

Paper laid
By Sen. (G.) Kihelwa
on Friday 14.02.2014

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14/02/14

REPUBLIC OF KENYA



THE SENATE

ELEVENTH PARLIAMENT

Approved
~~[Signature]~~ 14/2/14

Hon. Speaker
You may approve.
[Signature]
14/02/14

SPECIAL COMMITTEE ON THE PROPOSED REMOVAL FROM OFFICE OF
THE GOVERNOR AND THE DEPUTY GOVERNOR, EMBU COUNTY

THE REPORT OF THE COMMITTEE ON THE PROPOSED REMOVAL FROM
OFFICE OF THE GOVERNOR, EMBU COUNTY

14TH FEBRUARY, 2014

PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the special sitting of the Senate held on Tuesday 4th February, 2014, the Honourable Speaker of the Senate, by way of a Communication from the Chair, informed the Senate that he had received correspondence from the Speaker of the County Assembly of Embu communicating the approval of a Motion by the County Assembly of Embu to remove, from office, the Governor and the Deputy Governor of Embu County.

Mr. Speaker Sir,

Thereafter, the Senate Majority Leader gave Notice of and moved the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 28th January, 2014 the County Assembly of Embu approved Motions "to remove from office, by impeachment," the County Governor and the Deputy Governor of Embu County;

AND FURTHER, WHEREAS by letters dated 29th January, 2014 (Ref: CAE/SCA/1/28 and 29) and received in the Office of the Speaker of the Senate on 30th January, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 65(1)(b) the Senate, by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 65(1)(b), the Senate resolves to establish a Special Committee comprising the following Senators –

- 1. Senator Kipchumba Murkomen;*
- 2. Senator Kimani Wamatangi;*
- 3. Senator Zipporah Kittony;*
- 4. Senator (Prof.) Wilfred Lesan;*
- 5. Senator Naisula Lesuuda;*
- 6. Senator Peter Mositet;*
- 7. Senator James Orengo;*
- 8. Senator Boni Khalwale;*
- 9. Senator Boy Juma Boy;*
- 10. Senator (Eng.) Hargura Godana; and*
- 11. Senator Judith Sijeny;*

to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

Mr. Speaker Sir,

Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. Senator Kipchumba Murkomen;
2. Senator Kimani Wamatangi;
3. Senator Zipporah Kittony;
4. Senator (Prof.) Wilfred Lesan;
5. Senator Naisula Lesuuda;
6. Senator Peter Mositet;
7. Senator James Orengo;
8. Senator Boni Khalwale;
9. Senator Boy Juma Boy;
10. Senator (Eng.) Hargura Godana; and
11. Senator Judith Sijeny;

to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

Mr. Speaker Sir,

Section 33(4) of the County Governments Act, 2012 and standing order 65(2) of the Senate Standing Orders set out the mandate of the Special Committee as follows-

A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

The Committee, in the execution of its mandate, was guided by these provisions of the Act and the Standing Orders.

Mr. Speaker Sir,

The Special Committee held its first meeting on the afternoon of Tuesday, 4th February, 2014, following its establishment. Pursuant to standing order 181, at that meeting, the Committee conducted the election of its chairperson and vice-chairperson. Sen. Boni Khalwale and Sen. Kipchumba Murkomen were elected unopposed to the positions of chairperson and vice-chairperson, respectively.

The Committee held a total of eight Meetings and two Working Retreats. The first Retreat was held prior to the commencement of the hearing of evidence in the matter. The Retreat provided an opportunity for the Committee to consider its mandate, to develop Rules of Procedure that would guide the investigation, to consider the issues and questions that would require its determination and to prepare for the hearing of evidence in the matter. The second Retreat was dedicated to the preparation and adoption of the Report.

Mr. Speaker Sir,

Section 33 and standing order 65(3) of the Senate Standing Orders provide that the Governor shall have the right to appear and be represented before the special committee during its investigations. Pursuant to these provisions of law, the Committee invited both the Governor and the County Assembly to appear and be represented before the Committee. In this respect, the Committee received oral evidence from the parties, including eleven witnesses who appeared to give evidence for the Governor.

Mr. Speaker Sir,

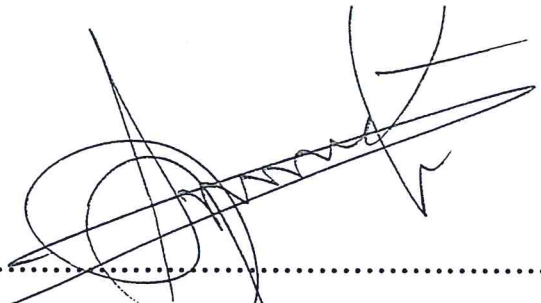
This is the first time in the history of this country that Parliament, and specifically the Senate, has considered the matter of removal of an officer from public office, commonly referred to as impeachment. This has therefore been a period of learning and of testing the various provisions of law relating to impeachment. The Committee has therefore made a number of recommendations of a policy and legislative nature that would benefit future processes.

Mr. Speaker Sir,

The Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to it in the execution of its mandate. The Committee further extends its appreciation to the parties to the matter: the County Assembly and its Advocates and the Governor and his Advocates, for their well-researched and eloquent submissions in this matter. The Committee also appreciates the media for the coverage of its proceedings during course of its investigations. Further, the Committee acknowledges the members of the public who expressed great interest in the matter, sitting in the galleries late into the night as they followed the proceedings of the investigations.

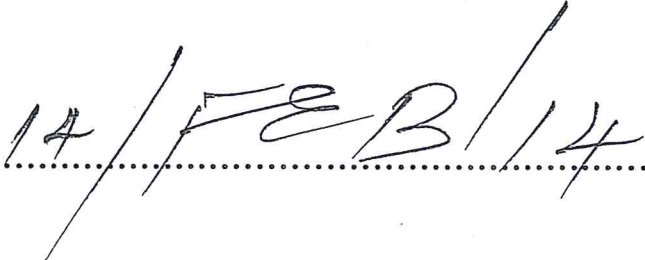
Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Special Committee, to present to the Senate, this Report of the Special Committee on the Proposed Removal from Office of the Governor, Embu County.



SIGNED:

SEN. BONI KHALWALE, M.P.
(CHAIRPERSON)



DATE:

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

1.0 INTRODUCTION

1.1. Background

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 28th January, 2014, the County Assembly of Embu approved Motions “to remove from office, by impeachment,” the County Governor and the Deputy Governor of Embu County.

2. Article 181 of the Constitution provides as follows-

Removal of a county governor

(1) *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.*

(2) *Parliament shall enact legislation providing for the procedure of removal of county governor on any of the grounds specified in clause (1).*


3. Section 33 of the County Governments Act provides as follows-

Removal of a governor

(1) *A member of the county assembly may by notice to the speaker, supported at least a third of all the members, move a motion for the removal of governor under Article 181 of the Constitution.*

(2) *If a motion under subsection (1) is supported by at least two-thirds of all members of the county assembly—*

(a) the speaker of the county assembly shall inform the Speaker of the



Senate of that resolution within two days; and
(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(5) The governor shall have the right to appear and be represented before the special committee during its investigations.

(6) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(8) If a vote in the Senate fails to result in the removal of the governor, the

Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.

4. By letters dated 29th January, 2014 (Ref: CAE/SCA/1/28 and 29) which were received in the Office of the Speaker of the Senate on 30th January, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate the following documents in respect of both the Governor and the Deputy Governor-

- (1) particulars of the allegations and related annexures;
- (2) the results of the Division;
- (3) the signatures in support of the Motion;
- (4) the signatures in support of the Notice of Motion;
- (5) the Hansard Report in respect of the Motion; and
- (6) the Attendance Register.

5. The documents submitted by the County Assembly of Embu to the Speaker of the Senate are attached as *Annex 1*.

6. In terms of Article 181 of the Constitution, section 33(3)(a) of the County Governments Act and standing order 65(1)(a) of the Senate Standing Orders, the Speaker of the Senate is required, *within seven days after receiving notice of a resolution from the Speaker of a County Assembly, to convene a meeting of the Senate to hear charges against the Governor.*

7. In this respect, by *Gazette* Notice No. 627 dated 31st January, 2014, which was published in a Special Issue of the *Kenya Gazette* published on the same day, the Speaker of the Senate convened a special sitting of the Senate for Tuesday, 4th February, 2014 at the Senate Chamber on the First Floor of the County Hall Building in Nairobi, commencing at 2:30 p.m. Pursuant to standing order 29(5) of the Senate Standing Orders, the Speaker specified the business of that sitting to be-

(1) Administration of Oath (Senator for Bungoma County); and

(2) Hearing of the charges against Mr. Martin Nyaga Wambora and Ms. Dorothy Nditi Muchungu, the Governor and Deputy Governor, respectively, of Embu County.

8. The *Gazette* Notice is attached as *Annex 2*.

1.2. The Special Sitting of the Senate held on 4th February, 2014

9. The special sitting of the Senate was held on Tuesday 4th February, 2014. The Order Paper and the Votes and Proceedings of that sitting are attached as *Annex 3*. At that sitting, the Speaker of the Senate, by way of a Communication, informed the Senators that he had received communication from the Speaker of the County Assembly of Embu relating to the approval of the Motion by the County Assembly of Embu County for the removal of the Governor and the Deputy Governor of

Embu County. The Communication of the Speaker of the Senate is attached as *Annex 4*.

10. Thereafter, the Senate Majority Leader gave Notice of and thereafter moved the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 28th January, 2014 the County Assembly of Embu approved Motions "to remove from office, by impeachment," the County Governor and the Deputy Governor of Embu County;

AND FURTHER, WHEREAS by letters dated 29th January, 2014 (Ref: CAE/SCA/1/28 and 29) and received in the Office of the Speaker of the Senate on 30th January, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 65(1)(b) the Senate, by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 65(1)(b), the Senate resolves to establish a Special Committee comprising the following Senators –

- 1. Senator Kipchumba Murkomen;*
- 2. Senator Kimani Wamatangi;*
- 3. Senator Zipporah Kittony;*

4. *Senator (Prof.) Wilfred Lesan;*
5. *Senator Naisula Lesuuda;*
6. *Senator Peter Mositet;*
7. *Senator James Orengo;*
8. *Senator Boni Khalwale;*
9. *Senator Boy Juma Boy;*
10. *Senator (Eng.) Hargura Godana; and*
11. *Senator Judith Sijeny;*

to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

11. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. *Senator Kipchumba Murkomen;*
2. *Senator Kimani Wamatangi;*
3. *Senator Zipporah Kittony;*
4. *Senator (Prof.) Wilfred Lesan;*
5. *Senator Naisula Lesuuda;*
6. *Senator Peter Mositet;*
7. *Senator James Orengo;*
8. *Senator Boni Khalwale;*
9. *Senator Boy Juma Boy;*
10. *Senator (Eng.) Hargura Godana; and*
11. *Senator Judith Sijeny;*

to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

2.0 METHOD OF WORK

12. In the execution of its mandate, the Committee conducted a number of activities which are set out below.

2.1. Meetings of the Special Committee

13. The Special Committee held its first meeting on the afternoon of Tuesday, 4th February, 2014, following its establishment. Pursuant to standing order 181, at that meeting, the Clerk of the Senate conducted the election of the chairperson and vice-chairperson of the Committee. Sen. Boni Khalwale was elected, unopposed, as the Chairperson of the Committee while Sen. Kipchumba Murkomen was similarly elected unopposed as the Vice-Chairperson of the Committee.

2.2. Indicative Programme of Events

14. Following the conduct of the election at the first meeting of the Committee, the Committee considered an Indicative Programme of Events which is attached as *Annex 5*. The Committee observed that in terms of section 33(4)(b) of the County Governments Act, 2012 and standing order 65(2)(b) of the Senate Standing Orders, the Committee had only ten days within which to investigate the matter in respect of both the Governor and the Deputy Governor and thereafter to report to the Senate on whether it found the particulars of the allegations against the Governor and those against the Deputy Governor to have been substantiated.

15. The Committee observed that from the experience of other jurisdictions, proceedings for the removal of persons from office, commonly referred to as impeachment proceedings, are quasi-judicial in nature. The proceedings bear close resemblance to a court-room trial, complete with examination and cross-examination of witnesses. Parties to the proceedings will usually be represented by Counsel.
 16. It was evident to the Committee, at that early stage, that bearing in mind the nature of the proceedings anticipated in the proceedings for the removal from office of the Governor, and further taking into account that the Committee's mandate extended to the consideration of the proposed removal from office of not one, as is usually the case in the experience of other jurisdictions, but two office holders, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.
 17. The Committee therefore observed then, and throughout its proceedings, that section 33(4)(b) of the County Governments Act, 2012 and standing order 65(2)(b) of the Senate Standing Orders may require to be amended so as to provide for ample time for the Committee to fully and effectively discharge its mandate while at the same time taking into account the need to ensure expeditious disposal of the impeachment proceedings. At the appropriate time, the Committee recommends that the period of time be revised upwards possibly to fourteen or twenty-one days.
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2.3. Invitations to Appear

18. The Committee observed that section 33(5) of the County Governments Act, 2012 and standing order 65(3) of the Senate Standing Orders provide that "*the Governor shall have the right to appear and be represented before the special committee during its investigations*". The Committee noted that the phraseology

in these provisions of law required “*an invitation to appear before the Committee*” as opposed to “*Witness Summons*”. Witness summonses, which are the tool used to compel the attendance of witnesses before courts and parliamentary Committees, require the attendance of the witness summoned.

19. In terms of section 23(a) of the National Assembly (Powers and Privileges) Act (Cap 6), as read together with section 7 of the Sixth Schedule to the Constitution, a witness who is summoned by a parliamentary Committee must appear before the Court or Committee at the pain of payment of a fine not exceeding two thousand shillings or imprisonment for a term not exceeding twelve months, or both such fine and imprisonment where the witness fails to make an appearance. A right to appear before a Committee, however, is not mandatory; a person who is invited to appear need not appear before the Committee. The Committee would however be required to demonstrate that it afforded the person, in this case the Governor, an opportunity to appear and be represented before the Committee. It was then for the Governor to determine whether to appear before the Committee and if so, whether to do so in person or by advocate, or in person and by advocate.

20. The Committee further observed that the County Assembly, as the originator of the Resolution for the removal of the Governor had by the letter to the Speaker of the Senate dated 29th January, 2014 filed, together with the Resolution of the Committee, a number of documents in respect of the Resolution. The Assembly could therefore have the option not to appear before the Committee and to rely entirely on the written documentation filed with the Office of the Speaker. However, the Committee observed that in the interests of justice, it would also be necessary to invite the Assembly to appear before the Committee, if it so desired, and to produce further evidence, if any, be it written evidence or presented by way of witnesses. It was noted however that whereas attendance by the Governor sought to be removed was a right, no such right exists for the County Assembly.

21. Having made these observations, and taking into account the limited time available, on 4th February, 2014, the Committee resolved to invite the Assembly and the Governor to appear before the Committee for the hearing of the evidence. In inviting the parties, for abundant caution, the Committee took a three-pronged approach-

- (a) personal service of the Invitation to Appear on the County Assembly and the Governor. The Invitations to Appear, duly served and acknowledged by the parties are attached as *Annex 5*;
- (b) publication of the Invitations to Appear in the *Kenya Gazette*. Copies of *Gazette* Notice Numbers 716, 717 and 718 appearing in the Special Issue of the *Kenya Gazette* dated 5th February, 2014 are attached as *Annex 6*; and
- (c) publication of the Invitations to Appear in two daily newspapers of national circulation. Extracts of the Invitations to Appear as they appeared on Thursday, 6th February, 2014 in both the Daily Nation Newspaper and the Standard Newspaper are attached as *Annex 7*.

22. In the Invitation to Appear, the Governor was requested to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Governor was informed that he would be required, within three days of the invitation, to file an answer to the charges with the Office of the Clerk of the Senate in which the Governor would set out-

- (a) the Governor's response to the particulars of the allegations;
- (b) how the Governor proposed to appear before the Special Committee; whether in person, by advocate, or in person and by advocate;
- (c) the names and addresses of the persons to be called as witnesses, if any, and a statement by each such witness; and

(d) any other evidence to be relied on.

23. The Invitation to Appear to the County Assembly required the Assembly, where it choose to appear before the Committee, within three days of the invitation, to file with the office of the Clerk of the Senate, documentation-

(a) designating the Members, if any, who would attend and represent the Assembly in the proceedings before the Special Committee;

(b) indicating the mode of appearance by the Members before the Special Committee; whether in person, by advocate, or in person and by advocate;

(c) indicating the names and addresses of the persons to be called as witnesses, if any, and a statement by each such witness; and

(d) specifying any other evidence to be relied on.

24. On 7th February, 2014, the Committee resolved to serve, on the County Assembly and the Governor, an Addendum to the Invitation to Appear, which is attached as *Annex 8*, by which the Committee-

(a) informed the parties that the first meeting of the Committee would be held, not in the Senate Chamber, 1st Floor, County Hall Building, Parliament Road, Nairobi, as indicated in the Invitation, but in the Amphitheatre, KICC Building, Nairobi;

(b) informed the parties that where witnesses would be called by the parties to appear before the Committee on behalf of the parties, witness statements containing a summary of the evidence to be presented by the witness before the Committee would require to be filed in the Office of the Clerk of the Senate, 1st Floor, County Hall Building, Parliament Road, Nairobi, at least

twenty-four hours prior to the date for the commencement of the hearing of the evidence; and

(c) forwarded to the parties the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor as adopted by the Special Committee on 6th February, 2014 which would apply to the proceedings of the Committee.

25. In response to the Invitation to Appear, the Governor filed the following documentation-

(1) A Memorandum of Appearance filed by M/s Nyamu & Nyamu Co. Advocates indicating that the firm of Advocates would appear on behalf of the Governor dated 8th February, 2014 and which was received in the Office of the Clerk on 9th February, 2014; and

(2) The Response by the Governor to the Alleged Violations Presented by the County Assembly of Embu through Letter No. CAK/SCA/1/27 of 29th January, 2014, which was received in the Office of the Clerk of the Senate on 9th February, 2014;

(3) A list of names and addresses of eleven persons proposed to be called as witnesses; and

(4) Witness statements in respect of some of the persons proposed to be called as witnesses.

26. On 10th February, 2014, at the commencement of the hearing of the evidence, the Governor made an application to file supplementary documentation which was allowed and following which the Governor filed additional supporting documentation which included further Witness Statements in respect of the witnesses that the Governor proposed to call to give evidence before the

Committee. Following a further application, which was allowed, the Governor filed further Witness Statements on 12th February, 2014. The bundle of documents filed by the Governor is attached as *Annex 9*.

27. In addition to the documents submitted to the Speaker of the Senate on 29th January, 2014, the County Assembly filed a document titled “Response of the County Assembly of Embu to the Summons to Appear before the Special Committee of the Senate” which was filed on behalf of the Assembly by M/s Muchoki Kangata Njenga & Company Advocates. The bundle of documents is attached as *Annex 10*.

2.4. Working Retreat of the Special Committee

28. The Committee held a two-day Retreat between 6th and 7th February, 2014. Coming just before the commencement of the hearing of evidence in the matter, the Retreat provided an opportunity for the Committee to prepare for the hearing of evidence, to further consider its mandate, to consider the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor and to consider the issues and questions arising for determination by the Committee.

2.5. Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor

29. On the Rules of Procedure, the Committee observed that Article 181 of the Constitution, section 33 of the County Governments Act, 2012 and standing order 65 of the Senate Standing Orders did not provide sufficient detail on the procedure to be followed by the Special Committee in the conduct of its investigation.

30. The Committee therefore observed that there was need to develop Rules of Procedure that would address specific issues of procedure. The Committee observed that in the United States of America and in the Philippines, the respective

Senate had developed and adopted Rules of Procedure to govern investigations during impeachment proceedings to supplement the general Rules of Procedure of the respective Senates.

31. The Committee adopted the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor on 6th February, 2014. The Rules of Procedure, which are attached as *Annex II*, regulate the procedure relating to a number of critical matters in respect of which the County Governments Act and the Standing Orders were silent.
32. It is important to observe that under Rule 33, the Committee proposes that the Rules shall, with necessary modifications, apply to the process for the removal of any other State or public officer in respect of whom the Senate has jurisdiction. The Committee further proposes that, at the appropriate time, the Senate considers adopting the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor. The adoption of the Rules by the Senate would provide a common framework for the operation of future Special Committees.
33. The Rules of Procedure were applied to the investigation by the Committee.

2.6. Issues and Questions for Determination by the Committee

34. The Committee devoted a considerable amount of time during the Retreat to consideration of a number of issues and questions that would require the determination of the Committee. The following are the issues that were considered by the Committee-

(1) Effect of Conservatory Court Order

35. The attention of the Committee was drawn to High Court (Nairobi) Constitutional Petition No. 51 of 2014, Martin Nyaga Wambora & the County Government of

Embu and the Speaker of the Senate & the Hon. Attorney-General, and certain orders issued by the Court thereunder. The Committee observed that the High Court had issued conservatory orders “*restraining the 1st respondent [the Speaker of the Senate] from introducing, discussing, sitting or otherwise deliberating the impeachment of the 1st petitioner based on the resolution forwarded by the Embu County Assembly until further orders of the Court*”.

36. The question before the Committee, therefore, was: *What is the effect of that court order on the Senate and the Special Committee?* The Committee resolved that it would defer its thoughts on the matter and hear the parties on the matter, if it would arise and therefore reserved its findings on the matter to the conclusion of the hearing of the evidence by the parties.

(2) Proceedings before the County Assembly of Embu

37. The Committee considered the following question: Is it open to the Senate to interrogate the proceedings before the County Assembly of Embu? Was it open to the Senate to inquire into the proceedings of the County Assembly so as to determine whether the Assembly had conducted its proceedings in accordance with the Constitution, the relevant laws and the Standing Orders while considering the Motion for the removal of the Governor and Deputy Governor of Embu County? The Committee similarly reserved its findings on this matter to the conclusion of the hearing of the evidence on the matter.

(3) Grounds for Removal of a Governor

38. The Committee considered the grounds for removal of a Governor as set out under Article 181 of the Constitution and noted that the Constitution sets out the following grounds for removal-

(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.

(4) Charges against the Governor and Deputy Governor

39. The Committee studied the Charges against the Governor as presented by the County Assembly as set out in the Appendix to the letter by the Speaker of the County Assembly of Embu – *Annex I*.

(5) Burden or Standard of Proof

40. The question of the burden or standard of proof applicable to proceedings for removal from office was considered by the Committee. The question before the Committee was whether the burden or standard of proof was that of-
- (a) on a balance of probabilities, as is the case in civil trials;
 - (b) beyond reasonable doubt, as is the case in criminal trials; or
 - (c) somewhere in between the two, that is, a standard of proof that should be higher than that of a balance of probabilities but lower than that of beyond reasonable doubt.
41. The Committee agreed to defer the consideration of this question until it heard the parties.
-

3.0 THE CONFERENCE OF PARTIES

42. The Committee received representations from both the County Assembly and the Governor that they would appear before the Committee. The County Assembly was represented by Messrs. Charles Njenga and George Ng'ang'a, who indicated that the Assembly would not be calling any witnesses. On the other hand, the

Governor, represented by Mr. Wilfred Nyamu and Mr. Peter Wanyama, indicated that eleven witnesses would be called to give evidence for the Governor. Pursuant to rule 10 of the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor, Counsel for the Governor requested that the Committee issues summonses to two witnesses, indicating that the Counsel had been unable to locate the witnesses.

43. Rule 10 provides that “the Committee may, at the request of the County Assembly or the Governor, invite or summon any person to appear and give evidence before the Committee”. The Committee therefore directed that the following two witnesses be summoned to appear before the Committee-

(a) Mr. Joshua Munyaka, Head of Procurement, Kitui County; and

(b) Mr. Gideon Makenge, Procurement Officer, Embu County.

44. Mr. Joshua Munyaka responded to the summons and appeared before the Committee on 12th February, 2014. Attempts to serve summons on Mr. Gideon Makenge failed. The officer could not be reached through his phone, at his workplace or at his residence.

45. On 10th February, 2014, prior to the commencement of the taking of evidence, the Committee held a Conference of the Parties to the matter; namely, the County Assembly and the Governor and their respective Counsel. The Deputy Governor and her Counsel were also present at the Conference. At the Conference, a Schedule of Activities for the Committee, which is attached as *Annex 12* was considered and adopted by the parties.

46. The Committee noted that the proposed removal of the Governor and the Deputy Governor were separate matters which would be heard and determined independently and consecutively, and therefore allocated time as between the two matters, taking into account the fact that the Deputy Governors matter would require less time as neither the County Assembly nor the Deputy Governor intended to call any witnesses. Additionally, in respect of each matter, the Schedule allocated time as between the parties.
47. In practice, it proved impossible to abide by the Schedule. Sittings proceeded into the small hours of the morning on each day. It is noteworthy, for example, that although the Governor's matter had been allocated time commencing at 10:30 a.m. on Monday, 10th February, 2014 and ending at 3:15 p.m. on Tuesday, 11th February, 2014, the matter was not concluded until 9:30 p.m. on the night of Wednesday, 12th February, 2014. Consequently, the Deputy Governor's matter was considerably delayed and could only commence thereafter ending on Thursday, 13th February, 2014 at 2:00 p.m., just twenty-four hours before the deadline for the receipt of the Committee's report by the Senate. The matter of the statutory time constraints faced by this process needs to be considered carefully.
48. The Committee again observes that in the interests of justice, and considering the weight of impeachment matters and the web of factual and legal issues that arise in such proceedings, it is important that the ten-day period assigned for investigation and reporting by the Committee be revised.

4.0 READING OF THE CHARGES AND OPENING STATEMENTS

49. Pursuant to rule 16 of the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor, the hearing before the Committee

commenced with the reading out, by the Clerk of the Senate, verbatim, the particulars of the allegations against the Governor. The Charges are contained in the bundle of documents contained in *Annex I*.

50. Thereafter, pursuant to rule 17, after the Particulars of the Allegations had been read out, the Committee allowed an Opening Statement to be made on behalf of the County Assembly and on behalf of the Governor. Rule 18 stipulates that an opening statement made under rule 17 shall be for not more than forty minutes, unless the Committee otherwise resolves.
51. The Opening Statement on behalf of the County Assembly was made by the Counsel for the Assembly. In their Opening Statements, Counsel for the County Assembly and the Counsel for the Governor and the Governor himself laid out a summary of the respective matters they would be urging before the Committee.
52. In the Opening Statement, Counsel stated that what was before the Committee was not a criminal trial but an investigation. Counsel urged the Committee to consider and analyze the documentation that had been filed before the Committee and to find, from the documentation, that the charges against the Governor were substantiated.

5.0 EVIDENCE PRESENTED BY THE PARTIES TO THE SPECIAL COMMITTEE

53. The evidence of the County Assembly of Embu was encapsulated in the letter dated 29th January, 2014 from the Speaker of the County Assembly to the Speaker of the Senate. In that letter the Speaker of the County Assembly stated that the County Assembly of Embu at its sitting of 28th January, 2014 approved a Motion to remove from office by impeachment the County Governor pursuant to and in

accordance with Article 181 of the Constitution of Kenya, 2010 as read together with section 33 of the County Governments Act, 2012. The Speaker of the County Assembly forwarded the Resolution of the Assembly together with the following documents-

- (i) Particulars of the allegations thereon and related annexures.
- (ii) The results of the division in the Assembly.
- (iii) The signatures in support of the motion in accordance with the Standing Orders.
- (iv) The signatures in support of the notice of motion.
- (v) The Hansard report in respect of the motion.
- (vi) Attendance register.

54. These documents summarizing the evidence of the County Assembly of Embu are contained in *Annex 10*.

6.0 THE HEARING

55. At the hearing, the County Assembly sought to prove the case against the Governor for the following alleged violations-

- (1) violation of the Public Procurement and Disposal Act 2005 and Regulations 2013;
- (2) violation of the Public Finance Management Act; 2012
- (3) violation of the County Government Act, 2012;
- (4) violation of the Constitution; and
- (5) abuse of office.

6.1. Violation of the Public Procurement and Disposal Act 2005 and Regulations, 2013

56. In support of this charge, the County Assembly cited and alleged the lack of procurement committees for the County Executive as required under section 26(4) of the Public Procurement and Disposal Act, 2005 and Regulation 7 of the Public Procurement and Disposal (County Government's) Regulations, 2013, failure and or neglect to observe the thresholds set for the various procurement methods under the Procurement Regulations, commencement of procurement for works for the rehabilitation of the Embu Stadium without ensuring that there were sufficient funds set aside in the budget to meet the obligations contrary to section 26(6) of the Public Procurement and Disposal Act, non-compliance with the Act and Regulations as outlined in the section 27(L) of the Public Procurement and Disposal Act and superintending over procurement of motor vehicles without evidence of adherence to procurement procedures. The County Assembly urged the Committee to find that the Governor was responsible by virtue of being the Chief Executive Officer of the County in terms of Article 179(4) of the Constitution and section 30(3)(f) of the County Governments Act, 2012 under which the Governor is accountable for the management and use of County resources.
-
57. The County Assembly cited the Auditor-General's Report on the Embu County Government and its findings of mismanagement and misappropriation of public funds at the Embu County Government. Despite this Report and the County Assembly's resolutions, the Governor had failed to take action against the public officers in respect of whom action had been recommended.

58. The defense of the Governor's corner was a denial of all the alleged particulars. It was urged, for the Governor, that contrary to the allegations, there had been, at all material times, relevant procurement committees, and that these committees had observed the relevant procurement laws and procedures. It was argued, in the alternative, that if there were any breaches of procurement laws and procedures, which was denied, these could not be ascribed to the Governor who, under the law, is not an accounting officer and is not permitted to participate directly in procurement processes. It was the case of the Governor that individual officers guilty of malpractice should be held accountable.

59. The Committee notes that the Auditor-General's Report had identified a number of procurement irregularities-

- (a) irregular award of contracts for repair works at the Town Hall and the Probation Offices;
- (b) unwarranted disqualification of interested bidders;
- (c) favouritism in consideration of responsiveness of tenders during evaluation;
- (d) financial and technical evaluation of contracts;
- (e) Irregular re-allocation of funds;
- (f) Lack of formal contracts;
- (g) Un-registered sub-contractor;
- (h) Irregular procurement methods;
- (i) Irregular award of contracts;
- (j) Delay in completion of works.

60. The Auditor-General, when he appeared before the Committee as an expert witness summoned by the Committee, confirmed that his report did find procurement irregularities in the procurement of works for two buildings, that is, the Town Hall and Probation offices. The firms awarded the contracts for the works were not approved by the Ministry of Public Works. Further the provisions of the PPDA with regard to restricted works were not complied with and the Auditor General was not supplied with any evidence to this effect. Two bidders for the works were also disqualified in a manner that reflected favouritism in that the criteria for disqualification, namely tax compliance, was used selectively. The Tender Committee was not consistent in its awards. The tender evaluation was not done properly and consistently.

61. The Auditor General agreed with the position that the Governor was not an accounting officer nor a participant in the procurement processes but held the view that the Governor would be responsible and accountable for the misdeeds in his County administration.

6.2. Violation of the Public Finance Management Act

62. In support of this Charge, the Committee was urged by the County Assembly to find that while under section 121 the County Government is required to carry out all procurement of goods and services and the disposal of assets in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act, the County Executive had carried out its procurement without a Tender Committee in place.

63. Further, the County Assembly argued that since the inception of the County Government of Embu, the County Assembly had never received any quarterly

report from the County Treasury and that the Governor, being aware of this, had done nothing to ensure submission of the Reports.

64. The Auditor-General's Report was again cited and its findings that the Accounting Officer of Embu County Government did not arrange for a board of survey to examine and verify cash on hand and bank balances at the close of business on 30 June, 2013 as required by the Government Financial Regulations and Procedures, the County Government of Embu held unsurrendered imprests totaling Kshs. 3,600,000 as at the closure of the financial year in contravention of Government Financial Regulations and Procedures.
65. The Auditor General found that the County Government of Embu did not validate or consolidate its debtors and creditors, especially the debtors of the defunct local authorities under the Embu County and that although the local authorities in Embu County prepared statements of assets and liabilities, there was no proper taking over of the motor vehicles and office equipment from the defunct local authorities. The Auditor General found that the County Government had not maintained a receipts cash book. Further there was poor maintenance of revenue collection control sheets. The Auditor recommended that the County Government should ensure that a receipts cashbook is maintained where revenue collected is promptly recorded. It was further recommended that a strong internal contract system be put in place to ensure proper accountability at every stage in the revenue collection cycle.
66. In respect of allowances, the Auditor-General cited the payment of subsistence allowance to a non-staff Member, irregular payment of sitting allowances totaling Kshs. 366,000/- to County Executive Committee Members and Kshs. 500,240/- to Members of the County Assembly, respectively. The Auditor-General further found that a sum of Kshs. 1,576,991/- was not accounted for.

67. The Auditor-General, in his evidence, informed the Committee that prior to publishing an Audit Report it was standard practice to issue a Management Letter to the concerned party to bring to the attention of the party the audit queries identified and to require remedial action. He further confirmed that this had happened in respect of the Report concerning Embu County and that despite the Management Letter, the queries had remained unexplained.
68. Responding to this charge, the Governor reiterated that if there were any breaches of procurement laws and procedures, which was denied, these could not be ascribed to the Governor who, under the law, is not an accounting officer and is not permitted to participate directly in procurement processes.
69. Counsel for the Governor argued that the appropriate action on the Auditor-General's Report was for it to be submitted to the Public Accounts Committee of the County Assembly for adoption before it could be relied on and action taken thereon. Without that having happened, the action of the County Assembly in impeaching the Governor on the basis of the Auditor-General's Report was premature and extreme.

6.3. Violation of the County Government Act, 2012

70. To support this charge, evidence was adduced by the County Assembly that the Embu County Government had, on 9th August, 2013, advertised for positions in the County Executive that had not been approved by the County Assembly thereby contravening section 62(2) of the County Governments Act, 2012, that persons had been hired who had not applied and who did not meet the qualifications for the respective positions, had failed and/ or neglected to develop for the approval of the County Executive Committee the organization of the County Government and

its various departments contrary to section 46 resulting in management confusion in the entire County Executive arm, failing and/or neglecting to sign and cause to be published notices of all formal decisions made by the County Executive Committee or the Governor contrary to section 30(2)(1) [of the County Governments Act, 2012], making it difficult for the public to put the Government to account, failure to design a performance management plan in accordance with section 47 [of the County Governments Act, 2012], resulting in poor delivery of public services, contrary to section 116(2) and 117 [of the County Governments Act, 2012].

71. Evidence was led that some of the positions which had been unlawfully advertised were the positions of-

- (1) Information Officer;
- (2) Director Governors Press Service;
- (3) Head of Budget Expenditure Management Services;
- (4) Head of County Supply Chain Management;
- (5) Head County Revenue Officer;
- (6) Deputy Head Revenue Officer;
- (7) Principal Legal Officer; and
- (8) Principal Information Officer.

72. The case was advanced by the County Assembly that the involvement of the Governor in the appointment of the County Public Service Board made him culpable or that in the alternative, if it was the Governor's case that he was not responsible for the advertisements, having knowledge that the advertisements were illegal and that the County Secretary under whose name they were put out was an officer under his charge, it was his responsibility to take action against that officer as the buck stopped with him. Instead, the allegation was made that far from

taking action to discipline the County Secretary, the Governor had gone to great lengths to defend her, going so far as to swear an Affidavit vouching for her innocence.

73. In response to these allegations, the Governor submitted that the responsibility for employment in the County Executive lay in the County Public Service Board and further that he had no role to play in the matter as the advertisement for the positions had been put out by the County Secretary on behalf of the County Public Service Board. This was therefore all an internal matter of the Embu County Public Service Board, which is an independent body. It was the Governor's case, further, that in any case, the positions advertised either did not require the approval of the County Assembly or were positions already in existence pursuant to a Circular from the Transition Authority and which were only being filled to replace officers who had been holding them in an interim capacity and who had since returned to their respective ministries or to wherever the Transition Authority had sourced them from. It was the argument of the Governor that there could be no vacuum permitted to be left in positions critical to the functioning of the County Government.
74. On failure to publish notices of formal decisions made by the County Executive Committee, the Governor's defense was that the Embu County did not as yet have a County *Gazette* in which these decisions could be published but that he had made use of other fora to keep the people of Embu County informed of the workings of his Government and that on the ground the people were quite satisfied with the performance and achievements of his administration.
75. The Governor argued further that swearing an affidavit in judicial proceedings in which he was an interested party could not be held against him or used to find him

culpable. The case was made that the Governor did not lose his constitutional right to recourse to legal redress or to the expression of his opinion just because he was the Governor.

6.4. Violation of the Constitution

76. To support the charge of violation of the Constitution the County Assembly argued that the Governor had violated Article 227 of the Constitution of Kenya by failing and/or neglecting to ensure that contracts for goods and services were issued in accordance with a system that was fair, equitable, transparent, competitive and cost effective. The particulars in support of this charge were that on diverse dates in 2013 the Governor failed and/or neglected to stop the rehabilitation of Embu stadium and the purchase of maize seeds without adherence to the lawful procurement procedure. The case was made how the contract for the face-lifting of the Embu Stadium was undertaken without adequate budgetary allocation to meet the obligations contrary to section 26(6) of the Public Procurement and Disposal Act.
77. The case was further made that the Governor oversaw the purchase of defective maize seeds which had failed to germinate and whose procurement had been undertaken in contravention of procurement laws and procedures had not only led to the loss of public resources, but also amounted to fraud on the people of Embu County in the form of wasted time, expenditure and unmet expectations. It was urged that the procurement mechanism used to purchase the maize seeds pointed to complacency, incompetence and manipulation of the procurement systems in order to aid fraud, for which the Governor should take responsibility.
78. In support of this charge the County Assembly relied on two reports of its Committees. The first report is that of the Joint Committees of Infrastructure, Youth and Sports on the face-lifting of the Embu Stadium dated 7th January, 2014

while the second is the report of the Joint Committee on Agriculture, Livestock, Fisheries and Cooperatives and the Committee on Public Accounts and Investments on maize seeds procurement by the County Executive dated 7th January, 2014.

79. It was the Assembly's case that the report on the face-lifting of the Embu Stadium was completed without the input of the County Secretary who, when summoned to appear before the Committees, had requested the Joint Committee for some time to put together the documents requested for by the Joint Committee. The Joint Committee made the following recommendations-

- (1) That no payments should be made in respect of the on-going face-lifting of the Embu Stadium until the County Assembly grants approval under the law and unless cleared in the report referred to in (4) below.
- (2) There are apparent signs of fraud and theft of public funds that require urgent investigation by the Ethics and Anti-Corruption Commission.
- (3) That until cleared by the Ethics and Anti-Corruption Commission, the County Secretary and tender committee members who were involved in the unprocedural procurement acts should step aside and be discharged off their duties immediately to allow for investigation.
- (4) That, the report of EACC on this matter be made available to this Assembly."

80. The report on the maize seeds procurement was similarly completed without the input of the County Secretary who had requested the Joint Committee for some time to put together the documents requested for by the Joint Committee. The Joint Committee made the following recommendations-

- (1) That, the Ethics and Anti-Corruption Commission (EACC) undertakes investigation and other actions that will aid in the

recovery of public funds from the officers who authorized the procurement and from the supplier.

- (2) That, until cleared by the EACC in this specific matter, the county secretary in her capacity as the authorizing officer and the entire tender committee step aside from the performance of their duties and the discharge of their powers in their respective public offices with immediate effect.
- (3) That, the EACC report in this matter be made available to the County Assembly.
- (4) That, the supplier involved in the supply of the failed maize seeds be barred from conducting any business with Embu County Government.”

81. The County Assembly’s case was additionally that the Governor was responsible for disregarding the national values and principles of governance contrary to Article 10 of the Constitution of Kenya especially the rule of law, accountability and transparency by failing to ensure that the necessary laws were adhered to and in particular, procurement laws, the County Governments Act and the Public Finance Management Act.

82. For the various transgressions alleged under this charge, the bulk of which were allegedly directly undertaken by the County Secretary, the Governor’s culpability was advanced as being predicated on his defence of the County Secretary despite the latter’s alleged blatant disregard of the law. The County Assembly, in particular, relied on the affidavit sworn by the Governor in Nairobi High Court Judicial Review Application No. 17 of 2014 and the press release of 14th January 2014.

83. In his defence, the Governor, in denying culpability or responsibility, noted that the County Secretary had been summoned by the Committees of the Embu County Assembly but had requested for time to adequately prepare for her presentation.

He averred that the County Assembly Committees arbitrarily rejected her request for extension of time and proceeded to make recommendations that were adverse to her, including a recommendation that the Governor suspends her from office pending investigations by the Ethics and Anti-Corruption Commission. The Governor stated, among other averments, that the County Assembly had been antagonizing the County Executive hampering the development agenda and realization of the Embu County's aspirations. The Governor opines that the rights of the County Secretary had been violated through the irregular resolution and supported her application to the High Court for the quashing of the resolution. He argued that the County Secretary had been condemned unheard and that this was against the principles of natural justice.

84. The County Assembly accused the Governor of contravention of Chapter Six of the Constitution on leadership and integrity by failing to ensure that all the necessary laws were adhered to, thereby eroding public confidence in the integrity of the office. In support of this charge, the Assembly alleged that the procurement of works for the face-lifting of the Embu Stadium and the purchase of certain motor vehicles had been undertaken without following the laid down procedures. Additionally, it was alleged that there had been undertaken an irregular recruitment of County directors in the various portfolios. These actions, in addition to the alleged organizing of a county delegation "study tour" to Rwanda which was alleged to have been organized in anticipation of the impeachment proceedings in order to "buy" County Assembly members against the motion, were alleged to have been contrary to Article 73(2)(a) of the Constitution.

85. The Governor denied the foregoing allegations in their entirety. It was his case that the Governor was not responsible for procurement matters, if at all this had been irregularly undertaken. On motor vehicles, his case was that these had been purchased under an existing Government supply contract through which all other

Counties and Ministries and similarly procured their vehicles. On the matter of the recruitment of officers, the Governor reiterated his non-involvement in matters recruitment and his non-interference in the affairs of the County Public Service Board.

86. The County Assembly further alleged that the Governor had failed and/or neglected to provide full and regular reports on matters relating to the County contrary to Article 183(3) of the Constitution and had failed and/or neglected to ensure that public money was used in a prudent and responsible manner contrary to Article 201 of the Constitution. To support these allegations, the County Assembly relied on the report of the Auditor-General on financial operations of Embu County dated 5th December 2013, and the alleged failure or neglect to stop the procurement of goods at inflated prices.

87. In the Governor's defence, it was contended that the alleged violations were not attributable to the Governor and could not properly be grounds for impeachment.

6.5. Abuse of Office

88. The final charge on the basis of which the County Assembly of Embu had resolved to remove the Governor from office was abuse of office. The County Assembly charged that the Governor as the overall accounting officer by dint of section 39(1) [of the County Governments Act], had failed to interdict the County Secretary as recommended by the County Assembly and that further, the Governor, in complete disregard of the Assembly's resolution, had gone on to defend the County Secretary through the affidavit that he had sworn and the Press Statement that he had issued on a local media station (Wimwaro). This, to the Assembly, was testimony of the complicity of the Governor for the violations of the law alleged.

89. To support this charge, the County Assembly reiterated the two Reports of the County Assembly Joint Committees on the face-lifting works at the Embu Stadium and the irregular procurement of defective maize seeds by the County Executive.
90. The Governor denied the charge of abuse of office arguing that it was vague and incompetent. He contended that the impugned conduct was that of the County Secretary and not of the Governor, and further that even after the resolution of the County Assembly, he still had to follow due process in any action he would take against the County Secretary. It was again urged, for the Governor, that the swearing of an affidavit in judicial proceedings could not amount to abuse of office and that in any case, considering that the matter was still alive in court, adverse comment on it was *sub judice*.

7.0 **OUTSTANDING ISSUES AND QUESTIONS FOR DETERMINATION BY THE COMMITTEE**

91. Before pronouncing itself on its findings and determinations in respect on the question of whether the charges against the Governor have been substantiated, it is important that all outstanding issues and questions that the Committee had put forward for itself as being germane to the matter be dealt with.
92. The first of these is the question of the effect of the conservatory order as recited under paragraphs 35 and 36 above. In the proceedings in this matter, this question was not canvassed at any length by the parties. The Governor urged the Committee to note that he had appeared before the Senate out of respect for the Senate and its constitutional roles but that such appearance was without prejudice

to judicial proceedings in which he was a party pending before the Courts in Embu and Nairobi.

93. The Committee is alive to the fact that this is a matter that has been the subject of public commentary and it is important that its views on the matter be placed on record. Although it is an important principle of the doctrine of the rule of law that orders of the courts should be obeyed, it is similarly a cardinal tenet of the principle of separation of powers that the legislature is solely responsible for the conduct of its own proceedings while it is seized of a matter.
94. The Special Committee adopts as trite law and reflective of the correct approach in this matter the position adumbrated by the Speaker of the National Assembly in his ruling delivered on 3rd February 2011 (*Official Hansard Report, of 3/2/2011*) in which he stated as follows-

“Each branch of Government must exercise its powers in a fine balancing act to ensure that it properly and effectively carries out its functions while at the same time does not infringe on the powers and responsibilities of the other branches of Government. Thus, this House is the assembly of the people. It represents their will. It enacts laws and deliberates on and resolves issues of concern to the people. *The judiciary can review the constitutionality of legislation or other actions taken by the National Assembly if challenged and can indeed declare a law or other action taken by the House to be unconstitutional and to be a nullity.* In my understanding, which I have stated severally before from this Chair, what the Judiciary cannot do, under our Constitution, is to stop or prevent the National Assembly from undertaking its constitutional functions. Neither can the Judiciary compel any action to be undertaken by Parliament. The principle ensures that Parliament as

the representatives of the people is not prevented from giving voice to the will of the people. *An attack on this principle is an attack on the sovereignty of the people, and in my estimation a grave attack on the Constitution. No one outside Parliament, not the Executive and not the Judiciary, tells Parliament, in a compulsive manner, what to do or not to do, when to do it or how to do it.*"(Emphasis added).

95. This approach has similarly been taken by Parliaments in other jurisdictions such as Ghana [in the Supreme Court Case of Ransford France vs. Electoral Commission of Ghana], Sri Lanka, the United States. It is an approach that we commend to the Senate. Parliament must exercise restraint and must not interfere so as to prejudice matters in respect of which the Courts are seized. But the Courts similarly have no right under our Constitution to intercept or remove from the jurisdiction of Parliament matters which under the Constitution or the laws are before Parliament. The Senate became irreversibly seized of this matter the moment the Speaker of the Senate received the letter from the Speaker of Embu County Assembly communicating the resolution of that Assembly to remove the Governor from office.
96. The next matter relates to the legality or propriety of the proceedings antecedent to the submission of the resolution of Embu County to the Speaker of the Senate and whether it was open to the Senate to inquire into the proceedings of the County Assembly so as to determine whether the Assembly had conducted its proceedings in accordance with the Constitution, the relevant laws and the Standing Orders. The matter, similarly, was not argued with any fervour. However, as it is an important matter and as it may come up in the future, it is useful that we put on record our view that the Senate becomes seized of the matter at the point at which the Speaker of the Senate receives the letter of the Speaker of a County Assembly communicating the resolution of that Assembly. It is not, in our respectful view,

within the jurisdiction of the Senate, to question or interrogate the proceedings of a County Assembly, which within our constitutional arrangement is a separate legislature having charge over its own internal proceedings.

97. The question of the burden or standard of proof applicable to proceedings for removal from office was canvassed during the hearing. Burden of proof is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defence by the amount of evidence required by law. Determining the burden of proof in impeachment proceedings has been the subject of debate across the world.
98. Counsel for the Governor urged the Committee to find, which we do, that impeachment proceedings are neither the classical civil proceedings nor criminal proceedings. Considering authorities and precedents on this matter, we find that the appropriate standard of proof is probably neither the “balance of probabilities” threshold of civil proceedings nor the “beyond reasonable doubt” threshold applicable to criminal trials.
99. While contributing to the debate Senator Miriam Defensor Santiago of the Senate of the Philippines in a keynote address delivered at a convention held on 8th February 2012 said that, “an impeachment trial is a unique process, because it is a hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain constitutional government, through the removal of an unfit official from a position of public trust.”

100. It is our finding that impeachment proceedings speak to matters of good governance under our Constitution and the standards of leadership and integrity set, particularly under Chapter Six of the Constitution. The question to be asked is whether, weighing one thing with another, and in the totality of all the circumstances, the person sought to be impeached passes the leadership and integrity test under the Constitution.

8.0 THE FINDINGS AND DETERMINATIONS OF THE COMMITTEE

101. We now come to the crux of the matter, the place where we must state in unequivocal terms, whether, pursuant to section 33(4) of the County Governments Act and standing order 65(2) of the Senate Standing Orders we find the particulars of the charges against the Governor of Embu County to be substantiated.

8.1. Findings on the Specific Charges

102. **On Charge 1: Violation of the Public Procurement and Disposal Act 2005 and Regulations 2013:** the Committee observes that it is common ground that there were procurement irregularities and malpractices and outright violations of the relevant laws. The only question is one of liability and whether responsibility for violations could be placed on the Governor as the County Assembly had done or whether liability resided solely with the responsible officers. It is the view of the Committee that while primary liability for violations of the procurement laws may lie with individual officers, Article 73 of the Constitution which provides for the responsibilities of leadership as read with 179(4) of the Constitution and section 30(3)(f) of the County Governments Act, 2012 lead to the conclusion that the Governor will be held liable for violations that occur during his watch and in respect of which he or she does not take action. **The Committee finds this Charge to be substantiated.**

103. **On Charge 2: Violation of Public Finance Management Act:** The Committee observed that this ground, like the previous ground, points to a systems failure at the County Government. Although the grounds cited may not be unprecedented or unique to the Embu County Government, the inaction shown on the part of the Governor, for which, far from showing remorse or conceiving of remedial action, the Governor variously pleaded ignorance and shifted blame to his subordinate officers or otherwise repudiated responsibility lead to the culpability complained of. **The Committee finds this Charge to be substantiated.**
104. **On Charge 3: Violation of the County Government Act, 2012:** The Committee finds that there are positions in the County Government establishment which have been populated contrary to the County Governments Act. To the extent that these positions constitute the civil service of the County, serving the Embu County Government, it is a matter that should concern the Governor whether the bureaucracy of his administration is lawfully constituted. The Governor's defense that the positions did not require the approval of the County Assembly is not correct and does not accord with the provisions of the County Governments Act, 2012. The Governor's further defense that the appointment of persons into the public service of the County is the prerogative of the County Public Service-Board – an independent body – is a solid one, on a reading of the County Governments Act and, in particular, sections 59 to 63 thereof. This is not to say that the Governor, as the Chief Executive Officer of the County, should be entirely oblivious of the happenings of this magnitude in the County and should take no steps to address them. On the whole, however, while the Governor's conduct in this respect may not have been satisfactory, **the Special Committee does not find this Charge to be substantiated.**

105. **On Charge 4: Violation of the Constitution:** The Committee observes, once again, that in matters of procurement, in respect of which Article 227 of the Constitution had been cited, there had been considerable inaction and lack of oversight on the part of the Governor. Although pursuant to Article 179(4) of the Constitution the Governor is the Chief Executive Officer of the County, it appeared to the Special Committee that the Governor, was a mere by-stander and observer in the procurement debacles. The Governor gave the impression that he had totally removed himself from the controversies surrounding the works for the Embu Stadium and the defective maize seeds, leaving these matters primarily to the County Secretary, if not to no one in particular. The Governor repeatedly argued that he would never involve himself in matters of procurement; which should be an entirely different thing from taking action to deal with those responsible for procurement malpractice. **The Committee finds this Charge to be substantiated.**
106. **On Charge 5: Abuse of Office:** On this Charge, the Committee observes that the Charge as framed was vague and unclear. The Charge as framed and prosecuted did not clearly and unequivocally demonstrate the manner in which the Governor had abused office as contemplated under Article 181(1)(c) of the Constitution. The centre-piece of the evidence in support of this Charge, which was argued at length, was that the action of County Governor in swearing an affidavit in Nairobi High Court Judicial Review Miscellaneous Application No. 17 of 2014 in which he made certain averments considered to be exculpatory of the County Secretary, against whom the County Assembly had certain adverse resolutions and against whom there were pending investigations by the Ethics and Anti-Corruption Commission, amounted to abuse of office. The Committee finds that to the extent that the Governor was a party in the matter, and to the extent that the affidavit cited is a pleading in a live judicial proceeding, no adverse inference should be made on it. In any event, the Committee endorses the view that anything

happening in judicial proceedings, unless the proceedings have been found by a court to have been an abuse or subversion of the judicial process, should not be held against a litigant or a party or any other participant howsoever in the judicial proceedings. **The Committee therefore finds that this Charge is not substantiated.**

8.2. Summary of Findings on Charges

107. The summary of the findings on the Charges is that the Special Committee has found three out of the five charges to have been substantiated, namely-

- (a) Charge 1: Violation of the Public Procurement and Disposal Act 2005 and Regulations 2013;
- (b) Charge 2: Violation of Public Finance Management Act; and
- (c) Charge 4: Violation of the Constitution.

9.0. OTHER OBSERVATIONS AND RECOMMENDATIONS

108. In the course of the execution of its mandate, the Committee made a number of observations which it wishes to put on record and in respect of which some recommendations are made.

9.1. Timelines

109. It has become apparent to the Committee that the timelines prescribed under section 33 of the County Governments Act and standing order 65 of the Senate Standing Orders may be unrealistic and may not adequately promote the realization of the objectives of the investigation. It may be considered whether a period of fourteen days for the conclusion of the investigation and report to the Senate may not be more viable. In the alternative, if the current timelines remain, it may be necessary to require that certain events and processes be concluded by a set time. The invitation to appear, the period within which to file documents, the

number of oral witnesses to be heard and the sitting hours for the purpose of the hearings may all be considered for prescription.

9.2. The General State of Affairs in Embu County

110. Although a comprehensive analysis of the state of affairs in Embu County was not part of the mandate of the Special Committee, it would be an omission on the part of the Special Committee not to mention that in the course of the investigation and particularly the public hearings, it became apparent that matters in that County were in a far less than satisfactory state. The toxic relations between sections of the County Assembly and the Executive were on parade, as was the state of confusion, disarray and lack of synergy in the County Executive Committee. Accusations of witch-hunting and bad faith were thrown back and forth. There is going to be need, whichever way the present matter concludes, for a concerted effort at seeking reconciliation and cohesion.

111. That was not all. It ended up being not just the Governor on trial. The Embu County Assembly, for example, though not under investigation by the Committee was not shown in particularly good light. The Auditor-General's Report was almost as damning in its assessment of the Assembly's state of affairs as it was of that of the Executive. The oral and documentary evidence presented by Ms. Margaret Lorna Kariuki made very disturbing allegations on the state of affairs in the County Assembly which although it was impossible to verify, it would equally be irresponsible to ignore. We recommend that the appropriate institutions and organs of integrity and oversight move with speed to investigate allegations made in respect of the state of affairs at the Embu County Assembly and take appropriate action.

9.3. Processes at the County Assembly

112. We are alive to the warning to ourselves not to interfere in internal processes of County Assemblies. We however, think that serious thought needs to be given to the desirability of revising the County Assembly Standing Orders in order to provide for some sort of hearing of a Governor prior to the resolution of the Assembly to remove them from office.

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