REPUBLIC OF KENYA

NYANDARUA COUNTY ASSEMBLY

1ST ASSEMBLY – THIRD SESSION – 2015

REPORT OF THE COMMITTEE ON DELEGATED COUNTY LEGISLATIONS

ON THE

PUBLIC FINANCE MANAGEMENT (EXECUTIVE COMMITTEE (MEMBER) CAR LOAN SCHEME) REGULATIONS, 2015

AND

PUBLIC FINANCE MANAGEMENT (EXECUTIVE COMMITTEE (MEMBER) MORTGAGE SCHEME) REGULATIONS, 2015

The Clerk's Office
Nyandarua County Assembly
P.O. Box 720 – 20303
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PREFACE

Mr. Speaker Sir,

The Public Finance Management (Executive Committee (member)Car Loan) Regulations, 2015 and Public Finance Management (Executive Committee (member)Mortgage) Regulations, 2015were tabled in this House on 10th of February 2015 by Hon. James Gachomba and pursuant to Standing Order 185 stood referred to the Committee on Delegated County Legislations.The Terms of reference are set out under Statutory Instruments Act 2013 and Standing Orders 185 of the Nyandarua County Assembly.

Committee Members

1. Hon. Peter Wahome Kamoche -Chairman
2. Hon. Jane Mwathe -Vice Chairman
3. Hon. James K. Gachomba -Member
4. Hon. Edinald Wambugu -"
5. Hon. PatriciahWanjugu -"
6. Hon. Joseph Mumba -"
7. Hon. Kimani Njiraini -"

ACKNOWLEDGEMENT

Mr. Speaker Sir,

The committee is alive to the immense contributions and support accorded to it by the Members of the County Assembly through their concern and contribution. Their immense contribution cannot be over looked.

On behalf of the Committee Members, I wish to extend our sincere appreciation for the invaluable support accorded to the committee by Your Office and the Office of the Clerk to ensure the Committee delivers its mandate.

Mr. Speaker Sir, I would also like to sincerely thank the Members of the Committee on Delegated County Legislation for the commitment exhibited during the scrutinizing of the Regulations and the compiling of this report. I also appreciate the work of our Secretariat comprising of Mureithi Wairimu (Deputy Clerk) and Joel Gicheha (Committee Clerk) who worked tirelessly to compile this report. I would also like to appreciate the contributions of Daniel Kamau the Commissionaire who worked with the committee during the entire period and the Ranges View Hotel Fraternity who offered an enabling environment.

Finally, **Mr. Speaker Sir,** it is now my pleasure, on behalf of the Committee to present this report to the House for adoption

Signed....................................

Hon. Peter Wahome Kamoche

Chairperson, Committee on Delegated County Legislations

CHAPTER ONE: INTRODUCTION

Mr. Speaker Sir,

Kenya is a Democratic Sovereign governed by a Presidency popularly elected by the people on one level and forty seven governors on another level. The concepts and principles of democratic governance anchored in the Constitution of Kenya 2010 expressly provides for sovereignty of the people of Kenya, and like in any democracy, a democracy is a government of the people, by the people and for the people. Thus, power is vested in the people and should only be exercised in accordance with the Constitution. The explicit power and sovereignty of the people of Kenya, as the custodian of the authority and power to govern includes its apportionment to designated state organs, institutions and offices, who exercise the same on behalf of the people pursuant to the Constitution and the laws of Kenya. The division of mandate, role, function to govern between the main stakeholders and arms of the state and government, i.e. the Parliament, the Executive and the Judiciary must be exercised in accordance with the Principles of Separation of Powers and Checks and Balances.

Mr. Speaker Sir,

Article 1 (2) and (3) provides that the people shall exercise Sovereign power under this Constitution through democratically elected representatives. The Constitution also delegates this people's power to Parliament and the legislative assemblies in the county governments, the national executive and the executive structures in the county governments and the Judiciary and independent tribunals which perform their functions in accordance with the Constitution. The sovereign power of the people is exercised both at the national and the county levels.

Mr. Speaker Sir,

Pursuant Article 94, the Constitution vests legislative authority of the people to Parliaments at the National level while Article 185 provides for the Legislative authority of the People at the County Government level to the County Assemblies.

The power to legislate is constitutionally vested in Parliaments and Assemblies. However, a Statutory Instruments Act which was a creation of Parliament was enacted to guide the procedure of legislating usingdelegated power and also give the same parliament some hand in approving the subsidiary laws passed by the Executive.

Mr. Speaker Sir,

Statutory Instruments Act 2013 has been used by the County Assemblies through the Delegated County Legislation Committees to check on the Executive in exercise of these delegated legislative powers. The Committee on Delegated County Legislation has made tremendous steps in customizing the Statutory Instruments Act 2013 to fit the needs of the County. This will go a long way into providing a smooth process of the making and scrutiny of the Statutory Instruments.

The most common form of delegated legislation are those used for legislation of general application emanating from a government department made by a statutory corporation having effect only within the area of responsibility of the authority. Such legislation is always empowered by an Act of Parliament/Assembly which is referred to as Parent Act/Enabling Act.

Mr. Speaker Sir,

Under the County Governments, laws that are enacted by the Assembly and which contains provisions that require the regulations to be made the CEC member, such regulations should be referred to as Delegated Legislation. Since such regulations form part of laws that govern the people, they should thus be subjected to approval by the Assembly which is the constitutionally mandated organ to perform Legislative functions.

This will prevent any regulations that are *ultra vires* and contrary to Section 13 of the Statutory Instrument Act 2013.

In the case of Public Finance Management (Executive Committee (member)Car Loan Scheme) Regulations, 2015 and Public Finance Management (Executive Committee (member)Mortgage Scheme) Regulations, 2015, they are made under Section 116 of the Public Finance Management Act 2012. Thus, in the scrutiny of the regulations, reference must be made to the Public Finance Management Act 2012 which is the Parent Act in this Case.

Section 13 of the Statutory Instruments Act 2013 which has guided the provisions **Standing Order 185**of the Nyandarua County Assembly Standing Orders provides for the procedure to be followed while dealing with the Statutory Instruments. The County Assembly has been using this Act but the

Committee has gone to great length into customizing the Act to fit the needs of the County whereby a legislative proposal has been drafted and approved the by the Committee and is now awaiting approval of the Hon. Speaker.

Under the circumstances in review, the PFM Act Section 116 provides for the creation of funds by the County Executive Committee M

ember for Finance under which the regulations are made. This Act is the Parent law in regard to the regulations in scrutiny.

Mr. Speaker sir,

The Public Finance Management Act 2012 Section 116provides that;

1. A County Executive Committee member for finance may establish other public funds with the approval of the County Executive Committee and the county assembly.
2. For every county public fund established, the County Executive Committee member for finance shall designate a person responsible for administering that fund.
3. The administrator of a county public fund shall ensure that the earnings of, or accruals to a county public fund are retained in the fund, unless the County Executive Committee member for finance directs otherwise.
4. The administrator of a county public fund shall ensure that money held in the fund, including any earnings or accruals referred to in

subsection (3) is spent only for the purposes for which the fund is established.

5. The County Executive Committee member for finance may wind up a county public fund with the approval of the county assembly.

6. On the winding up of a county public fund—

    a. the administrator of the fund shall pay any amount remaining in the fund into the County Exchequer Account; and

    b. the County Executive Committee member for finance shall, with the approval of the county assembly, pay any deficit in the fund from the County Exchequer Account.

7. The administrator of a county public fund shall—

    a. prepare accounts for the fund for each financial year;

    b. not later than three months after the end of each financial year, submit financial statements relating to those accounts to the Auditor-General; and

    c. present the financial statements to the county assembly.

8. The administrator of a county public fund shall ensure that the accounts for the fund and the annual financial statements relating to those accounts comply with the accounting standards prescribed and published by the Accounting Standards Board from time to time.

9. Regulations may provide for the establishment, management, operation or winding-up of county public funds under this section.

10. This section does not apply to the County Revenue Fund established under section 109 of this Act.

11. The funds and usage of money through the funds shall be published and publicised.

12. In this section—

"administrator", in relation to a county public fund, means a person designated by the County Executive Committee member for finance under Subsection (2) to administer the fund;

"County public fund" means a public fund established under Subsection (1).

Mr. Speaker Sir,

The above provisions for the creation of a fund are at the prerogative of the CEC for Finance but with the approval of the County Assembly. On the appointment of the Administrator of the Fund, the Committee could not understand whether a public servant with other duties was supposed to administer such a fund. The Committee sought legal advice and found out that it was easier to administer such a fund through an already employed public servant to reduce the burden of wages that would otherwise have been used on a new employee.

Mr. Speaker Sir,

This House has in the past found in similar circumstances of reviewing a regulation, the disregard of the provisions of the law by the Regulation making authority. The Assembly was seized with procedural irregularities and has urged the Executive into follow the law while introducing such Statutory Instruments.

CHAPTER TWO: OBSERVATIONS

Mr. Speaker Sir,

The Committee upon deliberations unanimously agreed to scrutinize the scheme funds in reference to the provision of the Constitution of Kenya, the Statutory Instrument Act, the Public Finance and Management Act the County Government Act and the Standing Orders.

In this regard pursuant to the provisions of the County Assembly Standing Orders 185 (3), the Committee considered the documents in respect to whether they are in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law and found out that indeed they were Constitutional and in accordance with the provisions of the Public Finance Management Act, 2012 Section 116 which is the enabling Act.

The committee members agreed in the scrutiny of the regulations that there was nothing to show whether consultation had taken place according to the provision of the Statutory Instruments Act Section 5 as consultation before making a statutory instrument was needed, where those to be affected had a right to raise their views and recommendations. The CEC member for finance should have tabled the regulations with the Regulatory Impact Statements, Explanatory Memoranda and Evidence that consultation took place in accordance with the Statutory Instruments Act just like there is a requirement for a policy paper/ sessional paper or legislative proposal in regards to any Bill introduced in the House. However, Pursuant to Section 9, the Statutory Instrument Act 2013 provide for exceptional circumstances where regulatory impact statements would be unnecessary. Thus, the committee found the requirement unnecessary for these particular regulations.

The committee observed that the regulations does not infringe on fundamental rights and freedoms of the public.

Mr. Speaker Sir,

Upon further analysis the committee found out that the regulations did not contain a matter which in the opinion of the Committee should more properly be dealt with in an Act of the County Assembly. The Creation of the Fund though the PFM Act 2012 provides that regulations may be madewould better be provided for in an Act of the Assembly. This provides enforceability and legality of the Whole process.

The Committee had made several suggestions to the Regulatory making authority for amendment. For example,in the interpretation, the term ……"Loan agreement" therein means an agreement between the fund and a member of the Scheme….."*the fund*"in this case is deemed to mean a party to the agreement. In the provisions of the construction of that fund, the committee had recommended that it should have perpetual succession, be a body corporate with the ability to sue or be sued and thus gain a *locus standi*. This meant that enforceability of the rules governing that fund would be easier. The committee had further agreed that if such a provision was not included, then it should be mandatory for the Regulations to provide that the committee should engage a financial institution which will provide rules to be followed and thus provide a means for enforceability. It is important to note that the Regulatory Making Authority made no reference in regard to the recommendations set out in the previous report by the Joint committee on Budget and Appropriation and Delegated County Legislations.

The Committee after lengthy deliberations decided to recommend that the creation of a committee was not cost effective for the fund. Thus, the Committee suggested that the County Executive Committee Should be mandated with all responsibilities of these committees.

The above notwithstanding, the committee agreed that the two regulations should be merged into one regulation with necessary referred to as **Public Finance Management (County Executive Committee (Members) Car Loan and Mortgage Scheme Fund) Regulations, 2015**since the terms of references were found to be almost similar with only a few differences.

Mr. Speaker Sir,

On the issue of CEC finance under the PFM Act designating an administrator to run and administer the fund, it was noted that this was an case of poor drafting since such an appointment would have better be done through a *Gazette Notice*rather than through the Regulations. This would make the revocation of such an appointment easier which would be done in another gazette notice rather than by amending the regulations.The appointment of chief officers to administer funds was also deliberated though members could not agree to whether these Officers should hold such other office as that of an administrator of a fund. Regulation 6 (4) provides that the

Committee shall administer the fund. This is a contradiction since the administrator is the person designated by the CEC finance.

Consequently pursuant to Section 13 (d) of the Statutory Instruments Act, the committee found out that the regulations does not contain imposition of taxation; in this case, the regulations are not made in regard to revenue raising measures.

In addition, the committee observed that at no point do the regulations gives retrospective effect to any of the provisions therein in respect of which the Constitution or the Act does not expressly give any such power, the regulations confines the parties involved to their established functions as per the Constitution and the County Government Act.

Mr. Speaker Sir,

The committee found out that the creation of the scheme funds involves expenditure from the County Revenue Fund or other public revenues since the total sum of the fund and other administrative expenses will be paid from the County Revenue Fund. The regulations are made to provide for car loan and mortgage for ten county executive committee members. Members agreed that the amount of the Capital Fund should be expressly provided for. On the issue, members wondered whether the allocation of funds for the same had been sanctioned by this Honourable House. Thus, plans should be put into place to ensure that finances are allocated tothe fund.

Mr. Speaker sir,

The committee also observed that the regulations are defective in their drafting and some clauses calls for elucidation.The issue of inclusion of the Chief Officer Finance as the administrator in the regulations was also a drafting anomaly. For example, if there was need to have a replacement of the administrator, would there be an amendment to the regulations? The Committee agreed that the best way to designate an administrator was through a Gazette Notice.Further analysis indicated that in the interpretation, the regulations provided that the officer administering the fund means the chief officer in charge of finance and economic planning, the committee found the need to define the latter as, the officer administering the fund means the administrator designated by the county executive Committee member for finance and economic planning as provided by the Public Finance Management Act section 116(2). This would cure the anomaly explained above.

Mr. Speaker sir

In addition, pursuant to Section 13(h) of the Statutory Instrument Act the regulations are defective in their drafting, such as the title of the regulations refers to "….Nyandarua County Executive Committee mortgage (Members) scheme fund.." the committee agreed that the same to refer to "….Nyandarua County Executive Committee (Members) Mortgage scheme fund…..", However after in depth scrutiny the committee noted the due to similarity in context the latter be consolidated into on scheme fund referred to as "….**Nyandarua County Public Finance Management (Executive Committee (Members) Car Loan and Mortgage Scheme Fund) Regulations, 2015**…..", Mr.Speaker sir

The committee found out that the Regulations do not appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made.

Since the creation of the fund is at the prerogative of the CEC member for Finance, the Committee found out that the regulations do not appears to have had unjustifiable delay in its publication or laying before County Assembly.

On the issue of the Regulations making rights, liberties or obligations unduly dependent upon non-reviewable decisions and making rights, liberties or obligations unduly dependent insufficiently defined administrative powers, the Committee found out that the powers and functions of both the Administrator and the Loan Management Committee are not expressly provided for and this is a danger in regard to misuse of public funds. The committee recommended that the functions should be duly and expressly provided for.

Further, the committee did not find any instance where the regulations:

i) inappropriately delegates legislative powers.
ii) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
iii) appears for any reason to infringe on the rule of law; and

iv) inadequately subjects the exercise of legislative power to County Assembly scrutiny.

CHAPTER THREE: RECOMMENDATIONS

Mr. Speaker sir

From the foregoing of the deliberations of the Committee, the members recommended as follows:

1. That the Committee disapproves these Regulations so that the regulatory making authority amends and mergesthe two regulations to provide for consolidated regulations that will have a central management of the Fund.
2. That the Car Loan and Mortgage Management Committee should be the County Executive Committee members and the 'Administrator' who shall appoint a financial Institution to manage the fund.
3. The legislation of regulations should be commenced that will cover all the public servants under the County Government in the Car Loan and Mortgage Fund Schemethat was proposed by the Salaries and Remuneration Commission and Budgetary Allocations made for the same.

CHAPTER FOUR: CONCLUSION

Mr. Speaker Sir,

This Assembly has an enormous responsibility in legislating, representation and oversight. On these functions, this Assembly should while working within the ambits of the law, the principles of separation of powers and checks and balances, diligently deliver optimally.

I thus urge the members to adopt this Report with its recommendations as the resolutions of this Honourable House for implementation by the Executive.

Finally **Mr. Speaker,** it is my pleasant duty and privilege, to on behalf of the Committee on Delegated County Legislation move a motion for adoption report.

Thank youMr. Speaker Sir, God bless this Assembly, God Bless Nyandarua County.