

REPUBLIC OF KENYA
MACHAKOS COUNTY ASSEMBLY

OFFICIAL REPORT

Tuesday, 19th June, 2018

The House met at 10.43 a.m.

[The Speaker (Hon. (Mrs.) Mwangangi) in the Chair]

PRAYERS

Hon. Speaker: Good morning, Hon. Members; how is the cold treating you? Just keep warm. Okay, we will start the business of today. Mr. Clerk, please proceed.

COMMUNICATION FROM THE CHAIR

JUDGEMENT OF COURT OF APPEAL IN ELECTION PETITION APPEAL No. 8 OF 2018

Hon. Speaker: Hon. Members, under this order I have a communication that I wish to make to you; it is arising from the sitting that we had on 12th June, 2018 and let me just communicate.

This is a communication from the chair on the judgment of 8th June, 2018 in NAIROBI COURT OF APPEAL, ELECTION PETITION APPEAL NO. 8 OF 2018.

Hon. Members, on Tuesday, 12th June, 2018, The Hon. Stephen Mwanthi rose on a point of order under Standing Order 30(1) seeking a discussion by the Assembly of an urgent matter of great County importance on the application of Article 182 of the Constitution in view of the judgment 8th June, 2018 of the Court of Appeal sitting in Nairobi in ELECTION PETITION APPEAL NO. 8 OF 2018: WAVINYA NDETI & ANOTHER VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (copy of the judgment is attached) to the communication.

The appeal arose out of the judgment of the High Court of Kenya at Machakos in which HON. WAVINYA NDETI had challenged the validity of the election of DR. ALFRED NGANGA MUTUA as the Governor for Machakos County in the August, 2017 election.

Hon. Members, as I give you this communication, I am acutely aware of the rule of *sub judice* and the fact that, as per letter dated 13th June, 2018 addressed to me by one M/S NYAMU & NYAMU ADVOCATES for and on behalf of DR. ALFRED NGANGA MUTUA, an appeal was filed in the Supreme Court of Kenya following the said judgment of the Court of Appeal.

This communication is of the nature of public statements, which can be made about the appeal pending in the Supreme Court without bending the rule of *sub judice*. The communication

does not in any way pre-judge the issues that are pending in the Supreme Court. It is a fair and accurate comment on the content of the judgment of the Court of Appeal No.8 of 2018 and the related constitutional and statutory provisions.

Hon. Members, going back to the events in this House of 12th June, 2018, Hon. Mwanthi drew the attention of the Speaker to the provisions of Article 182(1)(e) of the Constitution that states *inter alia* that the office of the County Governor shall become vacant if the holder of that office is removed from that office under the Constitution.

Hon. Mwanthi, further drew the attention of the Speaker to the provisions of Article 183(4) of the Constitution that states *inter alia* that if a vacancy occurs in the office of the 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.

In this regard, Hon. Mwanthi, pursuant to Standing Order 30, sought to move the motion that the Assembly adjourns to discuss a matter of County importance, on the state of the County since the office of the Governor is vacant, according to him.

Following that, Hon. Members made considerable ventilation on the matter and at the end I directed that this being a technical issue raising legal issues as well as a matter of great county importance, I would take it upon myself to communicate to the House as soon as possible. Today is the first sitting of the House since the 12th June, 2018 hence this communication.

From the deliberations and representations by the Hon. Members, which are too varied and numerous to be cited here individually, the followings issues are evident-

1. Is there a vacancy in the office of the Governor and Deputy Governor Machakos County, requiring the Speaker of the County Assembly to act as Governor pursuant to Article 182(4) of the Constitution?
2. What is the procedure for the Speaker of the County Assembly to assume office as an acting Governor?

Foremost, Hon. Members, it is important to reiterate that this House is a House of law. All Members of this House are guided by and pay homage to the rule of law starting with the Constitution, the legislations applicable and the Standing Orders of the House.

The motion that was ventilated by the Members which is the subject of this communication is premised on Article 182 of the Constitution and it provides as follows:
182.

- (1) The office of the county Governor shall become vacant if the holder of the office—
 - (a) dies;
 - (b) Resigns, in writing, addressed to the speaker of the county Assembly;
 - (c) Ceases to be eligible to be elected county governor under Article 180 (2);
 - (d) Is convicted of an offence punishable by imprisonment for at least twelve months; or
 - (e) Is removed from office under this Constitution.

(2) 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.

(3) If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of Article 180(7)—

(a) To have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under Article 180 (1); or

(b) Not to have served a term of office as county governor, in any other case.

(4) 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.

(5) 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.

(6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180 (1).

Hon. Members, Article 182(1)(e) provides *inter alia* that the office of county governor shall become vacant if the holder of the office is removed from office under the Constitution. In this regard Article 87 of the Constitution provides for settling of electoral disputes. In particular Article 87(1) of the Constitution provides *inter alia* that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. To this end Parliament, legislated the Elections Act No. 24 of 2011.

It well known that in Machakos County, following the last year's gubernatorial elections, there arose, an election dispute that has been the subject of judicial interrogation by the High Court of Kenya at Machakos as the Election Court and later in the Court of Appeal in an appeal arising from the high court of Kenya at Machakos. The judgment of the Court of Appeal was given on 8th June, 2018.

Hon. Members, Section 86 of the Elections Act provides for a Certificate of the election court as to the validity or otherwise of an election. The said Section 86 of the Elections Act states as follows:

86. Certificate of court as to validity of election

(1) An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission and notify the relevant Speaker.

Hon. Members, it is important to address the provision of the said Section 86 of the Elections Act *vis-à-vis* the provision of Article 182(1)(e) and 182(4) of the Constitution as read together with Article 87 of the Constitution since Section 86 of the Elections Act is what gives guidance on the validity or otherwise of an election at the penultimate stage of the electoral dispute envisaged by Article 87 of the Constitution.

Hon. Members, under section 2 of the Election Act the election court is defined as: "Election court" means the Supreme Court in exercise of the jurisdiction conferred upon it under Article 163(3)(a) presidential elections or the High Court in the exercise of the jurisdiction

conferred upon it under Article 165(3)(a) of the Constitution or the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of this Act.

Accordingly it is evident that for purposes of Section 86 of the Elections Act and the electoral dispute that arose over the Machakos County gubernatorial election, the Election Court in this case would be the High Court of Kenya at Machakos.

Hon. Members, returning to the provisions of Section 86 of the Elections Act, it now becomes clear that on the issue as to whether or not the holder of the county Governor was validly elected one must refer to the Certificate issued by the Election Court pursuant to the said Section 86 of the Election Act.

Hon. Members, it is instructive to note that whereas several Hon. Members, in this Assembly, in their ventilation of the issue that was before the Assembly on the 12th of June, 2018, held the view that the Independent Electoral and Boundaries Commission was the one vested with the responsibility of communicating the existence of a vacancy in the office of the County Governor, Section 86 of the Election addresses this issue quite clearly.

Under the said Section 86(1) which I have referred to the Election Court is charged with the responsibility of among others certifying issuing, the certificate to the Commission and notifying the relevant Speaker. It is therefore incumbent upon the Election Court and not the Independent Electoral and Boundaries Commission to notify the relevant Speaker through a Certificate of court as to the validity of the election.

Hon. Members, it is the Certificate of court issued by the Election Court as to the validity or otherwise of the election of the holder of the office of county Governor that signifies whether, indeed there is a vacancy in the office of county Governor and that of deputy governor requiring the Speaker of the County Assembly to act as county governor in accordance with Article 182(4) of the constitution.

Indeed it is my considered view Hon. Members, that this is why Parliament in its wisdom deemed it necessary to include the relevant Speaker as one of the persons required to be notified together with the IEBC of the validity of the election under Section 86 of the Elections Act so as to trigger the other legal processes that would ensue after an election is declared valid or invalid, as the case may be.

Hon. Members, you will appreciate that in the letter case, where the election is declared invalid then the issue of fresh elections comes up and this is where the importance of informing the Speaker, comes in because the Speaker, is supposed to occupy the office of the Governor in an acting capacity for the period stipulated in the Constitution in order not to leave a vacuum in the office of the Governor awaiting the outcome of the fresh elections.

(Applause)

Hon. Members, in further credence to the view I have expressed above on the importance and centrality of the Certificate of the Election Court. Article 182(5) of the Constitution provides *inter alia* that a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of the county Governor shall be held within sixty days Hon. Members, let me repeat, in further credence to the view I have expressed above on the importance and centrality of the Certificate of the Election Court, Article 182(5) of the Constitution provides *inter alia* that if a vacancy occurs in the circumstances contemplated by clause (4), an

election to the office of the county Governor shall be held within sixty days after the Speaker assumes the office of the Governor in an acting capacity..

The said Article 182(5) of the Constitution does not state within sixty days from the date the vacancy occurs but within sixty days from the day the Speaker assumes the office in an acting capacity. Hon. Members, the issue at hand is a case where as in other cases, the legal issues are sequential; it is also a matter that raises great public importance particularly for the County of Machakos.

I therefore request all concerned Parties to dutifully and faithfully play their roles to ensure the full adherence to and compliance with the law. The election Court upon determination of the Court of Appeal and I said as per Section 86 and Section 2 of the Election Act, the election court, in this case is the High Court of Kenya at Machakos and so the election Court upon the determination of the Appeal No. 8 of 2018 by the Court of Appeal where an appeal against the decision had been proffered, is required to move with haste and speed and duly issue the certificate of Court under Section 86 of the Election Court and notify both the Commission, IEBC and the relevant Speaker.

Any delay in issuing the certificate of the Court creates confusion and uncertainty as has been apparently the present issue that was discussed before this House on 12th of June, 2018.

At this juncture Hon. Members, I want to confirm to this House that a Speaker, I had not been notified by the election Court has been on validity or otherwise of the election of the current holder of the office of the County Governor of Machakos County as is required by Section 86 of the Election Act, thereby confirming if there is a vacancy in the office of the County Governor this requiring me to act as Governor under Article 182(4) of the Constitution and for the reason of the great importance of that matter, before in the County of Machakos and in a bid to uphold the principles of the Constitution and the statutory provisions applicable, I give directions that to the members and to the people of Machakos County, that the Clerk of this Assembly is hereby directed to write to the Deputy Registrar of the High Court of Kenya at Machakos, the Election Court, in this matter and inquire whether the certificate under Section 86 of the Election Act has been issued and if not, when it is going to be issued pursuant to the determination of the Court of Appeal on the Electoral dispute over the Machakos County Gubernatorial elections.

(Applause)

Upon receipt of the response Hon. Members from the High Court of Kenya at Machakos, the Chair will make further communication to this House on the matter. Kindly be guided Hon. Members. Thank you.

(Applause)

Mr. Clerk, proceed.

STATEMENT

BUSINESS FOR THE HOUSE FOR 19TH TO 20TH JUNE, 2018

Hon. Ndawa: Thank you, Madam Speaker. Hon. Speaker, I stand under Standing Order 41(2)(a), where during the Statement hour, a Member of the House Business Committee

designated by the Committee for that purpose shall not for more than 10 minutes present and lay on the Table a statement informing the House the business coming before the House.

Hon. Speaker, the House Business Committee met on the 18th June, 2018 and balloted business for this week pursuant to provisions of the Standing Order 151 as follows;

Tuesday, 19th June, 2018

Morning at 10.00 a.m.

1. Report of the Committee on Transport, Roads, Public Works of status of the road of Mavoko and Masinga Sub-Counties.

Afternoon at 2.30 p.m.

1. Report of Environment, Energy, Lands and Natural Resources on Yatta Canal by Hon. Kisini, Chair, Environment.

(Applause)

Wednesday, 20th June, 2018

Morning at 10.00 a.m.

1. Report of Labor, Public Service and ICT Committee on annual report of the County Public Service Board by Hon. Jeremiah Munguti, Chairperson Labor.
2. Motion that the House discusses and approves, the Motion that the Department of Lands does thorough search to establish all lands reserved for rural roads in Machakos County, marks the boundaries and clears those lands and declare the lands public utility in order to discourage further illegality of encroachment of public land in Machakos County by Hon. Agatha Mutunga, Nominated MCA.

Afternoon at 2.30 p.m.

1. Motion that the County Government of Machakos upgrades Kitini-Ndithini-Kawethei-Ndalani road and all access roads to motorable standards to improve transport and service delivery in Ndithini Ward by Hon. Patrick Kituku, MCA, Ndithini Ward.

Thank you, Madam Speaker.

(Applause)

Hon. Speaker: Thank you, Hon. Ndawa. Mr. Clerk, proceed.

MOTION

Hon. Speaker: Under this Order, we have one business by Hon. Daniel Mbevi.

Hon. Mulatya: Point of Order, Madam Speaker.

Hon. Speaker: Hon. Mulatya, point of order

Hon. Mulatya: Madam Speaker, this House lacks quorum

Hon. Speaker: Hon. Malatya, I am being informed there is quorum as of now. Let me just confirm that this House is of 59 Members and a third is 20 Members.

Hon. Mulatya: We are 19, Madam Speaker.

Hon. Speaker: I am being informed that the Members are 19; Mr. Clerk can you confirm. I am going to hear you Hon. Caleb and Hon. Titus Ikusya.

(Quorum checked)

The information I am getting is that the Members are 19. Hon. Members, I could hear points of order without discussing business because you wanted to express yourselves. Hon. Ikusya.

Hon. Kaloki: Thank you, Madam Speaker. I have some points of concern; for the last few days we have been noticing some unbecoming behavior from our fellow Members. How can a Whip of the other side whip out his Members and come back and start demanding that---

Hon. Speaker: Hon. Mulatya, a moment.

Hon. Kaloki: How can the Hon. Whip from the other side whip out all his Members out of this Hon. House only for him to come back after a few minutes and start dictating to us that there are no numbers? Madam Speaker, if this House continues the way it is, we would rather adjourn until when our fellow Members feel comfortable to continue debating.

If they are uncomfortable with their own issues, I would urge this House to continue debating matters of County importance which brought us here. We cannot be dictated, we cannot be micro-managed by a team of two or three people who sit somewhere under a tree to come and dictate on what should happen in this House. Thank you, Madam Speaker.

Hon. Speaker: Hon. Caleb and the others who wish to raise points of order; are we able to consider your points of order when we don't have quorum? I just want to hear that.

Hon. Ndawa, just a moment; let me read the relevant Standing Order and I want to tell you that the Speaker does not form a quorum in this House; the Speaker is not a Member of this House for purposes of debating. If it is matters of the House, you need to solve them; otherwise we will not continue like this, we are not transacting business because you cannot again transact business contrary to your own Standing Orders.

My attention has been drawn to want of quorum this particular time under Standing Order 32(1); if at any time after the Chair is taken, or when the Assembly is in Committee, a Member objects that there is not a quorum present, the Speaker or the Chairperson shall order a count of the Assembly or the Committee as the case may be.

I have ordered a count and I am told the Members are not the one third; that is 20. I am on my feet Hon. Ndawa....Hon. Members---

(2) If on the count under paragraph (1) a quorum does not appear to be present, the Speaker or the Chairperson shall cause the Division bell to be rung as on a division, and if no quorum is present at the expiration of eight minutes—

- a. If the Speaker is in the Chair, the Speaker shall adjourn the Assembly until the next sitting without question put;
- b. If the Assembly is in Committee, the Chairperson shall leave the Chair and report the fact to the Speaker, who shall adjourn the Assembly until the next sitting without question put.

Mr. Clerk, can you ring the bell.

(Quorum Bell rung)

(Loud consultations)

During the ringing of the bell, Hon. Members, the House is still session, please don't be disorderly. There is a process going on Hon. Kaloki, please appreciate your Standing Orders and don't test the patience of the Chair. Minority Leader, you want to stretch your feet; not when the House is in session.

Hon. Members, on the issue of quorum, the bell was rung for eight minutes.....If you cannot walk out Hon. Nziva and Hon. Kaloki, the Speaker, is on her feet you can't do that. Hon. Nziva, that is how you are acting? Okay, I will make the necessary decision.

So, Hon. Members the bell was rung under Standing Order 32(2) for eight minutes; Mr. Clerk, do we have quorum?

I am informed that there is still no quorum. Hon. Members, under Standing Order 32(2)(a), the Speaker shall adjourn the Assembly until the next sitting without question put if there is no quorum.

ADJOURNMENT

Hon. Speaker: I adjourn the House and the next sitting will be on the 19th June, 2018 at 2.30 p.m. today. Have a good afternoon.

The House rose at 11.23 a.m.