



REPUBLIC OF KENYA

THIRTEENTH PARLIAMENT | SECOND SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND
HUMAN RIGHTS

Rt. Hon. Speaker
Recommended for approval
for tabling.

21/11/2023



22/11/23

REPORT ON THE PETITION BY MR. TARATISIO IRERI KAWA TO
AMEND THE CONSTITUTION AND RELEVANT LAWS ON THE
ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY
GOVERNOR WHENEVER THOSE POSITIONS FALL VACANT



PAPERS LAID	
DATE	22/11/2023
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COMMITTEE	Legal
CLERK AT THE TABLE	Korako m

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

DC-EB
Forwarded & recommended for approval for
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November, 2023

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LIST OF ABBREVIATIONS AND ACRONYMS

CKRC	Constitution of Kenya Review Commission
COG	Council of Governors
KLRC	Kenya Law Reform Commission

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under standing order 228 of the Senate Standing Orders and is mandated '*to consider all matters relating to constitutional affairs, the organisation 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 is comprised of –

- | | | |
|----|---|--------------------|
| 1) | Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2) | Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chairperson |
| 3) | Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4) | Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 5) | Sen. Hamida Ali Kibwana, MP | - Member |
| 6) | Sen. Catherine Muyeka Mumma, MP | - Member |
| 7) | Sen. Veronica W. Nduati, MP | - Member |
| 8) | Sen. Karen Njeri Nyamu, MP | - Member |
| 9) | Sen. Andrew Omtatah Okoiti, MP | - Member |

The Minutes of the Committee in considering the Petition by Mr. Taratisio Ileri Kawe to amend the Constitution and relevant laws on the election of the Deputy President and Deputy Governor whenever those positions fall vacant are attached to this Report as *Annex I*.

FOREWORD BY THE CHAIRPERSON

Honourable Speaker,

The Petition by Mr. Taratisio Ireri Kawe proposing amendments to the Constitution and other laws on the election of a Deputy President and Deputy Governors whenever the positions become vacant was reported in the Senate on Wednesday, 20th September, 2023, following which it was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

The Petitioner prayed that the Senate introduces provisions to provide for direct election of a Deputy President or Deputy Governor whenever such a vacancy arose, and to provide for the appointment of someone to act in that position pending the holding of such direct elections to fill the position.

Honourable Speaker,

Upon committal of the Petition to the Committee, the Committee proceeded to invite the Petitioner who presented his testimony before the Committee, and invited responses and submissions from key stakeholders who the Committee felt would enrich its understanding of and consideration of the Petition. Following this call, the Committee received submissions from Katiba Institute, Kenya Law Reform Commission, and the Council of Governors.

Arising from these interactions, the Committee adopted its findings and recommendations, which are set out at Chapters Three and Four of this Report. Notably, the Committee found the Petition to be without merit, and recommends that no further action be taken thereon. This is on the basis that –

- i) the Constitution and statutes anticipated that vacancies would arise in the positions of deputy president and deputy governor, and came up with elaborate mechanisms for how such positions would be filled, including the approval of the nominee thereon by the National Assembly or the respective county assembly;
- ii) in approving such a nominee, the National Assembly and county assembly exercise their delegated powers under Article 1 of the Constitution, therefore ensuring legitimacy of the office holders; and
- iii) the existing process ensures continuity in service delivery, encourages economic and administrative stability, and mirrors best practice in comparative jurisdictions.

Honourable Speaker,

I take this opportunity to commend the Members of the Committee for their devotion and commitment to duty which made the consideration of the Petition successful. I also wish to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to the Committee in undertaking this assignment.

Honourable Speaker,

It is now my pleasant duty, pursuant to Standing Order 238(2), to present the Report of the Standing Committee on Justice, Legal Affairs and Human rights on the Petition by Mr. Taratisio Ileri Kawe proposing amendments to the Constitution and relevant laws on the election of the Deputy President and Deputy Governor whenever those positions fall vacant.

Signed

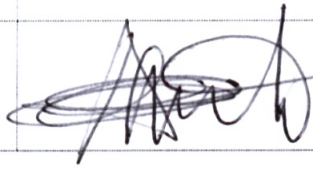


Date.....14.10.2023.....

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

ADOPTION OF THE REPORT ON THE PETITION BY MR. TARATISIO IRERI KAWA TO AMEND THE CONSTITUTION AND RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNOR WHENEVER THOSE POSITIONS FALL VACANT

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report.

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP (<i>Chairperson</i>)	
2.	Sen. Raphael Chimera Mwinzagu, MP (<i>Vice-Chairperson</i>)	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. William Cheptumo Kipkiror, CBS, MP	
5.	Sen. Hamida Ali Kibwana, MP	
6.	Sen. Catherine Muyeka Mumma, MP	
7.	Sen. Veronica W. Nduati, MP	
8.	Sen. Karen Njeri Nyamu, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	

CHAPTER ONE: INTRODUCTION

1.0 Summary of the Petition

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.
3. Pursuant to the said provisions, at the sitting of the Senate held on Wednesday, 20th September, 2023, the Speaker of the Senate reported to the Senate that a Petition had been submitted by Mr. Taratisio Ileri Kawe proposing to amend the Constitution and relevant laws on the election of the Deputy President and Deputy Governor whenever those positions fall vacant. A copy of the Petition is attached to this Report as *Annex 2*.
4. The salient issues contained in the Petition were –
 - a) That, Article 149(1) of the Constitution shifts the power of electing a Deputy President from the people to an individual person and eventually an endorsement by the National Assembly, which is contradictory and unconstitutional;
 - b) There is a dangerous precedent which was set in four counties, namely Wajir, Kiambu, Nyeri and Nairobi where Deputy Governors assumed offices of the Governor and appointed Deputy Governors who were never exposed to the electoral process. The Petitioner submits that this is as a result of Article 182 of the Constitution on the vacancy in the office of the County Governor; and
 - c) Article 182(4) of the Constitution which permits the Speaker of a County Assembly to act as the Governor in cases whereby the Deputy Governor cannot assume the office, has created a situation where the office of the Governor is held by a person not elected by the people of Kenya and is therefore unconstitutional.

5. The Petitioner therefore prayed that —

- a) The Senate amends the Constitution by introducing the sections of law which will provide for a by-election of the Deputy President and Deputy Governor after the assumption to the Presidency by the elected Deputy President and after the ascendancy of the elected Deputy Governor to the office of the Governor, respectively;
- b) The Senate amends the relevant law to give the President power to appoint a Cabinet Secretary in an acting capacity as a Deputy President for a period of six months within which an election for a substantive Deputy President shall have been done;
- c) The Senate amends the relevant law to give the County Governor power and authority to appoint a County Secretary in an acting capacity as a Deputy Governor for a period of six months within which an election for a substantive Deputy Governor shall have been done; and
- d) The Senate amends the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, 2012, the County Government Act, 2012, and any other law touching on the electoral process in Kenya to be in line with the amended Constitution.

1.1 Background: The concept of Joint Tickets

- 6. Joint tickets, also known as team-tickets, occur when candidates for the highest executive offices in a country or state, such as president and governor, are chosen from the same political party and run together on a joint ticket in an election. This system has evolved over time and has become a prominent feature in the electoral politics of various nations.
- 7. The practice of running candidates for president and vice president together evolved in the nineteenth century. Originally, in the USA, electors cast votes for two candidates on the same ballot for president, and the candidate who finished second place in the tabulation became vice president. This often resulted in instances where the president or governor came from one party, and the vice president or deputy governor came from a different party. For instance, the 1796 elections resulted in victory for President John Adams and Vice President Thomas Jefferson who were rivals hence causing severe tension.

8. In such a case, if a president or governor died in office, their deputy, who comes from the party losing the elections would assume the presidency or governorship.
9. The proponents of joint tickets in the USA in both presidential and gubernatorial elections noted that separate tickets were less desirable for the following reasons¹—
 - a) There were severe tensions and open animosity between presidents and vice presidents, who often had very different ideas;
 - b) when governors left the state, and lieutenant governors of the opposite party acted as governor in their absence they made decisions and appointments that were out of step with the elected governor's position; and
 - c) Governors were more likely to include their lieutenant governor in policy making when they were of the same party and as such voters would get better value for the money spins on the lieutenant governor's position.
10. They were therefore of the view that—
 - a) joint tickets facilitate a common expression of policy agendas. For this reason, they contribute to more programmatic political debate and more effective governance; and
 - b) joint tickets are better for national unity and succession planning.
11. On the other hand, opponents of joint tickets were of the view that—
 - a) joint tickets deprived voters of their right to vote for lieutenant gubernatorial candidates of their choosing;
 - b) having a governor and lieutenant governor of different parties was beneficial because it could provide a check on the governor's power; and
 - c) team-tickets allowed the gubernatorial nominees or their parties to artificially form a ticket in the search the lieutenant gubernatorial nominees would be selected for their ability to balance the ticket not their competence.
12. The practice of having separate tickets for the presidential and vice-presidential elections was adopted by the Philippines and is still practised there to date. Similar practices still exist in some US states, although it was abandoned in federal elections in the 1800s.

¹ T. Quinn Yeagain, *One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform*, 75 U. Miami L. Rev. 751 (2021) <<https://repository.law.miami.edu/umlr/vol75/iss3/4>> accessed 16 October 2023

1.2 The Constitution of Kenya Review Commission Report

13. The Constitution of Kenya Review Commission was established by the Constitution of Kenya Review Act (No. 9 of 2008) with the mandate to review the Constitution and make recommendations that would reflect and safeguard a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights, and gender equity.²
14. The Commission recommended new structure whereby presidential candidates would nominate an individual to be the vice president and that individual would be the running mate. In the event of the death, impeachment or resignation of the President, the Vice President, upon approval by Parliament, would assume the office of the President for the remainder of the term.
15. The rationale behind the recommendation was to ensure a transparent and effective guideline for succession to the office of the president. The Commission noted that the President would be elected by the people of Kenya through universal suffrage therefore, the vice-presidential office holder would have been democratically elected as well.

1.3. Legal provisions on the filling of a vacancy in the office of President, Deputy President, County Governor, and Deputy Governor

16. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Article 1(2) provides that the people may exercise their sovereign power either directly or through their democratically elected representatives.

a) Vacancy in the office of President or Deputy President

17. Article 146 (2) of the Constitution provides that, when a vacancy occurs in the office of President—
 - i) the Deputy President shall assume office as President for the remainder of the term of the President; or
 - ii) If the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President, the Speaker of the National Assembly shall act as President and an election to the office of President shall be held within sixty days after the vacancy arises in the office of President.

² Constitution of Kenya Review Commission (CKRC), *The final report of the Constitution of Kenya Review Commission*, CKRC, 2005

18. Once there is a vacancy in the office of the deputy president, Article 149 (1) provides that within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it. A simple majority in the National Assembly is required for approval of the nominee.

b) Vacancy in the office of Governor or Deputy Governor

19. Article 182 (2) provides that, if a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.
20. Article 182 (4) further provides that if a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor. Article 182 (5) provides that if a vacancy occurs in the circumstances contemplated under clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.
21. From the foregoing, it is clear that, although the line of succession is provided for in case the office of the governor falls vacant, the Constitution does not have any provisions on how the office of the deputy county governor is to be filled, as the provisions regarding the filling of the office were to be covered in county legislation enacted pursuant to article 200 (2)(c) of the Constitution, which contemplates legislation on '*the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates.*'
22. The County Governments Act, when initially passed by Parliament did not contain provisions on filling of a vacancy in the office of the deputy governor, hence leaving a lacuna.
23. For this reason, the Speaker of the County Assembly of Embu, in 2015, sought an advisory opinion from the Supreme Court of Kenya, *In Re Speaker, County Assembly of Embu [2018] eKLR*. The Speaker sought advice on, among other matters, the criteria for filling the vacancy that occurs in the Office of the Deputy County Governor, where the originally elected Deputy Governor assumes office as Governor, after impeachment of the elected County Governor.

24. In its advisory opinion, rendered in 2018, the Supreme Court advised as follows regarding filling of a vacancy in the office of a deputy county governor that occurs for any reason whatsoever—

The foregoing principle calls for a reading of Article 182 of the Constitution alongside Article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in Article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e. death, resignation or impeachment.

25. Following this advisory opinion, Parliament, in 2020, amended the County Government Act (No. 17 of 2012) to provide for the filling of a vacancy in the office of the deputy governor.
26. The County Government Act, provides in section 32C that a vacancy in the office of deputy governor shall occur if the holder of the office—
- (a) dies;
 - (b) resigns by a notice, in writing, addressed to the governor;
 - (c) ceases to be eligible for nomination as deputy governor under Article 180(5) of the Constitution;
 - (d) assumes the office of governor under Article 182(2) of the Constitution;
 - (e) is convicted of an offence punishable by imprisonment for at least six months; or
 - (f) is removed from office under this Act.
27. Section 32D provides that where a vacancy arises in the office of a deputy governor as provided for under section 32C, the governor shall within fourteen days, nominate the deputy governor; and with the approval of the county

assembly, appoint a deputy governor. The person nominated for appointment as deputy governor shall be a person eligible for election as governor.

28. The county assembly has fourteen days to consider a motion for approval for the appointment of the deputy governor, and resolve whether to approve the motion and is deemed to have approved the motion for the appointment of the deputy governor upon the lapse of fourteen days and having failed to make a resolution. The motion is to be supported by a simple majority of the members of a county assembly.

1.4 Review of law and practice in comparative jurisdictions

29. In order to fully appreciate the Petitioner's intention, it is important to contextualise by assessing different jurisdictions and how they handle the succession matters in instances when these offices become vacant.

a) United States of America

30. The 25th Amendment of the US Constitution deals with the presidential succession procedure when the office becomes vacant for a variety of reasons including death and resignation. It states that the Vice President shall become the president. Section 2 of this Amendment provides that whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
31. Prior to enactment of this Amendment, the office of the Vice President would remain vacant until the next election once the Vice President assumed the presidency. Sixteen vacancies occurred between 1789 and 1967, and these remained unfilled until the next election.
32. This Amendment was enacted in 1967, and used twice in the 1970s. First, Vice President Spiro Agnew resigned on 10th October, 1973, and President Nixon nominated Gerald R. Ford of Michigan to succeed him, following the procedures of section 2 of the Amendment for the first time. The Vice President assumed office upon confirmation of his appointment by both Houses. Secondly, when President Richard M. Nixon resigned on 9th August, 1974, and Vice President Ford immediately succeeded him as president. President Ford thereafter nominated Nelson A. Rockefeller of New York to be Vice President and he assumed office upon confirmation by both Houses.

33. Robert S Rankin, a scholar from Duke University³ opines that presidential succession in the US receives scant attention. However, in the circumstance where a Vice President ascends to the Presidency and there is a vacancy in the vice presidency, the question of succession creates a state of panic. The article points out that voters ultimately elect the president and vice president, while the issue of vesting the line of succession in other Officers of the State ultimately lands in the hands of Congress.

b) South Africa

34. In the case of South Africa, the Constitution, in article 90(1) provides that where a vacancy arises in the Office of the President, an office-bearer acts as President in the following order: The Deputy President, a Minister designated by the President, a Minister designated by the other members of the Cabinet or finally, the Speaker until the National Assembly designates one of its other members.
35. Despite having a very distinctive electoral process from Kenya, South Africa stands out as another jurisdiction whose Constitution prescribes the succession lineage of its vacant presidential offices.

c) Ghana

36. Similarly, Ghana's electoral process involves the president and vice-president running on a single ticket, in which the presidential candidate declares their running mate before the election. In addition, Article 60(6) of the Constitution provides that "*whenever the President dies, resigns or is removed from office, the Vice-President shall assume office as President for the unexpired term of office of the President with effect from the date of the death, resignation or removal of the President*". The Vice-President is required under article 60(10), upon assuming office as President under clause (6) of this Article, to nominate a person to the office of Vice-President *subject to approval by Parliament*.
37. The Constitution of Ghana goes further to appoint the Speaker of Parliament in the instance both the Vice President and the President are unable to perform their functions under the condition that a fresh election is held within three months of his assumption of office.

³ Presidential Succession in the United States: Robert S. Rankin The Journal of Politics 1946 8:1, 44-56

d) Nigeria

38. In Nigeria, similar to Kenya, the president and vice president run for election on a single ticket, and so do the governor and deputy governor. The process of filling the vacancies in both countries is also largely the same.
39. Article 146(1) of the Constitution of Nigeria provides that the Vice-President shall hold the office of President if the office becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with Article 143 of the Constitution.
40. Additionally, Article 146(3) provides that where the office of Vice-President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or removal under the Constitution, by his assumption of the office of President, or for any other reason, the President shall nominate and, with the approval of each House of the National Assembly, appoint a new Vice-President.
41. With regard to a vacancy in the deputy governor's office, Article 191(3) of the Constitution of Nigeria, provides that—

"When the office of Deputy Governor becomes vacant (a) by reason of death, resignation, impeachment, permanent incapacity or removal in accordance with Article 188 or 189 of the Constitution; (b) by his assumption of the office of Governor of a State in accordance with sub-section 1 of this section; or (c) for any other reason, the Governor shall nominate with approval of the House of Assembly of the State, appoint a Deputy Governor."

CHAPTER TWO: CONSIDERATION OF THE PETITION

2.0 Introduction

42. Upon committal of the Petition to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration, the Committee proceeded to invite the Petitioner who presented his arguments in favour of the prayers contained in the Petition. The Committee further invited written submissions on the Petition, whereupon it received comments from Katiba Institute, Kenya Law Reform Commission, and the Council of Governors.

2.1 Submissions by Katiba Institute

43. Katiba Institute submitted its comments on the Petition vide a letter dated 30th October, 2023 (*Annex 3*). The Institute submitted that –
- a) the appointment of the Deputy President is not unconstitutional considering the nature of the election which is on a joint ticket with the presidency. Further, they highlighted the pragmatism of the candidates selecting their running mates, in order to have an individual they can work with harmoniously, as opposed to an individual imposed on them in the event that the Deputy offices have their own, separate election as proposed in the Petition.
 - b) there is an assumption that the people are exercising their power through their elected representatives when the appointment is subjected to approval from the national and county government, therefore, the process is not purely appointive or unconstitutional as claimed in the Petition.
 - c) the current system of elections is effective in reducing costs of elections, therefore necessitating a by-election after every vacancy in the Deputy President or Deputy Governor offices would be costly and challenging.
 - d) on the concern raised in the Petition highlighting the Nairobi Metropolitan Services as an example of usurped power, that the matter was under judicious public interest litigation and was triggered by the overstepping of the National government after the removal of the Governor. The Courts would provide guidance on how to avoid similar situations in future, once the matter was concluded.

44. Katiba Institute therefore prayed that the Senate finds the proposed amendment to be without merit.

2.2 Submissions by Kenya Law Reform Commission

45. The Kenya Law Reform Commission submitted its comments on the Petition vide a letter dated 30th October, 2023 (*Annex 4*). KLRC observed that –
- a) according to Article 1(2) of the Constitution, the sovereign power the citizens of Kenya exercise is through elected representatives, therefore the processes provided for in the Constitution and the County Governments Act 2012, which prescribes presidential nomination and a legislative vote, while for Deputy Governors, a nomination as well as approval vote by the County assembly, are sufficiently valid, legal and uphold the sovereignty principle.
 - b) the exercise of sovereign authority through their democratically elected representatives when vacancies in offices occurs is in line with global best practices.
 - c) the filling of vacant seats without the need for an immediate election ensures continuity and political stability. This is because these offices fall vacant through sudden death, illness or resignation therefore unpredictable and can disrupt the normal functioning of government. This continuity ensures there is no power vacuum.
 - d) the current process encourages economic and administrative stability. When governments are in a constant state of flux due to constant elections, this leads to uncertainty and hesitation in business and investment decisions. Continuity in government provides a predictable environment for economic and administrative activities.
 - e) conducting elections affects efficiency of government officials in conducting their mandates and ensuring delivery of services to the people, through frequent distractions.
 - f) the current system prevents the abuse and corruption that frequent elections cause. Continuity minimises the potential for electoral misconduct or the exploitation of transitional phases in government.

- g) frequent elections can erode public confidence and trust if they are perceived as unnecessary or disruptive.
 - h) continuity is cost effective to avoid all the expenses associated with frequent elections including campaign costs, logistical expense, and administrative overhead.
 - i) the Constitution and the relevant electoral laws sufficiently provide for the situations addressed in the Petition; therefore it would be redundant to repeat them.
46. The Commission therefore prayed that the Committee rejects the proposed amendments to the Constitution and other laws on the election of a Deputy President and Deputy Governor.

2.3 Submissions by the Council of Governors

47. The Council of Governors submitted its comments on the Petition vide a letter dated 26th October, 2023 (*Annex 5*). In its submissions, the Council observed that –
- a) the court gave an advisory opinion in the case of *Re Speaker, County Assembly of Embu (2018) eKLR*, that where a vacancy occurs in the office of the Deputy Governor, the Governor shall within fourteen days nominate a person to fill it and the County Assembly is to vote on the nomination within sixty days of receiving it. The above advisory led to the introduction of Sections 32A, 32B, 33C and 33D of the County Governments Act (No. 17 of 2012).
 - b) there are sufficient laws in place that guide the nomination process in instances of vacancies addressed in; The Constitution, The County Government Act, Public Appointments (County Assemblies Approval) No.5 of 2017 and the Public Appointments (Parliamentary Approval) No. 33 of 2011.
 - c) Article 1 of the Constitution prescribes that the sovereign power of the people can be exercised through elected representatives. Therefore, the legislative vote by both Assemblies on the nomination candidate to Deputy President and Deputy Governor sufficiently represents the people of Kenya through their delegates; the members of National and County Assembly respectively.

- d) Section 146 of the Nigerian Constitution provides a similar process when it comes to filling the vacancy in the Office of the Vice President. It is therefore a global best practice.
 - e) There is no need to amend the Constitution by bringing in a lengthy electioneering process. Instead, the National and County governments should be tasked with encouraging public participation when considering the motion for approval of the nomination of a candidate to fill a vacancy in the Deputy President and Deputy Governor offices.
48. The Council, as was the case with Katiba Institute and the Kenya Law Reform Commission, recommended that the Committee rejects the proposed amendments.

CHAPTER THREE: OBSERVATIONS

49. Having considered the Petition and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights observes that –
- a) the constitutions of various countries prescribe how vacancies in the office of the president, deputy president, and various state executive positions such as the office of the governor and deputy governor are to be filled;
 - b) the respective parliaments in such instances exercise the people's sovereign power to approve persons nominated to fill the vacancy of vice president or deputy governor;
 - c) Kenya, pursuant to the Constitution of Kenya, and County Governments Act, No. 17 of 2012, has adopted similar practices as other countries in filling the vacancies in the office of the president, deputy president, governor, and deputy governor;
 - d) the deputy president or deputy governor, having been elected through universal suffrage in a joint ticket with the president or governor, is considered to have been democratically elected to office, and voters have adequate notice that the deputy president or deputy governor is the automatic successor to the president or governor at the time of elections;
 - e) although the line of succession is provided for in the Constitution in case the office of the governor falls vacant, the Constitution does not have any provisions on how the office of the deputy county governor is to be filled, as the provisions regarding the filling of the office were to be covered in county legislation enacted pursuant to article 200 (2)(c) of the Constitution, which contemplates legislation on *'the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates'*, i.e. the County Governments Act, No. 17 of 2012.
 - f) the procedure of filling the vacancy in the office of the deputy governor is outlined under sections 32C and 32D of the County Governments Act as recommended by the Supreme Court in its advisory opinion issued to the Speaker of the County Assembly of Embu in 2018, which court has also affirmed the intention of the Kenyan people on how to fill vacancies when enacting article 149 of the Constitution;

- g) the ultimate authority of approving nominees to fill vacancies in the office of the president, governor deputy president or deputy governor rests with the National Assembly and the county assembly, who exercise the democratic authority vested upon them by the Constitution, thus the filling of vacancies cannot be said to be unconstitutional; and
- h) holding fresh elections any time there is a vacancy in the said offices would keep the country in a perpetual state of election fever which often disrupts the economic and social wellbeing of the citizens.

CHAPTER FOUR: RECOMMENDATION

50. Arising from its observations as set out in the preceding Chapter, the Standing Committee on Justice, Legal Affairs and Human Rights finds the Petition to be without merit, and recommends that no further action be taken on it.

LIST OF ANNEXES

- Annex 1:* Minutes of the Committee in Considering the Petition
- Annex 2:* Copy of the Petition
- Annex 3:* Copy of Submissions by Katiba Institute
- Annex 4:* Copy of Submissions by Kenya Law Reform Commission
- Annex 5:* Copy of Submissions by the Council of Governors

Annex 1: Minutes of the Committee in
Considering the Petition



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE SEVENTY-NINTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY, 5TH OCTOBER, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM.

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 3. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4. Sen. Hamida Ali Kibwana, MP | - Member |
| 5. Sen. Veronica W. Maina, MP | - Member |
| 6. Sen. Catherine Muyeka Mumma, MP | - Member |
| 7. Sen. Karen Njeri Nyamu, MP | - Member |
| 8. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
|--|----------|

SECRETARIAT

- | | |
|-----------------------|---|
| 1. Mr. Charles Munyua | - Senior Cler Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Ms. Ndindi Kibathi | - Research Officer III |
| 5. Mr. Josphat Ng'eno | - Media Relations Officer III |
| 6. Ms. Judith Aoka | - Audio Officer III |
| 7. Mr. David Barasa | - Assistant Serjeant at Arms |

IN ATTENDANCE – PETITIONER

- | |
|-----------------------------|
| 1. Mr. Taratisio Ileri Kawe |
|-----------------------------|

MIN. NO. 389/2023

PRELIMINARIES

The Chairperson called the meeting to order at seventeen minutes past eight O'clock and opened with a word of prayer. This was followed by a self-introduction session by the Senators, secretariat and the Petitioner.

MIN. NO. 390/2023**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted having been proposed by Sen. Karen Njeri Nyamu, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

MIN. NO. 391/2023**CONFIRMATION OF MINUTES OF THE PREVIOUS MEETINGS**

- a) The Minutes of the 63rd Sitting held on Wednesday, 26th July, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.
- b) The Minutes of the 73rd Sitting held on Tuesday, 12th September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.
- c) The Minutes of the 74th Sitting held on Wednesday, 13th September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.
- d) The Minutes of the 75th Sitting held on Thursday, 14th September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.
- e) The Minutes of the 76th Sitting held on Tuesday, 19th September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.
- f) The Minutes of the 77th Sitting held on Wednesday, 20th September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Catherine Muyeka Mumma, MP.
- g) The Minutes of the 78th Sitting held on Thursday, 21st September, 2023 were confirmed as a true record of proceedings, after being proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

MIN. NO. 392/2023**MATTERS ARISING FROM MINUTES OF THE PREVIOUS MEETINGS**

- i) *Minute No. 314/2023 – proposed Breakfast Meeting with the Independent Electoral and Boundaries Commission*

The meeting was informed that, in the Committee workplan for October and November 2023, a high-level meeting on review of electoral laws was proposed to be held on 17th November, 2023, which would bring together the IEBC and other stakeholders.

- ii) that the Committee invites views from key stakeholders before concluding its consideration of the Petition.

MIN. NO. 396/2023

ADJOURNMENT

The Chairperson adjourned the meeting at twenty-four minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 11th September, 2023 at eight O'clock.

SIGNED:



DATE:

21/11/2023

- ii) *Minute No. 387/2023 – meeting with the Cabinet Secretary for Lands to consider the Petition by Ms. Zipporah C. K. Seroney*

The Committee noted that, while Summons had been issued requiring the Cabinet Secretary for Lands, Public Works, Housing and Urban Development to appear before the Committee on Wednesday, 11th October, 2023, a Cabinet reshuffle had since been carried out, a result of which there was a new Cabinet Secretary for Lands.

Noting that the report on the Petition was overdue, the Committee observed that the Principal Secretary may be invited to appear before the Committee on the said date to respond to the Petition.

The Committee was further informed that –

- a) a copy of the response received from the Ministry of Lands had been shared with the Petitioner, as directed by the Committee; and
- b) drafting of the Committee report on the Petition was underway.

MIN. NO. 393/2023

**CONSIDERATION OF LEGISLATIVE BUSINESS
BEFORE THE COMMITTEE**

The Committee was taken through and noted the status of legislative business before the Committee.

MIN. NO. 394/2023

**WORK PLAN OF THE COMMITTEE FOR
OCTOBER AND NOVEMBER, 2023**

The Committee was taken through and approved the proposed work plan of the Committee for October and November, 2023.

MIN. NO. 395/2023

**MEETING WITH MR. TARATISIO IRERI KAWA,
THE PETITIONER, TO DELIBERATE ON A
PETITION CONCERNING INTRODUCTION OF AN
AMENDMENT TO THE CONSTITUTION OF
KENYA AND OTHER RELEVANT LAWS ON THE
ELECTION OF THE DEPUTY PRESIDENT AND
DEPUTY GOVERNORS**

Upon invitation by the Chairperson, the Petitioner took the Committee through the Petition and explained to Members the background and rationale for the proposed amendments to the Constitution and statute on the procedure for filling the position of Deputy President or Deputy Governor whenever a vacancy arose.

Following deliberations, the Committee resolved -

- i) that a brief be prepared for consideration by the Committee on the law and practice in comparative jurisdictions where elections were held on a joint ticket, including how a vacancy in the office of the deputy was filled; and



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE EIGHTY-SECOND SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 17TH OCTOBER, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|----------------------------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair (<i>Chairing</i>) |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 4. Sen. Hamida Ali Kibwana, MP | - Member |
| 5. Sen. Catherine Muyeka Mumma, MP | - Member |
| 6. Sen. Veronica W. Maina, MP | - Member |
| 7. Sen. Karen Njeri Nyamu, MP | - Member |
| 8. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|---------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
|--|---------------|

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Clerk Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Ms. Ndindi Kibathi | - Research Officer III |
| 5. Mr. Constant Wamayuyi | - Research Officer III |
| 6. Mr. Joshat Ng'eno | - Media Relations Officer III |
| 7. Ms. Judith Aoka | - Assistant Audio Officer |
| 8. Mr. David Barasa | - Assistant Serjeant at Arms |

MIN. NO. 406/2023

PRELIMINARIES

Senator Fatuma Dullo, CBS, MP called the meeting to order at twenty-six minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 407/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Omtatah Okoiti, MP, and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 408/2023

**PETITION BY MR. TARATISIO IRERI KAWA
CONCERNING INTRODUCTION OF AN
AMENDMENT TO THE CONSTITUTION OF
KENYA AND OTHER RELEVANT LAWS ON THE
ELECTION OF THE ELECTION OF THE DEPUTY
PRESIDENT AND DEPUTY GOVERNORS**

The Committee resumed consideration of the Petition by Mr. Taratisio Ileri Kawa concerning introduction of an amendment to the Constitution of Kenya and other relevant laws on the election of the election of the Deputy President and Deputy Governors, whereupon it was taken through a research and legal brief and Petition.

During deliberations, the Committee observed that –

- 1) the Constitution and the County Governments Act set out an elaborate procedure to be followed in filling a vacancy in the office of the Deputy President or a Deputy Governor whenever such a vacancy arises;
- 2) the President and the Deputy President, at the national level, and the Governor and Deputy Governor, at the county level, are elected on a joint ticket during elections. Consequently, it could not be argued that the Deputy President or a Deputy Governor has not been elected by the people;
- 3) the procedure for filling a vacancy in the office of Deputy President or Deputy Governor required approval by Parliament and by the relevant County Assembly, respectively;
- 4) Article 1(2) of the Constitution provides that ‘The people may exercise their sovereign power either directly or through their democratically elected representatives’. Consequently, in approving nominees for appointment as Deputy President or Deputy Governor, Parliament and the relevant County Assembly do so in accordance with the sovereign power vested upon them;
- 5) the framers of the Constitution, given the cost and disruption brought about by elections, opted to create a path for the filling of such vacancies whenever they arose without having to go to an election. This was deemed a reasonable way of dealing with the situation;
- 6) the dysfunction in some of the counties, arising from soured relationships between Governors and their Deputies, was an issue of concern. Parliament ought to find a way to address the matter, including –
 - i) making the process of nominating a candidate for Deputy Governor more open, participatory, and competitive, so that the Deputy is perceived as a representative of the people and not merely as a friend or ally of the Governor;
 - ii) reviewing impeachment laws to make it more difficult to remove a Governor from office by impeachment; and
 - iii) assigning specific roles and functions to the office of Deputy Governor;

Thereupon, the Committee resolved to resume consideration of the Petition on Tuesday, 31st October, 2023, at which it would receive submissions from stakeholders in response to the Petition.

MIN. NO. 409/2023

ANY OTHER BUSINESS

The Committee was informed of an invitation to a Validation Meeting on the National Peacebuilding Architecture Review Process, scheduled to be held in Nairobi on 24th October, 2023.

MIN. NO. 410/2023

ADJOURNMENT

The Vice-Chairperson adjourned the meeting at twenty-seven minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 18th October, 2023 at eight O'clock.

SIGNED:

DATE:21/11/2023.....



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE EIGHTY- FOURTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 31ST OCTOBER, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. Veronica W. Maina, MP | - Member |
| 4. Sen. Catherine Muyeka Mumma, MP | - Member |
| 5. Sen. Karen Njeri Nyamu, MP | - Member |
| 6. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|--------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 2. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 3. Sen. Hamida Ali Kibwana, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Cler Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Mr. Constant Wamayuyi | - Research Officer III |
| 5. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 6. Ms. Judith Aoka | - Assistant Audio Officer |
| 7. Mr. David Barasa | - Assistant Serjeant at Arms |

INATTENDANCE – KENYA LAW REFORM COMMISSION

- | | |
|-----------------------|----------------------------------|
| 1. Mr. Anthony Otieno | - Principal Legal Reform Counsel |
|-----------------------|----------------------------------|

MIN. NO. 416/2023

PRELIMINARIES

The Chairperson called the meeting to order at fifteen minutes past eight O'clock and opened with a word of prayer. This was followed by a self – introductory session by the Members, Secretariat, and the invited guest from Kenya Law Reform Commission.

MIN. NO. 417/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Omtatah Okoiti, MP, and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 418/2023

**MEETING WITH INVITED STAKEHOLDERS TO
DELIBERATE ON THE PETITION BY TARATISIO
IRERI KAWA CONCERNING INTRODUCTION OF
AN AMENDMENT TO THE CONSTITUTION AND
OTHER RELEVANT LAWS ON THE ELECTION OF
THE DEPUTY PRESIDENT AND DEPUTY
GOVERNORS**

The Committee resumed consideration of the Petition by Taratisio Ileri Kawa concerning introduction of an amendment to the Constitution and other relevant laws on the election of the Deputy President and Deputy Governors, whereupon it was taken through submissions by the Kenya Law Reform Commission and the Council of Governors.

The Committee was further informed that the Office of the Attorney General and Katiba Institute had indicated that they would submit their written submissions on the Petition later in the week, while the Civil Society Parliamentary Engagement Network indicated that they had no representations to make in response to the Petition.

During deliberations, the Committee observed that –

- a) both the Council of Governors and Kenya Law Reform Commission were of the considered view that the legislative frameworks in place regarding the filling of a vacancy in the office of a Deputy President and Deputy Governor were sufficient;
- b) both stakeholders further noted that, in approving nominees for appointment as Deputy President and Deputy Governor, respectively, the National Assembly and the relevant County Assembly exercised the will of the people as delegated to them under Article 1(2) of the Constitution; and
- c) the Council of Governors underscored the need for extensive public participation to be conducted by the National Assembly or the relevant County Assembly when considering the suitability of a nominee for appointment as Deputy President or Deputy Governor, respectively.

Thereupon, the Committee resolved that, upon receipt of the pending submissions, the Secretariat proceeds to prepare the draft Report for consideration by the Committee.

MIN. NO. 419/2023

ADJOURNMENT

The Chair adjourned the meeting at fifty minutes past eight O'clock. The next meeting was scheduled to be held on Wednesday, 1st November, 2023 at eight O'clock.

SIGNED:

A handwritten signature in black ink, appearing to be 'W. Hammar', written over a dotted line.

DATE:

21/11/2023



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE EIGHTY- SIXTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY, 2ND NOVEMBER, 2023 AT 9.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 4. Sen. Catherine Muyeka Mumma, MP | - Member |
| 5. Sen. Veronica W. Maina, MP | - Member |
| 6. Sen. Karen Njeri Nyamu, MP | - Member |
| 7. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--------------------------------------|--------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 2. Sen. Hamida Ali Kibwana, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Cler Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Mr. Constant Wamayuyi | - Research Officer III |
| 5. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 6. Ms. Judith Aoka | - Assistant Audio Officer |
| 7. Mr. David Barasa | - Assistant Serjeant at Arms |

MIN. NO. 423/2023

PRELIMINARIES

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

MIN. NO. 424/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP, and seconded by Sen. Andrew Omtatah Okoiti.

MIN. NO. 425/2023

**MEETING WITH THE CABINET SECRETARY FOR
LANDS, PUBLIC WORKS, HOUSING AND URBAN
DEVELOPMENT TO DISCUSS THE PETITION BY
MS. ZIPPORAH C. K. SERONEY CONCERNING
MISTREATMENT, HARASSMENT, PROPERTY
LOSS AND HUMAN RIGHTS VIOLATIONS METED
ON THE FAMILY OF THE LATE HON. JEAN
MARIE SERONEY**

The Committee resumed consideration of the Petition by Ms. Zipporah C. K. Seroney, whereupon it was informed that a written request had been received from the Cabinet Secretary for Lands, Public Works, Housing and Urban Development to appear before the Committee at a later date.

Following deliberations, the Committee acceded to the request and resolved to re-invite the Cabinet Secretary to appear before the Committee on a date between 14th and 16th November, 2023, failure to which she would be summoned by the Committee.

MIN. NO. 426/2023

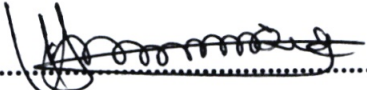
**BRIEFING ON THE COMMITTEE VISIT TO
MACHAKOS COUNTY SCHEDULED FOR FRIDAY,
3RD NOVEMBER, 2023 TO RECEIVE SUBMISSIONS
ON THE PETITION BY MUINDI MBINGU
MEMORIAL NGELANI ASSOCIATION
CONCERNING HISTORICAL INJUSTICES
SUFFERED BY RESIDENTS OF NGELANI AREA IN
MACHAKOS COUNTY DURING THE COLONIAL
PERIOD**

The Committee was briefed on the status of preparations and program for the visit to Machakos County, scheduled for Friday, 3rd November, 2023, to receive submissions on the Petition by Muindi Mbingu Memorial Ngelani Association concerning historical injustices suffered by residents of Ngelani areas in Machakos County during the colonial period.

MIN. NO. 427/2023

ADJOURNMENT

The Chair adjourned the meeting at fourty minutes past nine O'clock. The next meeting was scheduled to be held on Friday, 3rd November, 2023 at nine O'clock.

SIGNED: 

DATE: 21/11/2023



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE NINETY-SECOND SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 10TH NOVEMBER, 2023 AT 2.00 P.M. AT SAROVA WHITESANDS HOTEL, IN MOMBASA COUNTY

PRESENT

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|--------------------------------------|----------------------------------|
| 1. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair (<i>Chairing</i>) |
| 2. Sen. Catherine Muyeka Mumma, MP | - Member |
| 3. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|---------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 4. Sen. Hamida Ali Kibwana, MP | - Member |
| 5. Sen. Veronica W. Maina, MP | - Member |
| 6. Sen. Karen Njeri Nyamu, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. S. Njenga Nguguna | - Director |
| 2. Mr. Charles Munyua | - Senior Cler Assistant |
| 3. Ms. Lilian Waweru | - Legal Counsel II |
| 4. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 5. Mr. Constant Wamayuyi | - Research Officer III |
| 6. Ms. Ndindi Kibathi | - Research Officer III |
| 7. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 8. Ms. Judith Aoka | - Assistant Audio Officer |

MIN. NO. 451/2023

PRELIMINARIES

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

MIN. NO. 452/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Okoiti Omtatah, MP and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 453/2023

**CONSIDERATION OF THE PETITION BY
TARATISIO IRERI KAWA CONCERNING
INTRODUCTION OF AN AMENDMENT TO THE
CONSTITUTION OF KENYA AND OTHER
RELEVANT LAWS ON THE ELECTION OF THE
DEPUTY PRESIDENT AND DEPUTY GOVERNORS.**

The Committee resumed consideration of the Petition by Mr. Taratisio Ileri Kawa concerning introduction of an amendment to the Constitution of Kenya and other relevant laws on the election of the Deputy President and Deputy Governors.

The Committee was taken through and considered the draft Report on the Petition and Members made proposals be incorporated as observations and recommendations at chapters Three and Four of the report, following which the report will be scheduled for adoption.

MIN. NO. 454/2023

**CONSIDERATION OF THE PETITION BY MUINDI
MBINGU MEMORIAL NGELANI ASSOCIATION
CONCERNING HISTORICAL INJUSTICES
SUFFERED BY RESIDENTS OF NGELANI AREA IN
MACHAKOS COUNTY DURING THE COLONIAL
PERIOD.**

The Committee resumed consideration of the Petition by Muindi Mbingu Memorial Ngelani Association concerning historical injustices suffered by residents of Ngelani area in Machakos County during the colonial period.

The Committee was taken through and considered the draft Report on the Petition and Members made proposals be incorporated as observations and recommendations at chapters Three and Four of the report, following which the report will be scheduled for adoption.

MIN. NO. 455/2023

**CONSIDERATION OF THE PETITION BY MR.
LABAN OMUSUNDI ON BEHALF OF RESIDENTS
OF NAKURU COUNTY CONCERNING THE
ENACTMENT OF A CLAUSE IN THE ELECTORAL
LAWS THAT WILL MAKE SURE THAT ALL
NOMINATED MEMBERS OF THE COUNTY
ASSEMBLY (MCAS) ARE VOTERS AND
RESIDENTS OF RESPECTIVE COUNTIES.**

The Committee resumed consideration of the Petition by Mr. Laban Omusundi on behalf of residents of Nakuru County concerning the enactment of a clause in the electoral laws that will make sure that all nominated Members of the County Assembly (MCAs) are voters and residents of respective counties.



13TH PARLIAMENT | 2ND SESSION

MINUTES OF THE NINETY-THIRD SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 14TH NOVEMBER, 2023 AT 8.00 A.M. AT COMMITTEE ROOM 5, FIRST FLOOR, MAIN PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

- | | |
|--|-----------------------------------|
| 1. Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson (<i>Chairing</i>) |
| 2. Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chair |
| 3. Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4. Sen. Catherine Muyeka Mumma, MP | - Member |
| 5. Sen. Karen Njeri Nyamu, MP | - Member |
| 6. Sen. Andrew Omtatah Okoiti, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. Sen. Hamida Ali Kibwana, MP | - Member |
| 3. Sen. Veronica W. Maina, MP | - Member |

SECRETARIAT

- | | |
|--------------------------|---|
| 1. Mr. Charles Munyua | - Senior Clerk Assistant |
| 2. Ms. Lilian Waweru | - Legal Counsel II |
| 3. Ms. Lynn Aseka | - Clerk Assistant III (<i>Taking Minutes</i>) |
| 4. Mr. Constant Wamayuyi | - Research Officer III |
| 5. Ms. Ndindi Kibathi | - Research Officer III |
| 6. Mr. Josphat Ng'eno | - Media Relations Officer III |
| 7. Ms. Ngesa Rosebella | - Public Communications Officer III |
| 8. Ms. Judith Aoka | - Assistant Audio Officer |

MIN. NO. 457/2023

PRELIMINARIES

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

MIN. NO. 458/2023

ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Karen Njeri Nyamu, MP.

MIN. NO. 459/2023

THE PARLIAMENTARY POWERS AND PRIVILEGES (AMENDMENT) BILL, 2023 (SENATE BILLS NO. 37 OF 2023)

The Committee was taken through and considered the draft Report on the Parliamentary Powers and Privileges (Amendment) Bill, 2023 (Senate Bills No. 37 of 2023) with the proposed amendments incorporated as observations and recommendations at chapters three and four of the Report.

Thereafter the Committee adopted the Report, having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Karen Njeri Nyamu, MP.

MIN. NO. 460/2023

PETITION BY MS. ZIPPORAH C. K. SERONEY CONCERNING MISTREATMENT, HARASSMENT, PROPERTY LOSS AND HUMAN RIGHTS VIOLATIONS METED ON THE FAMILY OF THE LATE HON. JEAN MARIE SERONEY

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon, the Committee adopted the Report, having been proposed by Sen. Fatuma Adan Dullo, CBS, MP and seconded by Sen. Raphael Chimera Mwinzagu, MP.

MIN. NO. 461/2023

PETITION BY TARATISIO IRERI KAWA CONCERNING INTRODUCTION OF AN AMENDMENT TO THE CONSTITUTION OF KENYA AND OTHER RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNORS

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. Catherine Muyeka Mumma, MP.

MIN. NO. 462/2023

PETITION BY MUINDI MBINGU MEMORIAL NGELANI ASSOCIATION CONCERNING HISTORICAL INJUSTICES SUFFERED BY RESIDENTS OF NGELANI AREA IN MACHAKOS COUNTY DURING THE COLONIAL PERIOD

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP.

MIN. NO. 463/2023

**PETITION BY MR. LABAN OMUSUNDI ON
BEHALF OF RESIDENTS OF NAKURU COUNTY
CONCERNING THE ENACTMENT OF A CLAUSE
IN THE ELECTORAL LAWS THAT WILL MAKE
SURE THAT ALL NOMINATED MEMBERS OF
THE COUNTY ASSEMBLY (MCAS) ARE VOTERS
AND RESIDENTS OF RESPECTIVE COUNTIES**

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon the Committee adopted the Report, having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Andrew Omtatah Okoiti, MP

MIN. NO. 464/2023

ADJOURNMENT

The Chairperson adjourned the meeting at twelve minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 15th November, 2023 at eight O'clock.

SIGNED: 

DATE: 21/11/2023

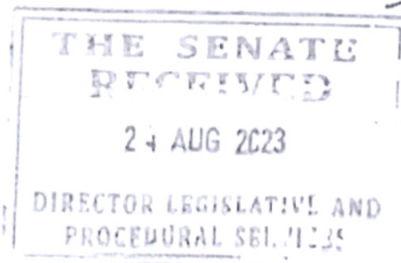
Annex 2: Copy of the Petition



THE CLERK OF SENATE
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI

SCHEDULE (S.3)

FORM OF PETITION



PS process
24/8/23
23 AUG 2023
① DLPs
Please deal.
23/8/23

RE: PETITION TO THE SENATE TO AMEND THE CONSITITUTION AND
RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND
DEPUTY GOVERNOR AFTER THOSE SEATS FALLS VACANT.

I, the undersigned,

Citizen of the Republic of Kenya, a resident of Embu County and a the Volunteer
Executive Director of Stars of Hope and Social Justice;

DRAW the attention of the Parliament to the following:

- ① Ms. Mwangi
Kindly review
and facilitate.
J. Claria
20/08/2023.
1. THAT, I have written this petition on behalf of Stars of Hope and Social Justice which is a Non-Governmental Organization registered to operate in Kenya and on behalf of the silent Majority within the Republic of Kenya.
 2. THAT, Stars of Hope and Social Justice is mandated to act as a protector of human rights and a protector of our Constitution.
 3. That, as the Volunteer Executive Director of Stars of Hope and Social Justice, a person of sane mind and a citizen of this Country, I am obliged by Consitution to Petition the Senate on any matter touching on the devolved units, any matter of National important and any constitutional matter in nature.
 4. THAT, Article 136 (1) states that "The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating presidential elections".
 5. THAT, Article 137 (1) states that "A person qualifies for nomination as a presidential candidate if the person, is a citizen by birth, is qualified to stand for election as a member of Parliament, is nominated by a political party, or is an independent candidate, and is nominated by not fewer than two thousand voters from each of a majority of the counties.

PETITION TO THE SENATE TO AMEND THE CONSITITUTION AND RELEVANT LAWS ON THE
ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNOR IN AN EVENT WHERE THE
SEAT(S) FALLS VACANT

6. THAT, Article 148(1) states that "Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President"
7. THAT, Article 149. (1) of our constitution states that "Within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it".
8. THAT, Article 149(1) shifts the power of electing a deputy President from the people to an individual person and eventually an endorsement by the National Assembly which is contradictory and unconstitutional.
9. THAT, Article 182 (2) of our 2010 constitution states that " If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor".
10. THAT, after the deputy Governor assumption of the office as the Governor, he appoints his deputy (non-elected) who could consequently become a Governor later if the office of the Governor falls vacant after which he would also appoint his deputy.
11. THAT, Article 182(4) of our 2010 constitution states that " If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor".
12. THAT, Article 182 (5) of our 2010 constitution states that "If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor".
13. THAT, Section 180(1) of part 2 of our Constitution (Election of county governor and deputy county governor) states that "The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year".
14. THAT, as a remedy for a leadership vacuum which might be created in the office of a Governor after it has fallen vacant, and his deputy has been removed are not able to undertake his mandate due to any reason as specified in the Constitution, the constitution states that the speaker of the concerned County Assembly may act as a Governor for a period of six months before an election to replace such a Governor is held.

15. THAT, on an extreme circumstance, a county may be led by none-elected leaders after the dissolution of such a County Government by the President.
16. THAT, there is a dangerous precedence which was set in three of our Counties namely Wajir, Kiambu, Nyeri and Nairobi where deputy Governors assumed offices of the Governor and appointed Deputy Governors who were never exposed to electoral process.
17. THAT, this petition has a very perfect example of a scenario where a person who was never elected by anybody nor was she a runningmate assumed the leadership of Nairobi County after the removal of Governor Mike Mbuvi Sonko.
18. THAT, the happening in Nairobi was a prove on how the Lacuna on the electoral laws in this country can be dangerous and can cause havoc, crisis and even a full blown conflict, if not addresses through an amendment in law.
19. THAT, nothing could prevent a similar and dangerous occurrence with our presidency, where we could have a purely non-elected person and his/her deputy occupying the presidency of this Country if immediate action of amending the relevant laws is not taken.
20. THAT, there is an urgent need for a constitutional amendment to protect Kenyans from being led or Governed by un-popular and non-elected leaders on purely elective positions within the two levels of the Government.
21. THAT, there is no article in our constitution which states that a person shall be sworn in as a substantive president on being appointed or who has previously been appointed as a Deputy President.
22. THAT, in case the seat of the deputy President falling vacant, the most senior Cabinet Secretary under the National Government, shall act as the Deputy President for a six months period within which a Substantive Deputy President shall have been elected.
23. THAT, in case the seat of the deputy Governor falling vacant, the County Secretary in the County Government setup can act as a Deputy Governor for a term of six months within which a substantive Deputy Governor shall have been elected.
24. THAT, as a democratic Country we should always follow a democratic process through which we elect our leaders of all the calibres in our society, hence the need to have a clause guiding on the election of the deputy President and Deputy Governor's position after such a seat falls vacant for whatever reason.
25. THAT, the proposed amendment in this petition does not and is not violation of Article 255 of our constitution.

26. THAT, I put to the attention of the Senate that I, present this petition before the Senate while aware that I had previously presented a similar petition as an individual, under the same facts in the second senate which did not bring it to its logical conclusion.

27. THAT, as the petition was relevant in the year 2021, still it is and requires to be given the attention, priority and weight as it touches on National security.

28. THAT, this petition does not interfere with national values and principles of governance referred to in Article 10 (2) (a) to (d), or the term of office of the President or the objects, principles and structure of devolved government.

29. THAT, this petition squarely falls under the Senate which by law is mandated to review and enact legislation as proposed in this petition.

30. THAT, I confirm that the issues in respect of which the petition is made are not pending before any court of law, or constitutional or legal body.

HEREFORE your humble petitioners Pray that the Senate—

1. Amend the constitution by introducing the sections of law which will provide for a by-election of the Deputy President and Deputy Governor after the assumption to the presidency by the elected Deputy President and after the ascendancy of the elected Deputy Governor to the office of the Governor respectively.
2. Amend the The Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, the County Government Act 2012 and any other Law touching on the electoral process in Kenya to be in line with the amended Constitution.
3. Amend the relevant law to give the president power to appoint a Cabinet Secretary in an acting capacity as a deputy President for a period of six months within which an election for a substantive Deputy President shall have been done.
4. Amend the relevant law to give the County Government power and authority to appoint a County Secretary in an acting capacity as a deputy Governor for a period of six months within which an election for a substantive Deputy Governor shall have been done.
5. Amend any other relevant law which robs Kenyans their sovereignty in electing their preferred leaders as well as killing the spirit of the constitution in matters related to the electoral leadership laws in Kenya.

And your PETITIONERS will ever pray.

That his petition heard and considered with a view of having it dealt with in accordance with the law and disposed off appropriately and expeditiously.

Dated this 3rd.....day of August.....2023.

	Name of petitioner	Full Address	National ID	Signature
1.	TARATISIO IRERI KAWU(ON BEHALF OF STARS OF HOPE AND SOCIAL JUSTICE	C/O BOX 139-60103 RUNYENJES TEL:0722861091	8600483	

Annex 3: Copy of Submissions by Katiba
Institute



Constitution as an Instrument of Change

30 October 2023

The Clerk of the Senate
Parliament Buildings
PO Box 41842 – 00100
Nairobi.

Re: Petition Concerning an Amendment to the Constitution and Other Relevant Laws on the Election of the Deputy President and Deputy Governors.

Background.

Katiba Institute (KI) is a research and litigation institution established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally assisting in developing a culture of constitutionalism in Kenya. KI received a request to comment on a petition to amend the Constitution and election laws governing the election of a deputy president and deputy governor when the seats fall vacant.

Summary

The Petitioner is concerned about the provisions of the law that provide for the nomination of the Deputy President and Deputy Governor to fill a vacancy, for allowing unpopular and non-elected leaders to govern, as follows:

- **Article 149(1)** which states that *the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it*, improperly transfers the power of electing a Deputy President from the people to an individual and the National Assembly.
- **Article 182(2)** which provides that *the Deputy County Governor shall assume office as County Governor for the remainder of the term of the county governor*, following which a governor who assumes office appoints a deputy governor who has not been elected. This process may result in a county being led by non-elected leaders should the governor's office again becomes vacant and the appointed deputy governor assumes office.
- The Petitioner also notes that a similar situation would arise upon the President's dissolution of a county government by the president, as happened in Nairobi County after the removal of the then serving governor, Sonko.

- He also cites the absence of a provision under the Constitution requiring the swearing-in of a Deputy President upon assuming office as President after a vacancy arises.

The Petitioner proposes an amendment to the law to include provisions for the by-election of the deputy governor and Deputy President and to give the President power to appoint a cabinet secretary to hold office in an acting capacity as the Deputy President and the governor to appoint a county secretary to act as Deputy Governor for six months until the positions are filled.

Comments

- The proposal to have a President, who assumes office after a vacancy arises, nominate a Deputy President, with approval by the National Assembly, is not peculiar. As things stand, the Deputy President is nominated by the President and elected with a President in a joint candidacy. It can, thus, be argued that the Deputy President is not, in a strict sense, elected. Instead, the electoral process focuses on popularly electing a President, not a Deputy President. This, however, does not downplay the electoral impact of a running mate in elections where factors such as regional and ethnic balance are at play.
- There is also an assumption that by subjecting the nomination to approval by Parliament, the people are exercising their power through their directly elected representatives. Therefore, the process is not purely appointive or unconstitutional.
- This model of filling in a vacancy in the office of the Deputy President is also applied in other countries. In the US, for example, section 2 of the 25th Amendment provides that *whenever a vacancy arises in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.*
- The current system also addresses the need to reduce the number and cost of elections which would be escalated should a by-election be held every time a vacancy arises in the offices of Deputy President and Deputy Governor as proposed, irrespective of the remaining term. A nation-wide by-election for a vacancy in the office of Deputy President would be particularly costly and challenging.
- Pragmatism in having a workable government is also a factor to consider. The reason for having a running mate is to give the presidential or gubernatorial candidate a choice to select a candidate to work with instead of having a person imposed on them, which could occur if a separate election of a Deputy President or deputy governor were held. The alternative, having the President or governor approve candidates for election, complicates the process further and defeats the purpose of an election.
- Although the Petitioner's concerns which were triggered by replacing the Nairobi County Government with the Nairobi Metropolitan Services (NMS), are understandable, we do not think that those concerns necessitate a constitutional amendment. The establishment of NMS were preceded by constitutional violations in which the national government overstepped its authority following the governor's removal. These constitutional violations are currently the subject of public interest litigation. The Court judgments will likely guide how to avoid similar situations.

Conclusion

We applaud the Petitioner's efforts and his willingness to engage the Senate. We would also like to thank the Senate for taking these concerns seriously and reaching out for comments.

Yours Sincerely,



Christine Nkonge
Executive Director

Annex 4: Copy of Submissions by 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(11)**.....
and Date



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

30th October, 2023

.....20.....

Mr. J.M. Nyegenye, CBS
Clerk of the Senate
Parliament Buildings
P.O. BOX 41842-00100
NAIROBI

Dear *Jere,*



DGAC

Kindly deal.

31/10/2023

REF: PETITION BY MR. TARATISIO IRERI KAWA CONCERNING INTRODUCTION OF AN AMENDMENT TO THE CONSTITUTION AND OTHER RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNORS

We acknowledge with thanks receipt of your letter Ref.No.SEN/DGAC/JLAHRC/2023(13) dated 3rd October, 2023 on the above matter.

1.0 BACKGROUND

KLRC has, in accordance with its mandate to ensure that all the laws conform to the letter and spirit of the Constitution and to keep all the laws of Kenya under review and to ensure its systematic development and reform, received an invitation from the Senate to consider and give our perspective on a Petition filed by Mr. Taratisho Ireri Kwame. Mr. Kwame has described himself as a citizen of the Republic of Kenya, a resident of Embu County and is the volunteer Executive Director of Stars of Hope and Social Justice.

The Petition proposes the introduction of an amendment to the Constitution and other relevant laws on the election of the Deputy President and Deputy Governors, particularly when the office of the President or Governor becomes vacant and is filled by the Deputy and a need therefore arises to fill the position of the Deputy President or the Governor.

The Petitioner had in 2021 presented a similar petition to the Second Senate, but there was no logical conclusion to its hearing.

2.0 ISSUES FOR CONSIDERATION FROM THE PETITION

Article 149(1) of the Constitution provides that the President shall within fourteen days after a vacancy in the office of the Deputy President arises, nominate a person to fill the vacancy and that the National Assembly shall subsequently vote on the nomination within sixty days of receiving it.

Section 32D of the County Government's Act, 2012 provides that where a vacancy occurs in the office of the deputy Governor, the Governor shall within fourteen days nominate a Deputy Governor who shall, with the approval of the county assembly, then be appointed as the deputy Governor.

Whilst these provisions are aimed at filling a vacant position, the Petitioner avers that the process of nomination and appointment is contradictory and unconstitutional for the following reasons:

- (i) Article 149(1) shifts the power of electing a deputy President from the people to an individual and eventually an endorsement by the National Assembly.
- (ii) On an extreme circumstance, a county may be led by non-elected leaders after the dissolution of a county government by the President

3.0 SUGGESTIONS BY THE PETITIONER

In view of the issues raised in the Petition, Mr. Kwame has made certain proposals to address the issues. These include:

- (a) Where the seat of the Deputy President becomes vacant, the most senior Cabinet Secretary under the National government should act as the Deputy President for a period of six months within which period elections for a Deputy President should be conducted.
- (b) Where the seat of the deputy Governor becomes vacant, the County Secretary should act as the Deputy Governor for a period of six months within which period elections for a Deputy Governor should be conducted.

This proposals are rationalized on the averment that as a democratic country, we should always follow a democratic process through which we elect our leaders.

4.0 PETITIONERS' PRAYERS

In view of the Issues and suggestions raised, the Petitioner requests the Senate:

- (a) To amend the Constitution, the Elections Act, the Independent Electoral and Boundaries Commissions Act, the County Government's Act and any other law relating to elections to provide for a by-election of the Deputy President and Deputy Governor after the assumption to the presidency by the elected Deputy President and Governor, respectively;
- (b) To amend the relevant laws to give the President the power to appoint a Cabinet Secretary in an acting capacity as a deputy President for a period of six months within which an election for a substantive Deputy President shall have been conducted;
- (c) To amend the relevant laws to give the County Governor the power to appoint a County Secretary in an acting capacity as a Deputy Governor for a period of six months within which an election for a substantive Deputy Governor shall have been conducted; and
- (d) To amend any other relevant law "which robs Kenyans their sovereignty in electing their preferred leaders as well as killing the spirit of the Constitution in matters related to the electoral leadership laws in Kenya".

5.0 OUR CONSIDERATION OF THE PETITION

We have reviewed the Petition and in our consideration narrowed down to three issues that if addressed, would render our position on the merits or demerits of the Petition. These are:

- (a) The interpretation of Article 1(2) of the Constitution
- (b) The social, economic and political considerations that the Petition raises

We address these two issues hereunder.

(a) The interpretation of Article 1(2) of the Constitution?

Overall, Article 1 of the Kenyan Constitution sets the fundamental principles that guide the country's governance. It emphasizes popular sovereignty, democratic governance, the unity of the nation and the constitutional framework as the foundation for Kenya's political and legal system.

Article 1(2) establishes the basis for the exercise of sovereign power in Kenya. It states that "The people may exercise their sovereign power either directly or through their democratically elected representatives."

It emphasizes that all sovereign power in Kenya resides with the people. This means that the ultimate authority for governance and decision-making is vested in the citizenry. It further outlines two ways in which the people can exercise their sovereign power:

- (a) Directly: This means that Kenyan citizens have the capacity to participate directly in decision-making processes, such as elections and referendums.
- (b) Through Elected Representatives: The people can also exercise their sovereignty indirectly by electing representatives who act on their behalf in legislative bodies, such as the National Assembly and the Senate.

Further, the sub-Article underscores the importance of democracy in the exercise of sovereign power by dint of the words "democratically elected representatives" reflecting the commitment to democratic governance and the need for elected officials to be accountable to the people. This provides a level of flexibility in the exercise of sovereign power. It allows for a combination of direct and representative democracy, depending on the specific context and needs of the governance process.

In summary therefore, Article 1(2) of the Kenyan Constitution establishes the fundamental principle of popular sovereignty, emphasizing that all sovereign power belongs to the people of Kenya. It outlines the ways in which this sovereignty can be exercised, both directly and through elected representatives, with an overarching commitment to democratic governance. This provision is central to the constitutional framework of Kenya and the principles of governance in the country.

A purposive interpretation of the Article therefore leads us to a determination that the exercise of sovereign authority directly or through democratically elected representatives allows for flexibility that is progressive and in line with global good practice whenever vacancies of elected representatives occur. Article 149(1) and section 32D of the County Government's Act, 2012 are therefore effective in ensuring that the people continue to play a role in governance, through their respective democratically elected representatives.

On this question therefore, we find that the letter and spirit behind Article 1(2) affirms the role of the citizenry and their elected representatives to exercise sovereign roles and duties in accordance with different prescribed and emerging situations. It is therefore in accordance with the Constitution that the National Assembly and the County Assembly can respectively approve or disapprove the nomination of a Deputy President or Deputy Governor when a vacancy arises.

(b) The social, economic and political considerations that the Petition raises

The processes provided for in both the Constitution and the County Government's Act, 2012 are designed to facilitate the smooth transition of leadership in the event of a vacancy.

For the Deputy President, this is achieved through a presidential nomination and a legislative vote, while for Deputy Governors, it involves a nomination and a subsequent approval of the nomination by the County Assembly.

Ensuring continuity of governance when a government seat falls vacant is necessary for several important reasons:

(a) Political Stability

Swiftly filling a vacant seat without the need for an immediate election can help maintain political stability. Vacancies can occur due to various reasons, including death, illness, or resignation, and sudden elections in such situations can disrupt the functioning of the government. Continuity ensures that there is no power vacuum and that essential government operations can proceed without interruption.

(b) Economic and Administrative Stability

Political stability is closely tied to economic and administrative stability. When a government is in a state of flux due to frequent elections, it can lead to uncertainty and hesitation in business and investment decisions. Continuity in governance provides a predictable environment for economic and administrative activities.

(c) Efficiency and Effectiveness

Conducting elections is a time-consuming process that can distract government officials from their duties. Continuity allows for the seamless operation of government agencies, ensuring the delivery of public services and the execution of important policies and programs without delays.

(d) Preventing Abuse and Corruption

Frequent elections can create opportunities for political manipulation, abuse and even corruption. Ensuring continuity minimizes the potential for electoral misconduct or the exploitation of transitional phases in government.

(e) Public Confidence

Consistent and stable governance can foster public confidence in the government and its ability to provide for the needs and interests of the people. Frequent elections can erode public trust if they are perceived as disruptive or unnecessary.

(f) Cost-Efficiency

Holding elections is costly. Continuity of governance can be a cost-effective option, as it avoids the expense associated with frequent elections, including campaign costs, logistical expenses, and administrative overhead.

It's essential to strike a balance between ensuring continuity and upholding democratic principles. Constitutional and legal provisions typically dictate the processes for filling vacant government seats and they often involve acting officeholders or specific timelines for holding elections to maintain a balance between continuity and democratic accountability. The specific approach may vary from country to country based on their constitutional and legal frameworks.

The consideration of the above reasons for the maintaining a structure that enables continuity of government leads us to rationalize that for purposes of promoting responsive law reform, the Petitioner's case that warrants by-elections to fill up vacant Deputy Presidential or Gubernatorial seats is not in tandem with the need to ensure systematic development of the law in response to prevailing social, economic and political realities.

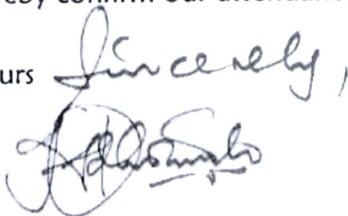
6.0 CONCLUSION

Globally, some constitutional and legal frameworks have provisions for interim or acting officeholders who can temporarily fill a vacant seat until the next regular election. These provisions ensure a smooth transition and continuity while upholding the rule of law. These provisions already exist in Kenya's Constitution under Articles 146(2) (b), and 182(4), (5) & (6) and there is therefore no need to repeat them.

As always, we remain committed to upholding the principles of democratic governance and the rule of law in Kenya by supporting every effort to improve our laws in response to the social, economic and political needs of the country.

We appreciate your invitation to appear and present our consideration of the Petition and hereby confirm our attendance.

Yours



Joash Dache, MBS
SECRETARY/CEO

Annex 5: Copy of Submissions by the
Council of Governors



COUNCIL OF GOVERNORS

Westlands Delta House 2nd Floor, Waiyaki Way.
P.O. BOX 40401-00100,
Nairobi.

Tel: (020) 2403314, 2403313
E-mail: info@cog.go.ke

Our Ref: COG/6/10 Vol. 12 (44)

26th October 2023

J. M. Nyegenye, CBS
The Clerk of the Senate
Parliament Buildings
NAIROBI



Dear Mr. Nyegenye,

SUBMISSIONS TO THE SENATE CONCERNING INTRODUCTION OF AN AMENDMENT TO THE CONSTITUTION AND OTHER RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNORS

Greetings.

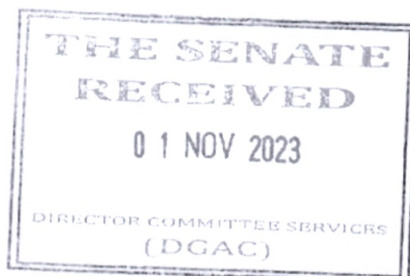
The above subject matter and your letter dated 13th October 2023 under Ref: **SEN/DGAC/DGC/JLAHRC/2023(131)** refer.

The Council of Governors has reviewed the Petition by Mr. Taratisio Ireri Kawe and hereby forwards the written submissions dated 26th October 2023 attached herewith for your consideration.

Please accept our highest esteem and regards.

Yours sincerely,

Mary Mwiti
Chief Executive Officer

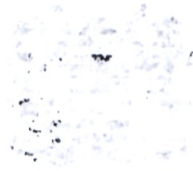


DGAC

Kindly deal

eg
01/11/2023

Lead Clerk JLAHRC
Please deal
1/11/2023



007-90034-03

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COUNCIL OF GOVERNORS

SUBMISSIONS TO THE SENATE CONCERNING INTRODUCTION OF AN AMENDMENT TO THE CONSTITUTION AND OTHER RELEVANT LAWS ON THE ELECTION OF THE DEPUTY PRESIDENT AND DEPUTY GOVERNORS

A. INTRODUCTION

The Petitioner herein, Mr. Taratisio Ileri vide a Petition dated 3rd August 2023 seeks the following inter alia, that the Senate:

1. Amends the constitution by introducing the sections of law which will provide a by election of the Deputy President and Deputy Governor after the assumption to the presidency by the elected Deputy President and after the ascendency of the elected Deputy Governor to the office of the Governor respectively;
2. Amends the Elections Act, 2011, the Independent Electoral Boundaries Commission Act, the County Government Act 2012 and any other Law touching on the electoral process in Kenya to be in line with the amended constitution;
3. Amends the relevant law to give the president power to appoint a Cabinet Secretary in an acting capacity as a deputy president for a period of six months within which an election for a substantive Deputy President shall have been done;
4. Amends the relevant law to give the County Government power and authority to appoint a County Secretary in an acting capacity as a deputy governor for a period of six months within which an election for a substantive Deputy Governor shall have been done;
5. Amends any other relevant law which robs Kenyans their sovereignty in electing their preferred leaders as well as killing the spirit of the constitution in matters related to the electoral leadership laws in Kenya.

B. CONSTITUTIONAL PROVISIONS

Vacancy in the Office of the Deputy President

Article 146(2) of the Constitution stipulates that when a vacancy occurs in the office of the president-

(a) the Deputy President shall assume office as a President, or

(b) if the office of the Deputy President is vacant, or the Deputy President is unable to assume the office, the Speaker shall act as President and an election to the office of the President shall be held within sixty days after the vacancy arose in the office of the President

Article 149(1) of the Constitution states that within fourteen days after a vacancy in the office of the Deputy President arises, the President shall nominate a person to fill in the vacancy, and the National Assembly shall vote in the nomination within sixty days after receiving it.

Vacancy in the Office of the Deputy Governor

Article 182 (2) of the Constitution provides that if a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor

Further, Article 182(4) states that if a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.

If a vacancy occurs as contemplated under Article 182(4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.

C. ISSUES FOR CONSIDERATION

The replacement of a vacancy arising in the office of the Deputy President and Deputy Governor is not a novel issue. Indeed, in the case of **Re Speaker, County Assembly of Embu (2018) eKLR**, an opinion was sought from the Supreme Court on the process of filling the position of Deputy Governor if he assumed the office of the Governor following the impeachment and removal from office of the incumbent Governor.

The Honourable Court held that:

“Despite the Constitution being silent on the filling of the vacant position of the Deputy Governor once the incumbent one assumes the Governor’s office, it is certainly not the intention of the Constitution that the Office of the Deputy Governor should remain vacant until the next cycle of General Elections.”

Similarly, so the Court held, that in the absence of any law, where a vacancy occurs in office of the Deputy County Governor, the Governor shall within fourteen days of such a vacancy, nominate a person to fill it, irrespective of how the vacancy arose. Like the National Assembly, the County Assembly is to vote on the nomination within sixty days of receiving it.

The above Advisory led to the introduction of Sections 32A,32B,33C and 33D of the County Governments Act, No. 17 of 2012.

In light of the foregoing, the Council submits that there are proper laws in place that guide the nomination of a candidate to fill vacancy in the offices of the Deputy President and Deputy Governor. The Constitution, the County Government Act, No. 17 of 2012, Public Appointments (County Assemblies Approval) No. 5 of 2017 and the Public Appointments (Parliamentary Approval) No. 33 of 2011 all address the concerns of the Petitioner.

Further, Article 1 of the Constitution states that power can only be exercised in accordance with the Constitution. People may choose to exercise it either by themselves or through their democratically elected representatives. The elected representatives regardless of whether they are members of the Senate, National Assembly or County Assembly, exercise their sovereign power as delegates. There is no need to subject the citizenry to another rigorous electoral process when the same can be exercised through the already elected representatives. The voice of the people will still be heard in the National Assembly and County Assembly. A motion for the approval of any nomination by County Assembly is provided under the Public Appointments (County Assemblies Approval) Act No. 5 of 2017 whereas a motion for the approval of any nomination by the National Assembly is provided under the Public Appointments (Parliamentary Approval) No. 33 of 2011. Notably, the aforesaid motion goes through public participation thus any decision made by the National Assembly or County Assembly will ideally be the people's voice.

We submit that the process denoted in the constitution is similar in other jurisdictions. We draw attention to the constitution of Nigeria which states as follows:

Section 191 of the Nigerian Constitution states as follows:

- (1) The Deputy Governor of a State shall hold the office of Governor of the State if the office of Governor becomes vacant by reason of death, resignation, impeachment, permanent incapacity or removal of the governor from office for any other reason in accordance with section 188 or 189 of this constitution.**
- (2) Where any vacancy occurs in the circumstances mentioned in subsection (1) of this section during a period when the office of Deputy Governor of the State is also vacant, the Speaker of the House of Assembly of the State shall hold the office of Governor of the State for a period of not more than three months, during which there shall be an election of a new Governor of the State who shall hold office for the unexpired term of office of the last holder of the office.**

(3) Where the office of the Deputy Governor becomes vacant

(a) by reason of death, resignation, impeachment, permanent incapacity or removal in accordance with section 188 or 189 of this Constitution;

(b) by his assumption of the office of Governor of a State in accordance with subsection (1) of this section; or

(c) for any other reason, the Governor shall nominate and with the approval of the House of Assembly of the State, appoint a new Deputy Governor.

Section 146 of the Nigerian Constitution provides a similar process when it comes to filling the vacancy of the office of the vice president.

D. Recommendation

To address the legal issues raised by the Petitioner, the Council of Governors recommends as follows:

There is no need to amend the constitution by bringing in a lengthy electioneering process as suggested by the Petitioner but rather the national and county officials should be tasked to enhance public participation in the National Assembly and County Assembly when considering the motion for approval of the nomination of a candidate to fill vacancy in the offices of the Deputy President and Deputy Governor.

Submitted for your consideration. Once again thank you for your continued support and please be assured of our highest esteem and consideration.