



REPUBLIC OF KENYA
TWELFTH PARLIAMENT- (SIXTH SESSION)
THE NATIONAL ASSEMBLY
COMMUNICATION FROM THE CHAIR

_____ (No. 017 of 2022) _____

THE CONSTITUTIONAL PROPRIETY OF THE FIRST SUPPLEMENTARY ESTIMATES FOR FY 2021/2022, IMPLICATION ON THE RESULTANT BILL AND LEGISLATIVE PROCESSES FOR CONSIDERATION OF FUTURE APPROVALS UNDER ARTICLE 223 OF THE CONSTITUTION

Honourable Members,

You will recall that, during the afternoon Sitting of the House on Tuesday, 29th March, 2022, the Member for Garissa Town, the Hon. Aden Duale rose on a Point of Order and raised a number of questions of **constitutional propriety** of the First Supplementary Estimates for FY 2021/2022 as presented to the House for approval by the Cabinet Secretary for the National Treasury. The Hon. Duale noted that, whereas Article 223 of the Constitution allows the Executive to utilise monies that are yet to be appropriated by the House, the same is subject **to a maximum of ten percent of the approved** Estimates of the particular financial year on each **Vote** and strict conditions on the timelines within which the Cabinet Secretary must **seek the approval of the House**. It was the Hon. Duale's submission that the Supplementary Estimates presented by the Cabinet Secretary did not adhere to the strict timelines imposed under Article 223 of the Constitution.

To buttress his claim, he contended that no approval of the monies used was sought either within two months of their first disbursement, or at least two weeks after the resumption of the House from a recess as contemplated under Article 223 of the Constitution. The Hon. Duale also asked the House to note that Article 223(4) of the Constitution only allows the introduction of an Appropriation Bill **for monies spent**, yet the request for approval from the Cabinet Secretary for the First Supplementary Estimates for FY 2021/2022 includes the potential appropriation of monies yet to be spent. These, he disputed, essentially constitute **new** undertakings by the National Executive at an advanced stage of the financial year. The Member also contended that these actions of the Cabinet Secretary, and by extension, the National Executive did not accord to the letter and the spirit of the Constitution; Sections 43 and 44 of the Public Finance Management Act, 2012, which impose limitations on accounting officers to reallocate appropriated funds and the responsibilities of the national government in submitting a supplementary budget, respectively; and Regulation 40 of the *Public Finance Management (National Government) Regulations, 2015* on the responsibilities of each accounting officer of the National Government when submitting items related to Supplementary Budget Estimates.

Hon. Members, In the ensuing debate, several Members were in support of the point raised by the Hon. Duale including the Hon. David Sankok, the Honourables Ndindi Nyoro, Kimani Ichungwah and George Murugara, who beseeched the Speaker to make a ruling on the matters before proceeding with debate on the Estimates.

On their part, the Leader of the Majority Party, the Chairperson of the Budget and Appropriations Committee and the Hon. Mark Nyamita, MP, Member for Uriri, urged the Speaker to allow debate on the Motion for Approval of the *First Supplementary Estimates for FY 2021/2022* on the basis of the past practice and precedent of the House in dealing with supplementary estimates submitted to the House, noting that issues such as those raised by the Member for Garissa Township have either not been previously raised or have been unanimously overruled by the House when raised. Further the Leader of the Majority Party offered an interpretation of Article 223(5) of the Constitution with respect to the scope and what constitutes the “**ten percent**” limit imposed on the **sum** of expenditure under Supplementary Appropriation, an interpretation which I must admit is most persuasive, as opposed to the claim that the constitutional limit is imposed on each Vote.

Hon. Members, As I have previously held, and upheld the rulings of my able predecessors, *a question of the constitutionality or otherwise of any matter under consideration by the House may be raised at any stage of its consideration as the Constitution obliges the Speaker to respect, uphold and defend the Constitution.* This obligation is further expressly outlined at Standing Order 47(3) relating to instances which the Speaker may declare a Motion inadmissible for being unconstitutional. While allowing resumption of debate on the *First Supplementary Estimates for FY 2021/2022*, I did reserve the delivery of a ruling on the matter for today on account of the urgency of the business in question and bearing in mind that the approval of the Motion on *Supplementary Estimates* is not the end of the process. Indeed, as the House is aware, the approval of such Motion is followed by consideration of the necessary *Supplementary Appropriations Bill*.

Hon. Members, I note, from the outset, that I have previously guided that, with regard to the constitutional propriety of matters before the House, the obligation of the Speaker is circumscribed to procedural aspects and facilitation of the proceedings of the House. Any attempts by a Speaker to address the substantive legal aspects of such business would, at the very least, be a usurpation of a role reserved for the High Court under Article 165(3) of the Constitution. Therefore, **Hon. Members**, in addressing the point raised by the Hon. Duale, I shall limit myself to the procedural aspects relating to the *First Supplementary Estimates for FY 2021/2022 as presented by the National Treasury* and the need to guide the House in its consideration of the Business relating to *Supplementary Estimates*.

Hon. Members, Article 223 of the Constitution provides as follows with regard to a Supplementary Appropriation, and I quote, —

(1) Subject to clauses (2) to (4), the national government may spend money that has not been appropriated if—

(a) the amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; or

(b) money has been withdrawn from the Contingencies Fund.

(2) The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3).

- (3) If Parliament is not sitting during the time contemplated in clause (2), or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.*
- (4) When the National Assembly has approved spending under clause (2), an appropriation Bill shall be introduced for the appropriation of the money spent.*
- (5) In any particular financial year, the national government may not spend under this Article more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage.*

Hon. Members, you will agree with the Member for Garissa Township that the provision is quite clear on the threshold to be met by the Cabinet Secretary for the National Treasury in making any submissions to the House that may require the approval of a supplementary appropriation over and above the sum appropriated by the House arising from the annual estimates. However, whereas Article 223 of the Constitution imposes strict conditions on how the national government may spend money that has not been appropriated; prescribes timelines within which the approval of the House should be sought; and caps the maximum amount that may be spent, **it does not make any further provision with regard to what is expected of Parliament thereafter apart from noting that the House may, by resolution, increase the limit of additional spending allowed. The Article does not also set a limit within which the House is to grant or deny the approval.**

Hon. Members, I further do note that, in line with settled House practice, the *First Supplementary Estimates for FY 2021/2022* were tabled in the House by the Leader of the Majority Party on 1st February, 2022. In keeping with the requirements of the Standing Orders, they were referred to the Budget and Appropriations Committee.

The Committee was expected to conduct public participation and engage the Departmental Committees and the National Treasury in order to make relevant recommendations to the House. A perusal of the *Schedule to the First Supplementary Estimates for FY2021/2022* incorporating the recommendations of the Committee, indicate that the net sum contained is a request to the House to approve the expenditure of **Kshs. 139,752,936,287.00**. When compared to the sum of Kshs. **1.942 Trillion** approved in the Budget Estimates for FY 2021/2022, the supplementary figure constitutes approximately seven percent (7%) of the approved Estimates. This, at face value, seems well within the ten percent (10%) threshold set by Article 223 (5) of the Constitution.

Hon. Members, What therefore remains in contention is whether the submissions from the National Treasury adhered to the constitutional timelines relating to supplementary estimates, and whether the House should approve additional expenditure of monies on projects and undertaking not contained in the approved Estimates for FY 2021/2022. The Report of the Committee, while recommending approval of revised proposals by the National Treasury, does not delve into the issue of the contested timelines.

Hon. Members, Though I note that with regard to **previous** Supplementary Estimates that the National Treasury has invariably submitted most requests for approval of spending of monies not appropriated by the House pursuant to the limits under Article 223 of the Constitution, I have perused the records of the House and confirm that my office is not in receipt of any such request with regard to the *First Supplementary Estimates for FY 2021/2022*.

Hon. Members, The Question before the Speaker at this stage is- ***Should this anomaly now vitiate the process already undertaken by the Budget & Appropriations Committee, the Departmental Committees and indeed change the entire course of the First Supplementary Estimates for FY 2021/2022, which now awaits consideration of the Supplementary Appropriations Bill?***

Hon. Members, I am of the considered view that, whereas the Cabinet Secretary for the National Treasury has evidently failed to meet the prescribed timelines with respect to seeking approvals for the first and subsequent withdrawals, consideration of the propriety of the Supplementary Items as submitted and the attendant legislation remains a task that this House **cannot** escape. Presently, the Standing Orders of this House do not guide on the form and manner in which the National Treasury seeks approval of expenditure in excess of the approved estimates and how **several** of such requests should be processed by the House, pending the submission of consolidated supplementary estimates. Additionally, no procedure is currently in place on how a request made outside the timelines prescribed under Article 223 of the Constitution should be treated.

Hon. Members, noting the lack of an express procedure, it would therefore be unfair for the Speaker to arrogate to himself the sole responsibility over a matter that is legislative in nature. You will recall that Article 124 of the Constitution requires the House to make rules for the orderly conduct of its proceedings. The Speaker may only refer to *Standing Order No. 1 relating to matters not provided for*, to provide guidance where no procedure is prescribed by the House.

Hon. Members, Pursuant to Standing Order No. 1, I am therefore persuaded to allow the House to conclude the process of approval of the *First Supplementary Estimates for FY 2021/2022* by way of consideration of *The Supplementary Appropriations Bill, 2022*, which is now before the House. I have chosen this option largely for three critical reasons. **First**, Article 259 (1)(d) of the Constitution requires any person interpreting the provisions of the Constitution in a manner that contributes to good governance. Any determination made with regard to the matter before the House ought not to terminally imperil the financing of government on account of administrative laxity or inaction. **Secondly**, I am not aware whether the Cabinet Secretary has indeed been interrogated by the Committee on the failure to adhere to the timelines relating to the requests made to this House and whether the restricted timelines for considering the Estimates allow the House adequate opportunity to obtain the required information. **Thirdly, Hon. Members**, as a non-voting Member of this House, it would be imprudent on the Speaker to solely allow what is essentially a procedural technicality to override the important objectives intended to be achieved through the consideration and approval of the *Supplementary Estimates*.

The horse seems to have bolted at this stage and the House must resolve this matter, one way or the other. The ultimate authority on the matter lies with the House.

Hon. Members, My reading of Article 223 of the Constitution requires this House to make a decision on any requests made by the National Government that are outside the Estimates approved by the House and the monies appropriated to finance the operation of government.

Hon. Members will recall that Article 206(2) of the Constitution grants the House the primary role of authorizing the withdrawal of any monies from the Consolidated Fund through legislation. Any request for withdrawal of monies from the Consolidated Fund or approval of monies spent from the Fund without prior authorization may also only be done by the House. Similarly, any authorization given to the National Government or the manner it may request authorization for spending squarely lies with the House.

Hon. Members, My direction that the consideration of the Supplementary Estimates and the Supplementary Appropriation Bill continues does not excuse the failings noted with regard to the Supplementary Estimates presented to this House. The obligations imposed on the Cabinet Secretary in their interactions with the House should not be taken lightly. I do remind the Cabinet Secretary for the National Treasury to strictly adhere to the timelines affecting any Supplementary Estimates presented to this House. Administratively, and to prevent any future non-compliance, I do direct that the Clerk maintain a specific register for noting any requests for approval made by the Cabinet Secretary for the National Treasury pursuant to Article 223 of the Constitution and facilitate the timely tabling of all such requests.

Each request must be reported to the House by the Budget and Appropriations Committee which must confirm compliance of such requests with the timelines prescribed under Article 223 of the Constitution.

Hon. Members, decisions of the House granting or denying approval sought under Article 223 should be specific and unequivocal. To aid the House to make such decision, the National Treasury should separate Expenditures under Article 223 of the Constitution from any ordinary re-allocations and/or additions for each Vote, under Separate Schedules.

With respect to spending under Article 223, the Schedules should also indicate the amount and the purpose under each Vote and Item. The Report of the Budget and Appropriations Committee on the examination of the same should also separate these two, in addition to the Schedules of Financial and Policy Resolutions. Further, since the Constitution expects the National Treasury to seek approval of the House within two months after the first approval, in future, the House will be at liberty to consider the approval ahead of the Supplementary Estimates for the particular year and consolidate the two at the relevant legislative stage, including at the stage of publication of the attendant Supplementary Appropriation Bill.

Hon. Members, With regard to the lacuna that is evident in the procedures of the House, I do direct the Procedure and House Rules Committee to, as a matter of urgency, interrogate the provisions of Article 223 of the Constitution and propose relevant text for inclusion in the Standing Orders. The Committee should recommend suitable text to codify the aforementioned procedure for processing requests from the National Treasury, including the registration, noting and reporting of the requests to the House and the scrutiny of the

compliance of the requests with prescribed timelines by the Budget and Appropriations Committee.

I also thank the Member for Garissa Township for raising this matter and the Members who contributed to the ensuing debate for their valuable insights that undoubtedly shall enrich future interactions between the House and the Executive with regard to budgetary matters.

Hon. Members, In summary it is therefore my considered finding—

- (1) THAT, the request to the House to approve the additional expenditure of Kshs. 139,752,936,287.00 when compared to the sum of Kshs. 1.942 Trillion approved in the Budget Estimates for FY 2021/2022 constitutes approximately seven percent (7%) of the approved Estimates which, at face value, is well within the ten percent (10%) threshold set by Article 223 (5) of the Constitution;**

- (2) THAT, since Article 259(1) (d) of the Constitution requires any person interpreting the provisions of the Constitution to do so in a manner that contributes to good governance, it would be imprudent on the Speaker to allow a procedural technicality to override the important objectives sought to be achieved through *Supplementary Estimates*. In this regard, pursuant to the provisions of Standing Order No. 1, the House shall continue with the process of approval of the *First Supplementary Estimates for FY 2021/2022* by way of consideration of *The Supplementary Appropriations Bill, 2022*, which is now before the House;**

- (3) THAT, the Cabinet Secretary for the National Treasury must, going forward, strictly adhere to the timelines required with respect to any future *Supplementary Estimates* submitted to the House;**
- (4) THAT, in future, the decision of the House granting or denying approval sought under Article 223 MUST be specific and unequivocal. To aid the House to make such decision, the National Treasury MUST separate Expenditures under Article 223 of the Constitution from any ordinary re-allocations and/or additions for each Vote, under Separate Schedules. With respect to expenditures under Article 223, the Schedule must also indicate the amount and the purpose under each Vote and Item; and when the first withdrawal of the said money was made. The Report of the Budget and Appropriations Committee on the examination of the same must also separate these two, in addition to the Schedules of Financial and Policy Resolutions;**
- (5) THAT, since the Constitution expects the National Treasury to seek approval of the House within two months after the first approval, in future, the House will be at liberty to consider the approval way ahead of the *Supplementary Estimates* for the particular year and thereafter consolidate the two at the relevant legislative stage, including at the stage of publication of the attendant **Supplementary Appropriation Bill;****

- (6) THAT, to avoid any future non-compliance, the Clerk shall maintain a specific register for noting any requests for approvals made by the Cabinet Secretary for the National Treasury pursuant to the provisions of Article 223 of the Constitution and facilitate the timely tabling of all such requests;**
- (7) THAT, each request must be reported to the House by the Budget and Appropriations Committee which must confirm compliance of such requests with the timelines prescribed under Article 223 of the Constitution; and,**
- (8) THAT, to address the lacuna in the procedures of the House, in its ongoing review of the Rules of Procedure of the House, the Procedure and House Rules Committee urgently interrogates the provisions of Article 223 of the Constitution and propose relevant text for inclusion in the Standing Orders to codify the aforementioned procedure for processing requests from the National Treasury for approval of additional expenditure.**

The House is accordingly guided.

I thank you!

THE HON. JUSTIN B.N. MUTURI, E.G.H, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, 31st March, 2022