

REPUBLIC OF KENYA



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| Paper Laid | |
| DATE | 25/05/2021 |
| TABLED BY | Chair, Devolution Committee |
| CLERK AT THE TABLE | Sauwal |

TWELFTH PARLIAMENT (FOURTH SESSION)

THE SENATE

STANDING COMMITTEE ON DEVOLUTION AND INTERGOVERNMENTAL RELATIONS

REPORT ON THE IMPASSE ON THE BUDGETARY ESTIMATES FOR FINANCIAL YEAR 2020/2021 FOR KIRINYAGA COUNTY BETWEEN THE COUNTY EXECUTIVE AND THE COUNTY ASSEMBLY

Clerk's Chambers
First Floor,
Parliament Buildings,
NAIROBI.

Approved
J. Kimani
24/5/2021

RT-Hon. Speaker
You may approve for tabling on 24/05/21

Revised & Forwarded for processing for approval 24/05/2021

FDR: DC-EG

MAY 2021

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PREFACE

Mr. Speaker,

The Standing Committee on Devolution and Intergovernmental Relations is established pursuant to Senate Standing Order 218 and mandated to: -

'consider all matters relating to devolution, intergovernmental and inter-county relations, governance and management of county governments, cities, towns and urban areas.'

The Committee is comprised of the following members: -

- | | |
|------------------------------------|--------------------|
| 1) Sen. Moses Kajwang', MP | - Chairperson |
| 2) Sen. Anuar Loitiptip, MP | - Vice Chairperson |
| 3) Sen. Kipchumba Murkomen,EGH, MP | - Member |
| 4) Sen. Aaron Cheruiyot,MP | - Member |
| 5) Sen. Isaac Mwaura, CBS, MP | - Member |
| 6) Sen. Rose Nyamunga, CBS, MP | - Member |
| 7) Sen. Cleophas Malalah, MP | - Member |
| 8) Sen. Victor Prengei, MP | - Member |

Mr. Speaker,

By a letter dated 10th July, 2020, Her Excellency the Governor of Kirinyaga County wrote to the Speaker of the Senate, notifying the Senate of an impasse that had emerged between the County Executive and County Assembly on the passage of the Budget Estimates for Financial Year 2020/21. Because of this impasse, the Governor in this same letter requested for the Senate to intervene, in line with its mandate of representing counties and serving to protect the interest of counties as provided in Article 96 of the Constitution.

The letter further provided detailed information on the County Assembly's consideration and approval of the Budget estimates, in contravention of major provisions outlined in law.

Mr. Speaker,

The Committee proceeded to consider the request pursuant to its mandate as provided in the Standing Orders of the Senate. In this regard, the Committee, by a letter dated 16th July 2020, invited the Governor and County Assembly to appear before the Senate Standing Committee on Devolution and Intergovernmental Relations in order to resolve the impasse and ensure that the Kirinyaga County Appropriation Bill 2020 is enacted on time and that the Budget Estimates for 2020/2021 are operationalized.

Mr. Speaker,

The Committee played a mediatory role in ensuring that the inter-county arms of Government came to an agreement, and in the process also sought to get to the root of the problem. The Committee considered whether it had jurisdiction to consider the matter, in view of the fact that Her Excellency the Governor of Kirinyaga County had also sought redress from the Courts.

Furthermore, the Committee considered the position of the County Executive, which accused the County Assembly in summary of sabotaging its efforts; the position of the County Assembly which in turn accused the Governor of high-handedness and highlighted her refusal to work with the County Assembly; and if both parties were justified in their arguments against each other.

Mr. Speaker,

Having extensively deliberated on the matter, the Committee arrived at the following findings. That –

- i) That there arose a matter of jurisdiction as to whether the Committee could consider the matter and play a mediatory role;
- ii) That the question of sub judice pursuant to Standing Order 98 was considered as the matter was also before the High Courts in Nairobi and Kerugoya;
- iii) That both parties acted in bad faith;
- iv) That the manner in which they conducted themselves displayed a blatant lack of fiscal responsibility;
- v) That there might be a need to reconsider the Departmental Vote Ceiling which is set at 1% in accordance with the Public Finance Management Act;
- vi) That the issue of Separation of Powers with regards to the Court issuing orders against a Parliamentary Process that had not yet been concluded arose; and
- vii) Whether an appropriations bill could or could not be enacted as a result of a court order.

Mr. Speaker,

Arising from its observations on the matter, and through deliberations on a way forward, the Committee recommends: -

- i) That, That the Senate ensures that there is a proper Compliance List drawn up, in conformity with the provisions of the relevant laws and in collaboration with the Office of the Controller of Budget, that may be used by all County Executives and County Governments in the passage of their Budgetary Estimates, to ensure parties operate within the ambit of the Law;
- ii) That the Senate should, through the various intergovernmental forums, discourage inter-county arms of government from suing each other due to its effect of making the working relationship strenuous, and the unnecessary legal fees incurred, which would be better spent paying workers and improving facilities within the counties ; and

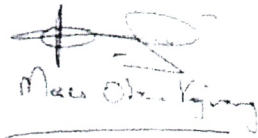
- iii) That there is an apparent need for the Senate and the County Assemblies Forum to deliberate on increasing the Departmental Vote Ceilings from 1% to a higher percentage; and
- iv) That the Senate, through this Committee, should present itself as a Mediator for issues pertaining to inter-county government disputes, as the Protector and Overseer of Devolution.

Mr. Speaker,

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it during consideration of this Request.

Mr. Speaker,

It is now my pleasant duty, pursuant to Standing Order 232(2), to present the Report of the Standing Committee on Devolution and Intergovernmental Relations on the impasse on the budgetary estimates for financial year 2020/2021 for Kirinyaga County between the county executive and the county assembly. I thank you, Mr. Speaker.



Moses Kajwang

Signed.....

Date.....

17/05/2021

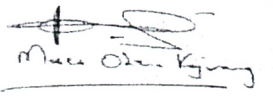
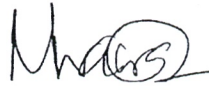

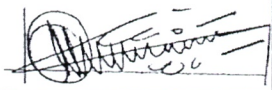
SEN. MOSES KAJWANG', MP

CHAIRPERSON

**STANDING COMMITTEE ON DEVOLUTION AND INTERGOVERNMENTAL
RELATIONS**

**ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON
DEVOLUTION AND INTERGOVERNMENTAL RELATIONS ON THE
IMPASSE ON THE BUDGETARY ESTIMATES FOR FINANCIAL YEAR
2020/2021 FOR KIRINYAGA COUNTY BETWEEN THE COUNTY
EXECUTIVE AND THE COUNTY ASSEMBLY**

**We, the undersigned Members of the Standing Committee on
Devolution and Intergovernmental Relations, do hereby append our
signatures to adopt this Report-**

| | | |
|----------------------------------|-------------------|---------------------------------------------------------------------------------------|
| Sen. Moses Kajwang', MP | -Chairperson |  |
| Sen. Anuar Loitiptip, MP | -Vice-Chairperson | |
| Sen. Kipchumba Murkomen, EGH, MP | -Member | |
| Sen. Aaron Cheruiyot, MP | -Member | |
| Sen. Isaac Mwaura, CBS, MP | -Member |  |
| Sen. Rose Nyamunga, CBS, MP | -Member |  |
| Sen. Cleophas Malalah, MP | -Member |  |
| Sen. Victor Prengei, MP | -Member | |

The Senate Standing Committee On Devolution And Intergovernmental Relations

NB - The late Sen. Kabasa
was present during the meeting
as depicted in the minutes
but then passed on
24/05/2021

CHAPTER ONE

ESTABLISHMENT, MANDATE AND MEMBERSHIP OF THE COMMITTEE

The Standing Committee on Devolution and Intergovernmental Relations is established pursuant to Senate Standing Order 218 and mandated to: -

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| 4) Sen. Aaron Cheruiyot,MP | - Member |
| 5) Sen. Isaac Mwaura, CBS, MP | - Member |
| 6) Sen. Cleophas Malalah, MP | - Member |
| 7) Sen. Rose Nyamunga, MP | - Member |
| 8) Sen. Victor Prengei, MP | - Member |
| 9) Sen. Boniface Kabaka, MP | - Member |

The Committee secretariat comprises: -

- | | |
|--------------------------|---------------------------|
| a) Mr. Crispus Njogu | - Second Clerk Assistant |
| b) Ms. Sylvia Adera | - Second Clerk Assistant |
| c) Mr. Jeremy Chabari | - Legal Counsel |
| d) Mr. Washington Otiato | - Media Relations Officer |
| e) Ms. Farhiya Ali | - Serjeant-at-Arms |

CHAPTER TWO

SUMMARY OF THE GENESIS OF THE REQUEST FOR INTERVENTION

2.1 Background

By a letter dated 10th July, 2020, Her Excellency the Governor of Kirinyaga County wrote to the Speaker of the Senate, notifying the Senate of an impasse that had emerged between the County Executive and County Assembly on the passage of the Budget Estimates for Financial Year 2020/21. Because of this impasse, the Governor in this same letter requested for the Senate to intervene, in line with its mandate of representing counties and serving to protect the interest of counties as provided in Article 96 of the Constitution.

The letter further provided detailed information on the County Assembly's consideration and approval of the Budget estimates, in contravention of major provisions outlined in law.

The Committee, by a letter dated 16th July 2020, invited the Governor and County Assembly to appear before the Senate Standing Committee on Devolution and Intergovernmental Relations in order to resolve the impasse and ensure that the Kirinyaga County Appropriation Bill 2020 is enacted on time and that the Budget Estimates for 2020/2021 are operationalized.

CHAPTER THREE

CHRONOLOGY OF THE MEDIATION PROCESS

The Committee, through its letter dated 16th July, 2020, invited Her Excellency the Governor of Kirinyaga County, the County Assembly and the office of the Auditor General to present their submissions before the Committee on 21st July, 2020.

In attendance for all the meetings was the Senator, Kirinyaga County, who was present in his capacity as the Senator of the County, and as the Chair of the Senate Standing Committee on Finance and Budget. The Committee noted that the Committee on Finance and Budget was also requested to resolve the impasse alongside the Committee on Devolution and Intergovernmental Relations. However, due to the Chairperson of Finance and Budget Committee's interest as the Senator of the embattled County, it was deemed prudent for the Committee on Devolution and Intergovernmental Relations to take the lead on this matter.

As a preliminary point of note, the Committee was informed that the County Assembly, which was not represented at the first meeting, had responded to the invitation from the Senate to appear before the Committee via a letter dated 20th July, 2020, in which the County Assembly requested the following:

- i) that the meeting be rescheduled to 27th July, 2020,
- ii) that parties to the impasse and the Committee have a physical meeting rather than virtual meeting; and
- iii) that they be allowed to invite more members who are relevant to the situation to attend the meeting, specifically:
 - Hon. David Kinyua Wangui- representing Kirinyaga Central;
 - Hon. Joel Wagura- representing Ndia;
 - Hon. John Baptist Kanga - representing Mwea West; and

- Hon. Gudson Muchina- representing Mwea East.

The Committee, having considered this request, and taking into account the constraints in the form of timelines prescribed by law in the passage of Budget estimates via an Appropriation Bill, decided to re-invite the County Assembly to present their submissions on Wednesday 22nd July, 2020, and allowed for the additional Members of the County Assembly to attend the meeting.

Upon dispensing with the preliminary issues, the Committee then proceeded to consider the Governor's submissions.

1. Hearing of the Kirinyaga County Governor's Submissions

The Governor presented her submissions, highlighting the following issues for the Committee's consideration:

- a) **Variation of Departmental Vote Ceilings**: on this, she submitted that S. 37(1) of the Public Finance (County Governments') Regulations 2015 limits the County Assembly variation of the budget expenditure votes to 1% of the vote ceilings , and this provision was flouted by the County Assembly as tabulated in her letter.
- b) **Variance on Staff Salaries** : that the County Assembly caused a variation on staff salaries by reducing salaries of staff across departments, which would inevitably lead to significant job losses. She particularly noted the reduction on salaries of Doctors and Nurses in the Health Department, which would result in job losses of over 200 county staff and over 500 health care workers and a complete grounding of healthcare provision in the County.

In addition, she recalled that during the last Financial Year wages of Casual workers were reduced, resulting in salaries being unpaid for

three months. This is a serious issue as the overall effect would be that hospitals would not be kept clean or sanitary for use by County residents.

- c) That the County Assembly **reallocated the above salary cuts to the development projects** which included Building of the County Assembly Headquarters Complex, MCA ward offices and projects from the previous financial year such as construction of power houses and renovation of a canteen, rather than reinforcing the County's efforts towards combatting the Pandemic.
- d) **On Conditional Grants**, S. 138(1) (b)(iii) of the Public Finance Management Act 2012 (herein the PFM Act) provides that the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement. In other words, such a grant is not discretionary but allocated for specific use. However the County Assembly proceeded to make changes in the following manner:
- i) by itemizing Kshs. 126 million being a conditional allocation financed by a grant from the Kenya Roads Board (KRB) for Roads Maintenance Fuel Levy (RMFL), which itemization was not in line with the Annual Work Plan submitted to the Kenya Roads Board and thus contrary to S 138(1)(b)(iii) of the PFM Act.
 - ii) by removing Kshs. 146,608,512.00, which is a conditional allocation financed by a grant from the World Bank for the Kenya Devolution Support Programme (KDSP), which is contrary to S 138(5) which requires grants and donations be appropriated before they are expended.
 - iii) by removing Kshs. 5.5 Million which is the County's contribution required to access the Agricultural Sector Development Support Programme (ASDSP II grant); and additionally removing Kshs. 6.5

Million which is the County contribution required to access the National Agriculture and Rural Inclusive Growth Project credit. The Assembly also removed Kshs. 26 Million which is the County's matching contribution as a requirement to access conditional grant for development of youth polytechnics.

- e) **On Statutory payments**, the County Assembly removed Kshs. 58 Million allocated for settlement of statutory payments to Kenya Revenue Authority (KRA). The implication of this removal is that KRA shall place an agency notice on the County's Revenue Fund (CRF). In case of such an eventuality, the county's operation will be grounded as the notice causes the suspension of all financial transactions on the account. Furthermore, the removal of Kshs. 30 Million for payment of recurrent Pending Bills means that pending bills for recurrent items will not be settled, which is against the Presidential directive and strict enforcement directive by the National Treasury. She noted this as a point of great concern as the National Treasury has been strict in enforcing compliance with the Presidential directive to the extent of withholding exchequer releases for counties.
- f) **Various Contraventions to the PFM Act** which include:
- i) Section 129(3) of PFM Act 2012, which states that "each County Assembly Clerk shall prepare and submit to the County Assembly the budget estimates for the County Assembly and a copy shall be submitted to the County Executive Committee Member for Finance" which was not submitted as required by the Act.
 - ii) Section 129 (4) of the PFM Act which states that "the County Executive comments on the budget estimates presented by the County Assembly Clerk, which was not done as the County

Assembly did not allow the CEC to make comments on the budget.

- iii) Section 131(1) of the PFM Act which states that “the County Assembly shall consider the County Government Budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by 30th June in each year.” The County Assembly frustrated compliance in this section by approving the estimates on 30th June, 2020.
- iv) Section 129(7) of the PFM Act which states that “Upon approval of the budget estimates by the county assembly, the County Executive Committee member for finance shall prepare and submit a County Appropriation Bill to the County Assembly of the approved estimates”, of which the County Assembly prepared the bill contrary to this provision and without consultation with the CEC Member for Finance.

In addition, the Governor informed the Committee that she had gone to court against the County Assembly’s Appropriation Bill 2020 under certificate of urgency. The Court, certified the matter urgent and granted interim orders staying all processes that would lead to the enactment of the Bill.

2. Hearing of the County Assembly’s Submissions

On Wednesday 22nd July, 2020, the County Assembly representatives appeared before the Committee to give its Submissions. The following were in attendance:

- The Speaker, County Assembly of Kirinyaga;
- The Majority Leader, County Assembly of Kirinyaga;
- Hon. Mathenge- Chairperson Budget and Appropriations Committee;

- David Kinyua Wangui- representing Kirinyaga Central;
- Hon. Joel Wagura- representing Ndia;
- Hon. John Baptist Kanga - representing Mwea West; and
- Hon. Gudson Muchina- representing Mwea East.

The County Assembly took cognizance of the Senate Committee's mediatory role, and proceeded to make the following submissions:

- a) **Conduct of the Governor:** On the Governor's conduct, the County Assembly raised their concern that the Governor operates under the belief that the role of the County Assembly is to approve whatever it receives from the County Executive, without consideration or necessary amendments and that if the County Assembly operated in such a manner, it would be relegated to the role of being a mere rubberstamp, and therefore fail in discharging its constitutional mandate.

Furthermore, the County Assembly noted that the Governor has on previous occasions refused to either assent or refer Bills back to the County Assembly as required by Section 24 of the County Governments Act, and this demonstrates the contempt with which this Governor holds the legislative authority of the County Assembly.

- b) **On the current dispute regarding the Kirinyaga County Appropriation Act, 2020 and the Kirinyaga County Supplementary Appropriation (No. 2) Act, 2020,** the County Assembly noted the following:

- i) that firstly, the Governor is not seeking the intervention of the Senate in good faith, and this is demonstrated by her suit against the County Assembly in two different High Court Stations and obtaining interim conservatory orders on the subject matter before inviting the intervention of the Senate;

- ii) Secondly, that pursuant to Section 21(1) of the County Governments Act, the legislative power of the County Assembly is exercised through Bills passed by the County Assembly and assented to by the Governor. The process of exercising this legislative power is outlined in the County Government Act.

For the Kirinyaga County Appropriation Act, 2020 and the Kirinyaga County Supplementary Appropriation (No. 2) Act, 2020, the process has reached a stage where pursuant to Section 24(5) of the County Government Act, assent by the Governor is mandatory, and the law does not allow the County Assembly to consider a second Memorandum from the Governor.

The County Assembly, in view of the foregoing, held that the only recourse, if the Governor and the Assembly reached any agreement from the negotiations, would be to amend the already passed appropriation law using a supplementary appropriation law. However this cannot happen if the previous legislative process is not completed by assent and publication in the Kenya Gazette.

The County Assembly stated that for the negotiations to be deemed to have been carried out in good faith, the Governor had to meet the following demands:

- a) That she should withdraw or cause the withdrawal of the two constitutional petitions filed at the High Court of Kenya in Kerugoya and the High Court of Kenya at Nairobi;
- b) That the Governor assents to and causes the publication in the Kenya Gazette of the Kirinyaga County Supplementary (No. 2) Act 2020;
- c) That the Governor assents to and causes the publication in the Kenya Gazette of the Kirinyaga County Appropriation Act, 2020; and

- d) That negotiations to address the Governor's concerns should be carried out within the context of a proposed supplementary appropriation law after extensive consultation and concurrence by the two parties.

In their submissions, the County Assembly also asserted that they had made several attempts to have the County Executive involved in the Budget making process and even furnished letters between both parties in support of this assertion. They therefore concluded their submissions by reiterating that if their demands were met, this would pave way to strengthening their relationship in the future.

3. Technical and Expert Advice Rendered by the Office of Controller of Budget

The Controller of Budget attended all meetings to render her expert opinion on the Budget Estimates for FY 2020/2021 for Kirinyaga County. She held the position she had given through her Correspondence to the Governor (and copied to all relevant leadership of the County Assembly) on their Draft Budget Estimates via a Correspondence dated 10th June, 2020, and therefore submitted as follows:

- a) That Section 12 of the Second Schedule of the PFM Act requires the County Governments to implement **Programme Based Budgets** (PBB) from the Financial Year 2014/2015. The PBB approach links available resources to the achievement of set objectives and outcomes, she noted that the Draft Budget of the County for FY 2020/2021 did not adopt the PBB framework;
- b) That a conditional allocation described as Kenya Devolution Support Project (KDSP) Level 2 of Kshs. 146,608,512/= had been included in the DBE as source revenue. This allocation is however not contained in the County Allocation Revenue Bill, 2020, and therefore her office advised the County to ensure the revenue estimates are revised for

- compliance with allocations contained in the County Allocation Revenue Bill, 2020 to avoid any possible budget deficit;
- c) That Regulation 25(1)(b) of the Public Finance Management (County Governments) Regulations, 2015 sets a limit on the County Government's expenditure on wages and benefits at 35 per cent of the County's total revenue. A review of the Draft Budget Estimates indicates that allocation to personnel emoluments is Kshs. 2.97 Billion, translating to 56.2 per cent of the total revenue and is above the ceiling provided in law. The office of the Controller of Budget therefore advised the County to ensure compliance with the legal limit on personnel emoluments expenditure;
 - d) That information on geographical location of development projects is necessary in ascertaining equity in resource allocation across the County. The FY 2020/2021 Draft Budget Estimates did not provide information on the project to be undertaken and their geographical location for the expenditure items as indicated in the letter such as a Kshs. 50 Million Capital grant to Semi- Autonomous Government Agencies that was allocated for County matching Contributions towards the National Government Coffee Revitalization Programme. The Office of the controller of Budget advised that the County provide sufficient information on the location of all projects in the Budget to enhance openness and accountability in line with Article 201 of the Constitution;
 - e) That the Budget allocation to some departments deviates from the ceiling contained in the County Fiscal Strategic Paper (CFSP) 2019 adopted by the County Assembly and advised the County to ensure that the budget complies with the ceilings in the approved CFSP 2020. It was noted that any deviations should be appropriately explained in line with Section 130(1)(iii) of the PFM Act;
 - f) That Sections 110, 112 and 113 of the PFM Act allow counties to establish and administer an Emergency Fund of up to 2 per cent of its

last audited revenue in a single year to cater for any unforeseen occurrences. The draft budget estimates contains an allocation of Kshs. 2 Million to the emergency kit, which is 0.04 per cent of the total revenue. The County is advised to enhance the allocation to the Emergency Fund to at least 2 percent of the last audited financial statements of revenue to ensure adequacy in line with Section 113 of the PFM Act, 2012; and

- g) That the draft budget estimates of Kshs. 5.28 Billion allocates Kshs. 4.33 Billion (81.1 per cent to recurrent expenditure and Kshs. 998.41 Million (18.9 per cent) to development expenditure. The allocations contravene Section 107 of the PFM Act which requires a minimum allocation of 30 per cent for development activities.

The Controller of Budget noted that these views she made on the draft Budget Estimate still applied to the current contentious Budget Estimates for FY 2020/2021. She therefore agreed with the submissions of the Governor on the indicated variances that were contrary to the law, and on the County Assembly's submissions on the Governor not working together with the County Assembly to remedy the underlying issues.

CHAPTER FOUR

COMMITTEE FINDINGS AND RECOMMENDATIONS

4.1 Committee Findings

Having considered the submissions of the County Governor and the County Assembly on the Budget Estimates for the FY 2020/2021, and upon considering the technical advice rendered by the Controller of Budget, the Committee, together with the Senator, Kirinyaga County, made the following observations:

1. As a preliminary issue, the Committee considered whether it had jurisdiction to mediate over the matter. Article 96(1) of the Constitution of Kenya proved instructive in this consideration, providing as follows:

“The Senate represents the counties and serves to protect the interests of the Counties and their governments.”

This provision gives the Senate impetus to protect the interests of the Counties by all means necessary, and in this particular case, by playing a mediatory role in order to protect the interests Kirinyaga County.

Article 125 of the Constitution further vests quasi-judicial powers upon the Committee by giving either Houses of Parliament or any of its committees the power to summon persons, receive documents, and examine or cross-examine witnesses. This mandate, in and of itself, may be interpreted as enabling this Committee to conduct a Mediatory role over arising issues in inter-county arms of government. The Committee therefore has the jurisdiction to mediate over the matter.

2. In addition to the Committee's considerations on its jurisdiction, to help resolve the impasse, the Committee observed that this issue was a subject matter before the High court in Nairobi, and in Kerugoya. In light of this, the Committee questioned whether they should mediate or await the Court's Judgment, as the Committee could not ignore the *sub judice* principle as provided in the Senate Standing Order No. 98.

Recommendation of the Committee

The Committee carefully considered this issue and noted that its mediatory role in resolving the impasse would not prejudice its fair determination in Court, and therefore would not be contrary to Senate Standing Order No. 98(2).

Furthermore, the Committee noted that Standing Order No. 98(5) gives the Chairperson of the Committee, through the Speaker, discretion to decide whether the Committee can deliberate on or make reference to the impasse. Consequently, **the Committee asserted that it has the discretion to mediate between the County Executive and County Assembly of Kirinyaga County.**

3. The Committee thereafter observed that both parties did not act in good faith towards each other, as they made it difficult to consider the Budgetary Estimates for the County, and this proved detrimental to the people of Kirinyaga County, who they ultimately serve.

Recommendation of the Committee

On this issue, the Committee therefore recommended that even as they try to help the County Executive and County Assembly of Kirinyaga County overcome the Impasse, both arms of Government should try to work in unison to advance the interests of the People of Kirinyaga County.

4. That from the submissions given, the Committee noted that fiscal responsibility was not observed by both the County Executive and the County Assembly in the drawing up the Budget Estimates for FY 2020/2021.

Recommendation of the Committee

On this issue, the Committee recommended that the Office of the Controller of Budget draw up a check list to ensure certain parameters are put in place as guidelines on observance of fiscal responsibility. This Checklist would act as guideline that would avoid such stalemates, and would be applicable to all County Governments for avoidance of any future Impasse.

The Committee also recommended that both the County Assembly and County Executive refer to the PFM (County Government) regulations 2015, which offer solutions to the variations given, so as to remedy arising issues such as the variations to the wage bill.

Based on this, the County Executive could formulate a Compliance plan that should be presented to the County Assembly.

5. That Timelines prescribed by law in the Budget making process were not observed, and this was yet again a Compliance Issue.

Recommendation of the Committee

The solution offered by the committee would be again for both the County Executive and County Assembly to institute a comprehensive Compliance plan when it comes to drawing of Budgetary Estimates that would be in conformity with the PFM Act, and the PFM (County Government) Regulations.

6. That the County Assembly seems to struggle with the provision requiring it to not exceed 1 per cent of the Vote's Ceilings when approving any changes in the annual estimates of budget under section 131 of the Act that would lead to an increase or reduction in expenditure of a Vote.

Recommendation of the Committee

The Committee recalled that the Senate had previously considered adjusting Budget Variations from the 1 per cent ceiling to 10 per cent. The Committee therefore recommended that they would propose the Senate liaising with the County Assemblies Forum, so as to review the adequacy and appropriateness of the limit in place.

7. The Committee also observed that the Court orders issued to the County Governor staying any action taken in passing the Bill from being enacted were irregular. In its considerations, the Committee noted that the Court may only interfere with any Parliamentary process (including legislative processes such as enactment of a Bill) once it is *functus officio*. Thereafter, should anyone challenge the process once concluded, the Court may interrogate and prosecute the manner in which it was concluded.

In support of this assertion, the Committee noted that this view is supported by the constitutionally entrenched doctrine of Separation of powers and carefully considered the following Authorities:

- a) The South African case, ***State v. Makwanyane & Another (CCT3/94) (1995) ZACC3 [para.262 – per Mahomed, J.]*** which held as follows: “*The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.*”

b) Under the doctrine of separation of powers & the principles enunciated by the **Court of Appeal in Civil Appeal No. 157 of 2009 John Harun Mwau vs Dr. Andrew Mulleti & Others & restated by the Supreme Court of Kenya in Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR**, it was held that the courts ought to refrain from judicial interference in parliamentary proceedings. The Court of Appeal stated as follows:

“In our analysis and with the foregoing provisions in mind, one of the primary functions of Parliament is to debate and pass resolutions freely on subjects of its own choosing. This is one of the cornerstones for parliamentary democracy. The performance of this function is secured by the members of Parliament each having the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). These freedoms, the single most important parliamentary privilege are the cornerstone to Sections 4 and 12 of the National Assembly (powers and Privileges) Act, Chapter 6 of the Laws of Kenya. The privilege embodies the concept of parliamentary immunity. In practical terms, the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Tied to this concept is the doctrine of parliamentary sovereignty and separation of powers which means that the law does not allow judicial review of parliamentary proceedings except in few cases where parliamentary legislation is contrary to the Constitution and rule of law.

As a general principle, a person wronged by parliamentary proceedings cannot apply for judicial review except where an Act of Parliament is unconstitutional. Consequently, statements made in Parliament may not be used to support a cause of action arising out of proceedings in Parliament. (See Prebble vs Television New Zealand (1995) 1 AC 321. The privilege and immunity conferred to parliamentary proceedings is wide and absolute – it is not excluded by the presence of malice or fraudulent purpose. In the Kenyan context, all proceedings in parliament are covered by parliamentary privilege and the absolute immunity. Proceedings in Parliament include ‘everything done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.’ (See First Report from the Select Committee on the Official Secrets Acts HC (1937-38) 173; Report from the Select Committee on the Official Secrets Act HC (1938-39) 101)”

- c) More recently, **the Supreme Court of Kenya in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR*** made the following resounding statement of principles with regard to the doctrine of separation of powers and the extent to which courts can interfere with parliamentary processes that are still underway:

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

- *each arm of Government has an obligation to recognize the independence of other arms of Government;*
- *each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;*
- *the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;*
- *for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case; and*
- *in the performance of the respective functions, every arm of Government is subject to the law.”*

The import of these provisions is that the Court should not have interfered with the processes of the County Assembly, which is also a Legislative Arm of Government.

The Question that then arises is as follows: what happens if the Court orders that were issued staying the passage of the Kirinyaga County Appropriation Bill 2020 are irregular? Is the bill automatically enacted after the lapse of 14 days of the assent and publication stage, or does the County Government pass the Bill afresh?

In-depth contemplation of these questions led the Committee to Regulation 36 of the Public Finance Management (County Governments) Regulations, 2015 on vote on account which states as follows:

“ (a) where the County Appropriation Act is not assented to or is not likely to be assented to before the first working day of the financial year, the Speaker to the County Assembly, with approval of County Assembly, shall communicate to the County Executive Committee Member grant of authority to withdraw from the County Revenue Fund of monies of an amount not exceeding one-half of the amount included in the estimates in accordance with section 134 of the Act;

(b) moneys withdrawn under paragraph (a) shall be for the purpose of meeting expenditure on the county government's programmes and activities in respect of the financial year—

- i) up to fifty (50%) percent of the estimates of budget for the financial year submitted to the County Assembly;*
- or*
- ii) until such a time the Appropriation Act is assented to, whichever is earlier.”*

Recommendation Offered:

It is the Committee's considered view that the Bill shall automatically come into force by operation of law due to the effluxion of time (which shall occur on Friday 24th July, 2020).

In the event that the County Executive decided to challenge the Constitutionality of the Act, which would result in further delay, then the Vote-on Account as provided for in Section 134 of the PFM Act and regulation 36 of the PFM (County Governments) Regulations 2015 kicks in to ensure continuity of operations within the County at usage of 50 per cent of the County Allocations, while the matter undergoes due process in Court. This would offer some form of reprieve to the People of Kirinyaga County, as a short term solution, while allowing the County Assembly and County Executive to iron out their issues.

4.2. Conclusion of the Matter:

The County Executive and County Assembly of Kirinyaga opted to have their matter concluded in a process outside of the purview of the Senate. However, this Committee decided to report on this matter for posterity reasons, and so as to have a process on record, in the event that yet another County faces such challenges.

From the foregoing, the Committee on Devolution and Intergovernmental Relations therefore advises as follows:

- 1. That the Senate ensures that there is a proper Compliance List drawn up, in conformity with the provisions of the relevant laws and in collaboration with the Office of the Controller of Budget, that may be used by all County Executives and County Governments in the passage of their Budgetary Estimates, to ensure parties operate within the ambit of the Law;***
- 2. That the Senate should, through the various intergovernmental forums, discourage inter-county arms of government from suing each other due to its effect of making the working relationship strenuous, and the unnecessary legal fees incurred, which would***

be better spent paying workers and improving facilities within the counties ; and

- 3. That there is an apparent need for the Senate and the County Assemblies Forum to deliberate on increasing the Departmental Vote Ceilings from 1% to a higher percentage; and*
- 4. That the Senate should better present itself as a Mediator for issues pertaining to inter-county disputes, as the Protector and Overseer of Devolution.*

LIST OF ANNEXES

- Annex 1:** Confirmed Minutes of Deliberations on the Matter.
- Annex 2:** Copy of the Request for Intervention by the Governor, Kirinyaga County.
- Annex 3:** Copies of Submissions by the County Assembly, Kirinyaga County.
- Annex 4:** Copy of Submissions by the Controller of Budget.
- Annex 5:** Copy of the Court Order in Petition No E217 of 2020: County Government of Kirinyaga Vs The Speaker of the County Assembly of Kirinyaga and the Controller of Budget and National Treasury.