



AN ADVISORY ON CIVIL APPEAL NO. E084 OF 2021

Dear Stakeholders,

TISA's mandate:

The Institute of Social Accountability's core mandate is to empower citizens to demand for sound delivery of services by holding their leaders to account through direct engagement. Thus, TISA's mission is to help Kenyans find their voice and agency to claim their rights to services; make the Kenyan government accountable for its duties and promises; and ultimately, *"make the constitution a lived experience."*

In light of this mandate, TISA through representation by Katiba Institute is one of the interested parties in the case of the Speaker of ***National Assembly & Another vs The Senate of the Republic of Kenya & 12 others***; herein referred to as the ***Civil Appeal E084 of 2021***.

Reasons for the matter:

The matter arose as a result of the Violation of Article 110(3) of the Constitution which states; "Before either house considers a Bill, the speakers of the National Assembly and Senate shall jointly resolve whether it is a Bill concerning counties and if it is, whether it is a special or Ordinary BILL.

The National Assembly passed a total of 23 legislations without concurrence of the speakers of the National Assembly and the Senate. The Senate responded by taking the matter to court; seeking nullification of those statutes and to protect the constitution from constant violation.

Hearing of the matter (High Court):

The matter was heard in the High Court and judgement delivered on 29th October 2020. The Court held that the pertinent issue was the interpretation of Article 110(3) of the Constitution. **The National Assembly was at fault for passing legislation without the concurrence of the speakers of the two houses.** Additionally, the Court issued conservatory orders for 9 months voiding the nullification of those statutes; thereafter, upon the lapse of the 9 months the statutes will be rendered null and void.

Matter proceeds to the Court of Appeal:

The National Assembly was aggrieved by this decision and proceeded to the Court of Appeal. Initially, the hearing was scheduled for 21st July 2021. However, one of the presiding judges stated the hearing may not proceed and made an oral application to recuse himself and cited conflict of interest being the principal reason. The bench was in consensus to postpone the hearing to a closer date and the matter to be heard on 27th July 2021 by a different bench that will meet the criteria of impartiality. The stay orders were denied as the matter would be heard before the expiration of the stay.

Hearing of the matter and judgement date (Court of Appeal):

On 27th July 2021, the matter was heard; Judgement is set to be delivered on 5th November 2021. Additionally, the stay order on the 23 statutes that should be nullified have been extended pending the date of judgement.

The outcome (National Assembly):

This is quite detrimental as it gives the National Assembly the leeway to further violate the Constitution. This is because the National Assembly pending judgement can autonomously pass legislation without observing Article 110(3) of the Constitution which makes concurrence of both speakers a prerequisite for consideration of a Bill.

The outcome vs accountability:

This enhances the lack of accountability and therefore **TISA and Katiba Institute have opted to remain vigilant and observant to ensure that public interest is protected and to uphold the sanctity of the Constitution.**

National Assembly Call to Submissions:

Additionally, The National Assembly through the Constitutional Implementation Oversight Committee issued a call for submissions of memoranda/public participation on the Daily Nation issue of 28th July 2021 on the 'Constitution of Kenya (Amendment) Bill No.40 of 2020 has raised some pertinent areas of concern that seem to be in violation of the Constitution, and they include:

- Seeking to amend the Constitution of Kenya in order to appoint Cabinet Secretaries from Members of Parliament.
- Authorizing the President to assign the Attorney General the duties of a Cabinet Secretary.
- Authorizing County Governors to appoint members of the County Executive Committee among members of the County Assembly.

These provisions are in contravention of the Constitution and undermine the principal of separation of powers. The executive and legislature will lack the autonomy to run their daily activities and in the long run accountability will be extremely far-fetched.

Our reflection:

It is our strong view that amendments to the constitution must ensure adequate time for public consultations and must be informed by robust public sensitization. The call for proposals also conflicts with the ongoing case on the BBI and it is our view that the proposed amendments must await the determination of the court and exhaustion of the court proceedings. They must also respect the principle of basic doctrine as articulated in the BBI Judgement; ***Petition No. E282 of 2020, David Ndii & Others vs Attorney General and Others***. We call upon members of the public to be vigilant and to demand the total observation of the Constitution to prevent our leaders from creating legislation that serves their narrow personal interests at the expense of the ordinary citizen.