

4th March 2014

1. Hon. Isaac Kiprono Ruto

Governor & Chairperson of the Council of Governors
Bomet County Government
P. O. Box 19 – 20400

BOMET

2. Hon. Dr. Nuh Nassir Abdi

Chairman, County Assembly Speakers' Forum
& Speaker of Tana River County Assembly
P. O. Box 29 – 70101

HOLA

3. Hon. Anne Waiguru, OGW

Cabinet Secretary
Ministry of Devolution and Planning
P. O. Box 30005 – 00100

NAIROBI

Dear

**RE: AN ADVISORY OPINION ON THE EXPENDITURE BY COUNTY
GOVERNMENTS ON FOREIGN TRIPS**

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the

Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the reports in the media on the expenditure by county governments across the country on foreign trips. In particular, it has been reported that county governments have spent millions of shillings to finance non-essential trips by their members. The reports further indicate that the trips have focused on a number of popular destinations, some of which may not add any value to the purposes of county government. The county governments, on the other hand, have stated that the trips are essential for their learning and development and that the money for such trips was approved in their budgets.

The foregoing raises a number of important issues on the management of counties, which are likely to undermine devolution in relation to the operations and development of the counties. How relevant are the foreign trips especially in relation to the destinations visited by the counties? To what extent should counties spend on foreign trips? Have the trips been conducted within the approved budgetary allocations? Are there cheap alternative ways of learning about the best practices in other countries without having to travel abroad? The foregoing state of affairs has occasioned us to invoke our advisory jurisdiction as hereunder.

a) PURPOSE OF DEVOLUTION

The primary purpose of devolution in the Constitution of Kenya is the promotion of good governance through decentralization of power, resources and representation. This is specifically provided for under Article 174 of the Constitution which variously outlines the objects of devolution as, inter alia:

- i.) To promote democratic and accountable exercise of power;
- ii.) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- iii.) To recognize the right of communities to manage their own affairs and to further their development;
- iv.) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- v.) To facilitate the decentralization of State Organs, their functions and services, from the capital of Kenya; and

vi.) To enhance checks and balances and the separation of powers.

The aforementioned objects are critical in ensuring the success of devolution in Kenya. To this end, county governments should conduct their affairs in a manner that accords to the objects and principles of devolution.

b) FISCAL PRUDENCE AND RESPONSIBILITY

Fiscal prudence and responsibility is one of the main tenets of our new constitutional dispensation. Indeed, it is one of the key pillars of the Constitution, and whose observance can, by and large, determine the successful realisation of the objects and principles of the Constitution. It is worth of note that fiscal prudence and responsibility is important for both the national government and county governments. In this regard, the Constitution in Chapter Twelve has extensively provided the principles and framework for public finance for the national government and county governments. In particular, Article 201(d) and (e) requires national government and county governments to maintain fiscal discipline by **'ensuring that public money is used in a prudent and responsible manner, and exercising responsible financial management.'**

The need for financial discipline is further provided for under the Public Finance Management Act which requires the national government and county governments to ensure that public finances are managed in accordance with the principles set out in the Constitution [Section 102(1)(a) & (b) of the Public Finance Management Act]. On the basis of the foregoing, county governments, like the national government, must exercise fiscal prudence and responsibility in accordance with the Constitution, the Public Finance Management Act, and any other relevant law or regulation. They must, for instance, avoid wasteful expenditure on any activity whose objectives can be otherwise achieved with minimal or no expenditure.

c) FOREIGN TRIPS BY COUNTY GOVERNMENTS

As has been mentioned above, the need for a devolved system of government was driven by the need for good governance, public participation and efficiency in service delivery. It is important to note that devolution, as provided under the Constitution, is unique and has different facets, whose implementation may present a number of challenges. This is

especially so given the fact that Kenya has been under a different system of governance for over four decades, and further, from the fact that implementation of the devolved system has just commenced. In this regard, undertaking comparative studies on countries with devolved system of governance, including visits to such countries may be necessary. Due to this, a number of county governments have conducted study visits to a number of countries as a way of learning about the best practices on the various aspects of devolution.

In examining the foreign visits by county governments, the Commission has noted the concerns about the choice of countries, frequency of the visits, expenditure on the visits, sizes of delegations, necessity of such visits and the non-co-ordination of the visits as between the county government, national government and the host country. Towards this end, the Commission has considered the provisions of the Constitution, the Public Finance Management Act and other relevant laws on devolution.

Specifically, the Commission wishes to point out the requirement for county governments **to promote democratic and accountable exercise of power** [A.174(a) & 175(a)]; **enhance public participation in matters that affect them** [A174(c)]; **promote social and economic development and the provision of proximate, easily accessible services** [A.174(f)]; and **enhance checks and balances** [(174(i)]. These provisions are further bolstered by the principles of public finance that require **openness, accountability, including public participation in financial matters** [201(a)]; **prudent and responsible use of public money** [201(d)]; **responsible financial management** [201(e)]; and **avoidance of wasteful expenditure**. These provisions are critical for the success of devolution, and further form the basis upon which the legality and legitimacy actions are assessed. On the basis of the foregoing, the Commission wishes to state as follows in relation to the issues that relate to the foreign visits by county governments.

1. Necessity and Choice of Foreign Visits

While the Commission appreciates the place and role of comparative studies in our devolved system of governance, we wish to point out that such activities should be well planned, based on necessity and circumstances of the concerned county. This invariably requires a systematic approach commencing with the needs assessment to identify critical aspects such as a diagnosis of the prevailing circumstances, the existing gaps, and the nature or type of intervention needed to bridge the gaps for success. The mapping exercise has the potential of identifying key areas for intervention and the means of undertaking such interventions with maximum outcomes at minimal costs.

The Commission further opines that once the county governments have determined the type of intervention needed, the next step should be to determine the means of undertaking the intervention, which may include a comparative study either through training, foreign visits or desk research. In relation to visits to foreign countries, it should be borne in mind that Kenya has a Presidential system of government with a unique system of devolution, which may not be similar to that in other countries. In this regard, county governments should exercise due diligence and ensure relevance of the countries to be visited. While the Commission takes cognizance of the limited time for the counties to prepare their first budgets and that public participation in the process might not have been optimal, it wishes to point out that the counties should ensure prudent and responsible use of the funds.

Based on the issues raised relating to foreign visits by county governments, it appears that they may not have properly considered the important aspects or stages of determining the necessity and means of undertaking the comparative studies. This would explain the reason why some counties commenced their operations with foreign trips immediately after taking oath of office; some countries have become popular destinations for the study tours; unduly large sizes of the delegations have been on foreign trips; and the opposition of such foreign trips by some Members of the County Assemblies in some counties. In this regard, the Commission wishes to state that the necessity and choice of the countries for foreign visits should be based on the following:

- (i) Issue under consideration, the gaps and the nature of interventions needed – whether it is an issue that requires the county government’s consideration.
- (ii) The available intervention options to the county government with maximum output at a minimal cost – whether an expert engaged or desk top review would not suffice.
- (iii) In case a study visit is needed, the choice of the country should be relevant to the issue under consideration, the size of the delegation and the cost of the visit.
- (iv) Other areas requiring the attention of the Members of County Assemblies around the period of visits, such as budgets, motions or approval of appointments.
- (v) In all cases, a foreign visit should always be a matter of last resort.**

2. Use of Alternative Means of Conducting Comparative Studies

One of the hallmarks of financial prudence should be a consideration of whether there are alternative means of undertaking the studies, which would produce maximum output at a minimal cost. In relation to the comparative studies, the available alternative means include use of Internet or extant literature for research and invitation of an expert for training or technical assistance. The use of alternative means becomes paramount and appropriate for the following reasons:

- i.) It involves the participation of a large number of people who would otherwise not have an opportunity to make a physical visit;
- ii.) It offers an accessible, faster, cost effective and convenient means of benchmarking with other jurisdictions; and
- iii.) It provides a platform for obtaining and sharing information on the best practices for more than one jurisdiction at once.

The Commission wishes to point out that the information on some of the best practices from other jurisdictions are already available in literature, most of which can be found on the Internet. In addition, there are a wide range of experts with practical knowledge and skills on the best practices who could be consulted by the County Governments on the issues under consideration. Further, we wish to encourage county governments to invite the Transition Authority, Commission for the Implementation of the Constitution, Kenya Law Reform Commission on any other institution or person or this Commission, to clarify such issues as may be of concern to them.

On the basis of the foregoing analysis, we specifically advise as follows:

- i.) That the County Governments should take cognizance of the purpose of devolution and conduct their affairs in a manner that accords to objects and principles of devolution. Towards this end, the **Governors and Speakers of the County Assemblies should exercise fiscal discipline by ensuring that public money is used in a prudent and responsible manner.** They should avoid wasteful expenditure on any activity, including the foreign trips, whose realization can be achieved with minimal or no expenditure.
- ii.) That the County Governments should embrace a participatory approach to identifying the specific areas requiring interventions in terms of best practices from other countries, and the nature of interventions to bridge the gaps. Where the intervention involves travelling to another country, they should consider the choice and relevance of the country to be visited, size of the delegation, frequency of the visits, expenditure and the general outcome. In such circumstances, a small delegation which reports to the larger team is desirable.
- iii.) That the County Government should ensure prudent allocation of resources during the budgeting process based on the constitutional and statutory guidelines. Failure to adhere to the guidelines would amount to a breach of the Constitution, the Public Finance Management Act and constitutes misallocation of resources, which is actionable under various anti-corruption and integrity related legislation.
- iv.) That the County Governments should use alternative ways of learning about the best practices in other countries through the use of available literature or by inviting internal or external experts to make presentations to the Members of the County Assemblies and other officers in the counties. They could, for instance, employ research assistants, on temporary basis, to assist in conducting research on the various best practices under consideration.

- v.) Pursuant to Article 59(2)(h-k) of the Constitution and Section 8 of the Act, **the Commission may, in appropriate instances, conduct systematic investigations around the visits to determine whether the visits were necessary, and make appropriate adverse findings, with necessary consequential action, where such expenditure is found necessary.**

- vi.) The Commission hereby reminds the Speakers of the County Assemblies and Members of the County Assemblies that they are State Officers within the meaning of Article 260 of the Constitution and are, therefore, covered by the requirements of Chapter Six and Article 232 (accountability for administrative acts) of the Constitution. **As such, where it is found that expenditure was improper, they would be personally and collectively held liable, which may include individual surcharge, criminal charge of abuse of power, finding of malfeasance and unfitness to hold public office, and may be disqualified from being eligible to be elected or appointed to public office.**

- vii.) The Commission is currently working with the Transition Authority to undertake a mapping analysis so that in the event that a county seeks to conduct a study tour, we would provide advice, on necessity, choice of country, size of delegation, duration of the visit and composition of the delegation.

- viii.) As provided for under the preamble and Article 174 of the Constitution, Kenya is one indivisible nation with 47 county governments. As such, there is need for co-ordination between the county governments and the national government in relation to the foreign trips by the county governments. In this regard, we wish to call upon the county governments to work closely with the Ministry of Foreign Affairs and the Transition Authority for co-ordination of such trips.

- ix.) **Where it is found necessary to conduct study tours, the report of such visits should be prepared and tabled in the County Assembly.** The report should capture the objectives of the visit, lessons learnt,

expenditure and the benefits of the visits. The report should also be issued to the respective Governor and Senator of the County, Transition Authority, Auditor-General, Controller of Budget and the Commission on Revenue Allocation.

DATED this **4th DAY** of **MARCH** 2014

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION ON ADMINISTRATIVE JUSTICE

Cc:

1. All Governors
2. All Senators
3. All Speakers of County Assemblies
4. Transition Authority
5. Commission on Revenue Allocation
6. Commission for the Implementation of the Constitution
7. Clerk of the Senate