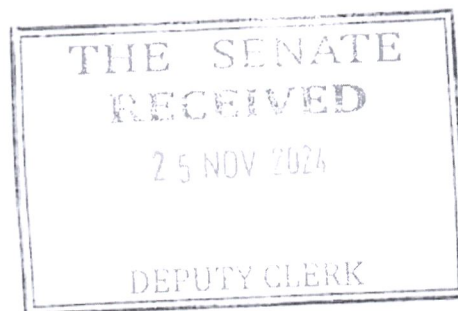
This Office acknowledges receipt of your letter dated 6th November 2024 requesting for a response to the petition under reference.

Annexed herewith is the memorandum highlighting this Office's views on the Petition.

Yours faithfully,

Ann N. Nderitu, CBS
Registrar of Political Parties/CEO

(Encl 1)





OFFICE OF THE REGISTRAR OF POLITICAL PARTIES MEMORANDUM ON THE PETITION BY LABAN OMUSUNDI CONCERNING THE LEGAL FRAMEWORK FOR RECALLING NOMINATED MEMBER OF COUNTY ASSEMBLY

A. INTRODUCTION

1. The Standing Committee on Justice, Legal Affairs and Human Rights vide a letter dated 6th November 2024 invited the Office of the Registrar of Political Parties (ORPP) to make submissions on a Petition by Laban Omusundi dated 5th August 2024 concerning the legal framework for recalling a nominated Member of County Assembly.
2. The ORPP is established under Section 33 of the Political Parties Act CAP 7D as an independent state office within the meaning of Article 260 of the Constitution. Its broad mandate under Section 34 of the PPA comprises regulation of political parties including the duty to certify that the names appearing in a party list are the names of members of the political party presenting the party list.
3. The Petitioner claims that while there is a legal framework for recall of the 1450 elected Members of County Assemblies, there is no framework for recall of nominated MCAs in terms of youth representatives being recalled by the youth, Person with Disability (PWDs) Representatives being recalled by PWDs, Marginalised representatives by the marginalized, and gender top-up representatives by gender top-up representatives. As a result, the Petitioner prays for amendment of the County Governments Act CAP 265 to provide for recall of nominated MCAs.

B. SUBMISSIONS

Election of Party List Members of County Assembly

4. Election to a county assembly in Kenya is either through the single-member electoral units during a general election in addition to a by-election, herein single-majority elections or through proportional representation by use of party lists, herein party list elections.
5. Pursuant to Article 177(1) (a) of the Constitution, single-majority MCAs are elected by voters in the respective wards. On the other hand, in terms of Articles 90(1) and 177(1) (b) of the Constitution, nominated MCAs are elected through party list elections by use of party lists as developed by political parties. Party list elections are therefore confined to political parties.
6. In line with Section 35 of the Elections Act CAP 7, Kenya uses a closed party list system whereby political parties submit party lists to the IEBC at least 45 days to the date of election. Closed party list system comprises the meaning that the lists cannot be opened or be changed during the life of a county assembly. According to Section 37(2) of the Elections Act CAP 7, where a party list is exhausted during the life of a county assembly, the respective political parties are at liberty to submit an additional party list.
7. Articles 177 (1) (b) and (c) of the Constitution illustrate that there are two categories of nominated MCAs; MCAs drawn from the gender top-up list and marginalized list respectively. The gender top-up list is for persons of either gender for purposes of attaining the two-third gender principle in the county assembly. The marginalised list on the other hand includes youth and PWDs.
8. Paragraph 19 of the Second Schedule to the PPA envisages a party constitution to stipulate the rules and regulations for nomination of candidates to political party

9. lists. Further, Section 34(6) of the Elections Act CAP 7 provides, *inter alia*, that the party lists submitted to the Independent Electoral and Boundaries Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.
10. The methods of nomination for determination of candidates for elections under Section 2 of the PPA are either direct or indirect nomination. These include use of all-party members and use of delegates.
11. Flowing from the above, the methods adopted by political parties to develop party lists give credence to the party members and not the various demographics within the party— women, youth, persons with disabilities, ethnic minorities, marginalised communities.
12. In this regard, the electorate that elects party list nominees to county assemblies are party members through political parties.

Recall of Members of the County Assembly

13. The Constitution under Article 104 (1) provides, *inter alia*, that the electorate for elections of the Senate and National Assembly have the right to recall their members of parliament. It provides—

“The electorate under Articles 97 and 98 have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament.”
14. It is instructive to note that Article 104 of the Constitution employs the phrases “electorate” and “constituency”. Due to the phraseology adopted, the textualism approach of interpretation could mean the provision intended for the recall to apply to single majority members only. It could also be interpreted that the provision intended for all members under Articles 97 and 98 of the Constitution to

15. be recalled by their respective electorates being voters in single majority elections and party members in party list election.
16. Nonetheless, the current recall provisions under the Elections Act CAP 7 illustrate that Parliament appreciated Article 104 of the Constitution as being applicable to single majority MPs.
17. Section 27 of the County Governments Act CAP 265 stipulates that the electorate in a county ward may recall their member of the county assembly before the end of the term of the member. This provision only addresses the single majority MCAs and not the party list MCAs.
18. The party list election is intended for representation of special interests. It is for this reason that the some of the requirements for single majority elections are not replicated in the party list election— For instance, the composition of the electorate.
19. This however does not mean the electorate that determines the party list members should be prohibited from exercising the recall rights. The recall provisions in law are meant to hold elected leaders to account. So that although there is a procedure for the nominated MCAs to lose their seats in line with the provisions of, inter alia, party constitutions, it would be good practice to expand the reach of recall provisions.
20. The Electoral Knowledge Network has observed as follows:

“More generally, there is a question of compatibility of recall with the electoral system. If the electoral system is candidate-based, there is no problem. If however it is party based, should the voters have the right to recall a specific representative nominated by a party? Would there be a difference between representatives chosen by the voters under open list proportional representation? In general, in list systems, does the party or the voters fill the vacancy caused by a successful recall?”

21. Given that election of party list members is by party members generally, the initiation and process of recall of party list MCAs have to be confined to party members. For instance, the gender top-up party list category contains both men and women regardless of whether they are youth, PWDs, or ethnic minorities, it would be therefore difficult to create an electorate that only votes in the gender top-up category and not vote in the marginalised list category.
22. The recall provisions may be introduced through expanding Section 9 of the Political Parties Act CAP 7D and the Second Schedule to the PPA on the content of the party constitution to the effect that party members on account of various grounds including a failure of the nominated MCA to represent a particular interest, be recalled.

REGISTRAR OF POLITICAL PARTIES
OFFICE OF THE REGISTRAR OF POLITICAL PARTIES

***Annex 4: Submissions by
the Kenya Law Reform
Commission***

KENYA LAW REFORM COMMISSION



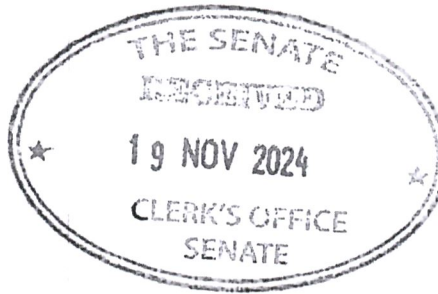
"A Vibrant Agency for Responsive Law Reform"

Telegrams: "LAWREFORM" NAIROBI
Telephone: Nairobi, +254-20-2241186/2241201
Fax: +254-20-2225786
www.info@klrc.go.ke

When replying please quote

Ref. No. **KLRC/8/86(42)**

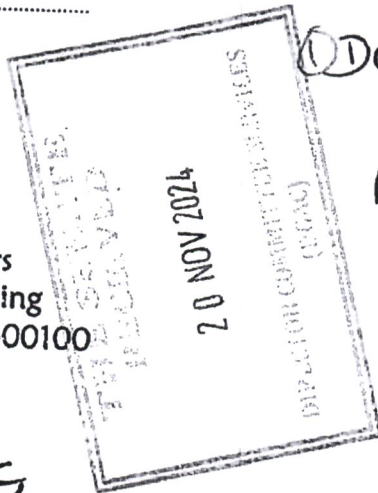
and Date



KENYA LAW REFORM COMMISSION
REINSURANCE PLAZA
3RD FLOOR
TAIFA ROAD
P.O. Box 34999-00100
NAIROBI, KENYA

18th November, 2024

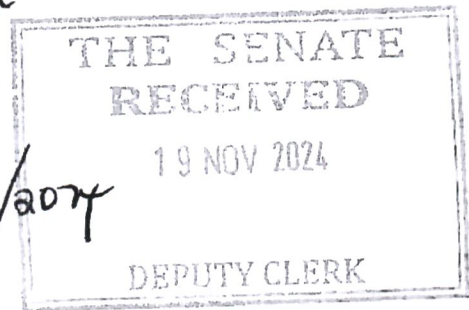
J.M. Nyegenye
Clerk of Senate
The Senate
Clerk's Chambers
Parliament Building
P.O Box 41842 -00100
NAIROBI



DGAC

Kindly deal

19/11/2024



Dear **Clerk,**

RE: PETITION BY MR. LABAN OMUSUNDI ON THE LEGAL FRAMEWORK FOR RECALLING A NOMINATED MEMBER OF COUNTY ASSEMBLY

Your letter Ref. SEN/DGAC/DGC/JLAHRC/2024/39(h) dated 6th November, 2024 refers.

The Kenya Law Reform Commission (KLRC) has analyzed the petition by Mr. Laban Omusundi on the legal framework for recalling a nominated member of county assembly and makes the following comments:

1. The right of recall on member of Parliament is provided for under Article 104 of the Constitution which provides that the electorate under Articles 97 and 98 (Membership of the National Assembly and Senate) have the right to recall the member of Parliament representing their constituency before the end of the term of the relevant House of Parliament. The Article further provides that Parliament shall enact legislation for grounds on which a member may be recalled and the procedure to be followed.

1

② HOD - Governance
SCA - JLAHRC
CAI - Devolution

Kindly deal

2. The Elections Act, Cap 7 at Part IV provides for recall of Member of Parliament.

45. Right of recall

(1) The electorate in a county or constituency may recall their member of Parliament before the end of the term of the relevant House of Parliament on any of the grounds specified in subsection (2).

(2) A Member of Parliament may be recalled where the member—

(a) is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;

(b) is found, after due process of the law, to have mismanaged public resources;

(c) is convicted of an offence under this Act.

(3) A recall of a member of Parliament under subsection (1) shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in subsection (2).

(4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the Member of Parliament and not later than twelve months immediately preceding the next general election.

(5) A recall petition shall not be filed against a Member of Parliament more than once during the term of that member in Parliament.

(6) A person who unsuccessfully contested an election under this Act shall not be eligible, directly or indirectly, to initiate a petition under this section.

46. Petition for recall.

(1) A recall under section 45 shall be initiated by a petition which shall be filed with the Commission and which shall be—

(a) in writing;

(b) signed by a petitioner who—

(i) is a voter in the constituency or county in respect of which the recall is sought; and

(ii) was registered to vote in the election in respect of which the recall is sought;

(c) accompanied by an order of the High Court issued in terms of section 45(3).

(2) The petition referred to in subsection (1) shall—

(a) specify the grounds for the recall as specified under section 45(2);

(b) contain a list of such number of names of voters in the constituency or county which shall represent at least thirty percent of the registered voters; and

(c) be accompanied by the fee prescribed for an election petition

3. Similar provisions are contained in Part IV of the County Governments Act:

“PART IV of the County Governments Act:

27. Recall of a county assembly member

(1) The electorate in a county ward may recall their member of the county assembly before the end of the term of the member on any of the grounds specified in subsection (2).

(2) A member of a county assembly may be recalled where the member—

is found, after due process of the law, to have violated the provisions of Chapter Six of the Constitution;

is found, after due process of the law, to have mismanaged public resources;

is convicted of an offence under the Elections Act (No. 24 of 2011).

(3) A recall of a member of the county assembly under subsection (1) shall only be initiated upon a judgment or finding by the High Court confirming the grounds specified in subsection (2).

(4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of the county assembly and not later than twelve months immediately preceding the next general election.

(5) A recall petition shall not be filed against a member of the county assembly more than once during the term of that member in the county assembly.

(6) A person who unsuccessfully contested an election under the Elections Act (No. 24 of 2011) shall not be eligible, directly or indirectly, to initiate a petition under this section.

28. Petition for recall

(1) A recall under section 27 shall be initiated by a petition which shall be filed with the Independent Electoral and Boundaries Commission and which shall be—

- a) in writing;
- b) signed by a petitioner who—
 - (i) is a voter in the Ward in respect of which the recall is sought; and
 - (ii) was registered to vote in the election in respect of which the recall is sought;
- c) accompanied by an order of the High Court issued in terms of section 27(3).

4. These provisions were interpreted by the Court the case *Katiba Institute & another v Attorney General & another [2017] eKLR Constitutional Petition No. 209 of 2016*. In the case, the petitioners argued that no legislation on recall was effectively passed and, that the provisions are inimical to the letter and spirit of the Constitution. Justices K Kimondo, G V Odunga, E C Mwita, J declared sections 45(2)(3) and (6), 46(1)(b)(ii) and (c) and 48 of the Elections Act and sections 27(2)(3) and (6) and 28(1)(b)(ii) and (c) of the County Governments to be unconstitutional on the grounds the provisions:

- a) are meaningless and superfluous;
- b) fall far short of the constitutional imperative in Article 104 of the Constitution and to that extent are unconstitutional;
- c) are discriminatory and therefore unconstitutional.

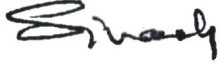
(The provisions declared unconstitutional are underlined for ease of reference)

5. In view of Article 2 (4) which provides that any law that is inconsistent with the Constitution is void to the extent of inconsistency, the Commission makes the following observations:

- (i) The recall clause does not have grounds on which a member may be recalled since the purported grounds were struck out;

- (ii) The procedure to be followed in a petition for recall is no longer clear since some requirements like 'being a registered voter' were struck off.
- (iii) The right of recall is incapable of being exercised through the remaining provisions of in both the Elections Act and the County Governments Act since there are not only no grounds for recall but also there exists huge procedural gaps.
6. The Commission recommends that the relevant Institutions formulate an inclusive policy direction on what are the grounds for recall and procedure for a recall petition and how will it be exercised for elected as well as nominated members of Parliament and county assemblies. The policy position will inform the amendment of the law to replace the provisions declared unconstitutional.

We thank you for your continued support and cooperation.

Yours 


Peter M. Musyimi
AG. SECRETARY/CEO

Copy to - Ms. Christine A. Agimba

