COUNCIL OF GOVERNORS

TALKING NOTES FOR H.E. JOSPHAT NANOK, CHAIRMAN COUNCIL OF GOVERNORS

INAUGRAL INDUCTION FOR SENATORS, SIMBA LODGE NAIVASHA
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Topic: Engagement with County Governments: challenges, opportunities and way forward

1. First, let me take this opportunity to congratulate all elected and nominated Senators on your election and nomination respectively to the Senate. I further congratulate Hon. Kenneth Lusaka, for his election as the Speaker of the Senate. As a former member of the Council of Governors, we hope that his election will foster cooperation and consultation between the Senate and the Council, and the County Governments at large. I am also delighted in the diversity of professional backgrounds from which our new members come from. We have four (4) Governors who were former Senators; three (3) Governors who served previously as Cabinet Secretaries; three (3) Governors who served previously as Members of Parliament; and there are other Governors who were long time senior public servants. This diversity in competencies will inevitably enhance collaborationand dialogue with other key institutions.

2. In my presentation, I would like to emphasize the role of the Senate as contemplated in Article 96 of the Constitution which is to protect the interests of the Counties. In legislation, oversight and representation, the main focus is whether in the execution of each role, the Senate is creating an enabling environment for County Governments to optimally deliver services; and successfully perform their functions and exercise their powers.

3. In the first phase of the devolved system of governance, we can celebrate successes in the relationship between the Senate and County Governments, but there have also been instances where controversy and conflict has arisen between the Senate and the Counties to the extent of requiring judicial intervention.

4. Successes:
    i. The Senate has been instrumental in allocation of national revenue. In the last financial year, the Senate was pivotal in guaranteeing an increase in the equitable share for Counties. The National Treasury had proposed KES 299 billion; the National Assembly reduced this to KES 291 billion; but Senate went with KES 314 billion. Through persistence of the Senate, the Counties' equitable share was agreed to the tune of KES 302 billion. This was after the realization that the nurses and doctors had been offered enhanced allowances.

    ii. The Senate has passed certain legislation to support County Governments' operations and their governance. For instance, the County Assembly Services Act, 2017 sought to assist in the running of the Assemblies; the County Governments (Amendment) Act, (No. 2 of 2017) sought to assist County Assemblies achieve the two-third gender rule in their sittings; and the Public Appointments (County Assemblies Approval) Act, 2017 sought to lay down the procedures for County Assembly approval for public appointees.

    iii. The Senate has had vibrant engagement with the Council of Governors. The Senate has participated and supported various Devolution Conferences. Additionally, the Senate has always called upon the Council to appear before it or submit memorandaon Bills before the floor of the Senate. There has been consensus but also divergence on some issues.

5. Despite the above, the relationship between the Senate and the County Governments has sometimes been marred with conflict. To illustrate:

i. The Senate has on various occasions passed unconstitutional laws aimed at clawing back on devolution. For example, the legislative amendments that had been proposed to the County Governments Act to introduce County Development Boards were not only retrogressive, but they also intended to undermine the Office of the Governor. As you are aware, we challenged the amendments in court and subsequently the court held that the Boards were indeed unconstitutional.

ii. In 2016, a Bill was introduced in the Senate to amend Sections 50, 51 and 52 of the County Governments Act in order to bind the County Public Service Board to employ sub-county administrators, ward administrators and village administrators after every general election. The Bill was ill-conceived as it tied the employment of these civil servants to the tenure of the Governor thereby politicizing the said positions.

iii. In another instance, we have had to challenge Governors' summons to the Senate since these have in several cases been applied subjectively. The Senate has in some occasions summoned Governors to appear and address reports that are concurrently being considered by the County Assemblies. Of course public funds must be accounted for but the quest to entrench fiscal responsibility must be in line with the law.

iv. In such circumstances, the Council has resorted to the courts for reprieve. In the case of Summons, the Court has held that the Senate should not use its powers granted in Article 96 of the Constitution to micromanage Counties. Before resorting to Summons, the Senate should consult and mediate on issues raised by the Office of the Auditor-General and summons should be issued in instances where County officials have declined to honor invitations from the Senate. Accounting officers should be the first point of contact on public finance management matters.

v. The Council has instituted court cases in instances where mediation failed to resolve the issues in controversy between the two levels of government. To illustrate, on roads classification, the court directed parties to negotiate and agree on a settlement but parties failed to gain consensus on the matter. However, it is worth noting that the Judiciary has on particular occasions issued favorable judgements to protect devolution. I will highlight some of the decisions as follows:

Petition	**Summary of Judgement**
Petition 561 of 2015- Wycliffe Oparanya case	The oversight powers of the Senate must be exercised properly and in accordance with the law.
Petition No. 291 and 314 of 2016- Coffee Regulations Case	In all regulatory development processes Counties must be consulted and this consultation must be meaningful and qualitative.
Petition 229 of 2015 and 187 of 2015- Kimabu Finance Acts case	Senate has no powers to interfere with legislative authority of County Governments. Article 96 of the Constitution doesn't confer it with such powers.
Impeachment petitions	The court set down the threshold for impeachment of Governors. The organ vested in the first instance with this power of removal is the County Assembly. Neither the court nor the Senate have the constitutional mandate to move the motion for the removal of a County Governor.
Petition 472 of 2014- roads case	The court directed the National Government to immediately transfer to the Counties maintenance, rehabilitation and improvement of roads in class D,E and unclassified.
Petition 300 of 2014- outdoor advertising case	The Court held that control of outdoor advertising is an exclusive function of the County Governments.

In the next five (5) years, as stakeholders in devolution, we need to adopt measures and mechanisms for alternative dispute resolution on matters policy and legislation. We may explore establishment of an ad hoc intergovernmental committee that brings together the Council and the Senate to seek consensus on Bills and other legislative instruments that affect County Governments. This will ensure that we do not constantly resort to judicial proceedings when a dispute arises.

6. General challenges experienced in the first phase of implementation of the devolved system of governance:
    i. There are laws that have been passed by Parliament and there are policies that have been developed and adopted by the National Government with provisions that seek to recentralize devolved functions back to the National Government. Moreover, a review of some National Government Strategy documents reveal little effort to foster devolution.

    ii. On funding, over the last four (4) years, County functions have not been adequately funded. As at the end of the transition period on 4th March, 2016, County Governments received an extra 31,113 kilometers of roads. Yet in the division of revenue for the financial year 2016/17 and 2017/18, no funds were allocated to the Counties to support the additional roads unlike the National Government which, despite handling only 39,995 kilometers of roads, receives an allocation of KES 79 billion. Moreover, national agencies, notably Kenya Urban Roads Authority (KURA), Kenya Rural Roads Authority (KeRRA) and the Kenya National Highways Authority (KeNHA) have continued to manage County roads.

    iii. Another challenge has been the duplication of functions. State agencies and corporations and regional development authorities must be restructured to align to the devolved system of government. To illustrate: in the 2015/16 budget, ongoing road construction and maintenance was allocated KES 85.2 billion. These monies went on to fund state actors like the Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KeRRA) who awarded contracts for County Roads- a County Government function. The same budget allocated a sum of KES 79.7 billion for agriculture, specifically irrigation projects, fisheries and livestock, yet under the Fourth Schedule of the Constitution Agriculture is a fully devolved function and the National

Government's mandate extends only to agricultural policy. Regional Development Authorities like the Tana&Athi River Development Authority (TARDA), Kerio Valley Development Authority, Lake Basin Development Basin and others, also continue to receive a share of the national budget only for these monies to be utilized for projects related to devolved functions and this has resulted in massive wastage of public funds.

iv. It is worth noting that during the fifth National and County Coordination Summit held between 10th and 11th February 2016 at the Sagana State Lodge, it was resolved that a committee be formed to undertake an analysis of the functions of both levels of government with the aim of eliminating duplication and wastage. There is a report that was finalized in April 2016 with recommendations that are yet to be adopted which include among other things, release of funds to County Governments for the unfunded functions in Library services worth KES.319 million, KES.8.4 billion for the additional 32,000 Kms of roads transferred to County Governments and enhancement of Fuel Maintenance Levy share from the current 15% to 25%.

v. County functions must be well funded. For this to be realized, the Constitution must be amended to anchor a 45% minimum threshold for equitable share of revenue allocated to County Governments.

vi. On consultation and cooperation, there have been instances where laws and policies touching on the functions of County Governments have been developed without proper and sufficient consultation between the two levels of government. Moving forward, we must all seek to put into practice the principles entrenched in Article 6(2) and Article 189 of the Constitution.

vii. Statutory intergovernmental institutions must be strengthened and properly institutionalized for them to be more effective. The Council of Governors, Intergovernmental Relations Technical Committee, the National and County Government Coordinating Summit and the Intergovernmental Budget and Economic Council should be independent, and not housed under any ministry so that they can be able to speedily implement their decisions.The CoG has already developed proposed amendments to the IGRA to have its secretariat anchored in law, as resolved in several Summit meetings. We had shared these legislative amendments with the previous Senate for tabling and enactment. I also wish to point out that the IBEC has no secretariat. IBEC is currently housed under the Office of the Deputy President. IBEC should have its own secretariat.

viii. Framework for funds flow system for conditional grants and donor funds must be finalized. A draft document on the administration and reporting of conditional grants has been generated but not yet adopted. Where donor funds are related to County functions, they should be disbursed to the Counties, not held at national ministries. The National Government should set up a unit at the National Treasury to manage conditional grants. The use of National Government agencies to hold funds for County functions undermines devolution.

7. Opportunities and way forward:
   i. In legislation, there needs to be collaboration and dialogue between the Senate and County Governments. Where Counties raise critical issues in Bills and other legislative instruments, the Senate should consider their input and seek clarifications where necessary. Our engagement going forward on legislation on policy should be faithfully guided by Article 189 of the Constitution.

   ii. On oversight, we acknowledge the power of the Senate in the oversight of nationally allocated revenue. However, these powers must be exercised cautiously and properly. Integrity and transparency are key ingredients in a democracy such as ours. And Counties are aware that they must manage their financial resources in a manner that promotes public confidence.

iii. Amendments to the County Governments Act have to be tabled so as to give clarification on issues of appointments and dismissals of political appointees.

iv. We need to continue collaborating in forasuch as Devolution Conferences and multi-agency committees.

v. Capacity building is also another area of cooperation between the County Governments and Senate.

vi. On legislation and policy, we need the Senate, in collaboration with the Council, to develop the following:

   a) legislation for the assumption of office of the governor;
   b) a framework for industrial negotiations;
   c) legislation that will clearly provide for a framework for enforcement of County legislation in the courts; and
   d) legislation that will facilitate sharing of revenues from natural resources, between the National Government, respective County Governments where the natural resources reside, and communities.

vii. Lastly, the Council, in fulfilling its statutory mandate, publishes its Annual report every year and is mandated to share the same with the Senate. In this regard, the Senate should moving forward, upon receipt of the same, give feedback on the report. Copies of such reports will be shared with the Senators present. We will also share the State of Devolution address that was issued earlier this year in May.

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