Eighty Ninth Sovereign Debt News Update: Separation of Powers Rears Its Head in Kenya's Public Debt and Finance Management

By:

The African Sovereign Debt Justice Network

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The doctrine of separation of powers, a principle of constitutional law, allocates specific functions, duties, and responsibilities to three distinct institutions of government: the legislative, the executive, and the judiciary. Also known as the system of checks and balances, the doctrine aims to prevent the concentration and abuse of power by one branch. The doctrine aims to ensure transparency and accountability at all levels of government administration. In the same breath, the doctrine transcends all other government and public institutions falling under government institutions. The separation of powers has reared its head in Kenya following the approval of the Public Finance Management (Amendment) Bill 2023 (through its second reading) and the signing of the Finance Act 2023 into law by President William Ruto. At play are the respective roles of parliament, the executive, and the judiciary. At the tail-end of June, a

High Court gave conservatory orders stalling the implementation of the Finance Act of 2023 after it had been signed into law by the President. In the meantime, the respective roles of Parliament and the National Treasury regarding public debt management arose when Parliament considered the Public Finance Management (Amendment) Bill 2023.

The Public Finance Management (Amendment) Bill 2023:

As noted above, the tensions between Kenya's National Assembly and the Treasury regarding their respective roles arose in the context of the amendment of the Public Finance Management (Amendment) Bill. On the 22nd of June 2023, the National Assembly of the Republic of Kenya approved the Public Finance Management (Amendment) Bill 2023 through its second reading.

The MPs, however, rejected a bid by the Treasury to empower the Public Debt Management Office (PDMO) to provide legislators with advisory services on debt affairs in Kenya. In Kenya, the Treasury, which houses the Public Debt Management Office (PDMO), typically oversees the negotiations and technical aspects of the debt contracting process, while the Parliament often plays an oversight role in ensuring transparency and accountability in borrowing. The MPs adopted a report through the Public Debt and Privatisation Committee, which deleted two clauses from the Public Finance Management (Amendment) Bill 2023, thereby denying the PDMO new advisory powers on public debt.

First, the House committee rejected amendments that would have allowed the debt office to advise Parliament on the maintenance of the nation's debt as well as the financial obligations related to loans raised or guaranteed and securities issued or guaranteed. The deleted amendments would have enabled the Treasury Cabinet Secretary and Parliament to receive advice from the PDMO on how much public debt is sustainable and the annual borrowing limit.

Secondly, the committee eliminated a provision that would have required the Treasury Cabinet Secretary to inform Parliament if the Finance Ministry exceeded the debt anchor through excessive borrowing. The clause contemplated that the PDMO would provide its advice on debt matters prior to the Parliament's approval.

The Public Finance Management Act of 2012 lists the PDMO's primary function as carrying out the government's debt management policy of minimising its financing cost over the long term, taking account of risk. As such, with the quashing of the new proposals, the PDMO will retain limited functions, which broadly capture the preparation of key documents. Perhaps, it is no surprise that the Parliament resisted the expansion of the role of the PDMO to the provision of advisory services. In order to effectively undertake their oversight responsibility, legislators should be able to act independently and without interference from the Treasury and PDMO, which already play a lead role in the negotiations and contracting processes. However, it can be argued that there are potential benefits in involving other important stakeholders in the debt management process. For instance, the Office of the Attorney General can be tasked with offering advisory services to the Parliament on key legal aspects such as contractual terms as well as arising financial obligations.

The Finance Act 2023:

In a unique development, on the 30th of June, the High Court of Kenya suspended the implementation of the Finance Act 2023. Busia Senator Okiya Omtatah filed a petition challenging the Finance Act 2023, which was set to be implemented from the 1st of July 2023. Having been assented to on the 26th of June 2023 by President William Ruto, this law was set to effectively double fuel tax and introduce new taxes in a bid to fund Ruto's Sh3. 6 trillion budget. According to one source, President William Ruto's administration is said to have pushed the law through parliament last week despite fierce opposition, claiming that additional income measures were required to help deal with rising debt repayments and fund employment-creation efforts.

One basis for the judicial suspension of the Finance Act arose because it was in contravention of the mandatory requirement that any Bill introduced in the National Assembly, which includes provisions pertaining to county governments in Kenya's federal system, must also be introduced to the Senate for concurrence, yet the Finance Bill 2023 was not submitted to the Senate. According to Omtatah, the Speaker of the National Assembly violated Article 110(3) of the Constitution by introducing the Finance Bill 2023 in the National Assembly without first determining, jointly with the Speaker of the Senate, whether the Bill concerned county government. The Finance Bill, according to

Omtatah's revised petition, comprises revisions to a number of laws that do not have anything to do with raising money for the government and to laws that have an impact on how the Senate conducts their mandate to defend the interests of counties and their governments.

Further, the negative socioeconomic implications of such tax imposition on the citizenry are widespread. Kenyans are already feeling the effects of the Finance Act, as the Energy and Petroleum Regulatory Authority (EPRA) hiked the price of super petrol by a staggering Ksh.13.49, (about 0.097 USD per litre), setting a new record for gasoline prices of Ksh.195.53 (about USD 1.40 per litre). Despite the High Court decision prohibiting the implementation of the disputed Finance Act 2023, EPRA's decision to change the Value Added Tax (VAT) requirement on petrol from 8% to 16% is in direct defiance of the court ruling. According to Omtatah, "*forcing employees to contribute an amount of money based on the applicable blanket deductible percentage without consideration of their existing contractual obligations on their salaries is not reasonable*." Commenting on the suspension of the Act, Senator Omtatah stressed in an interview that *this was an opportunity for Kenyans to get things right and that it was a question of upholding the rule of law*.

Ultimately, the petition highlights key issues of abrogation of procedure, the constitutionality of certain provisions, and the infringement of the right to own property. Ruling in favour of Senator Okiya Omtatah, Lady Justice Mugure Thande suspended the law for a week, pending the hearing and determination of the suit. The matter is scheduled for mention for directions on the 5th of July, 2023.

Kenya's Debt Ceiling is Raised:

It is interesting to note that amidst this commotion, the Public Finance Management Amendment Bill addressed one of the several conditions from the International Monetary Fund (IMF), that is, the conversion of Kenya's debt ceiling from the present Kenya Sh10 trillion to a debt anchor of 55 percent of GDP in present value terms. In March 2023, the National Assembly received approval from President William Ruto's Cabinet to raise the debt ceiling from its existing cap of Sh10 trillion to an anchor set at 55% of GDP in present value terms. The new ceiling means that the government is already in breach, given that Kenya’s debt is above 70 percent of the GDP and the new administration will now be forced to find means to walk the country backwards through growing the economy and slowing down on new loans. It is important to highlight that the approved debt ceiling pegged at 55% is above the set 50% of GDP threshold as per the East African Community (EAC) convergence ratio. Kenya’s debt of above 70% is therefore unsustainable according to the EAC standards.

While the Public Debt and Privatisation Committee approved the threshold of the debt anchor of 55% of GDP in present value terms, the committee has, however, provided a window not exceeding five per cent to accommodate the current debt threshold to GDP, which stands at 60 percent. According to Makali Mulu, the vice-chairperson of the committee, “*The committee recommends that the threshold for debt shall be a debt anchor of 55 percent and shall not exceed plus five per cent of the gross domestic product in present value terms*”.

For an effective public finance and debt management system, the highlighted institutions have a huge role to play in ensuring that Kenya is able to meet its debt obligations in a manner that does not leave the citizens tax-burdened and the economy in shambles. Undoubtedly, Parliament’s role in providing oversight in public finance and debt management matters is critical to the maintenance of a manageable debt stock. The Treasury’s proposal to give advisory powers to the Public Debt Management Office may very well have been in tension with Parliament’s independence to effectively carry out their mandate. With the Senator having challenged the Finance Act in court, it remains to be seen how the judiciary is going to play referee in the matter, hopefully all the while upholding the rule of law and the concept of justice. Further, the raising of Kenya’s debt ceiling to 55%, five percent higher than the benchmarked EAC threshold of 50%, poses as detrimental to Kenya’s public debt management system. There is therefore need to ensure that there is alignment of these public debt to GDP ratios for effective debt sustainability.

The AfSDJN urges the Kenyan government to respect the doctrines of separation of powers and constitutionalism, and to adhere to the concepts of democracy and justice and to uphold the rule of law.

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