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A. CONSTITUTIONAL FOUNDATIONS OF THE GOVERNORS RESPONSE

1. **Article 1(1) of the Constitution** provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.
2. **Article 2 (1) of the Constitution** is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
3. **Article 2 (2) of the Constitution** provides that no person may claim or exercise State authority except as authorised under the Constitution.
4. **Article 3 (1) of the Constitution** provides that every person has an obligation to respect, uphold and defend the Constitution.
5. **Article 10 of the Constitution** which prescribes core national values and principles of governance which bind-all State organs, State officers, public officers and all persons whenever they apply or interpret the constitution enact, apply or interpret

any law make or implement public policy decisions. Some of the national values and principles of governance mentioned include:

- i. good governance;
- ii. integrity;
- iii. human rights;
- iv. democracy;
- v. transparency;
- vi. accountability;
- vii. rule of law;
- viii. sharing and devolution of power,
- ix. democracy and participation of the people; and
- x. non-discrimination

6. Article 19 (1) of the Constitution provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

7. Article 19 (2) of the Constitution provides that the purpose of

recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

8. Article 19 (3) of the Constitution provides that the rights and fundamental freedoms in the Bill of Rights:-

- (a) belong to each individual and are not granted by the State;
- (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
- (c) are subject only to the limitations contemplated in the Constitution.

9. **Article 28 of the Constitution** provides the right of every person to human dignity and to have the same respected and protected.
10. **Article 38 (3) (c) the Constitution** provides the fundamental right of a person who is elected to hold office.
11. **Article 73 of the Constitution** which stipulates that the authority assigned to a State Officer is a trust to be exercised in a manner that:-
- i. is consistent with the purpose and objects of the Constitution;
 - ii. demonstrates respect for the people ;
 - iii. brings honour to the nation and dignity to the office; and
 - iv. promotes public confidence in the integrity of the office.
12. **Article 47(1) of the Constitution** provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

13. **Article 174 of the Constitution** provides the objects of devolution as follows:-

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) 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;
- (d)) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(i) to enhance checks and balances and the separation of powers.

14. **Article 181(1) of the Constitution** provides that a county governor may be removed from office on any of the following grounds:-

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

15. The interpretation of **Article 181 of the Constitution** has been made as follows:-

‘whatever is alleged against a Governor must;

(a) Be serious, substantial and weighty.

(b) There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.

(c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.

(d) The charges as framed must state with degree of precision the Article (s) or even sub-Article(s) of the Constitution.

16. **Article 179 (1) of the Constitution** provides that the executive authority of the county is vested in, and exercised by, a county executive committee.

17. **Article 179 (4) of the Constitution** provides that county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.

18. **Article 185 (3) of the Constitution** provide that a county

assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

19. **Article 185 (4) of the Constitution** provide that a county assembly may receive and approve plans and policies for:-

- (a) the management and exploitation of the county's resources; and
- (b) the development and management of its infrastructure and institutions.

20. **Article 195 (1) of the Constitution** provides that a county assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information.

21. **Article 195 (2) Constitution** provides that for the purposes of clause (1) (above), an assembly has the same powers as the High Court to:-

- (a) enforce the attendance of witnesses and examining

them on oath, affirmation or otherwise;

(b) compel the production of documents; and

(c) issue a commission or request to examine witnesses abroad.

22. **Article 196 (2) of the Constitution** provides that a county assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

23. The **Fourth Schedule of the Constitution** provides that a County Government has responsibility over County health services, including, in particular:-

(a) county health facilities and pharmacies;

(b) ambulance services;

(c) promotion of primary health care;

(d) licensing and control of undertakings that sell food to the public;

(e) veterinary services (excluding regulation of the profession);

(f) cemeteries, funeral parlours and crematoria; and

(g) refuse removal, refuse dumps and solid waste disposal.

24. The **Fourth Schedule of the Constitution** also vests a County Government with responsibility over County planning and development, including:-

(a) statistics;

(b) land survey and mapping;

(c) boundaries and fencing;

(d) housing; and

(e) electricity and gas reticulation and energy regulation

B. FACTUAL SITUATION UNDERLYING THE RESPONSE

1. On or about Friday 9th May 2014, at around 11.25 am a letter from the Speaker of the County Assembly was received at the Governors' Office.
2. The letter required the Governor to appear before the County Assembly on Wednesday 14th May 2014 at 2.30 PM.
3. **Article 195 of the Constitution** empowers the County Assembly or any of its Committee to summon any person to appear before it. Before the letter of 9th May 2014, the Governor has never been summoned or asked to appear before the County Assembly Committee on Energy, Health, Justice or any other Committee to answer questions on the charges.
4. The Governors avers that Article 63(2) of the Standing Orders which the Speaker made reference in his letter dated 9th May 2014 contemplate the Governor being given a Report of the Select Committee which investigated the matter three days before the date of the motion. That is to say :-

- (a) It is a mandatory requirement for the Governor to appear before a Select Committee;
- (b) If he appeared on 14th May 2014 at 2.30 PM, the report of the Select Committee should have given to him three days earlier.
- (c) Standing Order Number 63 (1) and (2) contains an inbuilt mechanism that guarantees the Governor a fair hearing.
- (d) If the County Assembly followed Standing Order Number 63 (2), the Report in question would have detailed the charges in question and examined the Governors responses.
- (e) When the Governor appeared before the plenary of the County Wednesday 14th May 2014 at 2.30 PM and made submissions, there was a **legitimate expectation** that the County Assembly would put its findings in a Report, which as per the Standing Order Number 63 (2) would provide the basis of any vote.

5. Therefore, Governor avers that the impeachment proceedings at the County Assembly don't comply with the County Assembly of Kericho's Standing Orders, the County Government Act 2012 and the Rules of National Justice and the Constitution of Kenya in that :-

a. the County Assembly didn't not constitute a Select Committee investigate the allegation as required by Standing Order No. 63 (1) and (2).

b. In approving the notice of motion for impeachment, the Speaker acted in violation of the Order 63 (1) and (2) of the interim standing orders in that:

(i) A select committee has never been established to investigate the allegations against the Governor.

(ii) The Governor has never been summoned and/or required to appear before the select Committee.

(iii) The select Committee has never prepared a report.

(iv) The impeachment proceedings in the Assembly can only be based on the report of the select Committee.

(v) The Governor has never been served with the report of select Committee.

6. The County Assembly Speaker alleges that the House Business Committee sat on 9th May 2014 and approved the motion for introduction in the order paper for Wednesday 14th May 2014. From the County Assembly's bundle of documents:-

(f) There was no House Business Committee meeting on 14th May 2014 and if there was a meeting, there was no sufficient quorum for the meeting in that :

(i) On 13th May 2014:-there was a meeting of all women elected and nominated leaders in Naivasha. All women MCA's from Kericho County Assembly were paid per diem to attend the meeting at Naivasha.

(ii)The other male members of the Committee were in Nairobi and Naivasha for meetings.

7. The purported proceedings to remove the Governor from office are extremely malicious having been precipitated by the decision of the County Executive of Kericho to file Constitutional Petition No. 4 of 2014 wherein the Executive complains that the County Assembly was breaching the principle of separation of powers when exercising its oversight roles. The Petition in question has been submitted to the Committee.

(a) Honourable Senators, we wish to put in our submission in regard to the impeachment proceedings before you, urge you to deeply consider the following issues.

(b) An impeachment proceeding is a constitutional process. Adherence to the constitutional parameters and the applicable law is imperative. In this regard the process had to conform with:-

- (i) The provisions of the Constitution
- (ii) County Government Act
- (iii) Public Procurement and Disposal Act
- (iv) Public Finance Management Act and;
- (v) Standing Orders for Kericho County Assembly

(c) Governor, Paul Kiprono Chepkwony like all other Kenyans is entitled to the right to fair administrative actions and due processes of the law. Article 47(1) of the Constitution of Kenya 2010.

(d) This Impeachment Proceedings before the Kericho County Assembly violated this clear provision of the Constitution.

(e) The Standing Orders are couched in mandatory terms and leaves no room for discretion.

(f) During the proceedings before Your Honour, a question arose as to whether the entire Assembly

could not convert itself into a committee. Our submission is that the Plenary Committee was obliged to ensure that evidence was recorded as part of the report.

(g) To date the Committee, either the Plenary or select has not collected any evidence. There is no report. It is clear that the mover of the Motion referred to a document of allegation.

(h) It is notable that the impeachment process took place during recess. We refer to this Honourable Committee to Minutes of the House Standing Committee of 30th April, 2014. In MIN/HBC/4/05/2014 NOTICE FOR IMPEACHMENT OF GOVERNOR.

(i) The last paragraph indicates that the Assembly proceeded to have a recess. It is instructive that the Speaker invoked the Provision of Standing Order 64 to Summon Members on 9th May, 2014 for a special sitting. A wrong Order was invoked. The

speaker ought to have invoked Standing Order No. 26. He ought to have gazetted the date. We submit that the proceeding of 14th May, 2014 before the Assembly was unlawful as the house was not properly constituted.

8. There were 5 grounds of impeachment in the Notice of Motion dated 30th April 2014. One can only speculate what happened between the time these allegations were taken to the floor of the County Assembly and the time these allegations were brought before the Governor as only three were presented.
9. Besides, in approving the notice of motion said to be prepared by Hon. Albert Kipkoech, the speaker of the County Assembly acted with intense malice.
10. The said Petition was slated for inter-parties hearing on 30th April 2014 when the date when the motion was introduced in the Assembly.

11. **After Court appearance on 30th April 2014** some members of the County Assembly of Kericho led by the Speaker of the County Assembly held demonstration in Kericho town against the Governor. The Video in question has been submitted to the Committee.

12. In sum, the entire impeachment proceedings against the Governors are ill conceived, malicious, capriciously, bad in law and unconstitutional.

C. SPECIFIC RESPONSES BY THE GOVERNOR

1..GROSS VIOLATION OF THE CONSTITUTION &PRIVATE PARTNERSHIP ACT

Irregular agreement between the County Government of Kericho and BlueTech UK Groups Ltd:

Allegation

On 13th January, 2014 the Governor on behalf of Kericho County Government entered into an agreement with a private company by the name BlueTech Groups Limited. The terms of the agreement were that the private company would design, build, finance, operate and subsequently transfer to the County 100MW solar plant whereby the proposed generation of 100MW electricity would be implemented in phases and the cost would be one million three hundred and fifty thousand dollars (1,350,000 USD) per MW ([Annexure 1a](#))

The Public Private Partnership Act No 15 of 2013 gives procedures which need to be followed before entering into such agreements. **Section 20 States** “A contracting authority shall prior to entering into public private partnership arrangements pursuant to Section 19, undertake a sector diagnostic study and assessment covering the following;

- ❖ Technical issues
- ❖ Legal regulatory, technical framework
- ❖ capacity status

- ❖ Commercial, financial and economic issues
- ❖ Such other issues as the Cabinet Secretary may stipulate”

Did the office of the Governor when entering into the agreement take a Diagnostic study into legal, regulatory and technical framework?

Response

The agreement in question is a Memorandum of Agreement / Understanding. **It is not a contract.** It is a document that records the details of an agreement between two companies or organizations which has not been legally approved (Cambridge Dictionary).

Cambridge Dictionary definition

“A Memorandum of Agreement is a document that records the details of an agreement between two companies or organizations which has not yet been legally approved”

MOAs are not legally binding but they carry a degree of seriousness and mutual respect, stronger than a gentleman’s agreement. Often, MOAs are the first steps towards a legal contract. In US law, a memorandum of agreement is synonymous with a letter of intent (LOI), which is a non-binding written agreement that implies a binding contract is to follow.

An MOA is more formal than a verbal agreement, but less formal than a contract. Organizations can use an MOA to establish and outline collaborative agreements, including service partnerships or

agreements to provide technical assistance and training. An MOA may be used regardless of whether or not money is to be exchanged as part of the agreement.

Therefore no legal contract had been entered between the County Government of Kericho and BlueTechs UK, Groups Ltd. It is just a gentleman's agreement at a serious level.

The Governor for all intents and purposes has unequivocally stated he has now taken legal advise and has commenced the process of subjecting the project to Kenya's regulatory requirements.

Clause 1(i) of the MOA page 4 States that "The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require considerable outlay of funds. The commencement of the project will be subject to the outcome of the study"

The Memorandum of Agreement in question is also subject to adherence of Kenya's regulatory requirements. This fact has been confirmed by the Governors legal counsel, the investor and the Director of Public Private Partnership at Treasury, Eng. Stanly Kamau.

The entire transaction is work in progress. The next step is to strictly comply with the legal framework in Kenya.

Allegation

Article 201 of the Constitution of Kenya 2010 highlights the principles of public finance which State that there shall be; openness and accountability including public participation in financial matters. There is no evidence that indeed public participation was done on any platforms established under Section 91 of the County Government Act as the County was to contribute 10% of the consideration which 135,000USD per MW. Likewise, the provisions of Article 201 of the Constitution require that the assembly for purposes of openness and accountability approves such projects BUT the approval of the Assembly was not sought in this instance.

Response

During the signing of the MOA on the 13th January 2014 Stakeholders who include; Members of County Assembly, County staff, community representatives and other stakeholders were invited. Details of the MOA were shared (**Annexure 1b** {letter of invitation dated 10th January 2014 to the Clerk of Kericho County Assembly}, **Annexure 1c** {programme of meeting at Tea Hotel on 13th January 2014}, **Annexure 1d** {photograph of signing ceremony outside Tea Hotel}, **Annexure 1e** {DVD containing BlueTechs function at Tea Hotel on 13th January, 2014})

Public Consultation/ participation in Kipsitet 15th January, 2014 was undertaken (**Annexure 1f**). In both forums evidently, the details of

the MOA were provided which included the contributions, that is, the 10% contributions presented.

The Executive has also indulged the following House Committees on the same proposed project to enhance public participation

- i) Energy Committee
- ii) Trade Committee
- iii) Budget and Appropriation Committee
- iv) Planning Committee

(Annexure 1g and Annexure 1h)

(Hansard Details)

Details of the investment have been openly been shared with the assembly. In all stages of the process the approval of the County Assembly will be sought.

Allegation

- (a) Other public participation forums are anticipated during the PPP compliance process, feasibility study, Environmental Impact Assessment (EIA), Benefit Sharing Agreement deliberations, and so on.

Section 22 of the Public Participation Act 2013 States; “where a contracting authority intends the authority enter into a project agreement in relation to that project on behalf of the authority”

The said agreement was executed by the Governor. **This is unlawful as the accounting officer as per Section 148 of the Public Finance Management Act 2012, read together with Section 2 States that ‘...the Committee Member for Finance shall be the accounting officer.’ This means the Governor abused his office by unlawfully entering into the contract.**

Response

No contract has been entered into. What was executed is a Memorandum of Agreement

Allegation

- ❖ **Section 61(3) Public Private Partnership Act 2013** States that a ‘contracting authority shall not consider a project for procurement under this section unless
- a) The project shall provide value for money
 - b) The project shall be affordable, and
 - c) The appropriate risks are transferred to the private party.

The word affordability as defined by the **Private Public Partnership Act, Section 2** is defined to mean.

The financial commitments to be incurred by a contracting authority in terms of a project agreement can be met by funds:-

- (i) Designated within the existing budget of the contracting authority for its functions for which the agreement relates

- (ii) Assigned to the contracting authority in accordance with its relevant future budgetary allocation provided that the commitment shall be sustainable and shall not impose an unreasonable burden to the contracting authority

The Governor signed the contract by committing 10% of the consideration hence violating the first condition as the funds were never budgeted for.

Failure to carry out due diligence before entering into this agreement exposed the County to unreasonable burden getting into debts hence violating the second condition.

Response

There was no contract in the first place. Consequently the 10% was never committed. The implementation of the project was due to be subjected to an extensive and final feasibility study, and regulatory compliance was anticipated. MOA (Page 4 Section 1(i)). Also in the MOA, the implementation is anticipated to commence between 9-12 months from the time of signing. This then means commencement if approved should fall in a different financial year, as in Section 1(f) of the Memorandum of Agreement (MOA).

Clause 1(i) of the MOA page 4 States **“The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require**

considerable outlay of funds. The commencement of the project will be subject to the outcome of the study.”

Allegation

The County Assembly never approved any law regarding the establishment of any public private partnership project facilitation fund. The Governor hence entered into an agreement without ensuring there was indeed a fund that would be used to prepare for the project, failed to comply with tendering process and project appraisal.

Response

The implementation stage has not been reached. The County has begun the process of engaging the Public Private Partnership Unit regarding the Compliance with and understanding of PPP Act 2013.

Allegation

As per clauses 1(c) and (g) of the agreement the County is to contribute 10% of the capital investment and land. The County will lease for a period of twenty five (25) years, as this is the term period of the contract, 500 acres of land to BlueTechs UK Group Ltd for the project. The exit clause in the agreement States that either party may terminate the agreement by giving 6 months notice consequently assets, which includes the land and liabilities will be apportioned on the basis of the ratio 70:30, whereas, the private company gets 70% and the County 30% of the same. **Section 65(4) of the Private**

Public Partnership Act 2013 States that ‘ a project agreement involving the use of a contracting authority property by the private party shall not divest the contracting authority of the responsibility for ensuring the property is appropriately protected against factors which may negatively affect the property including forfeitures, theft, loss or wastage.’ In the case of the termination as per Clause 5 (d) of the agreement, the County stands to lose 70% of the land property notwithstanding the period or term of the contract hence exposing the County to loss or wastage by entering into such an agreement.

Response

5(d) is the Exit Clause. There is no indication in the Clause supporting the above. The ration of 70:30 is on the Benefits Sharing Agreement. It is not clear what was used to arrive at the allegation that the County stands to lose 70% of the land.

Allegations

Section 107 (1) of the Public Finance Management Act 2012 States that ‘In managing the County Government Public Finances, the County Treasury shall enforce the following fiscal responsibility principle....

(f) the fiscal risks shall be managed prudently.’

The County Executive Member in charge of finance admitted in the Kericho County Fiscal Strategy Paper 2014/2015 page 16 that the

risks to the output for 2014 included the County Government embracing the Public Private Partnership framework in implementing key infrastructure projects. The CEC Finance also State that there fiscal risks associated with contingent liabilities which key materialize could undermine fiscal discipline.

This is in reference to the agreement referred hereinabove into between the County and a private entity without due process.

Response

The Advisory is going to be adhered to in the subsequent events and processes and there is no attestation of refusal by the Executive to comply. The CEC in charge of Finance gave a precaution that the projects to be implemented under the arrangement of the PPP will be scrutinized to safeguard the interest of the general public. If this project takes off under the same arrangement, the outcome of the feasibility study will outline the viability, cost implication and the returns from the same. This will inform County Governments on its implementation. Refer to County Fiscal Strategy Paper 2014/2015 part 2.7. This was not specific to the proposed solar project but in caution in general for any project to be implemented under the PPP arrangement (**Annexure 1i**)

From the above Statement it is clear that the Governor acted outside his mandate and in breach of laid down laws in entering into the said agreement.

The word 'affordability' is also described to mean the cost of delivering a facility or service in relation to the project of the contracting authority does not impose an unreasonable financial burden on the end user.

Allegation

- ❖ Failure to conduct the public participation and carry out diligence, the County cannot ascertain the actual costing of the project. This would mean that the end users would be subjected to high fees, charges, and taxes so as to meet the cost of delivering the service. The Governor by entering into such contracts exposed the County to such unnecessary risks.
- ❖ All projects should be procured through a competitive bidding process as is stipulated in Section 29 of the Public Private Partnership Act. No bidding was ever done for this project hence the whole process is an illegality. There were no requests done for qualification of such services as there was no notice/ advertisement on any newspapers. Even if the Governor privately initiated the investment there are certain conditions which have to be fulfilled as is stipulated in Section 61 which then needs to be proved by the Governor.

Did the County Executive establish a fund as is Stated in Section 68 of the Public Private Partnership Act?

Response

The PPP Part 8 Section 61(3) was quoted in isolation. It was supposed to be interpreted in totality starting from Part 8 Section 61(1) (2) (3)

The project is a privately initiated proposal hence will not be subjected to competitive bidding as per the PPP Act 2013 Section 61 (1). Therefore there is no violation of the PPP Act. All the factors will be taken into consideration at the PPP compliance, feasibility study, BSA, EIA and other processes stipulated for regulatory compliance **(Annexure 1j)**.

In conclusion, this is a proposed project. The only stage concluded is the signing of the Memorandum of Agreement. The other processes are ongoing, which included complying with the PPP Act **(Annexure 1k)**. There is no money lost nor any liability incurred from the proposed project as contained in the letter from BlueTechs dated 9th May 2014 **(Annexure 1l)**

2. GROSS VIOLATION OF THE PUBLIC FINANCE MANAGEMENT ACT 2012, THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE RULES MADE THEREUNDER AND VIOLATION OF THE CONSTITUTION

Irregular agreement between E-Plus Medical Service and Kericho County Government

On 7th January 2014, the Governor entered into an agreement on behalf of Kericho County Government with E-Plus Ltd (The Company). The terms of the agreement were that the private company was to provide comprehensive emergency services which include 7 ambulances, paramedics and ambulance operators to Kericho County. The contract price is Kshs. 600,000 per month per unit which means that the total consideration would be Kshs. 4,200,000 per month.

The contract (**Annexure 2a**) period was for 12 months which would amount to a total amount of Kshs. 50, 400,000.

Allegation

Article 201 of the Constitution highlights the principles of public finance which State that there shall be openness, accountability including public participation in financial matters. There is no evidence that indeed public participation was done on any platforms established under **Section 91 of the County Government Act**.

Response

Public participation was done through the County Integrated Development Plan (**CIDP**) process where teams went to all the wards in Kericho County to engage the public in putting the plan in place. As indicated in Chapters seven and eight of the CIDP, provision of ambulance services was one of the most common felt health needs by the residents throughout the County.

Allegation

The consideration was never budgeted for (**Annexure 2b**) hence the Governor ought not to have entered to such an agreement. Entering into such a contract violates the provision of Article 226 (5) which States;

“if the holder of a public office, including a political office directs or approves the use of public funds contrary to the law or instructions, the person is liable for any loss arising from that loss whether the person remains a holder or not”

The guiding principle of leadership and integrity as highlighted in Article 73 of the Constitution of Kenya includes selfless service based solely on the public interest demonstrated by honesty in the execution of public duties. The Governor was never honest by entering into the

said contract with the knowledge that there were no funds for the same as the money was no budgeted for.

Under the Public Procurement and Disposal Act and the rules made thereunder, any procurement for services such as the present one should comply strictly with the provisions of these mandatory provisions. These provisions were not followed in the procurement of the above referenced ambulance services.

Response

A Memorandum of Understanding (MOU) was signed on 7th January ([Annexure 2a](#)). However; it was to take effect on 20th February 2014 as per the Clause on the first paragraph on the last page '**....shall take effect from the commencement date and shall continue in force for one year SUBJECT to termination or renewal**'

The commencement date was 20th February, 2014 (**Page 2 second last paragraph.**) This was budgeted for in the supplementary budget which had already been submitted to the County Assembly. The supplementary budget was anticipated to be approved before 20th February, 2014.

Further to this, 13th of January, 2014 the Ag CEC Health and CEC Finance and Economic Planning and Kericho County Assembly Health Committee had a meeting on the same. The committee was

convinced on the hiring of the ambulances **(kindly refer to the Hansard to be provided by the County Assembly on the matter)**

Allegation

Article 179 (4) of the Constitution provides that the County Governor is the Chief Executive Officer of the County while Article 179 (6) of the Constitution provides that the members of the County Executive Committee are accountable to the Governor for the performance of their function and exercise of their powers in consequence thereof.

The Governor is liable for the gross violation of Article 27 of the Constitution by;

- Failing and / or neglecting to ensure that the contracts for procuring the ambulance and solar plant in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
- Neglecting to follow the statutory procedures in procuring for the solar plant and hiring of ambulance on a bid to defeat fairness, transparency, competitiveness and cost effectiveness in application of public funds.

Article 10 (2) of the Constitution of Kenya 2010 pronounces good governance, integrity, transparency and accountability as among the National values and principles of governance to which every State organ, State officer or any public officer is bound. The Governor of Kericho has violated this Article by failing to ensure adherence to laws

and Regulations that aid transparent and accountable use of County resources among them the Public Procurement Disposal Act 2005 and Regulations thereunder and the Public Finance Management Act 2012.

Response

The Kericho County Governor did not violate the Constitution in any way because he terminated the process of procurement of the hiring of ambulance services on advice given after consultations with the members of the County Assembly Health Committee.

On Friday 14th February, 2014 there was a meeting between the CEC Health Services, CEC Finance and Economic Planning, the Acting Chief Officer Health Services and the Kericho County Assembly Health Committee. After much discussion, the Committee was of the opinion that the ambulance line item be removed from the budget. The Committee further indicated that the ambulances would be budgeted for in the next financial year and that they would visit the Counties that had hired and those that had bought their ambulances in order to compare and have a balanced opinion **(Kindly refer to the Hansard to be provided by the County Assembly on the matter**

The Governor was advised about the same day by the CEC Health Services vide a letter dated 14th February, 2014 **(Annexure 2c)**. A cancellation letter dated 14th February 2014 was sent to KRCS E-Plus

Limited. This was way before the commencement date (20th February 2014 **(Annexure 2d)**)

A response was received from the Kenya Red Cross Secretary General vide a letter dated 19th February 2014 **(attached)** which absolved the County Government from any liability **(Annexure 2e)**. The Committee has also been provided with another latter dated 28th May 2014 that fulsomely clarifies the issue.

Strictly speaking, from the County Assembly's presentation their main argument on this point is that the purported termination of the Contract by the Governor and Red Cross is of no legal effect. In our view this is question of legal interpretation. It is not a ground of impeachment of the Governor. It does not meet the threshold. Finally, no single penny has been paid. The County Assembly deleted the budget line for this project hence the cancellation.

3. GROSS VIOLATION OF THE COUNTY GOVERNMENT ACT

Allegation

Unlawful recruiting of Personnel and creating in the County contrary to the provisions of Section 59, 60 and 62

Pursuant to **Section 59 of the County Government Act** “the County Public Service Board is mandated to establish and abolish offices in the County Public Service.”

Section 60 of the County Government Act also stated that “the Board can only establish these offices if satisfied that;

- The establishment of the Public Office serve public interest in line with the core function of the County Government.
- There exists no other public office in the County Public Service discharging or capable of discharging the duties for which the County is requested to establish another office.
- Upon establishment of the office, the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures...”

Section 62 (2) of the County Government Act states,

“if the Board intends to establish or abolish an office, it shall submit its proposal to the County Assembly for approval through the County Executive Committee member responsible for the County Public Service”

The Governor violated the above stated provisions by creating offices on diverse dates from May 2013 to April 2014 are unlawful as the offices were not established by the County Public Service Board and neither were the offices approved by the County Assembly.

Furthermore, the offices were not competitively sourced. The offices are as follows;

- Assistant Peace and Conflict Management
- Assistant Political Advisor
- Assistant Chief of Staff
- Assistant Economic Advisor
- Assistant Advisor, Science, Technology, Innovation and Research.

The Governor went ahead to appoint personal staff who failed to give adequate information which includes copies of their curriculum vitae, academic and professional qualification as is required by the Transitional Authority guidelines. The offices include;

- Chief of Staff
- Economic Advisor
- Legal Advisor
- Messenger
- Gardener
- Tea Person

The Governor also appointed 2 other unqualified Personnel to the position of;

- Director Governor's Press
- Political Advisor

All holders of the above cited offices unlawfully drew salaries from the County Treasury and burdening the ever increasing Wage Bill.

Response

a) Illegal establishment of offices

With the establishment of County Governments after the elections of March 2013, Governors came into office when there were only two cadres of staff at the County level. These were the categories under the former Local Authorities and staff which had been deployed to the Counties to man some critical positions.

Transition Authority (**TA**) issued guidelines on the cadre of staff to be in place once the Governor was in office. The guideline (**Annexure 3a**) provided that the Governor shall identify the persons to be appointed to the positions, which will be regularized by the County Public Service Board once they were in place. The positions included:

- Chief of Staff
- Economic Advisor
- Legal Advisor
- Political Advisor
- Director, Governor's Press Service
- Support Staff (Personal Assistant, Personal Secretary, Gardener, Cook, Driver and Messenger)

These positions were effectively established by TA and not the Governor and not need to go through the Assembly as required in Section 62. It is important to point out that the TA guidelines **did not** indicate that the Governor could not recruit other Personnel when there was need. Furthermore, Section 31(d) of the County Government Act (2012) states that the Governor shall have such powers as may be necessary for the execution of the duties of the office of the Governor.

Other positions given in the TA guidelines were to be filled competitively once the County Public Service Board (**CPSB**) was in place as required by the relevant Sections (59-61) of the County Government Act (2012). Some of the positions have since been filled to include the appointment of Chief Officers, Chief Budget Officer, Chief Economist and the Head of Human Resource Management among others.

b) Appointment of Assistant Advisors

The appointment of Assistant Advisors was out of the realization that the volume of work in the Governor's office kept increasing as the citizens started dealing with the County Government in earnest. The Advisors at this time were virtually one man offices. Considering that an officer takes leave or may be indisposed at times, it was apparent that some of the Officers under the Governor's personal staff would require assistants. This is confirmed by a request made by the Chief

of Staff to the Governor ([Annexure 3b](#)). Once again TA guidelines did not in any way suggest or imply that the Governor could not recruit assistants.

Towards meeting the objects of the relevant laws in promoting the interests of the County and facilitating necessary development, the Governor felt that there was a need to have a Research Advisor. In view of the disturbances which have been witnessed in the County particularly during election time, the Governor also felt that it was necessary to have an Advisor to look into issues of peace and conflict resolution. Clearly, no investor would want to have anything to do in a County that is perennially going through never ending cycles of violence. Peace was seen as a critical component in the establishment of a strong foundation for economic development.

c) Provision of inadequate information on qualification of Personnel

The allegation that the Personnel appointed did not provide adequate information on their qualification is untrue. Their documents were in their respective files at the Registry and have so far been availed to the County Public Service Board.

d) Appointment of unqualified Personnel

Concerning the recruitment of political and economic Advisors without the qualifications given in the TA guidelines, our take is that the exposure of the two individuals in their careers put them in a position where they were actually overqualified for the positions to which they were appointed by the Governor.

The Political Advisor is someone who has spent most of his working life as a trade unionist to the extent of rising to the level of a National Chairman of KNUT will obviously be several times more competent than a young man with any first degree that has been jobless for five years.

As for the Economist, the economic mainstay of the majority of the residents happens to be tea farming. The appointment of an individual who has risen to the highest level in one of the multinationals in the sector could not have been a mistake. The man has a vast experience in processing, value addition and research among others. He can deliver more to the County compared to a job seeker with a degree with a degree in Economics. In addition, personal staff as the word indicates should be people well acquainted with the user and whom the user has all the confidence in. The personal cook to the Deputy Governor does not have a Form four certificate but this is the person the Deputy Governor felt she could trust in her house.

While noting the contents of Sections 59 to 62 of the County Government Act and the TA guidelines which did not categorically

indicate that the Governor cannot fill other positions which he feels are desirable in the interest of the County, it was agreed that the CPSB seeks an advisory from the TA on whether the recruitment of additional appointees could be regularized by the Board. The Board then wrote to the TA in February 2014 with a reminder sent in April, 2014 ([Annexure 3c](#)). This denotes that no one wanted to break the law. The reply was received in April 2014 in a letter dated 23rd April 2014. The advice was that the Governor should not recruit Personnel and that recruitment of staff should be as given in the Act. The Advisories would not have been sought if indeed the Governor wanted to break the law. The office would not have taken advantage of this “lacuna” if indeed this was the case.

Following the Advisory, the Board and the Governor’s office are undertaking the following specific actions:

- Positions which the County Government feels are essential in the interest of the people of the County and its development will be established procedurally and filled competitively.
- Officers who meet the requirements for the positions can apply for the positions if they so wish.

Conclusion

In our summary, our view is as follows:-

- This is a period of transition in the implementation of the Constitution. We are just over one year old since the County Governments took office. Indeed the TA itself is still in place. The fact that the body is still operating confirms that we are in transition.
- It is our understanding that this is a period to make our interpretations on areas which may not come out clearly in the laws of the Constitution. The fact that several cases of interpretation have been filled with the judiciary by various Counties confirms this.
- To the extent that the basis for staff recruitment was based on the TA circular which was not explicit on the limit to which the Governor should be deemed not to have broken any law.
- The office is in the process of finalizing the County organizational structure and staff established in conjunction with the Ministry of Devolution and Planning. In the proposal, the Governor's office should have been an optimal staff of one hundred Personnel in order to enhance efficient and effective service delivery. This is way above what we have now [\(Annexure 3d\)](#)

D. GENERAL RESPONSE ON THE ALLEGATIONS

The Governor avers that the allegations against him are reflective of challenges in the implementation of the devolved government framework. They are not grounds for impeachment of an elected Governor. Kenya's devolution is a massive transition and requires taking stock of the current situation and making decisions about staffing counties and appropriately phasing in functions/resources; but there has been very little attention to strategy. Fundamentally, the success of devolution will require huge resources, public awareness, capacity building initiatives and highly committed personnel, institutions and organizations, founded on the national values as enshrined in the Constitution.

The essence of devolution is that at the local level the people are allowed a certain flexibility within which they can make decisions that are unique to themselves and their locality. They are allowed a measure of self-governance at this level but at the national level, decision-making is shared. The risks affecting the implementation of devolution in Kenya could be categorized as strategic, operational, institutional and funding. Strategic risks are perceived to be those that adversely affect the future shape and form of devolution in Kenya, especially in terms of their effect on

the anticipated outcomes, in relation to the provisions of the constitution. These include misinterpretation of the constitutional provisions in relation to devolution, political posturing as well as inadequate stakeholder understanding of the provisions and implications on devolution.

The solution to these challenges is not to impeach a Governor. The solutions lie in building capacities of county governments at all level and partly by emphasizing on an effective mechanism of legislative development at the national and county level. It was evident from Eng. Kamau's testimony before the Special Committee that even the Public Private Partnership Act that the governor is alleged to have violated is not complete. Regulations to implement the Act have not been enacted, manuals on PPPs not developed, sample PPP contracts not ready etc. On the other hand Governors are under massive pressure from the electorate to deliver projects.

E. GOVERNORS' PRAYERS

REASONS WHEREOF THE PROF. PAUL KIPRONO CHEPKWONY PRAYS TO THE SENATE TO MAKE THE FOLLOWING FINDING

1. A finding that within the intendment of Article 181 of the Constitution of Kenya and resonating the intention of section 33 of the County Government Act, the impeachment proceedings against Governor Prof. Paul Kiprono Chepkwony relating to **GROSS VIOLATION OF THE CONSTITUTION & PUBLIC AND PRIVATE PARTNERSHIP ACT** are not substantiated.
2. A finding that within the intendment of Article 181 of the Constitution of Kenya and resonating the intention of section 33 of the County Government Act, the impeachment proceedings against Governor Prof. Paul Kiprono Chepkwony relating to **Gross VIOLATION THE PUBLIC FINANCE MANAGEMENT ACT 2012, THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE RULES MADE THEREUNDER AND VIOLATION OF THE CONSTITUTION** are not substantiated.
3. A finding that within the intendment of Article 181 of the Constitution of Kenya and resonating the intention of section 33 of the County Government Act, the impeachment proceedings against Governor Prof. Paul Kiprono Chepkwony relating to **Gross VIOLATION OF THE COUNTY GOVERNMENT ACT 2012** are not substantiated.

A handwritten signature in blue ink, appearing to be 'KIPRONO', with a horizontal line underneath.

SIGNED BY PETER WANYAMA INSTRUCTED BY
MANYONGE WANYAMA & ASSOCIATES ADVOCATES
FOR PROF. PAUL KIPRONO CHEPKWONY, GOVERNOR
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