

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE  
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY  
IMPEACHMENT OF THE GOVERNOR OF MURANG'A COUNTY HELD  
ON THURSDAY, 5<sup>TH</sup> NOVEMBER, 2015,  
AT COUNTY HALL, AT 10.20 A.M.**

[The Chairperson – Sen. David Musila]

**SENATORS PRESENT**

Sen. Fatuma Adan Dullo	-	Vice Chairperson
Sen. Stephen Sang		Sen. Catherine Mukiite Nabwala
Sen. Janet Ong'era		Sen. Moses Kajwang
Sen. (Prof.) John Lonyangapuo		Sen. Stewart Madzayo

**SECRETARIAT**

Mr. Njoroge Antony	-	Director, Litigation Services
Ms. Eunice Gichangi		Director, Legal Services, Senate
Mr. Njenga Njuguna		Director, Committee Services, Senate

**IN ATTENDANCE**

**THE GOVERNOR'S TEAM**

Gov. Mwangi Wa Iria	-	Governor
Mr. Browne Nathans		Lead Attorney
Mr. Ng'ang'a Mbugua		Legal Counsel
Mr. Peter Wanyama		Advocate
Mr. Charles Njenga		Advocate
Mr. Muturi Wa Karanja		PA, Governor
Ms. Kahura Patricia Wanjiru		Legal assistant
Mr. George Kamau		CEC Finance
Dr. Susan Magada		CEC Health
Mr. Albert Mwaniki		CEC Agriculture
Mr. Muiruri Maina		CEC Co-operatives
Eng. Amos Njoroge		CEC Infrastructure
Ms. Masaki Sarah		CEC Lands, Housing and Planning
Ms. Eunice Nyambura Macharia		CEC Public Service and Administration
Mr. Patrick Mukuria		County Secretary
Mr. James Kairu		C.O. Supply Chain Management
Mr. Edwin Kimuyu		C.O. Finance

**THE COUNTY ASSEMBLY TEAM**

Hon. Mary Waithira	-	MCA
Hon. Peter Irungu Kihungi	-	MCA
Hon. Peter. I. Kihungi	-	MCA
Hon. Joel Ngugi Kibugi	-	MCA
Hon. Francis. N. Kimemia	-	MCA
Hon. Joseph Kimani Gitau	-	MCA
Hon. Peter Mweli	-	MCA
Hon. John Kahari	-	MCA
Hon. Chris Kinyanjui	-	MCA

**WITNESSES**

Mr. Alex Rugera	-	Office of the Auditor-General (AG)
Mr. Julius M. Mutinda	-	Director, KENAO

*(The Special Committee convened at 10.20 p.m.)*

**The Chairperson** (Sen. Musila): Good morning again, ladies and gentlemen, distinguished Senators, Members of the special Committee, the Governor's and the Assembly Team, members of the Press and the public. I am pleased to announce that our witnesses arrived. Therefore, we commence our proceedings this second day. As it is customary with Parliament, we start with a prayer.

*(Prayers)*

Our programme today will be as follows. We will start by hearing the evidence from the Auditor-General (AG) and then we will move on to the evidence of the Controller of Budget. After that, we will hear the evidence by the Governor and then we will have closing statements of half-an-hour each for both the Assembly and the Governor.

Do you have any issues on that programme that I have just mentioned so that we can clear them before we start? You notice that there was a lot of saving of time on the part of the Governor. Therefore, we will give them two hours and then they will still have another 30 minutes for the closing statements. Do you have an objection to that?

**Mr. Browne Nathans:** Mr. Chairman, Sir, good morning! I see great smiles on everybody and we thank God we are all alive. There is a small piece that we had requested in the morning and with these blessings of the rain, we had suggested that His Excellency the Governor could say a word of greetings – he has been with us – so that we know the human being we are dealing with. You said that should the opportunity arise, you would be more than happy not to address anything because he is represented by the counsel but as a sign of good gesture from him. At your convenience, consider that.

Otherwise we have no objection with the time because you have allocated the time accordingly.

**The Chairperson** (Sen. Musila): We will rule on that later. Counsel for the Assembly, any issues on what I have said?

**Mr. Mbuti Gathenji**: Mr. Chairman, Sir, we have no issue. The only thing that I would like to mention is that we would like to seek your guidance on any statement made by a person who is not a witness.

**The Chairperson** (Sen. Musila): If you are referring to the Governor, we said that we will rule on that when the time comes.

Let me begin by introducing Members of the Special Committee. You have already met them but for the purpose of record, I need to introduce them.

*(The Chairperson introduced himself  
and the Members of the Committee)*

*(Mr. Alex Rugera and Mr. Julius Mulinge before the Committee)*

We will now proceed with the programme as I announced earlier. We now call the first witness who is the Controller of Budget and the Auditor-General (AG). He is represented.

As we did yesterday, the witness will be examined by the Assembly for 20 minutes and cross examined for 20 minutes by the Governor's side and then re-examined for 10 minutes again by the Assembly. That is the timing that we will follow. I think we agreed that we will be strict on time because it is of the essence.

The witnesses are the Deputy Auditor-General (AG) Mr. Rugera Rugera and Mr. Julius Mulinge Mutinda is the Director, KENAO (Central Hub). They will be sworn because they could be joint witnesses. Deputy Auditor-General, if you have any issues that you will need to clarify with Mr. Mulinge, you can, but both of you will be sworn.

*(Mr. Alex Rugera and Mr. Julius Mulinge each took the oath)*

**The Chairperson** (Sen. Musila): These witnesses were called at the request of the Counsel for Murang'a County Assembly.

Counsel, you may now proceed.

**Mr. Mbuti Gathenji**: Thank you, Mr. Chairman, Sir. I am not very sure, gentlemen, I should start. I think I will just ask them to identify the areas that they are testifying on.

As you have heard, my name is Gathenji and my questions are related to the report that you prepared, especially covering the period of 1<sup>st</sup> July, 2015 to 30<sup>th</sup> June, 2014. I would be obliged if you can identify that document. If you had your copy, it would be much better but we will identify the document for the purpose of the Committee.

**The Chairperson** (Sen. Musila): Counsel, could you also guide us on where we can find it on this bundle?

**Mr. Mbuti Gathenji**: Mr. Chairman, Sir, that is true. I will do that. On the big bundle, that is the Assembly, it is Page 356. If there is any difficulty, we will try to assist in making sure that everybody has identified the page.

**The Chairperson** (Sen. Musila): There are problems in the pagination. There is another in Page 343. So, check either Page 343 or 338. When we are ready we will proceed.

**Mr. Mbuti Gathenji**: Mr. Chairman, Sir, I am confirming whether we are reading from the same page, at least, from the same document.

**The Chairperson** (Sen. Musila): I think so. Auditors, do you have the page? We want to make sure that you are there before we proceed.

**Mr. Alex Rugera**: Yes, it is the one. We are okay.

**The Chairperson** (Sen. Musila): We have received confirmation from the witnesses that they are okay. Proceed, Counsel for the Assembly.

**Mr. Browne Nathans**: Mr. Chairman, Sir, we need just one clarification for the record. What is the status of the document that is about to be discussed? Is it work in progress, a complete document and has it gone through all the stages that are supposed to be undertaken? Just so that we are clear, is it a draft, so that we can put it on record? Has it gone to the Assembly and through all the stages?

**The Chairperson** (Sen. Musila): Counsel, why can that not come later? You can ask that when you come to cross-examine the witness. Right now, we have not even heard anything about it. Counsel, for the Assembly, what do you say?

**Mr. Mbuti Gathenji**: I think he is jumping the gun. He will have his time. The witness will first confirm the mandate that they have to prepare this document, acknowledge that it is their document and tell us that status. I request the Counsel to be patient.

I will ask the question now so that we identify this document. Could one of you tell us what document this is and your mandate to prepare it?

**Mr. Alex Rugera**: Thank you, Mr. Chairman, Sir. The document we are referring to is the Report of the Auditor-General on the Financial Operations on Murang'a County Executive for the Period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June, 2014. This Report was signed by the

Auditor-General (AG) on 17<sup>th</sup> August, 2015. The Office of the Auditor-General (AG) has the mandate to audit and report on the matters of both the national and county governments. This is one of the mandated reports which were issued by the Auditor-General (AG).

**Mr. Mbuti Gathenji:** I wish you could also confirm, what is the process behind the preparation of this document?

**Mr. Alex Rugera:** The process that we use is the audit. We plan the audit, go to the field and carry out the audit by gathering evidence. In the audit evidence, of course, we interrogate the record and also discuss with the management. We then issue what we call “a management letter” to the management. After the response, whatever issues which have not been responded to properly are what is included in this final report.

**Mr. Mbuti Gathenji:** I would like you to confirm that you followed that procedure with respect to preparation of this document.

**Mr. Alex Rugera:** Yes, I followed all the procedures necessary for the audit.

**Mr. Mbuti Gathenji:** Let us now come to the specific findings. There is an item on Murang'a Investment Co-operative Society (MICS) otherwise known as *Shilingi kwa Shilingi*. Could you identify it? I believe it is on Page 18 of your document.

**Mr. Kimani:** Mr. Chairperson, Sir, I agree with your past statement because the documents are a little bit mixed up but I am now there.

**The Chairperson** (Sen. Musila): Okay, now you found it?

**Mr. Kimani:** Mr. Chairperson, Sir, yes.

**The Chairperson** (Sen. Musila): Then answer the question?

**Mr. Mbuti Gathenji:** Thank you, Mr. Chairman, Sir. We know the auditors are specific and particular. That is why we are giving you time. Now, with respect to that item, this Committee will be interested to know the documents you interrogated, the people you consulted, your assessment and your findings. We will not interrupt you. Just tell us on each of those items.

**Mr. Alex Rugera:** Thank you, Mr. Chairman, Sir. This item is on our findings when we viewed the investment; when we reviewed the expenditure of the county executive and I would like my colleague to take us through briefly so that we can get the details of what our findings were on that particular item.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, may be before you proceed, please give us the name of the person who is doing it.

**Mr. Julius Mulinge:** Mr. Chairman, Sir, my name is Julius Mulinge Mutinda, Director of Audit in Central Hub. We examine vouchers. The vouchers which we were given and made available for audit revealed that the county executive spent a total of sum of Kshs26, 072, 200 for Murang'a Investment Cooperative Society being payment for cost of adverts to promote the society and to invite the general public to purchase shares in the cooperative society through print media, radio, TV, website, billboards and the short code for SMS.

Further, the issue of other records made available for audit review showed the following anomalies. In the certificate number CS/15655 dated 1<sup>st</sup> October, 2013 indicates that Murang'a Investment Cooperative Society Ltd was registered under Cooperative Society Act, Cap 490 Section 6 (3) of the laws of Kenya. However, no document was made available by the county executive to show that the Society was licensed by the Sacco Society Regulatory Authority (SRA) to carry out deposit taking business in accordance with the Sacco Society Act 2008. That was our finding.

Thank you.

**Mr. Mbuti Gathenji:** May be you could elaborate. The documents that you examined; were they of specific supplier or who were the people involved in the advertisement?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, all the vouchers we are given with this total amount was showing different TV Stations, billboard defects. We analysed those ones and totaled into this amount.

**Mr. Mbuti Gathenji:** Do you know whether they keep a record of the names and addresses of the individuals involved in the supply of the questioned expenditure?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, yes we just relied on the payment vouchers. We have that list although we did not come with the list of individuals and companies involved.

**Mr. Mbuti Gathenji:** Can you be very specific on the anomalies that you found?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, the anomaly is that the cooperative society which we saw there had no document availed by the county executive to show that the society was licensed by the Sacco Society Regulatory Authority (SRA), to carry out deposit taking business in accordance with the Sacco Society Act 2008.

**Mr. Mbuti Gathenji:** Did you confirm the status of this organisation *vis-a-vis* the responsibility of the county on the issue of finance management? I repeat the question. Did you question the circumstances which this alleged cooperative got financing from the county government?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, we were not given any document to confirm whether this society has mandate to carry out deposit taking business. We were not given any document.

**Mr. Mbuti Gathenji:** Mr. Mutinda, that is one of the arguments. I am asking, did you confirm whether the county government had any mandate to finance this autonomous independent cooperative?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, this is why we queried because the money came from the public through Murang'a County government and it went to a private company. There were many queries because this was a private cooperative society which is different from Murang'a County government's operations. They got money from there for the cooperative society. The query here is that the money from the county government was used to advertise a private company. That was the major concern.

**Mr. Mbuti Gathenji:** By the time you compiled the Report, did you get an answer?

**Mr. Julius Mulinge:** Mr. Chairman, Sir, unfortunately, we wrote a management letter that showed that we were not given any document that we wanted and even the management letter was not replied to.

**Mr. Mbuti Gathenji:** Thank you very much. We now go to the next item. I believe it is page 17 of the document you are holding. The specific item is 4.5. Are you there?

**Mr. Mbuti Gathenji:** That is correct. Tell us what that item is and give us the same explanation, the way you have done with the first item.

**Mr. Julius Mulinge:** This query was in paragraph 4.5, Purchase of Land, which we based on Section 76(1) of Public Procurement and Disposal Act, 2005 which stipulates that a procuring entity may use a request for proposals for procurement if:-

- (a) the procurement of the services or combination of goods and services; and,
- (b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

However, payment documents made available for audit indicated that the county executive incurred an expenditure amounting to Kshs340 million in respect of purchase of a parcel of land for agro-marketing and value addition centre through a request for proposals instead of through open tender method of procurement, contrary to the requirement of the above said procurement law.

**The Chairperson (Sen. Musila):** Is there anything else you want to add?

**Mr. Julius Mulinge:** We were only concerned with the procurement process in this audit query.

**Mr. Mbuti Gathenji:** You have mentioned that this is with respect to expenditure of Kshs340 million for the purchase of land. Did you get any explanation or any document?

**Mr. Julius Mulinge:** For the query to be here, I can confirm that no explanation was given.

**Mr. Mbuti Gathenji:** Please turn to page 16 of the document. Let us look at your summary at page 16 of the document. You can just take us through and gives us your conclusion. This is my last question.

**Mr. Julius Mulinge:** Mr. Chairman, Sir, this is another issue. It is the not the one I was responding to.

**Mr. Mbuti Gathenji:** I agree that this is another issue, but we want to hear about it.

**Mr. Julius Mulinge:** So, could I start from the beginning of this issue?

**Mr. Mbuti Gathenji:** For completeness of the record, just read the whole summary and conclusion.

**Mr. Julius Mulinge:** This was in respect of irregular procurement of hay bales. Records maintained at the department of agriculture indicate that supply and transport 18,000 bales of Rhodes hay grass and 2,000 Lucerne hay grass were ordered for Mariira farm animal project. However, the following anomalies were noted:-

(1) There was no proof of acknowledgement of receipt of goods in form of delivery notes or S13s, as they were not available for audit.

(2) No evidence of issuance to the end user unit through S11s vouchers, as they were not availed for audit verification.

(3) In contravention of the Procurement and Disposal Act provision of goods and services amounting to Kshs4,995,000 were not advertised nationally.

(4) According to Voucher No.1622 dated 31<sup>st</sup> March, 2014, 18,000 bales of Rhodes hay and 2,000 bales of Lucerne hay were to be transported. Examination of records availed revealed that only Rhodes grass hay was supplied as follows:-

(i) Delivery note No.3348 dated 3<sup>rd</sup> April, 2014; quantity, 510 bales of boma Rhodes valued at Kshs45,900;

(ii) Delivery note No.104 dated 2<sup>nd</sup> May, 2014; quantity, 595 bales of Rhodes amounting to 53,550;

(iii) Delivery note No.165 dated 2<sup>nd</sup> May, 2014; quantity, 1190 bales of Rhodes amounting to Kshs107,100;

(iv) Delivery note No.102 dated 30<sup>th</sup> April, 2014; quantity, 597 bales of Rhodes valued at Kshs53,730;

(5) Delivery note No.101 dated 28<sup>th</sup> April, 2014; quantity, 1,200 of Rhodes amounting to Kshs108,000; and,

(6) Delivery note No.100 dated 3<sup>rd</sup> May, 2014; quantity, 1,783 bales of Rhodes amounting to Kshs160,470.

The total quantity is 5,875 bales of Rhodes valued at Kshs528,750.

Analysis of the Rhodes grass hay transported was as follows:-



Transport was set to be 500 bales per trip at Kshs45,000. A total of 18,000 bales of Rhodes hay at 500 bales per trip. There were 36 trips and, therefore, the total number of Rhodes hay transported was 5,875 bales divided by 500, which is equal to 11.75 trips. The total number of bales not transported was 18,000 minus 5875, which is equal to 12,125 bales. Those not transported are 12,125 divided by 500, which is equals to 24.25. Therefore, the total number of trips not delivered was 24.25 trips.

In summary, the Rhodes grass hay not transported is 24.25 at Kshs45,000, which is equal to Kshs1,091,250 and five trips of Lucerne grass not transported, at Kshs45,000, which is equal to Kshs225,000. The total is Kshs1, 316, 250.

Another split Voucher No.1623 dated 31<sup>st</sup> March, 2014 of Kshs3,100,000 in respect of payment and supply of 18,000 bales of Rhodes grass valued at Kshs3,150,000. From the records availed for audit, it was evident that out of the Kshs4,995,000 paid, goods with a value of Kshs4,666,250 were not delivered.

We have given it as Appendix VIII in our report and recommendation.  
Can I read the recommendation?

Our recommendation was that thorough investigations into this procurement should be instituted with a view to establishing whether all the grass paid for was delivered. The results of the investigation should be acted on accordingly.

**Mr. Mbuti Gathenji:** Was there any follow-up from your department regarding that recommendation?

**Mr. Julius Mulinge:** Currently, we are carrying out an audit. We normally check and equate it to the previous year. Therefore, that is the issue that we are following at this stage.

**Mr. Mbuti Gathenji:** Thank you. That is all from me.

**The Chairperson** (Sen. Musila): Thank you, Counsel. It is a few minutes past the time that was allocated. However, that is understood because of documentation. Let us have the Counsel for the Governor cross-examine the witness.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir. Good morning Mr. Rugera and Julius. Before I interrogate this matter in depth, do you have a copy of the Constitution with you? If Counsel for the Assembly has an extra copy, kindly give him.

Mr. Rugera, could you kindly turn to Article 229(7) of the Constitution? You agree with me that there are certain constitutional procedures that an audit report goes through before it is finally adopted. Is that correct?

**Mr. Alex Rugera:** Yes.

**Mr. George Ng'ang'a Mbugua:** First of all, could you establish a few pertinent facts; that the Report that you have made reference to was signed by the Auditor-General on 17<sup>th</sup> August, this year? Is that correct?

**Mr. Alex Rugera:** Yes.

**Mr. George Ng'ang'a Mbugua:** When was it forwarded to---

**Mr. Mbuthi Gathenji:** Could I assist the Committee? It is important that the Counsel ensures that his microphone is on when the answer is being given.

**The Chairperson (Sen. Musila):** Witness, you must press the button when you are answering any question, so that you are on record. I doubt whether what you said was recorded. Could you start from the beginning?

**Mr. George Ng'ang'a Mbugua:** The first question was that you confirm that the Constitution, under Article 229, provides for the constitutional procedures that an audit carried out by the Office of the Auditor-General goes through. Is it correct that there are certain procedures that are set out in the Constitution?

**Mr. Alex Rugera:** That is true.

**Mr. George Ng'ang'a Mbugua:** Thank you. Could you confirm, from the document that you have been referring to, that the Auditor-General appended his signature on 17<sup>th</sup> August this year?

**Mr. Alex Rugera:** True.

**Mr. George Ng'ang'a Mbugua:** This is very significant because I want you to look at that date vis-à-vis Article 229(8). Could you read to us what it says?

**Mr. Alex Rugera:** It says:-

“Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

**Mr. George Ng'ang'a Mbugua:** If at all that report was ever submitted to Murang'a County Assembly, when would the three months lapse, according to that Article of the Constitution?

**Mr. Mbuthi Gathenji:** Just to clarify, it says “within three months” but not “after three months.”

**Mr. George Ng'ang'a Mbugua:** Within three months after receiving. First, we want to establish when it was signed because it could not have been dispatched before the signature, unless that is what your evidence is. We have established when it was signed

by the Auditor-General. Subsequent to that signing, it is supposed to be acted upon, within a period of three months. When would three months lapse from the date it was signed by the Auditor-General?

**Mr. Alex Rugera:** Mathematically, it should be 17<sup>th</sup> November, 2015.

**Mr. George Ng'ang'a Mbugua:** Mathematically, it should be 17<sup>th</sup> November, 2015. The forwarding of the report to the assembly is for a purpose. Is that correct?

**Mr. Alex Rugera:** Yes.

**Mr. George Ng'ang'a Mbugua:** Do you agree with me that we have not yet reached 17<sup>th</sup> November, 2015? When is today, just for the record?

**Mr. Alex Rugera:** Today is 5<sup>th</sup> November, 2015.

**Mr. George Ng'ang'a Mbugua:** You will agree with me that we are now discussing a report that has not been debated and adopted by the assembly as per the provision we have read. The three months provided for have not lapsed or do you have evidence that that particular report has actually been adopted by the assembly, as we stand here?

**Mr. Alex Rugera:** Let me clarify this. Once an audit report has been signed and issued by the Auditor-General, it becomes a public document.

**Mr. George Ng'ang'a Mbugua:** That is not the question. Please, listen to my question. There is a mandatory requirement that the audit report shall be submitted to the relevant county assembly. Has this audit report been submitted in terms of that provision of the Constitution?

**Mr. Alex Rugera:** Yes, we submitted the report.

**Mr. George Ng'ang'a Mbugua:** Where is the forwarding letter, so that we can establish when that happened?

**Mr. Alex Rugera:** Allow me one minute to check my records here.

**Mr. George Ng'ang'a Mbugua:** As he does that, let us go to Sub-Article 8.

**Mr. Alex Rugera:** Please, let me check before we go on.

**Mr. George Ng'ang'a Mbugua:** Very well. Take your time.

**The Chairperson (Sen. Musila):** Let us allow the witness time to look at his records.

**Mr. Alex Rugera:** Mr. Chairman, Sir, there is a record of the dispatch which, unfortunately, we did not bring with us.

**The Chairperson** (Sen. Musila): Do you not have it now?

**Mr. Alex Rugera:** We do not have it now, but it is in my office.

**Mr. George Ng'ang'a Mbugua:** This sequence of events of critical because this document constitutes the basis of all the allegations facing the hon. Governor. We need to be very clear in our minds because anything that contravenes the Constitution under Article 204 – as you very well know – is null and void. Is that correct?

**Mr. Alex Rugera:** Yes.

**Mr. George Ng'ang'a Mbugua:** So, you really appreciate the importance of compliance with the Constitution. Let us carry on.

The Report – according to Sub-Article 8 – is supposed to be debated, considered and appropriate action taken. So, you have a report - and I am sure you will agree with me – that constitutes work-in-progress; that you have interrogated, raised queries, and, as it were, forwarded the document to another state organ for consideration. You will agree with me that they will interrogate that document and take a position on it, because for you to consider something, you have to review and take some action on it. Is that correct? Let us be systematic.

**Mr. Alex Rugera:** Is that my question?

**Mr. George Ng'ang'a Mbugua:** It is my question, Mr. Rugera.

**Mr. Alex Rugera:** I am wondering whether I should answer that question because once the audit report has been signed and issued, it is not my responsibility to debate and make recommendations.

**Mr. George Ng'ang'a Mbugua:** We are not running away from that. We are not even saying that it is your responsibility. However, since those provisions directly govern the operations of the Office of the Auditor-General, it is important for us to identify the stages, so that we can make a conclusion on whether, indeed, whatever is in the report can be considered, as we stand here and now, as conclusive. Having forwarded the report, if at all we have to assume that, that was done, without evidence that it has been considered and adopted by the assembly and relevant action taken, can work on that audit report be deemed to have been completed without compliance?

**Mr. Alex Rugera:** The moment the report of the Auditor General is signed, whether it is debate or not, it remains a report issued to the National Assembly.

**Mr. George Ng'ang'a Mbugua:** So according to you, sub-articles 7 and 8 of the Constitution is irrelevant in as far as the process that an audit report is supposed to go through is concerned?

**Mr. Alex Rugera:** No, I am not saying that.

**Mr. George Ng'ang'a Mbugua:** So, they are relevant?

**Mr. Alex Rugera:** I am trying to show you my responsibly as the Auditor General

**Mr. George Ng'ang'a Mbugua:** Mr. Rugera, kindly, if something is there in black and white in law, you may have a different opinion as to how it applies but I am asking you a very simple question; without that report going through the stages set out under sub-article 7 and 8, can that report and the content therein be deemed to have been final and conclusive for purposes of the content therein, without compliance of those two sections?

**Mr. Alex Rugera:** Correct.

**Mr. George Ng'ang'a Mbugua:** Let me take this question to the next level, just hung on. So according then to the office of the Auditor General those two sub-articles are irreverent for purposes of guiding the process or preparing an audit report.

**Mr. Alex Rugera:** I am not saying they are irreverent, they are relevant.

**Mr. George Ng'ang'a Mbugua:** Thank you.

**The Chairperson** (Sen. Musila): Counsel, you have repeatedly talked about adoption in sub-article 8 and I find no word there that suggests that the Auditor-General's report after being debated by the Assembly should be adopted. You have asked the witness severally about adoption of the Auditor-General's report and I do not find that word there.

**Mr. George Ng'ang'a Mbugua:** Sub-Article 8 says that within three months after receiving the audit report, first of all we have not even been told that particular report has been submitted; Parliament is this case the County Assembly because this is a report that touches on the county government of Murang'a - the county assembly shall debate and consider the report and take appropriate action. So maybe it was just a question of semantics that there is

**Mr. Mbuti Gathenji:** Excuse me.

**Mr. George Ng'ang'a Mbugua:** Can I answer senior counsel? I have the microphone and I am answering to the Honorable Committee and then you will have your opportunity, senior counsel, to speak.

**Mr. Mbuti Githenji:** The question is directed to the witness.

**Mr. George Ng'ang'a Mbugua:** I was answering, and I am saying that there is sequence of events, there is the debating, consideration of the report and there is the

taking of appropriate action which are stages we were not able to establish whether that has been done.

**The Chairperson** (Sen. Musila): My question was only about adoption.

**Mr. George Ng'ang'a Mbugua:** Yes, there is strictly no requirement for adoption but there is a requirement for consideration of the content of the that report

**The Chairperson** (Sen. Musila): My question was only about adoption which I found lacking

**Mr. George Ng'ang'a Mbugua:** I was using the word interchangeably, it is consideration

**The Chairperson** (Sen. Musila): So now you are done with the witness?

**Mr. Browne Nathans:** For the record, Mr. Chairman Sir, just on the same question, the record shows that no evidence has been tendered by the witness to confirm that indeed that report was delivered to the Assembly. Although he is going to get that document, he cannot confirm as of now. It is a document that should not even be admissible at all because it has not been confirmed whether it went to the relevant agency. So the process being flawed, we leave it at that level because it cannot be a subject of discussion just for the record.

**The Chairperson**(Sen. Musila): Witness you wanted to say something.

**Mr. Alex Rugera:** Yes, Mr. Chairman Sir. This letter of invitation came at 7.00 pm last night; the documents are there, including the evidence of delivery of the report and that is why it is being debated here definitely. However, I did not bring that particular copy of the delivery letter which I said I will make it available to the Committee. That does not mean that it was not submitted. Two, once the audit report has been signed by the Auditor-General, whether or not it is debated in any of the Houses, it does not make that report irrelevant at all because some of the reports we make are not debated and that does not change the report of the Auditor-General.

**The Chairperson** (Sen. Musila): We understand you. Can you submit that document of evidence to show that the audit report was delivered to the Assembly as soon as you here this place?

**Mr. Alex Rugera:** I will submit it today.

**The Chairperson** (Sen. Musila): Submit it today may be an hour from now because your office is not far from here.

**Mr. Rugera:** That is correct, Mr. Chairman, Sir. I will submit it today.

**The Chairperson** (Sen. Musila): Yes, counsel for the Assembly.

**Mr. Browne Nathans:** Mr. Chairman, Sir, if you allow us to just make one or two remarks because it is important, we would like to say that if this had been delivered to the Assembly, there is requirement for consideration and action taken so that the Assembly shall not be held to run from its oversight responsibility in other words, we would be treated to what the Assembly did on the subject.

**The Chairperson** (Sen. Musila): Counsel, please, the Chair directed the witness to bring in the document of evidence that the report was delivered. Let me ask the counsel of the Assembly to re-examine the witness.

**Mr. Muthi Gathenji:** I would to ask the Chair to ask the counsel not to submit at this stage because what we are getting are their views and submissions and not question to the witness. However, I want you, Mr. Rugera, to confirm that once you sign this audit report, it becomes a public document.

**Mr. Alex Rugera:** True.

**Mr. Muthi Gathenji:** And that any person including myself can get a copy.

**Mr. Alex Rugera:** Yes; once signed, the audit report becomes a public document and it is supposed to be published and publicized so that everybody can get a copy of the report.

**Mr. Muthi Gathenji:** I would like also to confirm that the items that you mentioned as having not been attended to by the County Executive were not attended to any time of submission .

**Mr. Alex Rugera:** That is true and---

**Mr. Muthi Gathenji:** I also want you to confirm that once the Auditor General finishes his work, all and sundry are at liberty to pick investigative action, if they so wish.

**Mr. Alex Rugera:** True.

**Mr. Muthi Gathenji:** I want you to confirm that the County Assembly is at liberty to make a choice of the mode of investigating the matters mentioned in the report.

**Mr. George Ng'ang'a Mbugua:** The question that the Assembly can make a choice, that is misleading, Mr. Chairman, Sir. There are some questions that we cannot just allow to pass. We have seen a provision that requires the Assembly to take action. So the question being put to the witness, first of all, is question of law regarding whether the Assembly has a choice to act on the report or not.

**The Chairperson** (Sen. Musila): Counsel, respond to that.

**Mr. Mbuthi Gathenji:** That is a very valid question. I will rephrase it. Once you issue a report, you have given and indicated areas of anomalies you did not get an answer to - Is adoption of that report a condition to any further action or consideration by the Assembly or is it a condition for any other authority that wants to investigate? In simple language, once you do your job and you release the public document, is it true that any person can do whatever action they want without any further reference to you? There is a finality in your report.

**Mr. Alex Rugera:** It is true and that is why we put this report on our website.

**The Chairperson** (Sen. Musila): Now, I am going to invite Members of the Special Committee to seek any clarification and they should be answered precisely. You can direct your clarification to the witness or to either of the counsel.

Sen. (Eng.) Muriuki was not introduced initially when he came in but I give him the opportunity.

**Sen. (Eng.) Muriuki:** Thank you, Mr. Chairman Sir. My apologies for coming late. Mine is a small clarification to invite a comment from the Governor's counsel.

I just need a small clarification from the Governor's Counsel. The tabling of report; ordinarily, the report goes to the House and then it is directed to the Public Accounts Committee (PAC). The nature of the action, especially within the Committee, gives whoever is being audited another chance to exhaust the documents required. For example, the letter you are now asking for. We can conclude that you do not have it at all.

The Counsel did mix up between adoption and taking action. If you take the Committee's report to the House, the action is to recommend action by the law enforcement entities like the Directorate of Criminal Investigation (CID) or the Ethics and Anti-Corruption Commission (EACC). However, the adoption which is a political vote whether to do it or not, does not prevent the EACC to go on and act on the matter. That is all I wish to clarify.

**Mr. Browne Nathans:** Madam Vice Chairperson, could you make it even clearer what the Hon. Senator has said. Our intention is to confirm, the witness is saying you make it a public document. A public for who? It is not just a public document. It is intended to be delivered to an agency that is duly established, called the County Assembly, which is the legislative arm; part of the three organs of a county Government.

It is mandatory, therefore, that that document be and is delivered and tabled. Once tabled, it is owned by the Assembly. The Assembly has no choice, but to act on it without exception and it shall consider first. So, we are even jumping the gun because we have not even gotten to 17<sup>th</sup> November. That is a side issue. Were these to be confirmed that it is has been duly delivered, we want to invite the County Assembly to confirm what



action, if any, was taken for consideration. What recommendations were made and what actions were taken, by who and when?

**The Vice Chairperson** (Sen. Adan): Counsel, we have dealt with that matter and closed it.

**Sen. Nabwala:** Madam Vice Chairperson, my question is to the Auditor General. After you carried out your audit for the 2014/15 Financial Year, and found out that there are very serious anomalies in your report. Well, you say you submitted the report to the County Assembly who are normally supposed to table it in the House and adopt and then pass it on for action. From your end, did you take any action if you were duly satisfied that there were anomalies or irregularities in Murang'a County Government?

**The Vice Chairperson** (Sen. Adan): Let us hear more questions.

**Sen. M. Kajwang':** Madam Vice Chairperson, I will avoid the legality or illegality of the document before us. However, I want the attention of the witness on this report. On pages 5 and 18 of the report, it regards *Shilingi kwa Shilingi* initiative. On page 5(9.0), you have indicated that the County Executive contributed a total of Kshs28,489,000 to Murang'a Investment Co-operative Society. On page 18(4.8), you have indicated that the County Executive spent a sum of Kshs26,072,000 on the same. Which number should we take for purposes of this Committee?

**The Chairperson** (Sen. Musila): Take your time. Are you in a position to answer now?

**Mr. Julius Mulinge:** Let me clarify here. In our initial management letter, we said that in total, the County Government incurred an expenditure of Kshs28,489,800 which includes a sum Kshs26,072,200 paid to Top Media Consultancy Ltd. to procure advertising space shown above in Murang'a Investment Co-operative Society. The amount was spent pursuant to request dated 6<sup>th</sup> November, 2013 and paid to the county executive in charge of the co-operative by the Society Interim Chairman. That is the difference. It was a sum of---

**Mr. Alex Rugera:** Madam Vice Chairperson, a sum of Kshs28,489,000 was the total. However, what specifically we were querying is Kshs26,072,000. So, the figure which should go on record is Kshs26,072,000.

**The Vice Chairperson** (Sen. Adan): Hon. Senator, are you satisfied with the answer given so we can move on?

**Sen. M. Kajwang':** Yes, Madam Vice Chairperson. Despite the fact that two figures appear in the same report, it would have been neat to have that clarification in this report. However, on the same point of *Shilingi kwa Shilingi* initiative, the issue on crime was anomaly. In your finding of *Shilingi kwa Shilingi* initiative, what was the crime? Was it the issue of deposit taking which should be within the domain of SASRA and not this

Special Committee? I know the Counsel for the Assembly asked that, but I want to hear it very succinctly from you.

**The Vice Chairperson** (Sen. Adan): Witness, did you get the question?

**Mr. Alex Rugera:** Yes, Madam Vice Chairperson.

**The Vice Chairperson** (Sen. Adan): We can take more questions instead of dealing with one after another.

**Sen. Ong'era:** Madam Vice Chairperson, I have three questions. First, is in regard to the purchase of land. Look at the Public Procurement and Disposal Act, Sections 29 and 73 relating to restricted tendering. The reasons that you have given us here are not the actual reasons that the law talks about.

Section 73 states:-

“When restricted tendering may be used, a procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed. A procuring entity may use restricted tendering if the following conditions are satisfied;

1. Competition for contract because of the complex or specified nature of the goods, works or services is limited to pre-qualified contractors that time and cost required to examine and evaluate a large number of tenders will be disproportionate to the value of goods, works or services to be procured and see there are only a few known suppliers of the goods, works or services s may be prescribed by the regulation.”

If I remember this rule right, under Section 29, general procurement rules says:

“The only instance that such kind of restricted tendering or direct procurement is allowed, is if they obtain a written approval of the tender committee and record in writing the reasons for using the alternative procurement procedure.”

That is the first question regarding the purchase of the land. The second question is on the irregular procurement of bales. What was the actual cost of one bale?

Madam Vice Chairperson, is Marira Farm a project or a farm owned by the County Government of Muranga? Regarding Article 229(7) and (9); do you as auditors think that Article 229(8) is important?

Why do you think that audit must be submitted to Parliament considering that the MCAs are the people's representatives? Must these reports be submitted as part of the process?

**The Vice Chairperson** (Sen. Adan): Those are a handful of questions. Is the witness ready to respond?

**Mr. Alex Rugera:** Madam Vice Chairperson, I am ready, but I request that we go question by question because they might be confusing.

**The Vice Chairperson** (Sen. Adan): Would you like us to repeat or you will handle question by question?

**Mr. Alex Rugera:** Madam Vice Chairperson, let me go through what I have. In the event that I may miss something, then it can be clarified.

The Kshs340 million in respect to the land that was purchased: It is above the threshold of restricted tendering. That is why we raised the issue because there could be other suppliers with equal value of land who may have supplied this item at a cheaper price.

To respond to the other question, let me quickly establish the cost of one bale---

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, for the record, I think this will be of assistance to this witness. As part of the documents we are relying on in our defence, we will show that the tendering process was competitive. It was advertised and in line with the provisions of Section 78 of the PFM Act. We will prove that it was not restricted tendering as has been raised.

**The Chairperson** (Sen. Musila): Counsel, why do you not wait for your time to come?

**The Vice Chairperson** (Sen. Adan): Please, proceed witness.

**Mr. Alex Rugera:** Madam Vice Chairperson, I am trying to check whether we have on record the cost per bale. What we have is the invoice of delivery and amount of the bale and the value of those bales. We can calculate from that. It was value per order so, that can only be derived from the ordered bales.

**The Vice Chairperson** (Sen. Adan): Hon. Senators, it looks like they might not give us the cost of one bale at the moment.

Witness, please, proceed to answer the questions from Sen. Ong'era and Sen. M. Kajwang. Are you okay? Would you like her to repeat the question?

**Mr. Alex Rugera:** Madam Vice Chairperson, on the Marira farm, it is not indicated whether it belongs to the county government. Here, they have just mentioned parcel of land. Marira Farm is mentioned as the place where the bales were going. We have not established whether Marira Farm belongs to the County Government. Marira Farm has been mentioned as the place where the bales were being taken by the Department of Agriculture of the County government of Murang'a.

**The Vice Chairperson** (Sen. Adan): Hon. Senator, do you want further clarification on the same?

**Sen. Ong'era:** Madam Vice Chairperson, as auditors who are keen under your constitutional obligations on ensuring that Government funds are properly used---you know that the County Government is not in the business of owning farms. Did you not find out the title to where those bales were going?

**Mr. Julius Mulinge:** Madam Vice Chairperson, we did not establish clearly whether Marira Farm is the same land that was purchased. Details to that are still with our auditors on the ground. We are, therefore, not sure whether it belongs to the County Government because is not mentioned whether the land that was purchased was Marira Farm.

**The Vice Chairperson (Sen. Adan):** Hon. Senator, if you want to pursue this matter, you can give the witness more time to look at their records. I am sure that they have short notes that might clarify your point.

The question that was asked by Sen. Mukiite has not been responded to.

**Sen. Nabwala:** Madam Vice Chairperson, I would like to know from the auditors after carrying out audit and finding out that there are irregularities or anomalies that have been carried out by the staff, what is the action they take? Do they just forward the report to the County Assembly or Parliament and the matter ends there? What else do you do?

**Mr. Alex Rugera:** Madam Vice Chairperson, my mandate is to audit and report to Parliament and the County Government. I have no legal mandate to take any further action other than reporting so that the other arm takes over the matter.

**The Vice Chairperson (Sen. Adan):** Hon. Senator, that is okay because their mandate ends at that. The other institutions will take up from that point.

**Mr. Browne Nathans:** Madam Vice Chairperson, the witness has made a very important remark. He has admitted on record that his report is incomplete because they did not even establish ownership of the farm.

**The Vice Chairperson (Sen. Adan):** No, counsel that is not the position.  
Proceed Sen.(Prof.) Lonyangapuo.

**Sen. (Prof.) Lonyangapuo:** Madam Vice Chairperson, this is a final report of the Auditor-General on the financial operations of Murang'a County Executive for the period 1<sup>st</sup> July 2013 to 30<sup>th</sup> June 2014.

Do not expect anything else because it is also finally signed by Mr. Edward R. Ouko, not for Mr. Ouko, it is signed by himself in person which means whatever information we have here should be the truth about the operations of Murang'a for that one year.

Madam Chairperson, I am surprised at the way the Auditor is taking the people of Murang'a and Kenya at large. A sum of Kshs340 million was used to buy land by a county government yet you dared not ask about how many acres they were and what the title deed number is.

Further, you also talked about 18,000 bales of hay and 2,000 bales of lucerne. For whose cows? Does this county own cows? For the very first time, we are hearing that there is a

county that owns cows; that, there was drought in the whole of Murang'a County to the extent that they went to look for hay to save the animals from its effects.

Madam Chairperson, is there a conspiracy by the Auditor-General and the county government to defraud the people of Murang'a? This is because nobody is revealing to us the full details about the usage of all this. Why are you only talking about transport fee of transporting this hay?

Lastly, did you visit Marira Farm? Is it related to the Kshs340 million spent or not? For now, I leave it there.

**The Vice Chairperson** (Sen. Adan): Thank you. Witness, I think you have--- Proceed Sen. Sang, is it on the same issue?

*(Sen. Sang spoke off record)*

Okay, let us proceed one by one. Respond to the one by Sen. (Prof.) Lonyangapuo.

**Mr. Alex Rugera:** Madam Vice Chairperson, the questions asked by the hon. Senator are valid. Concerning the Kshs340 million land; what we have reported is not all. We just picked the irregularities in the procurement. The number of acreage and where the farm is, is contained in what we call audit working paper file. These are not all the details we have for this land. However, let me ask my colleague to confirm whether there was a visit to this land and details of the acreage. Give me a just little bit of time.

**Mr. Julius Mulinge:** Madam Vice Chairperson, I want to confirm that there is land for livestock after Kenol. Concerning the details that the hon. Senator requested for; we were given this letter last night. I had to go all the way to Nyeri to bring this document. We have a working paper file. We went at night and returned at night.

We have details about that issue in our working file. That is in our working file which we did not get at night because the offices were closed. Yesterday, I was here; I went to Nyeri in the evening at 7.00 p.m. and I came back about 4.00 a.m.

**The Vice Chairperson** (Sen. Adan): Hon. Members, just to assist the witness; there is a title on the governor's documents on page 186, where the title belongs to the county government. I hope that is the right title for this piece of land.

**Mr. George Ng'ang'a Mbugua:** Madam Vice Chairperson, certainly we cannot include a title for a different piece of land.

**The Vice Chairperson** (Sen. Adan): Proceed, just seek a clarification.

**Mr. George Ng'ang'a Mbugua:** Yes, it is. We will be setting out the procedures that were followed before that title was finally issued to the county government.

**The Vice Chairperson** (Sen. Adan): Sen. Sang, say it just for the record.

**Sen. Sang:** Madam Vice Chairperson, we are being treated into some discussions on some Kshs340 million farm, then Marira, Lucerne and the roads. Is it the same piece of land that we are talking about?

**Mr. George Ng'ang'a Mbugua:** Thank you, Sen. Sang for that question. Marira Farm is a county government training institute. It was formerly vested in the national Government. Then the Transition Authority (TA) assigned it to the county government where they carry out a training institute for a dairy farming for farmers. It is a training institute that is owned by the county government. That is why you can see the county government is procuring feed for the animals that are used to train farmers in that institution. We will go into the details of that when we are doing our defence; it is more less like Animal Health and Industry Training Institute (AHITI) and other previous government institutions. So, it is vested in the county government of Murang'a since agriculture is a devolved function.

**The Vice Chairperson** (Sen. Adan): So, what is the name of the Kshs340 million farm?

**Mr. George Ng'ang'a Mbugua:** Madam Vice Chairperson, let me clarify. We do not have a farm---

**The Vice Chairperson** (Sen. Adan): A name for it?

**Mr. George Ng'ang'a Mbugua:** Yes, it is the title for that piece of land. The title that you have alluded to is the one that is mentioned in the procurement that has been queried by the office of the Auditor-General. So, that is for agro-marketing development. It is the one that constitutes the title that you have referred to. So, it is not Marira Farm. Marira Farm is different.

**The Vice Chairperson** (Sen. Adan): So, it is a farm owned by the county government?

**Mr. George Ng'ang'a Mbugua:** Yes, it is vested in the county government. It is owned by the county government. It was transferred by the TA to the county government. Previously, it was under the Ministry of Agriculture. What goes on there is an initiative of the county government. This is just a response to the query on whether the county government owns cows. We will explain why we have cows there and why we even procure animal feeds for that training institute.

**The Vice Chairperson** (Sen. Adan): Sen. Sang, are you okay with that?

**Sen. Sang:** Mr. Vice Chairperson, that is fine but I have two questions. If you look at the Article 229(7) and (8) of the Constitution which states:-

“Within three months, after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

The report that will come out of that process in the county assembly; will it be a report of the Auditor-General or a report of the county assembly on the Auditor-General's report? We need to know so that – do we still expect up to the tail end of this process, an auditor's report, will it change or we will receive what we would call a county assembly report on the Auditor-General's report? So that then from the Auditor-General's office, the document before us is a finality? If what will result from the county assembly after debate is a report of the Assembly, then we can take this as finality. I need you to clarify that.

Secondly, the Chair cleared up the issue of adoption and the counsel addressed himself to that.

On this issue of *Shilingi kwa Shilingi*, witness, the only concern that we seem to have on record is that the *Shilingi kwa Shilingi* cooperative society is not registered under the Sacco Society Regulatory Authority (SASRA), but your concern is the licensing. The question is this: If they had the licensing, would it be an audit query on your part? Is your concern only the license to carry out deposit taking or you have further concerns beyond that? And if you have further concerns beyond that, why did you not include it in this report?

**Mr. Alex Rugera:** Thank you Madam Chair. I will first of all dwell on the first question on the report of the Senate. Once we have submitted the report to the Senate or to the National Assembly or to the county government for debate, and it is debated, the report which now the Committee charged with that particular issue comes up with is not our report, it is that House's report; either the National Assembly or the Senate or the county assembly. The recommendations thereof are not our recommendations. They will be recommendations of that particular House.

Secondly Mr. Chairman, Sir, our concern on the *Shilingi kwa Shilingi* is that the county government was spending money on a private institution. If you read, it is saying, on further perusal, is when you realize that it is not registered, our concern was the expenditure on the cooperative society.

**Sen. Sang:** Mr. Chairman, Sir, just to clarify, if you look at that section, the first paragraph talks about the payment vouchers that you received and you indicated that clearly. Then you said further perusal on other documents made available for audit review showed the following anomalies:-

1. The registration certificate dated 1<sup>st</sup> October, 2013 indicates that the society was registered under the Cooperative Societies Act, however – and this is where you bring up the issue – no documents were made available by the CEC to show that the society was licensed by SASRA to carry out deposit taking business in accordance with societies Act.

Where is your concern or indication that *Shilingi kwa Shilingi* is a private entity? We are not getting that from what I read.

**Mr. Alex Rugera:** Thank you Hon. Senator. Let me give my colleague here because he has the detailed report on the same so that he can clarify that particular matter.

**Mr. Julius Mulinge:** Mr. Chairman, Sir, in our detailed report or management letter, we indicated several findings. This was a summary report. There is an issue of tender procurement of the advertising agencies companies like Top Image Media Consultancy, Extra PN Ltd and Trade Hawk Ltd. These were procured through quotations and we have given details on that although it is not in this one because it is a summary. We cannot put everything. Most issues are queried here as your concern is captured in this detailed report.

Thank you.

**Sen. Sang:** Mr. Chairman, Sir, is it possible then, that the Auditor-General is able to forward those details because – I think this is very important auditor - if you have to produce a document for consumption by the public, the document should not be too brief that you are unable to understand the issues being raised. A member of the public can only access this summarized report, you cannot be able to understand the details until we get into the management letter or into the deep details of the report.

So, maybe it is a concern in terms of your report writing practice that you seem to be summarizing too much to the extent that you end up losing even the very crucial details and leaving the public having to engage on matters that would have been helped if we had a more detailed report. If we can get those details, that would help us.

**The Vice Chairperson (Sen. Adan):** I think this is a matter that you need to discuss at the management level so that you can be able to help the public in future. I will hand over now to ---

**Mr. Browne Nathans:** Mr. Chairman, Sir, could you allow us to comment? Just for clarification of the question that has been raised by Sen. Sang – I know the Auditor-General's office would want to go into details and that is the reason we were saying it is not complete – actually, SASRA regulates only deposit taking and banking services saccos. This is purely an investment agency under the commissioner of cooperatives. That clarification is important and we thought they should have brought it out but they did not. When you say that your report is final, therefore, why would you even subject it to the county assembly? Is it cosmetic?

**The Chairperson (Sen. Musila):** Witness, you are going to give us the report on evidence that the report was submitted to the Murang'a County Assembly as you promised earlier. The issue that has been raised by Sen. Sang about the concerns – because you said your concerns were that public funds were being used on a private entity but it is not reflected in your report. What is reflected is your concern of registration, and you said that you have it. So, if you have that concern, we would like to see it if it is part of the report or the notes you were talking about. And be that as it may, you are released. Our subject to you is to bring the documents within an hour from now.



**Mr. Mbuti Gathenji :** Mr. Chairman, Sir, I had just one request. The last direction was very important. Could they also bring the management letter alongside?

**The Chairperson** (Sen. Musila): I think I was very clear because he said that the details asked by Sen. Sang were contained in that letter and I think I was clear I said two issues; the evidence on delivery of the report and those concerns as expressed in that management letter or whatever document you have for that matter. We want to thank you for coming, you have complained repeatedly about late invitation and we apologize for that but I think you have honoured us and we are grateful that you have honoured the summons even though they were delivered late. We thank you and you may pass our regards to the Auditor-General for that.

Now, we proceed on to hear the next witness, that is the Controller of Budget and I understand her representative is here, so we are ready for that.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, could we have a 10 minutes health break?

**The Chairperson** (Sen. Musila): Yes, I think that is reasonable. It is now 12.05 p.m.. Let us take a 10 minutes health break and we will be here by 12.15. We have considered the request by the counsel for a health break. I think we also need it.

*(The Special Committee adjourned temporarily at 12.10p.m.)*

*(The Special Committee resumed at 12.25 p.m.)*

*(The Controller of Budget (Ms. Agnes Odhiambo)  
before the Special Committee)*

**The Chairperson** (Sen. Musila): Good morning, again, ladies and gentlemen. We are back from our short recess and want to continue with our programme. My programme tells me that we are scheduled to hear evidence from the Controller of Budget. We want to thank her because she had a lot of difficulties in making time because of her other schedules. She had even requested that we allow her to come at 5.00 p.m. but we pleaded with her and she agreed to shelve other things and be with us at this hour. Therefore, I want to thank her profusely because I know that she is very busy and had to come on short notice. She is will be assisted by her officers, but they will not give any evidence. We are only swearing her. Therefore, I ask the clerk to swear the Controller of Budget.

*(Ms. Agnes Odhiambo took the oath)*

**The Chairperson** (Sen. Musila): Thank you very much, Madam. The Controller of Budget was summoned at the request of the Counsel for the County Assembly of Murang'a. Therefore, I will give the first chance to the Counsel for the Assembly.

**Mr. Mbuthi Gathenji:** It is good to know my name. My name is Mbuthi Gathenji. I will be asking you questions on behalf of the county assembly. I would wish that you give us a brief of the mandate and station under which you work.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, the Office of the Controller of Budget is established under Article 228 of the Constitution of Kenya, 2010 with the mandate to oversee and report on the implementation of the budgets of both the national and county governments, and ensure that the public has access to information on budget implementation, as enshrined in the Public Finance Management (PFM) Act. The other role is the control of public resources, which requires the Controller of Budget to approve and authorize withdrawals from public funds, if satisfied that the same is within the law. The Controller of Budget is bound by the objectives of constitutional commissions and independent office holders, which are: To protect the sovereignty of the people and promote constitutionalism as provided for in Article 249(1) of the Constitution of Kenya.

**Mr. Mbuthi Gathenji:** Thank you very much. We will now go to the specific duty that was carried out with respect to Murang'a County. I would like you to confirm that your office has been involved in those objectives of the office and that you carried out some activities.

**The Controller of Budget** (Ms. Agnes Odhiambo): Yes, we discharged our mandate with regards to Murang'a County, as provided for in the Constitution, which entailed reviewing their budgets and advising them appropriately on the formulation of their budgets. We also released funds to Murang'a County, in line with the Constitution.

**Mr. Mbuthi Gathenji:** I would like you to refer to a specific period of 2015. I would like to refer you to the Annual County Governments Budget Implementation Review Report for the year 2014/2015, dated August 2015. The document is in page 72 of the governor's bundle. It is easier to access that. Has everybody found the relevant page?

We would be happy if you could give us an overview of the work you did in respect to that period.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, as required by Article 228(6), we prepared the Annual County Governments Budget Implementation Review Report that covered all the 47 counties. The work entailed analyzing the expenditure reports from the counties with regard to recurrent and development expenditure and compiling the report that is before us. With regard to Murang'a County we analyzed the returns that were given to us and prepared a report, which is part of the big report that has been referred to. We also did the same for the development budget. If the advocate can direct us to the specific area that he would like us to cover, because the report is quite big.

**Mr. Mbuthi Gathenji:** Let me refer to your report on page 184 of the document. If you look at that, you will see a middle paragraph starting: "However, the following

challenges continue to hamper effective budgeting implementation.” You have numbered them. Are you there?

**The Controller of Budget** (Ms. Agnes Odhiambo): I am there.

**Mr. Mbuthi Gathenji:** I am concerned with Item No.2, but you can also give us a background on how you came to find this a challenge.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, in preparing the Budget Implementation Review Report, we look at challenges that may have affected execution of the budget in the period. In this particular instance, we were looking at the challenges that affected budget execution throughout the entire year. With regard to Murang’a County, we identified four items. I will go to No.2; relatively high pending bills, which affected quite a number of counties. We flagged this out as an area of major concern, because pending bills affect businesses. The business community is affected because if businessmen and women are not paid on time, that affects their businesses and, by extension, the entire business community.

Mr. Chairman, Sir, we requested the counties to avail their pending bills. We asked them to confirm to us what the pending bills were at the end of the financial year. With regard to Murang’a County, we received a letter confirming the pending bills. With your permission, I will refer the letter dated 3<sup>rd</sup> August, 2015. In the letter, the total pending bills were, at that time, Kshs1,094,315,526. Approximately, it is Kshs1.1 billion. Out of that, pending bills related to recurrent expenditure totaled to Kshs141,061,251. For development, the figure was Kshs953,254,275.

Mr. Chairman, Sir, there was an error in the report that we are looking at, because we inadvertently referred to Kshs953,254,275 as “billion.” The correct figure is Kshs953,254,275. We wrote to the Governor pointing out that the error and copied this letter to the speaker, the clerk and the county executive committee member in charge of finance, IT and economic planning. We will make that correction in our First Quarter Report, so that the correct figure is reflected.

Thank you.

**Mr. Mbuthi Gathenji:** As a follow-up, could you clarify whether you sought an explanation and whether you were given any?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, our mandate restricts us to providing information. In this particular case, challenges may have affected budget execution. Details of the composition of pending bills are looked at by the Auditor-General when he carries out audits of financial statement. That is the mandate of the Auditor-General when he audits in the normal way.

**Mr. Mbuthi Gathenji:** For the sake of record, please clarify how you classify documents. Do you ask for invoices?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, that is not our mandate. We do not ask for invoices because we do not verify figures. Figures are verified by the Auditor-General. We get block figures just the same way we release money to counties. When we release money to counties, they spend it and then account how they have done it. We do not delve into supporting documents because that is the mandate of the Auditor-General.

We use financial records that are kept by the county treasury. All spending entities at the counties prepare their financial statements and forward them to the county treasuries who then consolidate the information and give us the expenditure reports. That is the same procedure that we employ when we look at financial records of Ministries, departments and agencies.

When the Auditor-General audits and ascertains whether there was value for money, he delves into details; looks at the invoices, procurement processes and plans. He audits and carries out what we refer to as “value for money.” Value for money auditing is not the mandate of the Controller of Budget.

**Mr. Mbuti Gathenji:** Most obliged. We needed to have that distinction.

I request you to turn over to Page 077; that is Page 183 of your Report. The information there is: personal emolument, operation expenses. The third item is printing, advertising and communication. I just want you to confirm that, that is the expenditure that was disclosed to you.

**Mr. George Ng’ang’a Mbugua:** Mr. Chairman, Sir, objection with tremendous respect.

I am constrained because the same question has come back to haunt us. You will recall that yesterday, we raised an issue based on the allegations that are set out in these particulars, which we are supposed to confine ourselves to. The witness from the assembly said that their evidence is not what is contained in that allegation. The answer that is now being sought from Madam Agnes seeks to deviate from what is in the particulars of the allegation, contrary to Rules of Procedure of this Committee. To the extent that, that is what Counsel seeks to achieve through that question, we have an objection.

**The Chairperson** (Sen. Musila): I mentioned yesterday that the Special Committee will note those concerns. However, this is a different witness. She is not even aware of the witness you are talking about. Therefore, I will allow her to answer the question for the benefit of the Committee.

**Mr. Mbuti Gathenji:** I am most obliged. In fact, I was just about to say that this is a different witness on examination-in-chief. She has not given any contrary evidence. Again, our case still proceeds on other witnesses. Could you confirm that?

**The Chairperson** (Sen. Musila): Please, let us not raise issues on that matter. We have ruled and all agreed that this is a different witness

**Mr. Browne Nathans:** We respect your ruling, Mr. Chairman, Sir. All we are saying, just for the record, is that if a witness, honestly, has recanted part of the allegations which forms part of the material upon which the Governor is being impeached; a different witness must not matter whether he is different or the same or two others on the same subject, the materiality is what goes into our objection. I wonder if our objection can be on record so that we can raise it at an appropriate moment. We cannot permit a different witness to use a different part to arrive at an answer that was repudiated by another witness. That is circumlocution, going round, to arrive at an answer that was not given yesterday, so that it can favour them today. Yesterday was a different day, today is a different day but the question is the same, the allegation is the same.

**The Chairperson** (Sen. Musila): We have made a ruling on that. Let us proceed.

**The Controller of Budget** (Ms. Agnes Odhiambo): Thank you very much, Mr. Chairman, Sir. The economic item printing, advertising, and communication, comprises of several items as indicated; printing advertising and communication. The total of Kshs181.75 million comprises of expenditure under those economic items. If we single out advertising from that category advertising item, in the fourth quarter, advertising was Kshs978,578.00. I am explaining this because the summary is consolidated. It comprises of various economic items; printing on its own, advertising and communication but for purposes of reporting, they have been combined and, therefore, singling out advertising and bringing out the total in the fourth quarter. The total for the whole year is as follows: For advertising item, the County Assembly in total spent Kshs4,795,554 while the county executive spent Kshs14,461,416 on the same item giving a total for the whole financial year of Kshs19,256,970. This is the total for advertising component or advertising item because the category is under economic classification. We have only highlighted the advertising item because reading the attachment to the letter that invited us, the advertising as an economic item had an issue, so we have singled it out. Thank you, Mr. Chairman, Sir.

**Mr. Mbuti Gathenji:** Are you in a position to give us a break down on the Kshs181million?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, because of the short notice, we were only able to pick out what related to advertising out of the total figure because going through the document, I had explained the issue was touching on advertising and thereof we pulled that out and analyzed it on its own.

**Mr. Mbuti Gathenji:** On this item, is it a practise that you have to itemise one of the expenditures or highlighting it for one reason or another?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, when we are carrying out our analysis of the expenditure reports, we look at materiality and the items that are material, then we categorize them and try to show by way of a diagram just to demonstrate the materiality of those figures not really by any reason but materiality.

**Mr. Muthi Gathenji:** My colleague, Mr. Kimani, is going to ask you a few questions. Thank you very much, madam.

**The Chairman** (Sen. Musila): Mr. Kimani, you have about four minutes.

**Mr. Kimani:** Mr. Chairman, Sir, my question to the Controller of Budget is, as at 30<sup>th</sup> June 2015 when this report was compiled, how much was outstanding in terms of Treasury releases to the County Government? Was there money that was outstanding, due for release to the County Government?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, yes, I do recall that there was an outstanding amount but I do not have the exact figure but yes, there was. A number of counties had not received their May and June releases, and if I recall, Murang'a was among those counties but I do not have the figures right away. If you properly give me a few minutes to try and see whether we can get it. Give us a few seconds to confirm that. We can formally provide that figure to the Committee through the Secretariat.

**The Chairperson** (Sen. Musila): That is the amount that has not been remitted to the county government?

**The Controller of Budget** (Ms. Agnes Odhiambo): That is the amount which has not been released from the National Treasury because there was a delay and a few counties received their July releases, of which May and June were released in July but we will provide the exact figure.

**Mr. Muthi Gathenji:** That is the end of the questioning of the witness. Thank you.

**The Chairperson** (Sen. Musila): Thank you, counsel. Let us go for cross examination by the Council of Governors.

**Mr. George Ng'ang'a Mbugua:** Thank you very much, Agnes. I will begin my question with the last answer you have just given us that if you recollect the unremitted sums to the County Government of Murang'a for May and June was approximately Kshs900million so that in essence, had those funds been remitted to the county government and considering the reported bill of Kshs1.1 billion, how much approximately will be the balance? You notice the balance would be slightly around Kshs200 million. From local revenue sources of the County Government of Murang'a, how much approximately do they collect a month?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, we can provide that figure, my colleague is looking at the file

**Mr. Ng'ang'a Mbugua:** But, according to you, as the Controller of Budget, would you consider a bill of Kshs200 million as unsustainable given the entire budget of the County Government of Murang'a?

**The Controller of Budget** (Ms. Agnes Odhiambo): You mean pending bills of Kshs200 million?

**Mr. Ng'ang'a Mbugua:** Yes.

**The Controller of Budget** (Ms. Agnes Odhiambo): Looking at the total budget for the County Government of Murang'a and the releases that were yet to be released by the National Treasury and the materiality, in my judgement, I would not consider it really unsustainable pending bill. Those bills can be sorted out in the first quarter even from the local revenue.

**Mr. George Ng'ang'a Mbugua:** Ms. Agnes, you have made some fantastic recommendations on page 78 of the blue bundle, that is, the Governor's answer to the allegations. I am interested in recommendation No.2. It says:-

“The County Executive and the County Assembly should establish and adopt regulation to govern debt and wage bill, levels.”

In your own considered recommendation, you considered the County Assembly a very key organ in formulating regulations to govern future Bills. Is that correct?

**The Controller of Budget** (Ms. Agnes Odhiambo): Yes, Mr. Chairman, Sir. The County Assembly is a very important arm of the County Government. Therefore, yes, we considered that they must be involved in the regulations. It is the County Assembly that approves the regulation. So, their role is very key.

**Mr. George Ng'ang'a Mbugua:** Thank you, Ms. Agnes. There is a document I want to refer you to. That is the answer by the Governor, the Murang'a County Appropriation Act. It is on page 040. It was for this financial year dated 23<sup>rd</sup> July, 2015. This Act was enacted for this year by the County Assembly in default of assent by the Governor because of a very important bone of contention on page 047.

I have highlighted it for easy reference. There is an appropriation vote No.071300 Ward Development Fund (WDF) of Kshs700 million. Now that this has been a fairly controversial subject, has your office had the opportunity to consider whether such an appropriation would meet the test of constitutional compliance? Would it be constitutional? I refer you to page 36, where there is an opinion that emanated from your office.

As we have seen, the WDF of Kshs700 million was appropriated by the County Assembly. So, give us your thoughts, Ms. Agnes on whether you consider that appropriation to be in compliance with the Constitution. Under Article 228(5), before you approve any withdrawal from public funds, you have got to be satisfied that that appropriation is lawful.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, I will just give a background to the WDF by the counties. This matter came up in the last financial year and the one before that. This compelled the office of the Controller of Budget to give guidelines to the counties wishing to establish the fund so that it can be consistent with the Constitution.

Article 174(i) is clear on separation of powers between the County Executive and the Assembly. So, the office issued these guidelines with that Article in mind and gave detailed procedures to be followed when establishing that fund.

One fundamental recommendation, was that the County Assembly Members cannot play any Executive role, starting with even patrons. All that the County Assembly Members can do is to play an oversight role. Together with the public, be able to identify projects that should be funded by such a fund. After identification, those projects have to be forwarded to the Executive for inclusion in the planning documents and consequently execution.

We issued guidelines on 18<sup>th</sup> December, 2014. They were addressed to all Governors, County Assembly Speakers and Clerks. The same was copied to other various offices. We can avail a copy of the same.

On the WDF proposed by Murang'a County, I met the representatives of Murang'a County Assembly. I explained in details, the establishment of the WDF. My advice was that they had to amend the law to remove themselves from managing it. So, when the office received the 2015/16 budget and the Appropriation Act, the WDF was still provided for and the amount was Kshs700 million, we wrote to Murang'a County addressing the Governor. The letter was dated 6<sup>th</sup> August, 2015. In the letter, the office highlighted the areas that the county government needed to address in order to fully comply with the law as it relates to budget execution.

The items are many, but I will just pick the relevant one, on WDF. It reads;

“A total of Kshs700 million has been allocated to WDF under the department of Finance and Economic Planning. This Fund should be established in accordance with the Constitution of Kenya 2010, Articles 174(i), 201(d) that deals with prudence in the use of resources and Section 116 of the Public Finance Management Act, 2012.

Further, an allocation of Kshs700 million to WDF, in our view, is excessive. This amount should be allocated to specific projects under the development budget for respective departments. In our view, the finance and economic planning department may not have adequate capacity to implement projects amounting to Kshs700 million.”



The county leadership responded. However, I will not go through that in the interest of time. We still wrote to the county leadership informing them that the office will not be in a position to release Kshs700 million against the WDF because the Act that was operationalizing that fund was inconsistent with the constitution.

That is as far as that item is concerned. Although it was appropriated and is in the Appropriation Act, 2015, the Controller of Budget cannot release even a cent against that vote because the Act is not consistent with the Constitution.

**Sen. M. Kajwang:** Mr. Chairman, Sir, kindly allow me to make a remark. According to our rules of procedure, Rule No.32, I seek your indulgence on the issue of Ward Development Fund (WDF). The issue came up yesterday and it has been brought up again today. I know that it might not be proper for me to talk about matters that are not before this Committee, but it was also the highlight of media reports about this Special Committee.

I seek your guidance that the issue on the WDF because it does not lie anywhere on the charges raised by the Murang'a County Assembly. I seek your guidance on the relevance of that particular matter pursuant to rule No.32. which gives you the same powers that we have under the Senate Standing Order No.1.

**The Chairperson** (Sen. Musila): Thank you, Senator.

Counsel, what is the relevance of the WDF in this matter?

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, the motive behind every impeachment process is always critical for a Committee of this nature to investigate. Because we are the accused, in our answer, we have clearly set out the matters that preceeded the Motion to impeach and there is an element of WDF. We will demonstrate that this matter was also fought by the Senate when dealing with Governor Chepkwony's report by the Senate, that the motive is critical. The court of Appeal has also gone ahead to say that the motive is critical in any impeachment process. Therefore, our case will be that the controversy between the executive and the assembly on the issue of the WDF is at the crux of these proceedings and as a matter of fact, the controversy preceeded the resolution to propose the removal of the governor.

Mr. Chairman, Sir, they have attached the Appropriations Bill for this year. It was not even assented to by the Governor. It became operational by default of that assent. You can see from the documents that there is an apparent controversy between the Executive and the Assembly on an issue that is material to these proceedings. It is important to note that this witness has been called at the behest of the Assembly; that material that is relevant to this proceeding and that has been made an issue because they have made a case and we have rebutted. There is an issue to be determined by this Assembly on the issue of WDF. It is only the Assembly that is restricted to the charges as framed. In our case, when we are ventilating our defence, we can bring out that issue to show that the

motive was not *bona fide*. This is because if you know that you are bringing a report for submission to plenary, the issue of motive is critical. It is the issue that the witness will be seeking to demonstrate using that piece of evidence.

**The Chairperson** (Sen. Musila): Hon. Senators, as you may recall, this matter came up yesterday as you rightly observed. It is the Governor's case to bring in any evidence. As far as the evidence is admissible, if you look at No.32 of our rules, it gives the Chairperson – where there is not particular provision in the Standing Orders – the mandate to decide whether it should be admitted or not. However, because it featured yesterday as a motive behind the Assembly bringing in the Impeachment Motion, I think that it is fair to allow that they continue with that item

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir.

Ms. Agnes, I just have one more question and then my colleague will ask you about two more questions.

**The Chairperson** (Sen. Musila): Counsel, I would like to remind you that we have ten more minutes.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir.

Ms. Agnes, you have said that appropriation of Kshs700 million, notwithstanding that it appears in the budget for this financial year, your office cannot authorize withdrawal of that amount.

**The Controller of Budget** (Ms. Agnes Odhiambo): Yes, Mr. Chairman, Sir. We cannot authorize withdrawal of such an amount because the Act operationalizing the WDF for Murang'a County is inconsistent with the Articles that I have quoted from the Constitution.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, for an appropriation of Kshs700 million, against an annual budget of slightly below Kshs5 billion, the Controller of Budget will agree with that it would significantly hamper the ability of the executive to carry out their functions as required by law.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, we raised that in our letter dated 6<sup>th</sup> August, 2015 to the Governor, we highlighted the fact that Kshs700 million allocated to the WDF is excessive in our view because we looked at the total resource enveloped. If Kshs700 million was to go to one particular fund, in our view, that would be excessive.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, and that it would in fact hamper significantly the ability of the county Executive to deliver services to the County Government of Murang'a if they cannot access that appropriation?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, can he, please, repeat the question?

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, in view of your answer, I am just taking it to the next level; that inability to access that appropriation would significantly affect the ability of the County Executive to deliver on their programmes and policies as enshrined in the budget.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, that is true because it is a huge amount. Therefore, it cannot be accessed, but it would delay implementation of other development projects.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, perhaps, even including an escalation of the wage Bill because if that was an amount that had been factored in, as projected income, and it cannot be accessed, you would agree with me that it would have an impact on the wage bill, especially for the goods and services that have already been procured.

**The Chairperson** (Sen. Musila): Is there a point of objection?

**Mr. Kimani:** Mr. Chairman, Sir, the Counsel is leading the witness by seeking opinion. He should put matters concerning facts, but not seek opinions from the witness.

**The Chairperson** (Sen. Musila): I sustain that objection. The Counsel is now making suggestion such as the wage bill and other issues which are not relevant. I allowed you to proceed with that style of cross examination but I think that you are going overboard.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, that is well taken. I now give the floor to my learned friend, Mr. Njenga, who also has a few questions for the Controller of Budget.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I have issues to be clarified by the Controller of Budget. For the benefit of this Committee, can she confirm the exact role of an Assembly in the formulation of a budget?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, as I stated earlier, the County Assembly is a very important arm of the County Government. Their role is critical in the budget making process. It starts with the County Assembly approving all the planning documents. It is the county assembly that approves the County Integrated Development Plans, the County Fiscal Strategy Papers, Annual Development Plans, and the Debt Strategy Papers, among others.

After that, it is the County Assembly that looks at the budget estimates that are submitted by the County Executive by 30<sup>th</sup> April. The County Assembly interrogates the budget estimates submitted by the Executive. If satisfied, it passes those estimates. If not

satisfied, it amend the estimates; the County Assembly prepares a report or memorandum to the Executive to take on board the amendments that the county assembly proposes.

So, it plays a very critical role. After all the amendments are taken on board, it is the county assembly that approves the final budget estimates before 30<sup>th</sup> June and goes further to approve the Appropriation Bill which is then assented to by the governor. There are many stages; I have just summarized.

One other critical activity that the county assembly undertakes is to engage the public; public participation when it is interrogating the budget. After the budget has been prepared, the county assembly also plays an oversight role on execution of that budget. So, the county assembly can summon the executive to give an explanation on how the budget is being executed.

Thank you.

**Mr. Charles Njenga:** So, I am right to say that they have an approval and oversight role but they do not have an implementation role of the budget, right?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, the County Assembly does not have the implementation role but the Accounting Officer, the Clerk to the county assembly implements the budget of the County Assembly.

With your permission, I can comment on implementation of the development budget. The County Assembly can implement that bit; that development budget that relates to the County Assembly, for example, construction of the offices of the County Assembly. In our view as an office, we feel that can be executed by the County Assembly but it cannot execute development projects across, that is the mandate of the Executive. The County Assembly should play an oversight role and hold the Executive to account if they are not implementing the projects as per the planning documents because the planning documents are approved by the County Assembly. So, the County Assembly will be checking and asking; "you told us you will implement this project this time costing this amount, why have you not done it?" This is just to demonstrate its role.

**Mr. Charles Njenga:** Very well. From your experience as the Controller of Budget for the entire country, can you tell the Committee whether the exercise of this role by the Assembly and the assemblies countrywide has been a challenge in the formulation of budgets for all the counties? Give us your experience as the Controller of Budget.

**The Controller of Budget** (Ms. Agnes Odhiambo): Sorry, I missed out the exercise---

**Mr. Charles Njenga:** Whether this approval process and how it is exercised within the counties has been a challenge to the formulation of county budgets in the country.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, there have been challenges in the formulation process. In some counties the county assemblies have

changed the budgets, gone ahead and approved those changed budgets and prepared the Appropriation Bill. But that process of changing; the actual changing and preparation of the appropriation bill should be for the Executive. So, the county assembly should make amendments but those amendments should then be forwarded to the executive for inclusion in the budget. Then the executive should prepare the Appropriation Bill; take it back to the county assembly for approval before it is assented to by the governor.

Therefore, there have been challenges. That is an area – maybe this is a good opportunity to make that recommendation – that, that process needs to be looked at so that it can be streamlined and made very clear for the future.

**The Chairperson** (Sen. Musila): But that is not with reference to Murang'a, You are referring to the general. I just wanted to ask the counsel because here we are being specific to Murang'a County so that for record purpose; what the witness has said does not specifically apply to Murang'a, it is nationwide. Am I correct?

**The Controller of Budget** (Ms. Agnes Odhiambo): Yes, Mr. Chairman, Sir.

**Mr. Charles Njenga:** From the record, you will see that is the exact situation that we have in Murang'a County. We shall be submitting exactly on that and extensively. We are just doing the background.

Finally, I just want your comments on a recommendation of a commission of inquiry – Chairman; I had supplied an extract of the report of a commission of inquiry to the petition to suspend Makeni County. It is a public document. I just want her comment on one aspect. I had supplied a copy to the Assembly lawyers. I will do no more than invite her comments and then, I will sit down.

On the question of budget, I just want your comment on paragraph 5(b) which, with the Chairman's permission, I will read out. It is a very brief recommendation or observation on the budget making powers of the Assembly.

The Commission confirmed, if I may read;

“These budget making powers which the Constitution has granted to the National Assembly have been reproduced in Section 131 of the PFM Act for the county assemblies. This has led to a conflict of interest as Members of the County Assembly (MCAs) have allocated monies to areas in which they have personal interest and approved budgets and that have redefined the priorities of the executive fundamentally and thereby made it difficult for the executive to implement the same.”

I do not want to read the entire extract, I am sure you have it. I just want your comments on that together with recommendation that is at sub paragraph (f) where the commission recommended the amendment of Section 131 of the PFM. Just a comment and I will rest on that.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, that is exactly what I was explaining. When the county assembly amends the budget, those amendments

should be returned to the executive for incorporation. That is what happens at the National Assembly. When amendments are made, they are forwarded to the Executive and the National Treasury and it engages with the Budget and Appropriations Committee until when consensus is reached. So, that was my recommendation and it still stands.

**The Chairperson** (Sen. Musila): Your time is up. So, now we move to re-examination of the witness.

**Mr. Mbuti Gathenji**: Mr. Chairman, Sir, I have very few questions. I am impressed by the Committee on its mastery of its areas of jurisdiction. However, there is one question I want to ask you in respect to the sustainability or non-sustainability of debts; do you have a statutory formula of making the opinion that you have given with respect to Murang'a?

**The Controller of Budget** (Ms. Agnes Odhiambo): Sorry, Mr. Chairman, Sir, please, come again counsel.

**Mr. Mbuti Gathenji**: I will ask again. Is there a statutory formula which you applied or which is applicable in calculating and capping to opinion that a debt is sustainable or not.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, there is no formula which is applicable.

**Mr. Mbuti Gathenji**: Thank you, I will go to the next question.

**Mr. George Ng'ang'a Mbugua**: Mr. Chairman, Sir, maybe before he proceeds, sorry it is just one minute. That the allegation of unsustainability was from them; so I suspected that they would be having the formula of unsustainability. They are now cross examining their witness.

**The Chairperson** (Sen. Musila): Counsel, the counsel for the Assembly has been very quiet as you cross examined the witness. Now, it is his turn. Please, give him time. Yesterday, he challenged that he is a senior counsel.

**Mr. Browne Nathans**: Mr. Chairman, Sir, please---

**Mr. Mbuti Gathenji**: There is no respect shown by these counsel. They should let me finish.

**The Chairperson** (Sen. Musila): He should be allowed to finish his questions.

**Mr. Browne Nathans**: Mr. Chairman, Sir, we will allow him. I seek your intervention so that you can protect us. They raised an allegation---

**The Chairperson** (Sen. Musila): This time I am protecting the counsel for the Assembly.

**Mr. Browne Nathans:** Mr. Chairman, Sir, but they cannot seek a formula on an allegation they made from their witness. Now that they did not have a formula they want to throw it back to us and say: "She should deny the recommendation she has made that the debt is not sustainable ---"

**The Chairperson** (Sen. Musila): Counsel for the Assembly will proceed.

**Mr. Mbuti Gathenji:** Good practice requires that, first, you listen to people and secondly, you let people finish. That is good practice. I am clarifying a matter. I will proceed to do it. I have asked her because you have given a formula. The next thing is; is it a matter of the rule of the thumb?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, let us clarify this issue of sustainability of debts. As I did mention as I was making my remarks, this is a problem that was affecting nearly all the counties. For various reasons that I will not delve into, therefore, in terms of accessing the sustainability and the effect on the business community, you look at each county and you look at the revenue that that county can be able to generate, you look at the balance that is yet to be released by the National Treasury and then you come up with a conclusion as to whether that debt is sustainable or not. I put it in that context. You have to analyze all the economic parameters that are affecting that specific county.

**The Chairperson** (Sen. Musila): So, that is an issue that is your discretion?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, we provided the information on pending Bills in our reports, we never at any one point indicated whether that county can pay its debts or not. We were flagging that out for the entire country. We said this can become a very big problem, let us deal with it now. Let us not sweep it under the carpet then some years to come we find that the pending Bills or the debts for the counties are unsustainable. I do recall that I flagged out this matter as a very important matter that needs to be dealt with during the Inter-Governmental Budget and Economic Council meeting which is Chaired by the Deputy President. I wanted to flag it out as an issue that we should deal with as a country. It was from that perspective. My role as the Controller of Budget is to ensure that information pertaining to budget implementation or execution is known by the public.

**Mr. Mbuti Gathenji:** Thank you. I would just for record want to clarify, this is an expert witness. She is not a witness for us and not for them, and that is the context under which this witness was called. If they have no memory, we clarify that this witness is coming as an expert independently.

Thank you.

**Mr. George Ng'ang'a Mbugua:** I confirm we do have memory, just for the record.

**Mr. Kimani:** Madam Agnes, you have confirmed that you were involved in the negotiations between the assembly and the executive regarding this Ward Development

Fund money. I am asking the witness to confirm that she was involved in the discussion regarding the amount of Kshs700 million already provided for in the current budget.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, I confirm. I had a very fruitful meeting with some Members of the county assembly including the Speaker and the Clerk and the discussions were very fruitful and I thought that this amount will be adjusted in their supplementary budget. Because they concurred with my recommendation that this amount be allocated to the various departments to be implemented by the executive and they play the oversight role.

**Mr. Kimani:** Mr. Chairman, Sir, that is exactly where I was coming from, so that the recommendation that you made was that the executive comes up with the programmes and the assembly will merely oversight those programmes. That is correct?

**The Controller of Budget** (Ms. Agnes Odhiambo): That is correct, Mr. Chairman, Sir.

**Mr. Kimani:** So, what is remaining now, would you confirm that it is only the regulations of those programmes to activate the release of these funds as per your mandate?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, the Controller of Budget does not get involved in preparation of regulations, in preparation of policies, that is for the county executive and for approval by the county assembly. We only get involved in the regulations or legislation affecting funds as provided for in section 116 of the Public Finance Management Act.

**Mr. Kimani:** Thank you. So, the confirmation I was seeking from you is that the regulations that are not pending with regard to this money should be made by the county executive. Is that correct?

**Mr. Browne Nathans:** Mr. Chairman, Sir, the expert witness frankly cannot confirm what the executive is going to do. I think you are putting your own witness through an agonizing moment. She has been a brilliant witness who should be based at that point.

**The Chairperson** (Sen. Musila): Can you answer that question, madam?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, with regard to the Ward Development Fund or projects to be implemented at the Ward level, we are expecting the county – I will talk about the county because it is the responsibility of the executive and also the assembly - to amend their budget, allocate this amount to various projects under various departments, give us an approved supplementary budget and then implement. The implementation and the regulations and policies that are required to implement the project are the mandate of the executive with the approval of the county assembly. We do not come in.



**The Chairperson** (Sen. Musila): And I do not think there was any harm in that answer, counsel for the governor, I do not know why---

**Mr. Browne Nathans:** Mr. Chairman, Sir, I confirm there was no harm. I just wanted to protect this excellent witness. It is a great answer; I commend that.

**The Chairperson** (Sen. Musila): Thank you so much but we still have a little bit of more time with you because the Members of the Special Committee may wish to seek some clarification before you go. So, can I ask if there is any Hon. Senator wishing to seek clarification from either the witness or any of the counsels?

**The Vice Chairperson** (Sen. Adan): Thank you Chair. My question goes to the Controller of Budget. This *hullabaloo* about Ward Development Fund, of course, you have explained that all the counties are having similar problems. Are there counties that you have already released funds to, for the purpose of Ward Development Fund?

Secondly, the County government of Murang'a was authorized by the County Assembly of Murang'a to borrow Kshs200 million from Kenya Commercial Bank (KCB). Does that require authorization from the national Government?

**Sen. Nabwala:** Thank you very much Chair. Mine is to the office of the Controller of Budget. What I would like her to confirm is that a county cannot carry out an expenditure to the tune of Kshs1.1 billion which is now being called debts without having an authorization from you, and whether this is not for you, whether this is work in progress because we are saying the county has unsustainable debts of Kshs1.1 billion as at that date of the audit.

**The Chairperson** (Sen. Musila): Witness you may answer the two questions from the Vice Chairperson and from Sen. Nabwala. If you should need any repeat of the question, be free.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, the first question whether there are any counties that we may have released money to with regard to Ward Development Fund, let me confirm that we have not approved any Ward Development Fund to the counties. I know some counties – and let me also clarify that it is not all counties –came to us and we explained to them about Ward development Fund, they concurred with our recommendations and went and adjusted.

So, there are a few that have still been following the establishment of that fund but we have not as yet approved any because most of the counties want the Members of the county assemblies to play an implementation role which we are advising that it is not possible because the Constitution is very clear on separation of powers. In terms of the Kshs200 million borrowed from KCB, I want to take it that this is actually an overdraft; working capital support. So, it is really not a long term loan and with your permission, we can look at section 142 of the PFM Act.

Mr. Chairman, Sir, the county assembly may authorise short term borrowing by county government entities for cash management purposes. The National Treasury is required to guarantee medium to long term but according to Section 142, a county can borrow basically for short term purposes which is basically a cash management tool.

In terms of pending bills, first, let me explain that pending bills - I am explaining general pending bills from an accounting point of view - are bills that are incurred for expenses or projects that have already been factored in the Budget. The Controller of Budget can only approve release of money to an activity or a programme or a sub-programme if that programme is provided for in the Budget.

First and foremost, the expenditure must have been provided for in the Budget. But, for one reason or another, when that project is implemented, at the close of the year, if the project has not been completed, or certificate issued, the county government may not be in a position to retire that liability because of one reason or another but mainly if the certificate is not ready. Assume it is a road that has been factored in the Budget and allocated funds. It is implemented but by 30<sup>th</sup> June, when the year is closing, the certificates have not been issued by the engineers *et cetera*. The county government cannot pay because that process has not been completed.

At the end of the year, the cost of that road, will be a pending bill but can be paid in July or in August.

That is how we look at the issue of pending bills. Some of the dates are actually provided for in the budget but because of resources, may be the county does not have money at that point in time, therefore, it ends up being a liability at the end of the financial year but it ceases to be a liability the following month when it is retired. We will have to analyse for how long these bills have been pending.

**Sen. (Eng.) Muriuki:** Thank you, Mr. Chairman, Sir. The counsel for the Governor seems to bring an issue that the whole affair of the impeachment was as a result of the disagreement of the Ward Development Fund a little bit. These are simple questions. The county assembly came up with this Fund and forwarded to the Governor in the normal way for the Governor to assent to. The Governor did nothing. From what we are gathering here, he sort of did nothing. He did not refuse or sent it back in the normal way with some amendments to be done or at all. He just kept quiet and it is on that basis that as per the law, it became a legal anyway, after the lapse of 14 days.

Can the counsel clarify why the Governor would want to do nothing when a matter is so critical and if he sent it back to the assembly, perhaps there would have been a rejoinder from the assembly, thereby bringing some discussion which should bring harmony, which would have been better than the situation we are in?

The other one is perhaps the Governor to note, as far as the Special Committee is concerned or Senate for that matter is concerned, the fact that there may have been a motive, perhaps will not in any way dilute our conclusion if some allegations are substantiated.

Thank you.

**The Chairperson** (Sen. Musila): Questions are channeled to the counsel for the Governor and I will allow one more.

**Sen. M Kajwang:** Thank you Mr. Chairman, Sir. I direct two questions to the witness; the Controller of Budget. If you look at the gist of some of the accusations leveled against the Governor, there was an issue on debt and advertising cost. I will confine myself to the two.

The issue of debt level in Murang'a is of significant concern to the citizens. I say that because when I look at the evidence that has been brought to this Special Committee, you will find that from 7<sup>th</sup> September, 2015 the County Secretary, a Mr. P. Mukuria wrote a letter referenced "County Financial Statement". He sought to dispel allegations that the county owed Kshs 2.5billion to suppliers and contractors. He went further and clarified that the outstanding supplier payment was around Kshs 1billion.

Mr. Chairman, Sir, the letter by the County Secretary came after the County Executive Committee Member of Finance, a Mr. George Kamau had responded to a request from the county assembly to clarify the outstanding debt. The County Executive Committee member for Finance gave a breakdown of outstanding bills and Local Purchase Order totaling Kshs 2.47 billion. The reason why I bring this is to illustrate the different numbers that have been flying around. The Controller of Budget in her Report for the Financial Year ended, noted that the pending bills were Kshs1.1billion.

Murang'a County seems to be in the same position that the entire nation is in where numbers are being bandied around, from left, right and centre concerning the debt position of the sovereign debt of the country and the county's. The specific question to the Controller of Budget is:-

- (1) How do you treat Local Purchase Orders in working out the pending bills or the debt position of a county? Should they be included?
- (2) Does it concern you that there does not seem to be consistency on the outstanding debts of counties? I know you have a constitutional mandate to bring that clarity. Does it concern you when at the county level, these different figures are being bandied around?

Mr. Chairman, Sir, I had said that there will be two questions. With regard to the one on the advertising expenditure which the Controller of Budget has clarified, what worries me is that the total amount that has been broken down by the Controller of Budget that comes to Kshs 19.25million for both the assembly and the executive combined. If you take what the executive spent, it was Kshs14million.

We have seen the Auditor-General's Report that tells us that the county government spent Kshs 26million in advertising and promotion of the 'Shilingi kwa Shilingi' Sacco. I am worried about the different numbers coming from different constitutional bodies that the Controller of Budget says Kshs14million has been spent and the Auditor-General says Kshs26million has been spent. The specific question there is; if Kshs 14million was

spent, what was the budget? Are you also concerned that you could be in possession of a figure that on the surface might appear to be deflated or inflated or cooked?

**The Chairperson** (Sen. Musila): I want to stop there for clarifications. I will come again. Let us get the answers. Clarifications start from the counsel for the Governor on the question asked by Sen. (Eng.) Muriuki.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir. The Governor did not choose to do nothing. He was very involved through his County Executive Committee Member of Finance when the first proposed estimates for this year were submitted to the assembly. You will notice that we have a letter in our bundle at page 34 and 35 that sets out the response by the county executive with regard to the action that the county assembly took on the budget which in view of the county executive redesigned the entire budget. It removed funds from one programme, for instance, infrastructure, health and then came up with a vote called Ward Development Fund and assigning it Kshs 700million. So, the letter was there and the Governor did not choose to do nothing about it.

It is Kshs700 million. So, the letter was there; the governor did not choose to do nothing about it. I notice you want to make an intervention. But, perhaps---

**Sen. (Eng.) Muriuki:** It is because I think you got my point wrong. The issue is that the County Assembly of Murang'a came up with a Bill to create ward development fund. Correct me if I am wrong, but I understood that it was sent to the governor for assent and did not assent to it. In fact, he did nothing about it.

**Mr. George Ng'ang'a Mbugua:** He sent a memorandum. Your question was whether he gave a memorandum. I was drawing your attention to the page that has that memorandum. So, action was taken. So he did not choose to do nothing. The other issue--  
-

**The Chairperson** (Sen. Musila): Look at page 34 and see whether you are satisfied whether that is the memorandum?

**Mr. George Ng'ang'a Mbugua:** There is a document that has the heading: "Murang'a County Budget 2015/2016." Paragraph two says: "Please, note that we still stand by the issues raised by my memorandum re-forwarded to you on the 14<sup>th</sup> July."

This is a letter dated 17<sup>th</sup> July and it refers to a memorandum of 14<sup>th</sup> July. It sets out the concerns, one of which is that the budget was badly mutilated to an extent of creating a new budget. Key projects like road development have been grossly under-funded and a new item called ward development fund was introduced to the budget and allocated a whopping Kshs700 million. So, the reasons the governor could not assent have been set out clearly. But we are not begrudging the assembly for gazeting because they have the power. In our defence, we shall be demonstrating that these matters and controversies partly informed the decision that was made by the assembly. That will be part of our evidence.

**The Chairperson** (Sen. Musila): That is fine, Counsel. You have clarified that.

**Sen. (Eng.) Muriuki:** Just for the record, there are two issues here. The executive generates a budget, takes it to the assembly and they do not agree. Then the assembly on its own decides to go ahead to gazette instead of sending it back to the executive, agreeing or discussing it. The argument started with the refusal of the governor to accept the ward development fund, with the amendments suggested by the Controller of Budget. That is the point I was following; that he did not assent the Bill; not the budget.

**Mr. George Ng'ang'a Mbugua:** Let me clarify. He did not refuse to assent to the Bill with the suggestion of Controller of Budget. In fact, the Controller of Budget indicates that the vote called the ward development fund is unconstitutional. The governor, as a man who respects the Constitution and the guidelines for constitutional offices, was guided that there was an item that raised issues about the legality of the Bill. There was no agreement after that. Is this arising because we have guidelines from the Office of the Controller of Budget? Please consider this, because they simply went ahead to gazette, which is fine because they have the statutory power to do that.

**Sen. (Eng.) Muriuki:** I rest the matter.

**Mr. George Ng'ang'a Mbugua:** For the record, that is a money bill, which requires full input from the executive, pursuant to the provisions of the Constitution. I am sure the Controller of Budgets can agree as well.

**The Chairperson** (Sen. Musila): I now invite the Controller of Budget to respond to the questions by Sen. M. Kajwang.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, on the issue of treatment of invoices, I want to state that the Government uses cash accounting as opposed to accrual basis of accounting. If the county was using the accrual basis of accounting, then that invoice would have accrued as an expenditure and the credit side would have been a liability. Since we use cash basis of accounting the invoice is treated as a pending bill, and it is cleared the following year when the payment is made.

In terms of consistency of the numbers and different figures floating around; not just for Murang'a County but other counties as well, because of the reports emanating from the media giving different figures, we wrote to all the counties seeking validation of all the pending bills. We wrote to Murang'a on 24<sup>th</sup> August, 2015 and the letter was addressed to the County Executive Committee (CEC) member for Finance, who responded and gave a figure of Kshs1, 094,315,526 which we used in our report.

In terms of the figures on advertising expenditure, the figure given by the Auditor-General of Kshs26 million relates to the Financial Year 2013/2014. Those are the financial statements that have been audited by the Auditor-General. The figure given by

the Controller of Budget is for 2014/2015 Financial Year. So, there are two different financial years.

**Sen. M. Kajwang:** Mr. Chairman, Sir, with your indulgence, I just beg to correct that. The Auditor-General was here this morning, sitting on the same seat, and we were looking at the financial statements up to 30th June, 2014.

**The Chairperson** (Sen. Musila): You asked the question about Local Purchase Order (LPO) and it was not responded to. Do you count LPOs as pending bills? Sen. M. Kajwang wanted to know that. That was an issue that needed clarification yesterday.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, to distinguish again from an accounting perspective, an invoice is issued when goods have been delivered or services rendered. An LPO should be issued when the procurement process has been concluded. It is either an LPO or Local Supply Order (LSO) or a contract signed, showing that Supplier X can now render the services or supply the goods. If an LPO has been issued but the goods have not been delivered or services rendered, then that LPO cannot be a pending bill. This is because no goods have been delivered and no services have been rendered. You have an LPO as a supplier, but you have not performed your side of the contract. Therefore, you cannot lay a claim on the resources of the county. I am speaking as a qualified accountant, in fact, a fellow of the Institute of Certified Public Accountants.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, I have a clarification arising from long-term and short-term loans. I wish the witness could clarify what period is considered long-term or short-term. Also, I wish she could confirm that their documents are public documents and whether she could avail the Third Quarter Report, because that is where the Kshs200 million has been mentioned.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, a short-term debt is usually one year and below. Beyond one year, it becomes medium-term or long-term. Our documents are public documents and as I stated in the beginning, we have a responsibility to ensure that the public has access to budget implementation information. That is in Section 39 of the Public Finance Management Act.

According to Article 228(6) of the Constitution, we are required by law to publish these reports on a quarterly basis. We judiciously do that and provide the reports to the Senate for the counties and the National Assembly for the Ministries, departments and agencies. Therefore, we have been availing these documents to the Senate. We also share the reports with the counties. We give the reports to all county assemblies countrywide. We post them on our website and give the governors 20 copies each to share with their executive teams. We also give them to the clerks and speakers of counties. We also avail copies of our reports to Huduma centres and universities. Therefore, the reports are widely circulated.

**Mr. Mbuti Gathenji:** The reason I asked that is because in the Third Quarter you specifically stated that the loan of Kshs200 million was an irregular overdraft. For completeness of the record, since this question came from the Senators, it is good that, that is in the record of this Committee.

**The Chairperson** (Sen. Musila): Did you get that?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, with your permission we will check on that and avail the two outstanding issues on the balances that had not been released by the Treasury and the Kshs200 million loan. We will avail that information in writing to the Special Committee.

**The Chairperson** (Sen. Musila): Thank you for that. However, it is important that we get this today. By the way, did you find Item 3 on Page 192 of your document?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, we have found it. We will reconfirm the reasons behind this and check whether the county assembly actually approved. It would be irregular if the county assembly did not approve. We will confirm that.

**The Chairperson** (Sen. Musila): All right. Let us listen to Sen. Ong'era and Sen. Sang in that order.

**Sen. Ong'era:** Mr. Chairman, Sir, the question I wanted to ask was eloquently asked by Sen. M. Kajwang. This was relating to the conflicting figures that we have been given on the pending bills and advertisement. I want to confirm that it has been well answered and stated eloquently by the Controller of Budget.

**The Chairperson** (Sen. Musila): Thank you, Senator.

**Sen. Sang:** Mr. Chairman, Sir, I guess what the Controller of Budget will supply this Committee with is the County Governments Exchequer Report as at 30<sup>th</sup> June, 2015 on the releases. That is important if we have to determine the outstanding pending bills. So, I hope you will share that with us. You also need to confirm the sources of the information because we seem to have two different figures from the same executive. There is a figure of Kshs2.5 billion and another one of Kshs1.1 billion. Could you confirm to us the source of the information that you have regarding the figure of Kshs1.1 billion?

Secondly, the Controller of Budget should confirm whether there is a requirement in law that budgets of counties are programme-based and whether that has been implemented. In terms of budgeting we need to know whether the budget is itemized and that every figure corresponds to every budget line. You should confirm whether that is the case and if Murang'a County Budget complied with that provision of the law.

As the Controller of Budget, do you consider – before you give the green light for a budget to be approved – constitutional provisions of Schedule Six with regard to the

categorisation of national Government functions and county government functions? Would you, for example, allow a budget of a county government that gives allocation for the establishment of an international airport or a university? Is that allowed by law? If a county government allocates the same, would you approve it?

**Mr. George Ng'ang'a Mbugua:** Is that in Schedule Four or Schedule Six?

**Sen. Sang:** Sorry, it is Schedule Four.

You have raised constitutional issues with regard to the ward development fund. The same county government established a bursary scheme. Murang'a County may have a different name, but they allocated resources for bursaries. Could you confirm to us whether or not that is a devolved function? If it is not and you allowed it, under what constitutional provisions did that succeed to go through?

Finally, yesterday, we had discussions about an allocation of about Kshs31 million towards improvement of infrastructure in a secondary school. I do not know whether it would surprise you that the county government allocated resources for the upgrade of infrastructure within a secondary school. Could you tell us whether that is a devolved function and if it was sanctioned by you?

**The Chairperson** (Sen. Musila): I think you have a mouthful. Therefore, proceed.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, before she responds, I just want to make a clarification on the figures that Sen. Sang has raised. In his first intervention, he said that we were provided with two figures by the county executive. I just want to clarify that the figure of Kshs2.5 billion came from the assembly, when they added the alleged outstanding bill and the Local Purchase Orders (LPOs). The last answer by the Controller of Budget was that an LPO is not considered as a debt. They came up with that. I just want to clarify that.

**The Chairperson** (Sen. Musila): Counsel, Sen. M. Kajwang wanted that clarification because of yesterday's issue. It is very well taken care of.  
Yes, Controller of Budget.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, on the issue of the County Governments Exchequer releases, we shall provide that before the end of business today.

In terms of the pending bills, we can support the figure of Kshs1.1 billion that we gave because we have a letter from the county confirming that.

In terms of overdraft, we shall check on our provision in the report and provide details on that.



On the programme-based budget, according to the Public Finance Management (PFM) Act, counties were to implement programme-based budgets with effect from 2014/2015 Financial Year, and a year earlier for the national Government. Murang'a County prepared its programme-based budget. There were few challenges which we highlighted to them and they promised to rectify at supplementary. But by and large, it was programme-based.

In terms of allocation of resources to national Government functions, Sen. Sang gave an example of an international airport. We cannot, certainly, release money to such a function like that because the resources are huge.

Mr. Chairman, Sir, counties are supporting security operations, for instance. Normally, when that happens, we write to them and they also write to us, supporting why that activity is being undertaken. Some of the counties have actually given us memorandum of understanding between them and the national Government. Where there is an MoU between a county and the national Government entity that implements that particular function, we normally accept and release the funds.

Let me explain about the bursary scheme. Counties were allowed, by the Transition Authority (TA) to establish bursary funds. We issued a circular to all the counties, attaching the approval from the TA. In that circular, the counties were also allowed to support infrastructure in schools. Therefore, that was a specific approval from the TA, and there is a letter to that effect.

The last one is the allocation of Kshs31 million to a secondary school. We need to check whether this allocation was made in line with the advice from the TA. We can also clarify our position on that when we shall be clarifying the other two issues.

Thank you, Mr. Chairman, Sir.

**The Chairperson** (Sen. Musila): We are coming to the end of clarification. Let us listen to the Vice Chairperson.

**The Vice Chairperson** (Sen. Adan): Mr. Chairman, Sir, I seek further clarification on the budget for infrastructure for Murang'a County. You explained that there was an approval by the TA for a certain infrastructure exercise to be undertaken in a certain school. In the case of Murang'a, as Sen. Sang has said, they allocated some money for the infrastructure of Kahuhia Girls. Did you approve that along with the bursary?

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, I have explained about the bursary. Counties were allowed by the TA to establish bursary funds. That is okay and it is very clear.

Concerning allocation for infrastructure in a school, we will come back to you. We need to check the records and give you an appropriate answer on that.

**The Chairperson** (Sen. Musila): Very well. Could we know when the documents will come? Time is of the essence and we need to conclude our hearings this afternoon.

**Sen. Sang:** Mr. Chairman, Sir, I have one question concerning something that we had a discussion on this morning. Was the purchase of a piece of land for Kshs340 million part of the programme-based budget and was it provided for in the budget?

**Mr. Browne Nathans:** Mr. Chairman, Sir, just for the record. Like we said, we will give our part of---. Just to remind you, that was specifically in the budget.

**The Chairperson** (Sen. Musila): That is okay. However, it does not stop the witness from answering the question. When your time comes, you will deal with it.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, which year's budget is that, so that we check?

**Sen. Sang:** The budget for 2014/2015. Could you help us establish whether it is 2013/2014 or 2014/2015? Just get us the correct year.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, we had carried the budget for 2014/2015. However, we will check that.

**The Chairperson** (Sen. Musila): Fine. However, we request that you give us all the documents we have requested for today by 4.00 p.m. It is just about two hours from now. I know that you are very efficient and you shall do that.

**The Controller of Budget** (Ms. Agnes Odhiambo): Thank you, Mr. Chairman, Sir. We will ensure that we provide the information before 5.00 p.m.

**The Chairperson** (Sen. Musila): Yes, Counsel.

**Mr. Kimani:** Mr. Chairman, Sir, there is a clarification that a witness can make that could help all of us here. She has indicated that they do not factor in LPOs for purposes of looking at debts. However, where an LPO has been given and the supplier has already delivered goods or services but an invoice has not been released, does it mean that the liability is not recognised?

I have been reading Section 26 of the Public Procurement Act which states that every entity must procure within a specific budget. That is important for everyone here.

**Mr. Browne Nathans:** Mr. Chairman, Sir, the witness has already confirmed that it is not a debt.

**The Chairperson** (Sen. Musila): Mr. Counsel, we are very aware of what the witness's response was. However, the counsel has asked the witness a question; let us hear her answer.

**Mr. Browne Nathans:** Mr. Chairman, Sir, with tremendous respect, our fear is that we are re-opening a subject that has been addressed and gone on record. You also need to protect us. She has responded to the question and the Counsel now wants to submit on the same so that he, possibly, extracts a different answer.

**The Chairperson** (Sen. Musila): Why do you think that she will give a different answer?

**Mr. Browne Nathans:** Because the matter was closed and you ruled on it.

**The Chairperson** (Sen. Musila): Counsel, please ask your question.

**Mr. Kimani:** Mr. Chairman, Sir, we are avoiding an argument with our colleagues. This is for the benefit of everyone here but not just the assembly. Yesterday, we had the issue of LPOs. We dealt with a figure of Kshs618 million from LPOs that came from the county executive. Once an LPO has been given and goods or services have been delivered, why is it not a financial obligation? Section 26 of the Public Procurement Act indicates that all procurements must be within a specific budget. How do you treat such kinds of LPOs?

**Mr. Browne Nathans:** Mr. Chairman, Sir, with due respect, the Counsel is giving evidence but not asking a question because he is even citing the provisions of the law. Strenuously, we object to that line of questioning because the expert witness had given her position on LPOs.

**The Chairperson** (Sen. Musila): We note that objection. However, the witness will answer the question.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, I stated very clearly that where an LPO has been issued, but no goods have been supplied or services rendered, that is not a debt. Even from an accounting point of view, it is not a liability. Where an LPO has been issued, services rendered and goods supplied, in the normal course of business, the supplier should invoice. If the supplier has not invoiced, then, questions must be asked. I am not talking as a Controller of Budget, but an accountant. If goods have been delivered; you received an LPO, delivered goods or rendered services, why can you not raise an invoice? What is the problem with that transaction? Those are the key governance questions that must be asked.

**The Chairperson** (Sen. Musila): The Counsel, you must be happy because she has answered exactly the same way she answered before.

**Mr. Browne Nathans:** Mr. Chairman, Sir, in fact, her first response was superb. We do not want to be superfluous over superb. We were happy with the first response she gave. In fact, we also love the second response. We are happy but we were happy even with the first one.

**The Controller of Budget** (Ms. Agnes Odhiambo): Mr. Chairman, Sir, even as a governance expert, if there is a transaction like that, it should be reported to the Ethics and Anti-Corruption Commission (EACC) for investigation. Why should you supply goods and you do not want to invoice? What is wrong with that transaction?

**The Chairperson** (Sen. Musila): All Right. On behalf of the Special Committee and that of the Counsels on both sides, I thank the Controller of Budget for her contribution. She has really enriched the proceedings of this Special Committee and we thank you profusely. We know that you are busy. However, we request that you give us the documents that you have promised before 5.00 p.m. Therefore, I now release you. Thank you.

**The Controller of Budget** (Ms. Agnes Odhiambo): Thank you very much, Mr. Chairman, Sir.

**The Chairperson** (Sen. Musila): It is now quarter past two and we have got to go for a one-hour lunch break. Therefore, we will be expected to be back here at exactly 3.15p.m. Please, keep time. Time is of the essence because today is our last day. We have to retire and make our report. This session is adjourned.

*The Special Committee adjourned at 2.15p.m.*

*(The Special Committee resumed Sitting at 3.22 p.m.)*

**The Chairperson** (Sen. Musila): Let us proceed. I seek the cooperation of all parties so that we do not delay the programme. We should have been doing this at 9.00 a.m. So, we are many hours behind schedule. Let us hear the evidence from the Governor. With the indulgence of the Counsel, I request that you stick to two hours which is generous enough and then we will give the other counsels 20 minutes to rebut and then you will have 30 minutes to give closing remarks for the Governor's Counsel and 30 minutes for the other Counsel. All that, adds up to three hours which in my view is reasonable enough.

Is there any objection to that?

**Mr. Browne Nathans**: Mr. Chairman, Sir, we have our separate 30 minutes for preliminary point. Therefore, that totals up to three and half hours. We would have been happy to do with four hours. However, if three and half hours is granted to us, it would be fine.

**The Chairperson** (Sen. Musila): We agreed to give you 30 minutes for preliminary issues. However, the assumption of the Committee was that yesterday, you dealt on that issue. We are denying you the 30 minutes, but if you can organize your time and do both within the three hours, it will be great. We appreciate that we owe you 30 minutes for preliminary issue. On the issue of the Governor, I can report that the Special Committee has declined.

Governor's Counsel, please, proceed. You have two and a half hours.

**Mr. Browne Nathans:** Mr. Chairman, Sir, you gave us three hours.

**The Chairperson** (Sen. Musila): You have two hours and 30 minutes for preliminaries.

**Mr. Browne Nathans:** Mr. Chairman, Sir, we have organized ourselves in such a way that my colleagues will take the chunk of the time. Mine is just to manage time. My learned colleague, Mr. Mbugua, will delve into the preliminary points. Thereafter, the two gentlemen; Mr. Wanyama and Mr. Njenga will deal with respective issues that they have been duly assigned.

This Special Committee of the Senate, has been told of a gentleman in the allegations that were made in the opening remarks yesterday. We heard accusations of a man that is not; one, consultative, two, arrogant, three, a know it all. However, not one single document was tabled to suggest that, in fact, to prove that he is undermining the Assembly. It is our profound view that this is not true. We have the documents to prove that what we are saying is true and, therefore, rebut that allegation.

Mr. Chairman, Sir, I draw your attention and that of the Members of this Special Committee of the Senate to the bundle of documents that we gave as the Governor's response; from page 268 to 305. In this document, you will see that if there is anything called consultative, this must really be it. You will see that the Governor has involved his office, chief officers, county advisors, county public service board, county executive members, his cabinet and the county assembly. If you delve a little deeper in there, you will see all those names, including chairmen of committees. I would like it to go on record that this is a man who is consultative in all the work that he has been doing for the last three years. That rebuts the allegation that was tabled by the county assembly.

I now hand over to Mr. Ng'ang'a Mbugua. Thank you.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, and the Members of this Select Committee, looking at the time, I will take less than 30 minutes to argue the preliminary points that we have raised in our answer to the particulars of the allegations.

In commencing my presentation, I would like to refer to what the Senate has done in the past and the recommendations it made when it comes to the question of the removal of a governor from office.

When the Senate was considering the matter of the proposed removal of the Governor of Embu County, the report that was tabled by the Special Committee of the Senate, which we have attached for your ease of reference on page 20 of the answer by the Governor, is an extract, because we presumed that it is a document that is already in the hands of the Senate. Hon. Senators pronounced themselves on the issue of the hearing that a process that deals with the proposed removal of a governor should take.

It stated that;-"We are alive to the warning to ourselves to not interfere in internal processes of County Assembly. However, we think that serious thought needs to be given to the desirability of reviewing the County Assembly Standing Orders in order to provide for some sought of hearing of a governor prior to the resolution of an assembly to remove them from office."

Mr. Chairman, Sir, the context within which Hon. Senators expressed themselves was that there was no provision in the Standing Orders of the County Assembly of Embu with respect to the matter for the removal of a governor. However, we have a totally different set of circumstances in the case of Murang'a County. On page 22 of our answer, we have attached an extract of the Standing Orders of the County Assembly of Murang'a. It refers to the right to be heard and it is very categorical that whenever the Constitution or any law or the Standing Orders No.1 requires the Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant committee of the Assembly considering the matter and shall be entitled to legal representation.

The Standing Orders are crafted in mandatory terms, adopted by the Assembly for purposes of governing the question of removal or proposed removal of a governor from office. The first question that we need to interact with is; was there compliance with this fantastic Standing Order that echoes what Article 47 of the Constitution on procedural fairness provides and what Article 50 of the Constitution on the right to a fair trial provides?

Mr. Chairman, Sir, it is our very considered view that, that Standing Order was violated by the Assembly.

There is an admission by the Assembly on page 308 of the answer where the Assembly seems to be of the view that the right to be heard is before the Senate and not before the Assembly, notwithstanding what that Standing Order provides.

Mr. Chairman, Sir, if you look at page 308, at paragraph nine the assertion that the governor should be accorded the chance to appear before the Assembly is wrong both in law and fact. What is the assembly saying? That, in fact, there is no such a right notwithstanding that we have seen what their Standing Order provides. They think that it would undermine the role of the Senate with regard to the impeachment of a Governor as set out under Article 181.

Again, in the mind of the Assembly, they think that by according the Governor a right to be heard, they would be undermining the role of the Senate in dealing with this question.

Mr. Chairman, Sir, it is important we contextualize the role of the Assembly in matters of proposed removal. An Assembly is comprised of men and women of honour, who are literate and can read and understand. Once a motion has been proposed with the violations, the merits or otherwise of those violations is to be interrogated in a process

where you notify the governor, tell him: "These are the proposed grounds for your removal; under Standing Order No.67, we are inviting you to appear on a particular date, venue and time for a particular business." This is so that the governor can present his case and before the mover of that motion on the floor of the Assembly does so, the Assembly is well seized of the position, so that perhaps after hearing the Governor, there might be some Members of the Assembly who will take a totally different view of the subject. Once that position has been heard, and probably you have Assembly Members who are not in agreement, they will probably shoot down the motion. Therefore, it will not escalate this matter to the Senate. The Senate does not have original jurisdiction in matters of impeachment.

Mr. Chairman, Sir, my submission is that to the extent that the decision that was taken by the Assembly was; number one, in contravention of their Standing Orders, any purported resolution for the removal of the Governor was unprocedural, irregular, invalid and in fact, premature, because that very clearly defined mechanism had not been exhausted. I can do no more than demonstrate how that right to appear and be heard is exercised.

I was so glad when I was served with an invitation to appear by this honourable Senate addressed by to my client, hon. Mwangi wa Iria, from the Senate. I am just using this for purposes of demonstration. It sets out what the purpose of the invitation is and says; "Now therefore, the Special Committee invites you to appear and be represented before the Committee during its investigations." Let me pause there. The assembly, should have demonstrated; one, that they invited, not necessarily before a committee of the assembly but even a plenary; that, "we invite you to appear before the plenary on a particular date". This invitation from the Senate goes on to say: "The first meeting of the Committee shall be held on Wednesday, 4<sup>th</sup> November, 2015 at 10.00 a.m. in the County Hall Chamber, First Floor. If you choose to appear before the Committee, the Committee requires you to file certain documents within a particular timeline."

Mr. Chairman, Sir, that invitation was so clear to the governor when it was served on us by the Senate that we knew, first of all the nature of the case that we were facing, when we are expected to appear and exonerate ourselves or present our evidence. What we have is a situation where a Standing Order is trivialized. I will do no more than refer to you the letter that was communicated to the hon. Governor by the Speaker at page 24 and 25. First of all, at page 25, you will notice that the speaker is telling the governor that:

"In view of the aforementioned in pursuant to Standing Order No.67" so, you can see that the Speaker is very well alive to that Standing Order, on the right to be heard but then he seeks to qualify that or to interpret that Standing Order in a subjective way and qualify how the right is to be exercised. It is not upon the speaker to qualify how the right is to be exercised because it is in the Standing Order. So, it is "you shall be invited to appear and be heard" it does not say "you shall provide exonerating evidence to us."

It is important because you cannot examine or interrogate a document but you can pose a question to the Governor so that the framers of that Standing Order feel very strongly that appearance is critical. Had that been done, the hon. Governor would have appeared, stated his case and perhaps he would have persuaded some of the MCAs that, indeed,

there is no merit in those allegations and, therefore, save everybody; one, escalating the matter to a very important state organ we call the Senate; and that, discharge a very important constitutional mandate by saying “let us exhaust our own mechanism before we escalate the matter there.”

I want to bring this into context, of what initially aggrieved the hon. Governor. If you look at that letter at page 24, it was served on the office of the Governor. In fact, the intention was not even to serve the Governor personally because whether or not the Governor is in the county, his office is open for receipt of documents. It was received on 15<sup>th</sup> October, 2015. At page 25 it says:

“The so called exonerating evidence should be received within 7 days’ notice period.”

Let us even assume that they were right to qualify how that right was to be exercised. You reckon the seven days from the time you notified the hon. Governor that: “This is what is facing you.” So, the maturity of that motion could not have been any time before the seven days. What the Assembly did is that on the sixth day which was on 21st and this is a matter on record – the motion was on the order paper, it was moved and a resolution was passed. I believe the next day; the Communication to the Speaker of the Senate was done.

First, as you can see, there was never any genuine intention to even get to engage the Governor at all. Even the seven days they provided for did not even exhaust. This right to be heard is so sacrosanct, critical and occupies a very important place in our constitutional architecture. It cannot be trivialized.

If the hon. Senators, you get yourselves satisfied that, indeed, there were those violations; one, you have an answer under Article 2(1) and (4) of the Constitution where it says to the action that you did contravened--- To the extent that the action that you did contravenes: One, the right of the governor to be heard under Article 47.

There is a procedural fairness aspect that is enshrined in Article 47 which is now expressed. In fact, you will see the letter of the Speaker echoes Article 47. This is clear because if you look at it, it actually quotes Article 10, page 25 pursuant to Articles 10, 50 and 47. So that you can see the Speaker was perfectly aware that this matter is constitutionally underpinned, but the action the assembly did was to violate those constitutional provisions. What is the net effect? Under Article 2 (4), anything that is done which is in contravention of the Constitution is invalid. By telling the county assembly that whatever you did was unconstitutional, you will not be abdicating your responsibility to protect county governments under article 96.

You will be telling county assemblies across the entire Republic that, yes, we will intervene and when called upon we shall do so, but only to the extent that you have also complied with the law. But we shall not be complicit in violation of the law. That is what we are seeking of you; that let everybody--- Because this Constitution that we enacted and we gave ourselves is supreme; it is a living instrument. Yesterday, I gave an example,



if my dream comes true some day and I become the governor of Kiambu County, one of the things I would expect if something of this nature is to be initiated, that kindly at the very least can you hear me first - it is not about the honourable governor, it is about everybody.

Mr. Chairman, Sir, we are saying, kindly find that they violated this Constitution that they have quoted in their letter, and, therefore, this is not right for us. Please, next time – for this one we will not even interrogate the merits or otherwise of this Motion – kindly make sure that you comply with the law before you bring the Motion to us. If you look at page two of my answer, the High Court has had to pronounce itself on this issue of the right to be heard.

The High Court clearly stated and echoed the observation of Wambora I Report, at page two, paragraph 3.8. I presume this document is part of the answer: 3.8. It is just a quotation from a decision of the High Court. I do not know whether you have it, Hon. Senators.

**The Chairperson** (Sen. Musila): Senators, this is the folder with the programmes.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, our own High Court echoed the words of the honourable Senate. I am referring to Paragraph 3.8 where I have given an extract of a finding on the right to be heard. The High Court agreed with this Senate and said that since it is the county assembly that advanced findings the conduct of a governor while in office are first made--- It goes on to say that we are persuaded to find, which we hereby do, that even at the county assembly, the right to a hearing must be accorded to a governor at any time the Motion proposing removal from office is being debated before it is approved and rejected.

So, you can see, it is before it is approved or rejected. It goes on to say - this was now the finding - that in the circumstances, the removal of the first petitioner as the governor was *null* and *void*. Essentially, what the High Court was saying was that it considered the violation of that right to be heard so fundamental that it made the action of the Senate to be *null* and *void*. It is not on the issue of merits but on the issue of denying the governor that right to be heard.

At paragraph 3.11 – again these are decisions that will be supplied to the secretariat because they are all reported – there is a recent decision that was made on the removal of the Speaker of the County Assembly of Kisumu. It is a fairly recent decision by the Court of Appeal, at 3.1, Page 3.8 of my answer. This is what the Court of Appeal sitting in Kisumu said: -

“All persons including state organs are obliged to comply and defend the Constitution. The Constitution subjects the discharge of mandates of all persons including the national and county assemblies which are quasi-judicial in nature to supervisory jurisdictions of the High Court”

As the doctrine of separation of powers is part of the architecture of the same Constitution, it is not derogation from the doctrine of separation of power to subject the county legislative assembly and even the National Assembly to the supervisory jurisdiction of the court in exercise of their *quasi-judicial* functions if they violate the Constitution.

The Court of Appeal went to annul the removal of the Speaker of the County Assembly of Kisumu and said that the Kisumu County Assembly did not follow due process in the impeachment of the Speaker, the second respondent; in the circumstances, the removal from office was *null* and *void*.

Mr. Chairman, Sir, there is a plethora of authorities but I just want to put this matter into context; that it is not as trivial as to say you will be heard before the Senate. In fact, even in the Wambora I decision, the Court of Appeal was alive to the fact that the Senate also has an obligation to hear the governor. But it still went on to find, that notwithstanding, you have to demonstrate that he was also heard before the assembly.

I have gone on at paragraph 3.1.3 to basically set out the manner in which this Motion was moved and I have referred to 3.1.3 when the governor was served, and that is not even in dispute. There is a letter the governor wrote back which we will interact with but one of the things you will note is that there was even some documentation that the governor was seeking, so that, perhaps, what we expected is that the documents we have provided you with are the documents we have in support of our Motion, and therefore, appear on a particular date or not even respond and say these are the documents but say we have received your letter, we are now inviting you to appear and defend yourself on this date before this Committee or if not, even a plenary. But that is something you will not see.

Mr. Chairman, Sir, if you go to the timing, because this is also significant. You will notice even the time the governor received the letter on the 15<sup>th</sup>, it was on a Thursday. Then there was the 16<sup>th</sup>, the letter was forwarded to me for purposes of responding. On 19<sup>th</sup>, we had responded. Because the letter we wrote back to the Speaker was on the 19<sup>th</sup> and it is in this bundle. On 20<sup>th</sup>, it was *Mashujaa* Day. So, when we wrote the letter on that 19<sup>th</sup>, you can imagine there was even no day that that particular letter was interrogated because on the 21<sup>st</sup>, the Motion was moved, the governor had no knowledge that that Motion is being moved, only to learn through the media that they have approved that Motion, and the next day as you will notice from the documents that we have attached, at page 30 of the answer, it was in the *Standard newspaper* on the 22<sup>nd</sup> which was on Thursday - the Motion was approved on Wednesday - stating: "Murang'a Governor impeached." We have provided the *Nation newspaper* at page 33 which states: "Murang'a votes to send the governor home".

Mr. Chairman, Sir, those actions are the ones that now led the governor before you as honourable Senators. Aggrieved by those actions - this should not be taken to mean that we have no confidence whatsoever with the process before the Senate - we took steps to go to the High Court to challenge that process. But you will have opportunity to look at

that ruling. We did not demonstrate prejudice so that the judge found that notwithstanding, the governor will still remain in office, but the judge did not pronounce himself substantively on those issues because the petition is still yet to be heard. We raised that matter on procedure and compliance with the law. In the wisdom of the court, they felt that these are matters that the Senate can deal with. So, this issue is still properly before you for determination because you are dealing with the merits. I am happy yesterday you directed that this issue be raised as we canvass our defence so that you will be in a position to look at the documents that supports this argument.

Mr. Chairman, Sir, that is why we are asking this Special Committee when it retires, to make its finding because you are properly seized of the matter. Where do we get this? Every state organ including the Senate is under an obligation to comply with the Constitution and you have the capacity to interpret the Constitution.

The matter is in your able hands but you have the capacity to interpret whether the Constitution was violated or not. I have five minutes before my 30 minutes end.

This is a matter we shall invite you to consider at a preliminary stage. Should you find that there were those violations that we have enumerated, you may recommend to plenary, that we have interacted with this matter and even without reporting on whether these allegations have been substantiated, you are sufficiently satisfied that the actions of the assembly not only contravened their own Standing Orders but also the Constitution. You have the mandate to do so.

Mr. Chairman, Sir, in the second limb of my preliminary point, you will find it in the supplementary; the blue bundle. That is where we have raised the issue of public participation. It is the first page 018A. You will notice - this is not in dispute - that the assembly ran an advert in the newspapers after the Notice for the Motion had been given. I will try and get you that document in due course. There was one newspaper advert that was given purportedly in compliance of their requirement for public participation. Let me bring this matter into context.

That whereas the assembly is vested with the statutory power to move the Motion, the Constitution has clearly provided for a requirement when the county assembly is carrying out its mandate to engage the citizens. Why this matter was so important to sufficiently engage the citizens is because, first, the resultant effect of the action that would have been taken by the assembly was in essence to take away the right to their popularly elected leader.

Mr. Chairman, Sir, before this gentleman took over office, the residents of the Murang'a County, just like they did in their election of their Senator and Members of the National Assembly, they made a decision. When allegations are made that he has violated the Constitution by establishing AI crushes, perhaps, the public should have been engaged so that they are able to show how they have been helped by the AI crushes. We heard it was a program that was subsidized. I am saving Kshs500 for artificial insemination, yet I see that, that is one of the allegations. There is already an obligation to engage the public.

Mr. Chairman, Sir, I invite you to page 081B paragraph 148. It is not in dispute that they were under obligation to engage. If you look at page 148 there is a rendition there in the Wambora case. In our view, the question is not whether the public ought to participate in the process of the removal of a Governor but to what extent should that participation go? In our view, some level of public participation must be injected into the process in order to appreciate the fact that the Governor is elected by the people and in order to avoid situations - I emphasise there - to avoid situations where a popular Governor is removed from office due to malice. This brings into context why part of our defence is on the motive.

The court is sufficiently aware that if we are not careful, this process, however noble it was, because it was an oversight process, it can be abused due to malice, ill will and vendetta by the Members of the County Assembly. It is not the Governor saying that. It is the court saying that we must be alive to the fact that this removal process may be abused. How do we guard against this? I invite you to look at the nature of public participation contemplated by law. I refer you to paragraph 151 of my response, page 018C.

**The Chairperson** (Sen. Musila): Counsel you have a minute for that preliminary issue.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, yes. In fact that is why I have jumped to paragraph 151. The County Assembly of Murang'a only published a notice of the intention to remove the Governor under Article 181 of the Constitution in the *Standard* newspaper. They have also provided that document. This notice was not sufficient to facilitate public participation. Why do we say that?

The notice did not set out the allegations made against the Governor. The notice did not indicate the date and time when the Motion to remove the Governor would be moved. Chapter 8 of the County Governments Act which is critical because it is the Chapter that gives effect to the requirement for citizen participation under the Constitution sets out in material detail the mode and form of citizen participation that should be undertaken at the county. It includes use of local infrastructure. They are saying that putting it in a newspaper of national circulation is not enough. In fact, the words are, "local infrastructure", such as ward offices, notices to local churches, mosques and other community fora. The intention is to reach the greatest number possible so, that 'Wanjiku' going to the market place may just stumble upon a notice probably in vernacular saying this and that is proposed to be done or there will be a *baraza* or an informal session at the chief's office or at one of the most frequented areas within the ward level for that purpose.

Mr. Chairman, Sir, what we are interrogating here is--- If you turn to page 149, of that document, the High Court said that it is not enough as it were to simply run up notices in the newspapers. There must be genuine intention to make that participation qualitative. When we say it is enough to run an advert, are you assuming that everybody within Murang'a has access to internet facilities? I am not saying this to show that something

has failed, no. We must be alive to the fact that some of these issues on technological development have to do with the resource capacity of the *mwananchi*. Are you, therefore, assuming that everybody buys a *Standard* newspaper?

The framers of this Act are saying that to a large extent, we expect people at the ward level to go to *barazas*, ward levels or otherwise popular establishments. Have we made deliberate efforts to make them aware? The question will not be whether there was a notification but was it enough for the purpose of meaningfully engaging the estate before consideration of the question whether their popular elected leader should be removed from office.

I conclude by saying that should you be persuaded and we are seeking to persuade you that those two constitutional requirements were violated, then do not hesitate to nullify the process that was carried out by the County Assembly of Murang'a and say you will not interrogate the merits of this allegation until we have a resolution before us as Senators that complies with the law. When we do that, we all rise to the occasion to defend, uphold and protect the Constitution which is a constitutional imperative under Article 10 of the Constitution. That is what we are urging you on that preliminary point.

**The Chairperson** (Sen. Musila): Thank you counsel. That ends the issue of preliminary issue that you raised since yesterday. We are glad to have lived to our promise that we will give you ample time to argue that issue and you have had your say. We will now move on to get your evidence.

**Sen. Madzayo:** Mr. Chairman, Sir, may I have your attention? We appreciate the submissions made by the learned Counsel on the preliminary point that he made. I am wondering whether we can ask both the Counsels, when they are doing their main submissions, to avoid repetitive submissions. I have noticed that whatever we heard yesterday is what we have heard today. We have a number of bundles with us and have to go through all these documents before we can make a finding tomorrow, unless you do not want us to sleep tonight.

**Mr. George Ng'ang'a Mbugua:** I confirm we will not. I appreciate that intervention, hon. Senator. We did not relate the facts. Generally, in the opening statements, we made an attempt to show that, but we never related the law to the facts. This is because we were promised that we would be given a chance. I promise the Special Committee that we will not delve into that issue again, when we are canvassing our defence in response to the particulars of allegations.

**The Chairperson** (Sen. Musila): That was a good point raised by Sen. Madzayo.

**Mr. Browne Nathans:** Mr. Chairman, Sir, we still invite the learned Counsel to proceed for 30 minutes. If you can help to control the timing so that he will have his 30 minutes; Counsel Wanyama, 30 minutes and Counsel Njenga 30 minutes on specific issues that we have shared out.

**The Chairperson** (Sen. Musila): That is within timeframe that I gave.

**Mr. Browne Nathans:** Mr. Chairman, Sir, we will be left with another 30 minutes to play around with.

**The Chairperson** (Sen. Musila): If you can do one-and-a-half hours the better for us.

**Mr. Browne Nathans:** If we can be controlled within that timeframe, we will be very happy.

**Sen. Sang:** On a point of order, Mr. Chairman, Sir. Ordinarily, when a preliminary point is prosecuted by one party, the practice is that you would hear the other party on the same. If my memory serves me right, yesterday you talked about 30 minutes allocated to that preliminary issue and 20 minutes for the Counsel for the Governor and 10 minutes for the Counsel for the Assembly. I seek your guidance.

**The Chairperson** (Sen. Musila): We will have no objection if the Counsel for the Assembly wishes to rebut anything that has been said or wants to wait until his 30 minutes for submission. It is a reasonable point, but I leave it to the Counsel for the Assembly. You could want to rebut when you are doing your submission of 30 minutes, but if he wants to take time, the Special Committee will have no objection.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, if my memory serves me right, the directions that you gave yesterday is that they will be heard together, only that there was a rider that you will give us the 30 minutes when dealing with it. We were thinking that we would prosecute the defence then when my learned Senior is doing a rejoinder to the issues that may arise, it can be dealt with. This is because we did not separate the preliminary points to be canvassed. Normally, when you direct that it be heard first, that is when it is isolated from the merits.

**The Chairperson** (Sen. Musila): We refrained from that because we were not to give any determination. That is why we did not want that preliminary objection to be started with. Otherwise, we would be expecting determination on the part of the Special Committee. That is why we wanted to hear all the evidence, including the preliminary objection. Can I hear the Counsel for the Assembly?

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, I entirely agree with the Senator. He is actually arguing from a logical and important legal principle. Preliminary points cannot be raised at the end of the case. The order asked for, which is an order of nullity, cannot be argued at this time considering your mandate. It would be more convenient for me to answer and then if there is a case to answer for them then they can proceed. We have been asked to pass a resolution or come with an order that nobody should be heard on merit. We have already been heard on merit. I do not want to always rise and talk to my colleagues but apparently, this is completely misplaced. I am prepared to take the 10 minutes and answer them, because mine will be very brief and then, they can then open

up. After this argument, you are supposed to give a ruling whether you have dismissed or upheld that preliminary point. You cannot mix it---

**Mr. Browne Nathans:** Mr. Chairman, Sir, with all due respect to our Senior---

**The Chairperson** (Sen. Musila): Let us not argue over it. Counsel for the Assembly, yesterday we were very clear. The Counsel for the Governor wanted to start with the preliminary objection and the Special Committee said that it wanted to hear all evidence. Therefore, for the record, let us give them an opportunity at the end. Our rules say that we give them 30 minutes, which we have just done. If you want to say something, we can agree even to add you 10 minutes in the end; in order to rebut or add whatever has been said. I want us to agree that this is a quasi-judicial process. We do not want to say that we are following the rules or adhere to---

Supposing we listened to him yesterday and we were convinced, probably, we would not be here today. That is why we said that we want to hear everybody's evidence and preliminary objections, so that in totality we will be guided by all what we have heard during these two days.

**Mr. Mbuthi Gathenji:** Mr. Chairman, Sir, I am just giving an observation which is logical and is the normal application even outside, but I stand guided. We will make our submissions and draw your attention to the fact that, that preliminary point was misplaced by the situation of it at the end.

**The Chairperson** (Sen. Musila): So, you will wait until that time when I give you the opportunity to do that.

**Mr. Mbuthi Gathenji:** I see they are opposing, yet I thought they would be with me.

**The Chairperson** (Sen. Musila): They are not opposing, but even if they do, the Chair finds that to be reasonable. Will you do it now or later?

**Mr. Mbuthi Gathenji:** I wish to take it now because it is more logical.

**The Chairperson** (Sen. Musila): This Special Committee wants to be as accommodative as possible to all sides. I want that to go on record, just like the Counsel say.

**Mr. Browne Nathans:** We hope that does not eat in to our time.

**The Chairperson** (Sen. Musila): No, your time is intact. Counsel, how many minutes did you request for?

**Mr. Mbuthi Gathenji:** I will take about 10 minutes.

**The Chairperson** (Sen. Musila): Fine, proceed.

**Mr. Mbuti Gathenji:** First, I wish to draw your attention to the order that you are required to make. At the end of this submission of my learned friend representing the Governor, he asking that you to interrogate whatever he has said and make a resolution, that there has not been any compliance or presumably, you may terminate these proceedings; that you do not proceed and hear them on merit. This is coming at the end of our case.

I observed yesterday and still insist that the preliminary point is always based on admitted facts. We insist that there have not been any admitted facts. They have not placed before you any material for you to make any decision which is very drastic and draconian to terminate proceedings. On the other hand, you have actually proceeded to take evidence. You have called officers from the state and they have testified.

The application for preliminary objection of the point of law is spend and compromised. The only logical thing is for you to complete. Once you complete, you will make all the observations at the end. We are not guiding this Committee as a court of law. I would like to tell you the reason the matter that was brought to you has no relevance.

My learned friend filed a Petition No.458 of 2015. This petition sought to stop these proceedings to come before you and that application was dismissed. Matters concerning service, merit and constitutionality – because these are constitutional matters – were canvassed in the High Court. Worse is that the matter is still pending. They went for an interlocutory application. That means: “stop before we go to the main application.” We are still minded that there will be a hearing of main application. In fact, to tell you the truth, we have not yet filed all the documents that are necessary for hearing the petition. We filed only documents which related to the conservatory orders. This is the Senate and that is the High Court hearing a constitutional matter.

Concerning what you have been referred to in the Constitution, I doubt if you are the competent authority to make a decision on the constitutionality of what happened in Murang’a, because that is an issue pending hearing. On the first instance, I persuade you not to be dragged into hearing a matter that is in the High Court; that may result in the nullification of what happened in Murang’a. There will be two judgements; yours and the one by the High Court. The one in the High Court is made by the competent authority. That is where my case first rests.

Secondly, you have no evidence, whatsoever, about what happened in Murang’a, unless you reconstitute your Committee to first interrogate what the first and second services were, if at all there were. It is interesting that my learned friend is relying on a letter dated 15<sup>th</sup>, yet there is no evidence of what happened before 15<sup>th</sup>. All those matters are before the High Court and they will be before the High Court until we file substantive affidavit, which will show the track up to the time the motion was canvassed.

To me, it is an exercise in futility for you to bring up a matter that is before the High Court and make a decision. Again, there is a very big danger here because your mandate is limited. I would like to draw your attention to Section 33 of the County Governments



Act. You actually pronounced them here and we listened very carefully. Section 33 of the County Government Act gives you powers. I will look at Sub-Section 3. It actually positions where you will come in. You do not come in to determine matters prior to when you receive the letter from the Speaker. Your jurisdiction starts from when you receive the letter and you have quite frankly done the right thing. In our preliminary meeting, you briefed us why you are seized of this matter.

Now, you are being asked to stop all that and start interrogating the procedures before you receive the letter from the Speaker. You are supposed to, within seven days after receiving notice, offer resolution from the speaker of the county assembly. The Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor. The Senate, by resolution, may appoint a Special Committee, which has been done, comprising eleven of its Members. A special committee appointed shall investigate the matter. This is the matter contained in the Motion.

Somewhere along the line, somebody missed the bus and that is not our fault. If he caught the bus, he would have stopped these proceedings. In fact, they were at liberty to go to the Court of Appeal and appeal against the ruling using conservatory. You would not be seized of anything here and we would be talking about the future.

The other issue is to report the special committee to the Senate within ten days, whether it finds the particulars of the allegations substantiated. We have brought allegations. We, on our part, have not raised any constitutional matter that will justify your intervention from anybody. There is no closed petition because, apparently, in the wisdom of Parliament, they never provided one, where a person against whom the allegations are made can intervene.

The next issue is that within ten days, whether you find the particulars of the allegation against the Governor to have been substantiated--- I entirely agree with you that this is a quasi-judicial proceeding. You are not supposed to find anybody guilty or not guilty because the burden there is higher. You are not supposed to do a constitutional finding because that is reserved in the High Court. To me, you must be satisfied that the orders you are being asked to render here are within the law. I do not want to go into the Constitution, because it is all a matter of fact that you do not have any powers there.

Matters of fact which have not been litigated have been brought here. We have not had any witness testifying on service. It is an assumption that service had defects. All the matters that have been referred to here – whether the Wambora I, II or whatever Wambora you are referred to – will only be relevant if you have jurisdiction. Therefore, on that point, I would like to request that you proceed on the mandate that you were given and complete it. Their rights are still not lost. They can still go to the High Court or wherever and have---. They actually have two options; to continue with the petition and have the proceedings in Murang'a nullified or, at the end of your proceeding, go to court and have it nullified. Whichever way they go, that is where their remedy lies.

With that very brief submission, I request that we proceed and finish.

Thank you.

**The Chairperson** (Sen. Musila): Thank you, Counsel. Indeed, we will proceed and finish.

**Mr. Browne Nathans:** Yes, I will start now with a-two minutes rejoinder. That will be part of the 30 minutes that I will take

**The Chairperson** (Sen. Musila): No! No!

**Mr. Browne Nathans:** It will be part of---

**The Chairperson** (Sen. Musila): I thought we agreed that after that you finish. Now, you are asking for another rejoinder. Why do you not want to use your 30 minutes now? If you want to use it to reply, I have no problem.

**Mr. Browne Nathan:** That is what I am saying, Mr. Chairman, Sir.

**The Chairman** (Sen. Musila): May be we misunderstood each other.

**Mr. Browne Nathans:** I am sorry.

**The Chairperson** (Sen. Musila): Go on.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, while we are on this, I think we should ask the Senior counsel to desist from using derogatory language by saying; "they can go whenever they want to go", "whatever Wambora you are referring to" - We do not even know "whatever Wambora" means. That must be withdrawn and should not be part of the record. Coming from a man who has read the law and practiced it for almost 40 years and has grandchildren and greatchildren is a terrible error of judgment.

**The Chairperson** (Sen. Musila): Let us proceed.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir. I will now take my 30 minutes if I could be assisted by the secretariat to ensure timing.

You have been told, Mr. Chairman, Sir, that you have no jurisdiction to deal with matters of the Constitution. Hon. Senators, I wish to invite you to look at Article 3 of the Constitution which says that every person has an obligation to respect, uphold and defend this Constitution." Every person included; even you, hon. Senators.

If you look at Article 2(1), it clearly states that the Constitution is the supreme law of the Republic; binds all persons and all states organs at both levels. I must say with tremendous respect, I am surprised that if an issue of the Constitution were to arise before

the Floor of the Senate, that the Speaker of the Senate would not rule on it but would refer the person who would have raised that issue to the high court to interpret.

With due respect, this honorable Senate has the capacity – I was just giving an illustration - and an obligation to uphold and respect the Constitution.

Article 10 of the Constitution is on national values and principles of governance. The national values and principles of governance in this article binds all state organs, one of them being the Senate, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, applies or interprets any law, make or implement public policy decision. This process is anchored in law. You will not get a better answer as to your jurisdiction to determine the constitutionality of the matter before you than from Article 10. Suffice it to state that even in the matter you have been referred to which you will find in a ruling because the Senate, and we are glad we are represented, and we are glad because the Senate took a very neutral position because it knew that it would sit as an arbiter.

The document which the secretariat has, which is a replying affidavit that was filed by the Senate, the Senate contended, the verdict is actually reproduced in this ruling by the hon. Judge that the third and fourth respondent; this was the Speaker of the Senate, and the Senate itself also contend that the petitioners have not established that the fourth respondent; the Senate, is not best placed to determine whether the motion for the removal of the petitioner was in accordance with the Constitution. The position the Senate took was; we have not only the jurisdiction but the capacity to determine the constitutionality. That is the position this Senate took in a document that is available to this Senate.

Mr. Chairman, Sir , you will also notice at paragraph 95, just to bring this issue into context, one of the things the judge found was that it is clear that if the Senate process continues and the first petitioner is impeached and removed as governor and yet when the petition is heard the first petitioner is vindicated; the High Court said we have not vindicated your complaints at paragraph 95. But the court said that even if this process continues, like it is doing now, for instance, you return a finding that, that particular impeachment is confirmed and therefore the governor should be removed from office, this is what the judge found---. The judge appreciated that the matter is still at large. He said that when the petition is heard, the first petitioner is vindicated meaning if the High Court upholds our contention on the unconstitutionality; this is what the judge said; when the first petitioner is vindicated and the court finds reason to agree with the first petitioner. The court has not said “I disagree with you or I do not disagree with you. Then the court said: Then the order sought may issue, the petition will not be rendered nugatory. In other words, the judge is saying, we will allow the process before the Senate to proceed.

The Senate has told us through its own replying affidavit that it has the ability, the capacity and the mandate to determine the constitutionality. If we are to be dissatisfied

with the findings of the Senate, the court can still intervene. I bring that matter into contest to demonstrate that this is an issue perfectly within your mandate.

We have been told about Section 33. Section 33 is subservient to the Constitution. You have been told that you can only determine whether the allegations have been substantiated. With due respect, that is not a proper reading of the law, because the first port of call is the Constitution, and under Article 2(4), the Constitution tells you that anything done in contravention of the Constitution is null and void. The County Governments Act under Section 33 is subservient to the Constitution so that before you even ask yourself whether the allegations have been substantiated; ask yourself: Has the constitution been complied with? So that we are saying you will not be violating the law by not returning a verdict on whether the allegations have been substantiated, but you will, simply be saying before we return that verdict, we have established that the basis for our verdict contravenes the Constitution. Therefore, even if we were to pronounce ourselves on the merits, it will still be unconstitutional. Taking the position by counsel for the Assembly is actually making the Constitution subservient to Section 33 of the County Government Act.

That was my rejoinder.

Mr. Chairman, Sir, we want to make our response very targeted, so we will keep referring to what the allegations are because we notice the rules restrict ourselves to what the allegations are. The first allegation is gross violation of the Constitution and I will not read because it is in the Motion 1(i), it is on the issue of debts. I will not say that you have not been told that existence of a debt by a county government is a violation of any law, leave alone the Constitution. Before we even go to where there is gross violation, you needed to, first of all, have been told where there is such a violation.

Two, what evidence was led? The evidence that was led through official documents is the existence of a debt of Kshs1.1billion, so that we have evidence, that if even you are to find that allegation may constitute a violation, the evidence adduced is not in consonance with the particulars. I say this because when we were preparing our defense, we were doing it on the basis of these particulars so that the moment evidence is led that we have Kshs1.1 billion, we have got to ask ourselves: Has the allegation of existence of Kshs 2 billion been substantiated? My Answers is no. Even without going to the question whether it is a gross violation.

Mr. Chairman, Sir, just to open it up a bit, you heard from the Controller of Budget. She used the word that if you consider what is owing; the receivables from National Treasury, as against what was officially confirmed as Kshs1.1 billion; the balance cannot be said to be unsustainable. On one hand, even the so called unsustainability does not constitute a ground for removal under Article 15. However, even if you were to find that, you heard from a witness who was not ours or the Assembly's, that she does not consider it as unsustainable even after taking into account how much is owed to the County against what is officially owned to other persons by the county. That is with respect to that particular violation.

The other violation is the one to be found still under ground one, but part (iii). We have been told the violation of the Constitution with respect to an alleged amount incurred on advertisement for Kshs247 million. What was the evidence that was led? This is because you substantiate by leading evidence to support the charge. The evidence that was led from the Controller of Budget was that what we have specifically for advertisement was Kshs14 million. That is what was spent by the county executive. In fact, there was a figure that was also read for what was spent by the County Assembly. So, even the evidence that was led does not support the allegation.

However, another most important concession is the concession that was made yesterday by the Assembly's own witness. When I posed a question on cross-examination about that alleged debt, the witness said; "That is not my evidence". That allegation is not substantiated.

In violation 1(iv), you have been told that there is failure to enact legislation on Artificial Insemination (AI) crushes among others. I am surprised that the Constitution gives the County Assembly as its core mandate, a legislative function. Then, the same Assembly abdicates that function and then vilifies the Executive for not doing what the Assembly is supposed to do. This Honourable Senate should not countenance such a position.

We were able to show and this you will find under Article 185 of the Constitution that the legislative authority of the county is vested and exercised by the county assembly. In fact, that is the first core mandate. The executive that is headed by the honourable Governor, its core mandate is to implement county legislation. If the Assembly felt the AI crushes programme was so important as to require legislation, what would have stopped them from coming up with such a legislation? We never got an answer.

I do not want to delve into the nobility of the issue of AI crushes. However, I heard the witness trying to divert or evade that question by saying that they did not consider AI crushes necessary. That was the answer they gave, adding that; "We have zero grazing framers, so it is better if the vet comes to the home instead of taking the cow to---". However, he again made a concession and said that the programme has been helpful because it is a subsidy by the county government. Instead of paying Kshs1,000 for AI, the county Government has made it possible for farmers to get AI services at Kshs500. I am relating that to show you that whatever informed these allegations, there is nothing into them.

The other issue, because my learned friend will deal with some of those other issues, is the issue of symbols. We have been told that there are county symbols that were gazetted. Those symbols have not been implemented. Yes, there were proposed symbols that were sent more than two years ago. It took so long for the approval of those symbols. By the time they were being approved, the County Government had expended tremendous resources on printing and coming up with other documents. So, even when they were gazetted, the county government was still financially constrained. They decided to

exhaust the gazetted printing resources, and then, when inviting the next bunch of printing material, they would incorporate the gazette symbols.

We are saying we do not have enough resources. From a prudent perspective, I do not consider the action of the county Government in exhausting the printing material that had already been printed before these symbols were approved to run out before they can procure a consignment that contains the now approved and gazetted symbols.

For your information, and this can be gotten from the gazette notice, these symbols were gazetted on 29<sup>th</sup> June, 2015. So, since inception of the County Government, what has been used were the proposed symbols that were modified subsequently and gazetted. Before the gazette, there was printing materials that had to be used. My submission is; that does not constitute a violation of any law at all and that the position taken by the Assembly is, indeed, reasonable in the circumstances.

I want to deal with the elephant in the room. That is procurement of land. You were told that there was a piece of land that was bought for Kshs340 million. This is allegation (xi) through evading open tender method. I take that to mean, it was not competitive. Hon. Senators, I want to take you through a very small journey that preceded the purchase of this piece of land. Kindly, turn to page 152 of the answer by the Governor.

I want to, first of all, lay a basis that there was never a restricted tendering system for this piece of land. The procedure that was used was the procedure set out under section 76 of the Public Procurement and Disposal Act: Request For Proposals (RFP). RFP is not restrictive tendering. It is an alternative procurement procedure set out under the Public Procurement and Disposal Act. That Section 76 sets out--- 76, 77 and 78 - notice inviting expression of interest. Under 78, there was an expression of interest at page 152. It reads:

“Request for expression of interest: Murang’a County Government intends to engage land owners to offer their parcels for sale to the County Government. This is for the purpose of creating an agro-marketing and value addition centre to add value to the products of the County.”

The objective has been set out; the scope of the assignment is to conduct an enquiry on land availability in particular the assignment required and it is set out.

Murang’a County Government now invites interested farms or persons to express their interest in the above assignment and sets out what is required. Shortlisted farms will be issued with request for proposal document with terms of reference.”

Mr. Chairman, Sir, here are documents with terms of reference. At this point in time, even the RFPs has not been sent out, but all and sundry is invited to submit or respond to that expression of interest. Therefore, it was done openly and communicated to the public. It is, therefore, a fallacy to suggest that it was not competitive.

Mr. Chairman, Sir, moving to page 154, you will get minutes of the tender opening meeting held and in minute one, you will notice that there were responses by two firms. You will also have opportunity to see that there is a minute there where there was only one witness who represented KENJA and the total number of applications; were two and only one met the requirements. You will also see in the minutes on page 156, of the Eleventh Meeting of the Murang'a County Tender Committee Meeting; the parcel of land, Mitubiri Wemper, Block Two, 2575 is significant because that parcel number is the one that you will find the title that we have attached.

Mr. Chairman, Sir, when you look at page 158, we have the documents chronologically to show the process that was followed. You will notice that there is even communication with the tenderer, on pages 161 and 162. On page 165, there are the minutes of the tender evaluation. On page 166, there is a report on evaluation report. You will notice that on page 167, the County Government wrote a letter, dated 22<sup>nd</sup> October to the county lands officer, an officer of the national Government in the Ministry of Lands, Housing and Urban Development requesting them to conduct a land valuation in order to advise the county government on its current open market value. The County Government wanted an officer of the national Government to advise them on the value of that piece of land and the evidence is on page 167.

Mr. Chairman, Sir, on page 170, there is an official communication to the County lands officer, Murang'a County requesting for the valuation. It is signed by Mr. J. K. Kairu and copied to a number of persons. On page 173, you will notice that there is a negotiation committee for land purchase held on 3<sup>rd</sup> December and it sets out the persons present. You will notice that on page 175, the minutes of the Murang'a County Tender Committee Meeting. There is an aspect there on land negotiation and it goes on to the decision of the committee, which is on page 176. The Committee deliberated on the negotiation report and noted that the negotiation were as detailed in the appointment letter.

The committee approved the report of the negotiations and awarded as adhered below. Farm KENJAP Limited, land 34.5 acres, is the size of the farm that you see in the title deed that you will see and it is priced at Kshs9.8 million per acre totaling to Kshs340 million for 34.5 acres.

Mr. Chairman, Sir, we have attached the report and valuation from the Ministry of Lands, Housing and Urban Development on page 177. I invite you to go to page 179. The report is signed by the principal valuer, Murang'a County, Mr. Stephen Maina Warutere, Valuation of the Mitubiri Wemper, Block Two, Current Open Market Value. That is not from an officer of the County Government. It is valued at Kshs340 million and that is on page 179.

The County Government also felt that there would be need for another independent report. A report was presented by Up Country Valuers. The report is addressed to the county secretary, Murang'a County, Tender No.MCG, paragraph two of that report reads:-

“ I was appointed by the Institution of Surveyors of Kenya to represent them in the board of tender meeting.”

There was even a deliberate attempt to invite an observer from the Institute of Surveyors of Kenya who prepared this report. On page 183, the observer, confirms the process of buying the land as being above board. The process took the correct procedure of acquisition. The county government is cautious and took all the necessary measures to avoid loss. The process is professionally undertaken by professionals from the Government and the private sector.

On page 184, there are minutes which we will have opportunity to look at and on page 186, there is evidence that the land was bought. There is a title attached in the name of Murang'a County Government for a parcel of land, 13.9 hectares which when converted, you will notice that what was acquired in terms of acreage is in conformity with all the documents that we have attached.

Mr. Chairman, Sir, the case here is that violation (viii), of evading open tender, what could have been more open than what I have demonstrated. There is absolutely no merit to that allegation. The intention must have been, perhaps, to sensationalize matters and make it appear that there was something irregular about spending Kshs340 million. Since the allegation was that it was not open and competitive, we rest our answer there on the competitiveness of the process.

The other issue that I was to deal with briefly is on the allegation of abuse of office; gross misconduct. Abuse of office is a crime. In allegation (iii), the Governor has been told that he has abused office. Looking at the violation no. 3(iii), the one that states; Appointment of

Mr. Christopher Ngera, as the Chief Officer for Education and Training, who had been rejected by the County Assembly and then goes on to say that it is defrauding public funds through payment of allowances. What is the process that was followed?

You will find that from the documents that we have supplied on page 266, the letter attached is a delivery note on page 267, but the letter is on the Murang'a County Government, Chief Officer nominee, Ministry of Education, Technical and Training, Mr. Christopher Ngera. It reads;-

“We refer to the above matter and to your letter dated received by the county government on 11<sup>th</sup> September, 2014. We note that the notification for nomination of Mr. Christopher Waweru Ngera to the position of chief officer was laid to the Assembly on 4<sup>th</sup> August, 2014, by a letter dated 7<sup>th</sup> August 2014”.

The Assembly acknowledges receipt.

Mr. Chairman, Sir, by a letter dated 12<sup>th</sup> August, the County Government forwarded the additional documents requested by the assembly. It then goes ahead to say: “Pursuant to Section 8 of the Public Appointment parliamentary Approval Act---.”



Under the County Governments Act, national legislation, unless the county has enacted their own county legislation, if you look at Section 8 of the County Government Act, subsection 2, if a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation if any, shall with necessary modification apply. It is not in dispute that when it comes to the question of vetting a nominee, or a proposed chief officer of any department within the county, the Public Appointment Parliamentary Approval Act applies. It has a timeline within which the nominee should either be rejected or approved by the Assembly. What happened in the circumstances of this case is that the process was done competitively where the county service public board interviewed candidates and submitted one name to the Governor as the proposed nominee for that position. That name was forwarded to the Assembly. It took the Assembly more than those 14 days from the date the Assembly received that letter.

By the time they were communicating the rejection, the letter had been dispatched, appointing the chief officer in terms of Section nine of that Act where, at the expiry of the period for consideration specified in Section 6, without approval or rejection of the nomination, the candidate shall be deemed to have been approved. We have seen documents by the Assembly where they sought to go behind the role of the County Public Service Board (CSPB) and again inviting the candidates that had been invited by the Board for purposes of those interviews. You will see, where besides Mr. Ngera, they have attached documents to show they invited another candidate called Mr. Mburu.

Mr. Chairman, Sir, the role of the Assembly under Section 8 of the County Governments Act states;

“The county assembly shall vet and approve nominees for appointment.”

It does not carry out interviews of prospective candidates. It is a nominee sent; reject or approve but they engaged in an exercise that is not even within their mandate to invite all the candidates that the CSPB had invited and on account of that, then sought to communicate rejection after the statutory timeline had expired. In my very humble view, that appointment was done in accordance with the law. In fact, just for avoidance of doubt, I must also point out that after that matter became the subject of considerable controversy and this nominee learnt about it, he did not take up the appointment. It is a matter on record. When the appointment letter was sent to this candidate; he heard about the controversy much later when now the assembly was saying they did not approve. The Governor acted within the law to issue the appointment letter but the candidate opted not to even take it up. That is a different matter. Since the accusation is that the Governor circumvented the process of approval, we have demonstrated that there is absolutely no merit in this accusation.

Mr. Chairman, Sir, I am sorry I have taken two more minutes.

**The Chairperson** (Sen. Musila): That is from your colleague's time.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir. My colleagues will handle the rest of the violations and we will try to be within the time.

**The Chairperson** (Sen. Musila): Which counsel?

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, it is Mr. Njenga.

**Mr. Charles Njenga:** Mr. Chairman, Sir, let me stay here. Let me reserve that for those who want to be governors for Murang'a or Kiambu counties. Maybe I want to be a Senator.

*(Laughter)*

Allow me to refer you to the decision of this Special Committee in the matter of Governor (Prof.) Paul Chepkwony; I think copies of that decision were circulated. I wish to highlight paragraph 225 for one very material aspect of impeachment charges. If we are together I can go straight ahead. As we were reminded by one of your Members that this is a House of rules and one of the rules is precedence. The Senate follows its own precedence.

The Senate having interrogated previous impeachments, it has set its precedence. The precedent I want to invite your attention to is on the standard of threshold. When you are interrogating a violation, the standard that you must look for is set out in your determination by this Senate at paragraph 225. I wish to highlight sub paragraph 4 which says:

“This particular violation must be demonstrated to have led to harm, loss and damage to society.” This is the Senate speaking. That, in our own standard and rules, when we are considering an impeachment violation, our standard and the question we must pose to ourselves is: Has this violation led to harm, loss and damage to society? That is one.

Also, allow me to jump to paragraph 239 on one other consideration that the Senate must consider. The question at that point was violation of the County Governments Act, in particular the provisions with regard to the CPSB. This is what the Senate said, if I may read:

“The Special Committee however took note of the fact that the Governor had stated and also produced correspondence that indicated that his office and that of the CPSB was in the process of taking remedial measures on these personnel related matters.  
“

This is very important in my submission and in my answer to the violations, it goes on to say:

“In light of this, the Special Committee found that it would be premature for the Special Committee to make an adverse finding against the governor while the matter had not yet been concluded at the county level.”

In considering a violation the Senate is saying, we are looking at two things; harm to the general society and two, is there available evidence of remedial action that is ongoing, that is still being undertaken at the county level. This is the standard of this House. We wish to submit that this is the standard that must be applied to the violations that are now alleged against the Governor for Murang'a County.

Mr. Chairman, Sir, permit me to refer to violation No.1(2) that has been much spoken about on the Murang'a Investment Cooperative. We have answered that in extensive detail at paragraph 14 to 18 of our response. However, I wish to add that the only evidence tendered in demonstration that there was loss of funds or misappropriation of funds, that is the word used in the violation, was the Auditor-General's report. That is the only evidence with regard to that allegation. The Auditor-General was here and produced the same report. In that report, he says: "My complaint against or on this ground on this project is not misappropriation, it is lack of license". Even when we evaluate the evidence produced by the accusers, in support of that ground, it falls short of the expectation and standard required to establish that ground."

Let us apply the standard of the Senate with regard to that allegation and violation. The questions we must ask – I am saying this in reference to page 213 of the Assembly's documents which set out the recommendations made by the County Assembly.

Did this particular undertaking by the county government; first of all, did it bring harm, loss and damage to society? That is a question that the Senate has to interrogate in considering impeachment because that standard that we must apply is the standard of impeachment that has been set out by the Senate. The recommendations of the county assembly by themselves even without interrogating any other document or any other evidence, confirm that in actual fact, this was a very noble project that has fundamental socio-economic benefits to the entire Murang'a County.

Mr. Chairman, Sir, secondly and in the standard set out in that Chepkwony decision, if at all – that has been identified as a challenge – the legal structure was a problem, between assembly and the executive – the next question that the Senate must ask itself is, are there then remedial measures being taken by the county governor and the county executive? On the question of remedial measures, I do know more members but refer you to page 71 of the governor's response. That is an announcement that has been produced and referred to extensively in these proceedings.

I do not wish to go into the content, but the gist of that communication is twofold; that, we shall correct the legal structure, the legal framework under which this cooperative is being undertaken. The second is that the projects and the investment cooperative is being handed over to members of the public.

So, on the question of remedial measures, there is evidence. There is material before this Committee to show that, yes, there were challenges but there is work in progress at the county level. Therefore, in the words of the Senate Committee, that question is premature for the Senate's consideration in an impeachment Motion. Permit me to quickly respond

to the question of an allegation of a debt of Kshs59 million allegedly sustained in works for the Gakoigo stadium.

On this, the question that the Senate must ask is where the evidence of this debt is. The Controller of Budget speaking both as controller and a professional stated that the evidence of debt is an invoice. It is not an internal report of an assembly. So, let the Senators go through the entire bundle. It is a very bulky bundle of the assembly and look for an invoice by a contractor contracted to do these works showing that he is owed Kshs59 million. That would be evidence in support of that allegation. In the absence of that invoice, that allegation remains just but an allegation.

Mr. Chairman, Sir, because of time, I will address myself to the question of the failure – and this is IV under Gross Violation I, at page three of the charges. There is an allegation that there is failure to establish a county budget and economic forum as stipulated under section 137 of the Public Finance Management Act (PFM). If you look at the words under 137 of the PFM Act, the words used in that particular provisions are that – this is important because it is in the opening of the statutory provision being cited – it opens as such: “As soon as is practicable after the commencement of the this Act”

So that in considering whether it is a violation not to have this forum, you have to delve into the fact of practicability. Practicability is a question of facts. What is practicable for Nairobi is not practicable for Murang’a or for any other county. We would have expected material to be laid before this Select Committee to show that there are reasonable and practicable circumstances prevailing, but that notwithstanding, there has not been the establishment of this particular forum.

Mr. Chairman, Sir, secondly, that provision of law does not set a time limit, and this is material because if the Select Committee was to investigate whether or not there is a violation, it has to consider what the cut off line was, what was the last date, when was it to be established. If that date has lapsed, and there is still no such forum, then we can plead a violation. If you look at the structure proposed – I am referring to page 79 of the county governor’s documents, and I am now addressing myself to the test of this Senate on whether or not there are ongoing interventions on any violation alleged at the county level because this is the standard of the Senate.

You will see that the County Secretary has proposed a structure of the county. It is still a proposal but you can see that there is a proposal to establish the economic forum under that particular structure. It is directly under the office of the governor at the same level with the office of the County Secretary. The intention is there, it is work in progress. The practicability has not yet been exhausted. We have not crossed that line. So, it cannot be now framed as a ground of impeachment, and we state that in connection to our submission that the impeachment proceedings before this honourable Senate are purely activated by ulterior motives that have nothing to do with the particulars and the allegations that have been set out in these charges.

Mr. Chairman, Sir, there is an allegation about undermining the county assembly by purportedly failing to remit certain funds to the assembly. We have responded to that at paragraphs 46 and 48 of the governor's response, I do not wish to read it verbatim because of time but you will note that when you interrogate those two particular paragraphs, the question is purely a matter of reconciliation. There are counter allegations that certain funds have been expended to the credit of the county assembly. They have not been converted in any way, so, it is an arithmetic question. How much does each organ owe the other? Can that now be stated as a reason for pleading an allegation of violation of Article 171 of the PMF Act? Not at all even by any stretch of that particular provision, it cannot be. We are saying that there is a mathematical intervention that needs to be undertaken by the accounting officer of the assembly and that is the Clerk, with the County Executive Committee (CEC) member and then a number will be arrived at and then a formula of payment shall be made. That is in paragraphs 46 and 48 of our response.

On that ground alone, we urge that the Senate considers that particular allegation unsubstantiated. The standard in Chepkwony's case before this Committee which is the latest Report on impeachment made by the Senate stated that the violation has to be shown to cause harm, loss and damage to the society.

On the issue of procurement of hay for the Marira Farm, you will notice that the allegation under crimes under national law, the allegation of violation against the Governor is two-fold. We must stick to the allegations as framed. First of all the allegation is; "irregular purchase of hay". That is the wrong or the sin for which they accuse the Governor. Then, they went ahead and said that there was no documented evidence for release and delivery of 20, 000 bales of hay. There is a question of documentation. On procurement, I will refer the Committee to page 116 of the response by the Governor which has tender committee minutes and the particular minute which we are looking for is Minute No. 14 at page 133. When you look at that document, the tender committee considered the issue of the supply and the return of verdict and awarded the tender. On whether or not the supply was done, I will refer the Committee, there is quite a bundle and I do not wish to refer to them serially up from page 201 to 249. I am sure the Committee will look at them when they retire.

Those are the delivery notes; acknowledgements of receipt for that particular time. On that particular allegation, the documents are available; they were supplied to the Office of the Auditor-General. In fact, I am glad the Auditor-General said he will supply the management letter to show that they did not even ask for these documents but they were supplied. For the benefit of this Committee they are here. On that question, there cannot be any doubt whatsoever that there is an able response. Before I hand over to my co-counsel, there is an allegation under crimes under national law for the violation of Article 212 and Section 58, conscious of my time, that there was a debt---

**Mr. Browne Nathans:** Sorry, Madam Vice Chairperson. Just to be clear, I think we sort of confused the learned counsel. He is left with 10 of his 30 minutes so that he does not

rush through. The 10 of his 30 minutes and the other learned colleague will still have his 30 minutes. So, you can take your time.

**Mr. Charles Njenga:** Madam Vice Chairperson, very well. I will be very fast. At 2 (1), violation of Article 221, on the borrowing of a loan of Kshs 200million, the Controller of Budget rested the matter by relying on Section 142 of the Public Finance and Management Act that there is statutory framework for certain borrowing and yesterday the Committee was shown an actual resolution of the assembly authorizing that particular borrowing. It is not an issue.

Abuse of office at ground 3, there is an allegation that the Governor by virtue of his portrait appearing in certain materials, is in violation of Article 75 (1) and Section 13. It is not contested that the Governor is the head of the county. The Governor identifies the county. Branding in itself as an allegation would connote a measure of self advertisement of the person of the Governor by saying I am the best Governor, the most brilliant, most handsome and such superlatives, none has been demonstrated. All we have been shown are county projects, materials which have the name of the county on them and which pronounce the fact that they are the county initiatives and which have the portrait of the Governor. By any stretch of Section 13 of Leadership and Integrity Act, it cannot constitute misuse of public trust. We rest that at that.

Madam Vice Chairperson, on violation nine and 10, that is at page five of the charges. There is an allegation that certain tenders were split nine times, that is at nine and 10, at an elementary evidentially level, we were not shown this alleged 11 Local Purchase Orders. Those ones were not produced before this Senate. So, that allegation has no basis on the evidence that is before the Committee.

I wish to refer you to our bundle of documents. At page 108 we have reproduced Section 30 and this is the proviso on the question of splitting of tenders. The law says that no procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure. That is very important as a proviso. When you allege splitting, you must go ahead and demonstrate that the purpose was to avoid the use of a procurement procedure. What you have before you is a mere allegation that there was a split, but as you will see from a treasury circular that we have annexed at page 112 of the bundle, this is allowed. There is a circular to that effect. As you read it together with Section 31(7), it is allowed to promote efficiency in delivery of certain projects that cannot be done effectively as a whole. In consideration of that particular allegation, there is no evidence. Secondly, there is a clear legal framework provided before you that allows the use of such tools of procurement.

I wish to quickly pass over to my colleague, so that he can take the other 30 minutes and then our senior colleague shall wrap it up.

**Mr. Browne Nathans:** Madam Vice Chairperson, we will proceed to the learned Counsel, Peter Wanyama, but just for the record, we still have our 30 minutes wrap-up. As soon as he finishes, we will have another 30 minutes.

**Mr. Peter Wanyama:** Thank you very much, Madam Vice-Chairperson. I want to start by looking at Section 33 of the County Governments Act, which is a key part of our defence. Section 33 of the County Governments Act creates a statutory obligation for the county assembly to substantiate these allegations, which they have made against the governor. In terms of that particular section the county assembly is supposed to bring to this particular Committee probative information, to give substance to and establish proof - that is competed evidence- of those allegations with the governor in a manner that meets the constitutional threshold which has been laid in Article 181 and interpreted by this Senate and the Court of Appeal. I will be coming back to that interpretation. It is absolutely critical for that to come out.

For the record, it is important for us to state that our statement of defence answers each and every allegation. There is no allegation which has been left unanswered, to the satisfaction of both the meaning of substantiation. If you look at most of the allegations we have demonstrated that in each and every claim, there is no substantiation at all.

Secondly, the county assembly has committed a major taboo in criminal law. It is a major taboo in criminal law to say that a person has committed an offence where the statute has not prescribed that offence. In their statement of charges before this Committee, they have charged the governor with what they call 'crimes.' For the record, it is important to emphasize that a crime only exists where a statute expressly states that it is a crime and it goes ahead to prescribe the punishment. For instance, if you commit the offence of corruption, it becomes proscribed. Then it says that the person who commits this offence shall be guilty and the punishment is stated expressly in that particular section of the law.

One of the things that we want to emphasize for the record – and we said it yesterday – is that it is absolutely critical that where the governor has been alleged to have committed a crime under national law, it is important for us to go to that particular section of the law and see whether it indeed creates a crime. Otherwise, if you do not do that, the approach will justify our submission; that the particular allegation is not substantiated at all.

Yesterday, I cited the first example, and based on Sen. Madzayo's direction I do not want repeat it. Let us go to the example at page 6 (ii) of their document. They say that the governor has committed serious crimes under national law in the following ways:-

“Contrary to Article 201(d) of the Constitution.”

The implication of that is that you have to go to Article 201 of the Constitution and see whether it creates a crime. It is express, clear and unequivocal; it does not create a crime at all.

Secondly, if you go to Section 29 of the Public Procurement and Disposals Act, there is no crime which that section creates. Therefore, on this aspect alone you would clearly say that, that part of the charge is extremely and fundamentally defective for purpose of impeachment. If the governor was being accused of murder, it is a serious crime under the national law. If he was being accused of corruption, it is a serious crime under

national law. If the governor was under investigation, prosecuted and charged in a court of law for having breached the Penal Code and convicted, that is a serious crime. For the record, it is important that we create that distinction, so that, that issue is dealt with once and for all.

Thirdly, the governor has been accused that he has spent public funds on non-devolved functions. In our view, this allegation does not meet the statutory and constitutional threshold, because express testimony has been adduced before this Committee from the Controller of Budget that there is an express letter from the Transition Authority (TA). I have not seen it but it is something which the Committee will be given later on. Perhaps the Controller of Budget has brought the document before the Committee. Counties were allowed to a certain extent to appropriate money in their budgets for infrastructural maintenance in primary and secondary schools. To the extent that an allegation has been made that the governor has spent money on non-devolved functions, and therefore, calling that to be a gross violation of the Constitution and legislation, that allegation has not been substantiated.

Fourthly, what is the meaning of the word “gross?” It is important that we address the meaning of the word “gross.” If the Senate Committee, for whatever reasons, finds that a particular allegation creates a violation of a statute or the constitution, the Constitution requires that you have to go to the second stage of determination and find whether that is “gross” violation of that legislation or the Constitution.

Again, it is important for the record, to take a reading of what the Senate has determined on the matter concerning the impeachment of Prof. Chepkwony, Governor for Kericho County, at page 85. Apart from the standards that my learned friend read, which this Committee must take into consideration, the Senate has defined the meaning of the word “gross” at paragraph 224. The paragraph states:-

“It is useful to note the various meanings of the word “gross” in relation to violation.”

Then it says: “Gross violation is a flagrant violation.” So, the question we need to ask ourselves here is whether spending money on a devolved function - like the cooperative sector, to make sure that the people of Murang’a County get the benefit of that particular activity from the County Government which is a tool to improve the household economy - is by law a flagrant violation of the Constitution.

Secondly, is it a glaring error on the part of the County Government? Thirdly, is it unpleasant to buy hay on a farm which is used for training farmers; a key component of an agricultural development function, which is a devolved function in the Fourth Schedule? Is it a vulgar activity? Are we saying that the Governor slapped someone because that is vulgar? Is it crass because that is what the Senate is saying?

The Senate goes ahead to say:-

“It must be a severe transgression of the constitutional law.”



What is this severe transgression of constitutional law which the Governor is being accused of? If you look at all these charges which have been brought before the Committee that the Governor is accused of, which of these actually fits the threshold? If you examine this, the only inference that one can make is that these allegations do not meet the thresholds which have been laid down in law and the Constitution.

There are thresholds which we urge this Committee to consider. There are thresholds which are persuasive to you in terms of the standards, which you have already laid down in previous decisions. It is also important to mention that during the impeachment proceedings, there is no evidence at all to demonstrate that there is loss of public funds. Secondly, there is no evidence at all to demonstrate that the Governor personally benefitted. It would have been so much different if there is evidence before this Committee that the Governor benefitted to the tune of, say, Kshs5 million or Kshs10 million from the Kshs340 million which was used to purchase land; money which can easily be traced to his account and evidence produced before this Committee. That would then meet the threshold which you laid down in this particular decision.

Lastly, it is important also to emphasise that yesterday we had a discussion - and we would like this to go on record - on what is the standard of responsibility for purpose of impeachment; whether the responsibility is personal or collective. I want to bring to the attention of the Committee about this bundle. There is a very important decision which we urge you to put on record. You have seen that this particular decision quotes certain High Court decisions. The decision of a Special Committee of the Senate in the matter concerning the removal of Gov. (Prof.) Chepkwony quotes very significant decisions from the United States of America (USA), the High Court, Nigeria and the Court of Appeal. Then, it goes ahead to make a determination. Therefore, it is important for us to see, in terms of interpretation, what the Court of Appeal has said.

It is not our defence that the Governor is not accountable for the use of public resources; that shall go on record. Our defence is that if you look at the allegations which have been laid against the Governor, they do not meet the threshold which has been set out in Article 181 of the Constitution and interpreted. This is because the High Court, the Court of Appeal and the Supreme Court have a constitutional obligation to interpret the Constitution. They fill up what is silent or missing in the Constitution.

There is a decision concerning Governor Wambora, which went to the Court of Appeal and the High Court had occasion to interpret the provisions of Article 181. For the record, it is important also to emphasise that an interpretation by the High Court or the Court of Appeal on any matter concerning the Constitution, unless it is reversed in an appeal, is an interpretation which is binding and it is part and parcel of our laws in Kenya. It is one of the exceptions in the principle of separation of powers; that even courts can be engaged in lawmaking, but to the extent of interpreting the existing legislation. Whatever the courts say is what is known as *stare decisis* in law. These are decisions of the courts which we use to interpret the Constitution and law.

There is a very important issue for our case on Page 128 of this bundle. It appears that the county assembly case is based on what is called collective guilt. However, that is not the principle in law. The principle in law which you need to use to determine these impeachment proceedings is the principles which the court has laid down. This is what Paragraph 40 on Page 128 of this bundle states:-

“The Senate, in impeaching the first appellant, adopted the concept of collective responsibility and cited Article 226(5) of the Constitution.”

First of all, it is important for us to, here again for purposes of putting things on record, understand that there is a very fundamental and sacrosanct rule in Constitution interpretation. When you interpret the Constitution, you must consider each and every relevant provision. You should interpret the Constitution conjunctively but not disjunctively. Therefore, you should not interpret Article 181 in isolation. You interpret Article 181 in accordance with Articles 10 and 96, which gives you powers and Article 2(4) which says that anything which is done pursuant to the Constitution is null and void if it is not done in accordance with the dictates of the Constitution. That is why the court quoted Article 226(5).

The Article stipulates that a holder of a public office who directs or approves the use of public funds, contrary to law or instruction, is liable for any ensuing laws. This is what the Senate said. The Court of Appeal went ahead to state:-

“We are of the view that collective responsibility is a policy, governance and accountability concept and not a principle of personal liability or individual culpability. Now that the Governor is in the dock, is there anything in terms of the evidence that has been laid to demonstrate personal or individual culpability? I will keep on emphasizing this: Is there any evidence before this Committee to show that the Governor personally benefited? Secondly, is there any evidence before this Committee to show that the Governor wrote a letter or directed the misappropriation of public funds? That is what is very critical for our case.

Then it says:-

“If it were so, in the instant case, collective responsibility will imply that individual members of the various organs of the County Government will be personally liable for acts or omissions of any person in the employ of the County Government. Collective responsibility does not mean that the leader or head is individually responsible and politically liable for acts or omissions of subordinates.”

Yes, the Governor is accountable for the use of county resources under Section 30 of the County Governments Act. That is something which the court has confirmed.

We went to court to seek that interpretation and it said: “No! No! We have read Section 30 and the Governor is accountable.” Our proceedings with respect to violations of Article 181 of the Constitution are special impeachment proceedings and must meet the

threshold which the court has said that they must be considered. The court is saying: “Run away from that aspect of collective responsibility. Try and find personal guilt and culpability, which is the standard that is being said here.”

As I wind up, it will follow that all persons who are collectively bound must individually be held answerable, blameworthy and accountable. This is not the intent and import of the concept of collective responsibility. We concur with the statement by the High Court that there must be nexus. This is what the evidence before the county assembly has completely failed to quickly demonstrate.

In fact, we are saying that it is a taboo in impeachment proceedings to cloth an Act as if it is a gross violation of the Constitution yet the facts reveal the opposite. It is actually a benefit for the people. There is no loss of public funds and you are saying it is gross. There is no violation, then you are saying there is violation. That has come out very clearly from the evidence from the Controller of Budget. For instance, she says that this debt was actually approved by the County Assembly. She has said that this is a short-term borrowing which is allowed, while the County Assembly is saying that this was a violation. You can clearly see where we are coming from.

In terms of annexure, they go ahead and say that “we agree with other submissions by the counsel for the appellant; the counsel for Governor Wambora, that an element of personal knowledge that includes intentional – now, they are adding other standards which you have already stated in the Chepkwony Impeachment – It says “that includes intentional, there must be intention to pilferage public resources, brazen, smash and bribe type of stealing. You just come and smash the County Treasury and you steal public resources in full glare of the public. That can demonstrate through evidence, a willful gross violation of the Constitution, or other written law must be established.

In the instant case, the high court made a mistake by not determining whether the facts before it; a nexus was established between the appellant and the gross violation. We are urging this Committee to look at this evidence which had been submitted by the County Assembly. Does it create a nexus between the governor and these allegations? Where is the nexus? Is it positive or negative nexus? Has the governor benefited, in the manner that we have created?

As the Court of Appeal said, the impeachment of a governor is a serious process. That is why we have to involve the County Assembly and the Senate for the purpose of checking whether that has been met or not. These standards are very high. We are sincerely and eagerly praying that you adopt this in your determination. It is the standards which will create jurisprudence. Devolution is central in this country; it is a new concept and there are challenges to the implementation of devolution. Most of these issues that you are seeing here are just challenges to the implementation of devolution. There is a decision we have annexed; the advisory opinion, which the Senate sought when the National Assembly was growing horns. The Senate went to the Supreme Court to get a clarification on the role of the Senate in devolution.

If you look at page 167 of this decision, there is a concurring opinion of Chief Mutunga where he looks at the centrality of devolution. He said that we all have an obligation to promote and protect devolution. If the County Assembly is using the Ward Development Fund as a tool to frustrate development activities in the county; or as a tool to brazenly act with impunity, then this Senate has an obligation to intervene. There is evidence before this Committee that the proceedings before the Senate were principally precipitated by the decision by the Governor, something which the Controller of Budget has confirmed - not to accede to unconstitutional mechanism by the County Assembly Members to control the Ward Development Fund.

The Senate has an obligation under Article 96 and in accordance with this decision to make sure that all these challenges with respect to checks and balances at the county government level are addressed through other mechanisms. Indeed, in the decision of the Senate in the matter concerning the impeachment of the Kericho Governor, Prof. Chepkwony, the Senate was very clear that county assemblies should use other oversight mechanisms to redress to their concerns. Impeachment is not the only process because that process can be subjected to abuse. As we have seen in these particular proceedings, there is outright and extreme abuse of impeachment proceedings by this county assembly.

We urge this Committee to look at these impeachment proceedings in a fair manner. To sign off, again, on one point which my learned friend did not address earlier on, there is just one issue; that a county assembly is a formal institution, it is a constitutional body. How is a governor supposed to know that there is a business to transact at the county assembly if he is not notified? Is he supposed to be knocking at the doors of the County Assembly and say, when am I supposed to appear, when am I supposed to be heard, when is my impeachment motion listed? The Order Paper is a document which only the Members of County Assembly can access and the staff who work in the County Assembly.

It is a major and severe violation of the governor's constitutional rights for the Governor not to be accorded the opportunity to be heard. Even if they did not like him, the aspect of according the Governor an opportunity to be heard is so sacrosanct, it can never be taken away by anybody because it is a right which is granted by the Constitution. In the decision concerning the impeachment of the Governor for Kericho, Prof. Chepkwony, the Senate was very clear that where there are allegations of breach of national justice, the Senate will intervene and make a determination on that point. In this case, the Senate did not intervene because there were no breaches. The Governor was given an opportunity, he went to the County Assembly and defended himself, and then they voted and impeached him. In this particular case, they never bothered to invite him to appear before the Assembly. The position of the County Assembly on that is that the Governor ought to know what was in the Order Paper. The mere fact that they notified him through a Motion that they forwarded to him, in our view, that is absolutely unprocedural and unconstitutional and we urge this Committee to consider all those relevant facts.

Thank you very much.

**Mr. Browne Nathans:** Mr. Chairman, Sir, it is worth taking a pause and wondering whether our case has not been exhaustively demonstrated. However, for the sake of completeness, we have another 40 minutes. I know 10 minutes was left out of his time plus the actual 30 that you had reserved for us which makes it 33 minutes. If you would like us to exhaust those points or our colleagues will like to, we can proceed. If not, we will end it there.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, we feel on our side that we have done justice to our defense. We may not have exhausted our time but I noticed that we had along day yesterday. Whatever else that needsto be said,we can do that in the submission and we will be very brief equally, because we feel that we have made our case.

**The Chairperson** (Sen. Musila): Thank you for your magnanimity and we appreciate very much. We now move to the counsel for the Assembly. Thank you for cross-examination. Counsel, you still have 30 minutes for submission.

**Mr. Peter Wanyama:** Mr. Chairman Sir, just one point of clarification, the Governor did indicate that he was appearing through counsel and not through witnesses. Therefore it maybe unprocedural for the County Assembly to seek to cross-examine counsel on that particular basis. I think the better process is for them to go to their submissions.

**The Chairperson** (Sen. Musila): If they wish they can make statement in a way of rebuttal for 10 minutes and then go to their submission and then we will come to you for your submission. Do it also within 30 minutes.

**Mr. Mbuthi Gathenji:** Mr. Chairman, Sir, I thought you said we had 20 minutes.

**The Chairperson** (Sen. Musila): Sorry, I beg your pardon, 20 minutes for rebuttal of that evidence and then 30 minutes for closing statements. I will rule on closing statements after you finish that bit. The times I am giving are maximums. You do not have to do them to entirety.

**Mr. Peter Kimani:** Mr. Chairman, Sir, we note that in the reply filed by the Governor's counsel, a lot of admissions have been done. I propose to highlight the areas that are really not in context between the two parties in order to save time. I intend to restate the Assembly's case, highlight the grounds in the Motion and then make our closing submission.

I want, for the record, to state that for me, this is not just a legal matter because I come from Murang'a as much as I am prosecuting this case. I also never thought this day would come when I am prosecuting a case against the Governor, who is my personal friend. However, this is the bigger picture of the law and the Constitution, public management of issues and where the country wants to go.

It is the Assembly's case, Hon. Senators that the grounds that were laid in the Motion have more than ably been substantiated. When the Committee retires to consider, it will agree with the Assembly. I will take the Committee through eight points. Just restating our case and rebutting what has being said by the defence.

I will start with the issue of Kshs2.5 billion, the debt. It is the case by the defence, that the only debt that has been substantiated in these proceedings is the Kshs1.1 billion because that is the figure that was quoted by the Controller of Budget from her report. However, I want to rebut that position by indicating that the Controller of Budget clearly said that she got that figure by way of request to the county executive for them to indicate the debt level. I want to quote the letter. The letter to the Controller of Budget from the County Executive was dated 24<sup>th</sup> August, 2015.

The issue of Kshs1.1 billion that is now being relied heavily upon the Controller of Budget cannot be true because it came from the Executive. Before this Special Committee was laid a report which is in the Assembly's document, I will not refer to it. It is an exhaustive report with invoices and Local Purchase Order (LPOs), some as low as Kshs13,000 others in hundreds of thousands, all the way totaling to Kshs2.5 billion.

Nothing would have been better in their defence to say the actual position is Kshs1.1 billion and show the correct schedule. The defence has chosen to fight a proxy war against the figure of Kshs2.5 million which is documented and laid before this Committee. Therefore, because these proceedings are about documents and evidence, in absence of any other schedule or report, rebutting that figure, we ask the committee to find the figure of Kshs2.5 billion as enough proof. The figure is very well documented in terms of dates, the Local Purchase Orders (LPOs), Local Service Orders (LSOs), services provided, the provider and everything else to prove the Kshs2.5 billion.

An issue has risen about the sustainability of a debt of Kshs2.5 billion. I want to indicate that Murang'a annual budget is about Kshs5.5 billion. So, when we talk of Kshs2.5 billion, the issue of whether it is sustainable or not, the kind of response we would be using, is such as that that Mr. Wanyama is using, of "glaring and shocking."

I will emphasize that point by asking the Committee to find that that unsustainable debt as per the Motion laid before you, has to be substantiated. The Committee will further note that the issue of the debt management paper and the county fiscal strategy paper are not documents that the Assembly has requested for. Those are legal documents. They are part of management of public finance. They were provided for by the framers of the law for definitiveness and predictability of the manner in which public funds are going to be run.

If the county executive will be forwarding debt management paper to the Assembly with figures that can never be relied upon, how will the Assembly be able to plan or compare locations? I submit that that first ground, of the violation of the Constitution, the Public Finance Management Act and the Public Procurement and Disposal Act, has been substantiated.

On the second ground, of the Murang'a Investment Co-operative Society, the *Shilingi kwa Shilingi* initiative, the figure of Kshs28,489,800 is not in dispute. The only variation that was done by the Auditor-General this morning was that he said that out of that Kshs28,489,800, it is only Kshs26 million that was specifically spent on advertisement but the whole amount is not in dispute. The defence that has been offered is that the Kshs28,489,800 has gone to a public body, a co-operative, to help the people of Murang'a. Nothing can be further from the truth.

Right from the promoters of that body, those are not tea or coffee, avocado and dairy farmers. They are heavyweights as the report of the Committee will show. It had nothing to do with the common man. The promoters, as we were shown, are very clear. We were able to prove from the report of *Shilingi kwa Shilingi* initiative, done by the Assembly, that Kshs28.5 million was spent to mobilize, Kshs1.5 million. That has not been controverted. A figure of Kshs140 million was thrown by my colleague from the bar. I tried to tame it because the figure of Kshs1.5 was in the *Shilingi kwa Shilingi* report.

I ask this committee, in all principles of public finance management and prudence, I do not know what business one can possibly do, to spend Kshs28.5 million, only to generate Kshs1.5 million. I urge the Committee to find that the expenditure on *Shilingi kwa Shilingi* initiative had no basis. It was a private entity. It had no connection with the people of Murang'a. That expenditure presents itself as a case of wastage of public funds which the county cannot afford.

I will go to my third ground. I do not want to belabour the issue of *Shilingi kwa Shilingi* initiative; a lot has been said here. The issue of expenditure on advertisement, the Motion presented a figure of Kshs247 million from two quarters, that is, 114 and 133. That figure has been contended as a fictitious figure that has no basis from the documents that we have presented. It is for that reason, we ask the Controller of Budget to bring to you, the reports of both quarters, before the annual report. You will be able to find those two figures there.

Mr. Chairman, Sir, a figure of Kshs247 million cannot be sustained. A figure of Kshs181.5 million has been admitted by the Executive. I would like us to look at the specific admission in the reply that has been filled before you. That is on page 8 of 18 in the reply that is in the folders that the Senators were provided with. Allegation on advertisement expenditure, the allegation given to this Special Committee is that we did not spend Kshs247 million. We spent Kshs187.75 million. Reading from the first paragraph on page 19, "the allegation that was laid by Hon. Mary Waihera is that the county has spent Kshs247 million against a paltry budget of Kshs7 million. What I want the Committee to ask itself and the Assembly has asked itself and found this to be shocking and glaring that Kshs181.5 million being used against a budget of Kshs7 million, is an abuse of the budget process and against the rules of public finance.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, I have an intervention. I am sorry Counsel. I did not want to interfere with your train of thought. Counsel is relying on page

8 of 18 to demonstrate that we have admitted Kshs181.5 million for advertisement, but I have written in bold; printing, advertising and communication. That is significant because he is referring to a document that contains the component of that expenditure, but he has conveniently chosen to read that to be an admission for advertisement alone. For purposes of the HANSARD, can Counsel, first and foremost, be requested not to mislead this Committee? Secondly, that there be a correction on what he calls an admission; that it is not advertising alone, but advertising, printing and information.

**The Chairperson** (Sen. Musila): Counsel, please, proceed.

**Mr. Peter Kimani:** Mr. Chairman, Sir, the point that I was making is that a figure of Kshs181.75 million against a budget provision of Kshs7 million is gross. The allegation by Hon. Mary Waithera was that it is abuse of the principles of public finance management. I, therefore, urge the Committee to find that the expenditure is unwarranted, unattainable, and that ground is substantiated.

I have ten minutes remaining. Therefore, let me quickly jump to the issue of procurement of land costing Kshs340 million which was referred to as the elephant in the room. I refer this Committee to look at page 154; it is a document that my colleague took you through and I want to rebut on an issue that arose. The minutes on page 154 are those of opening the tender. It says that only two companies responded; KENJAP and Elocamp Building Contractors. The paragraph under Minute two 01/2013 says that there was only one witness who represented KENJAP and the total number of applications were only two. Only two bidders responded to that advertisement.

Mr. Chairman, Sir, if you look at page 155, you will see that at the point of evaluation, you will find a third company called Nalpas Quality Consult has been introduced into the tender evaluation. This has been done because the law states that if a bid does not attract three bidders, it is unresponsive. Before you, is a bid that was not responsive. Therefore, the people who were responsible conveniently introduced a third company in order to beat the law. I submit to you that this is not just an irregularity, it actually borders on fraud touching on Kshs340 million. This is now what I tell Mr. Wanyama is gross violation of the law and the Constitution.

Mr. Chairman, Sir, before I dispose of that ground, I take you to page 156 where you will find a key ground about the procurement of this land.

In the minutes of 27<sup>th</sup> November, 2013, among the people who were in the tender committee; number three in the attendance list is one, Mr. Stephen M. Warutere. He is the gentleman who eventually did the valuation report that was worth Kshs340 million. My question is: Was this a tender process that was done above board with the valuer sitting in the tender committee and being actively involved in the process where they have introduced a third person and, ultimately, he is the one who values the land? I submit that the ground of gross wastage of Kshs340 million and irregular and fraudulent procurement that the ground has been substantiated.



Mr. Chairman, Sir, moving to ground number five, on the failure to raise county funds. With regard to procurement malpractices, the splitting of Gakoigo Stadium and Ithanga Kahuro Conjunction, I would like the HANSARD to capture that the issue of those two matters, are captured well in the statement of the Mover of the Motion. The table summarizing the splitting is reproduced there, verbatim. The people who were given the tender to split are the same people. That is all documented. Therefore, I will not take you back to it. I only want to rebut the issue of the circular that my colleague has indicated to you; that the circular allows you to split tenders. I would like to state categorically that the circular only allows what the law calls unbundling of tenders meaning the same tender can be split to give special interest groups an opportunity; women, youth and the people with disabilities.

You will realize that in the split contract of the Gakoigo Stadium and Ithanga Kahuro Conjunction, is to the same companies owned by able people. I, therefore, request you to reject the defence of unbundling of tenders and find the splitting of tenders was pure abuse of Section 30 of the Public Procurement Act as it was for purposes of putting the threshold of Kshs4 million done cleverly to allow the contractors to benefit.

Mr. Chairman, Sir, on the issue of accountability, I would like to bundle it with the failure to enact legislation, to constitute the audit committee and county budget and economic forum. There are many allegations that are in the Motion and we are going to answer them in our written submissions. My rebut and presentation is that there would have been nothing easier than for the defence to come and say that this was the County Integrated Development Plan (CIDP) for this year, the annual development for this year and the programmes under the various departments for this year. Nothing has been given.

Instead, that has been turned to the Assembly that it has failed to come up with the legislation. I ask you to reject that defence and find that the County Government of Murang'a cannot be expending billions of shillings without the enabling statutory and policy framework provided for in the law to expend public monies. I do submit to this Committee that the ground and the sub grounds that are put in the Motion have been more than substantiated

Mr. Chairman, Sir, I would like to conclude on the issue of the money that the County Assembly is complaining about. I refer you to the reply that has been tendered before you. It is an allegation of the county government, on page number six on the Motion itself on ground (vi), on page 4. The County Government's allegations and complaint is that the executive has deliberately crippled the operations of the assembly. They requisite monies from the wonderful lady; the Controller of Budget, and when the money comes to the Executive, it will not be released to the Assembly. The summary of these funds is in the Motion on page 4. However, in the reply that has been given before you on page 10 of 18, the response on item No.50, the only response, he gives is that Kshs28.779 million is what had not been remitted to the Assembly as at the close of the financial year. Therefore, that money was sent back to the National Treasury.

Mr. Chairman, Sir, no explanation has been given as to why, in the first place, Kshs28.779 million was sent back because it was not released. The other figures in the Financial Year 2013/2014, a whopping Kshs44 million in the Financial Year 2014/2015, there is the figure that I am responding to. In this current year, Kshs51.843 million has not yet been released. The Assembly feels that this is sabotage and an attempt to cripple the Assembly and it feels that the Assembly cannot run the Government that way. I submit to you to find that as abuse of office and acting contrary to the principles of leadership as in Article 10 of the Constitution. Kshs181.75 million against a budget of Ksh7 million is an abuse of the budget process and the budget as a tool of running public finance.

Mr. Chairman, Sir, I will not go to the documents anymore because we have a written submission. I only want to respond to the issue of motive then I will sit down. On issue of motive, it has been submitted to you that the Assembly's case is all based on the Ward Development Fund, that we have a major stone to grind with the Governor on this case. Nothing can be further from the truth. The Ward Development Fund was passed in May, 2014. That is one and a half years ago. The Appropriation Act that was tabled here is only for this year, in July, 2015.

The Controller of Budget clearly indicated the guidelines that she has given about the spending of the Kshs700 million; that has been agreed upon with one question; the rules of spending that money will come from the Executive. So, how could the Assembly possibly be fighting the Executive and they are there seated for the Executive who have been given the power to develop the regulations on how that money would be spent? I ask you, Special Committee, the very able Senators, to reject that ground of motive and focus on the very serious grounds that have been placed in this motion; to find that these grounds have been substantiated. I rest my case there.

**The Chairperson** (Sen. Musila): You still have four minutes for you counsel to finish.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, I am always very brief. I will not break my rules. The area that I will cover, first is the legal aspect of the threshold you have been referred to, the report of Prof. Kiprono Chepkwony at page 85 by my learned friend, Mr. Wamalwa - I am so sorry, it is Mr. Wanyama. On page 85, he gives five elements that you must meet. When I look at them, I do not know whether it is the Senate that made the mistake but they are not cumulative. First, the allegation must be serious, substantiated and weighty. They do not say "and" then they follow with the other one. The violation must be fragrant and glaring. My submission is if any one of them is proved, we are home.

The other thing is; I would like now to revert to the type of proceedings and defence that has been adopted by the Governor. My learned friend has said there is almost what I can call total admission. The reason I say this – apart from the documents that you have, that they have put forward, in a quasi-judicial proceeding, there is not a single witness who has sat here to give any evidence on any document. That is a very telling story. This document, even ours, had to be interpreted. We lost one witness here and all watched. We

had good document, a very good statement, but there he was. You must take into consideration that this type of defence does not work with quasi-judicial proceedings. You must have a witness to testify and back that document. The Governor has chosen and he is here, to say; I will not tender any oral evidence. Now, if you look at those documents and they do not tell any story and there is no person backing them, you have no evidence before you. That is the tactic that they have used, that is the risk they have taken.

I want to make an observation on a few things because what they did is say: "Just bring the witnesses and you question them. We will prove them wrong." Let me make this observation, we agreed and they accepted that the mode of procedure is that we will bring all the statements. We did that. Those statements of our witnesses are uncontradicted in so far that the cross examination did not touch on every aspect their evidence. That is the bottom line. There they have been saying there is no evidence. They may not have realised, where they did not cross-examine, that evidence stands uncontradicted. The other aspect of that evidence is this: Since they did not call rebuttal evidence, you cannot, as a Committee cast any doubt on the evidence that stands alone uncontradicted.

I wish also to say something about the nature of evidence that we tendered. We also brought evidence of third parties; the Government officers who have statutory responsibilities, what they do in normal way of business has no malice. They foresee that nobody will use that document. We have the Controller of Budget and the Auditor-General, I wish you would put a lot of weight to that evidence because, it is uncontradicted. It is evidence of an independent witness.

There are only a few things that I would like to correct. I think it is important that I highlight them. The first part of the evidence relates to the definition of Local Purchase Orders (LPOs). First, my colleagues have said the LPOs were part of what was brought by the Executive. The Controller of Budget or Auditor-General said there is no evidence *prima facie* unless the invoice comes from the supplier. If the supplier does not raise an invoice, there is even a criminal element. How does the Executive bring them unless they know the origin? If the Assembly took this as the real figure – I am talking about the Kshs2.5 billion – if they took it as correct and budgeted for it, who has made this move? It is the Executive that has given them. So, you must look at that with suspicion. And with that rider, the explanation given, that they will normally not be treated; but the services, if rendered, who should have come here to say the services were rendered or not? It is the person who brought them as part of the debt.

The other aspect I would like to mention is with respect to the authorities that you have again and again, we have been told; Wambora I and II. It is a question of collective or personal responsibility. There is no finality in that judgment. If you find that there is an act committed by the Governor, and that is our case, that is his responsibility. The Constitution, and I am obliged by the Vice Chairperson, who brought us to the attention of Section 30 which is very clear; the Governor is responsible for management and use of resources.

So, if you do make a finding that there is that responsibility, you have fulfilled the obligations of responsibility. I know they have alluded to the CEC and there is a separate case going on. Incidentally, he was not brought here. No material has been brought here. So, as far as you are concerned, you assist with the case to the governor and his responsibility.

Mr. Chairman, Sir, lastly, I would like to mention that my learned friend said that you are bound by the decision of your Senate. These proceedings concerning impeachment are a development in the jurisprudence. You are not bound. You are a Committee like the one that sat in other cases. You are entitled to make distinction if you do find peculiarity in our case.

My submission is, do not feel bound to follow the decision of another Senate Committee because this case is different. There is a principle of distinction. If you find that you can distinguish this case with another on the basis of fact or circumstances, feel free to depart. When I look at this Committee, I feel very proud. The Chairman is a person who has served in Government. So, what we have been saying all through are things that you are very familiar with. I see people here who are of legal persuasion. So, it is my submission that we have put before you a fully substantiated and uncontradicted allegation and you must make the return that is appropriate for this case.

**The Chairperson** (Sen. Musila): Thank you counsel. We have reached a point of closing statements and each side will have 30 minutes---

**Sen. Sang:** Mr. Chairman, Sir, I was wondering whether we would not have an opportunity to raise a few issues to the discussions that have gone on especially from the counsel representing the governor and also some of the issues that were raised. Is it your position that we just sit down, listen to them and we have concerns and issues. I guess this was the governor's case just like yesterday we had all the witnesses representing the county assembly and we had the opportunity to interrogate and seek clarifications. I thought that should be availed.

**The Chairperson** (Sen. Musila): This is your Committee, I cannot rule you out because you may have some information or clarification you are seeking. I am only asking that you be brief on it.

**Mr. Browne Nathans:** Thank you Chair. So that it goes on record, I appreciate how you have directed. It is the first time we are noticing since the profession of law became a profession, that a lawyer can come, bring forward a case and say since we did not have witnesses, he encourages and invites the Senate to find in their favour. In fact, for all I wanted to conclude, those were pure lamentations that belong to the Holy Bible. So, he has just lamentations that must not ---

**Mr. Muthi Gathenji:** I have a lot of objection to his observation.

**The Chairperson** (Sen. Musila): Why would you not wait and say what you are saying later when we give you time to do your closing statements, counsel? I think you will have time. You have 30 minutes to say what you want to say as closing remarks, and you can put those statements in there. So, Sen. Sang do you have any issue you want to ask that it be clarified?

**Sen. Sang:** Chair, a few clarifications. One; and this is to the governor's defense. The whole of yesterday and today, you have made references to the minutes or to the report of a consultative meeting that took place as an indication of the level of consultation initiated by the governor, reaching out to the county assembly and all the other stakeholders.

My question is that you provided us with only one report relating to one meeting. Would you consider that as sufficient consultation if you are talking about a period of close to one and a half years or two years? Were those conclusive or you have other meetings or forums that you have continued to engage with the county assembly?

Mr. Chairman, Sir, there was also an issue raised about – I think counsel Wanyama did address this – the right to be heard. When you made references to the Order Paper, you made some references to the effect that order papers are meant for the assembly alone. Is it, in fact, true - this could be a question to the county assembly – that your order paper documents are available to the public? I know, for example, in the Senate and the National Assembly just like in other county assemblies, that piece of document is uploaded and available for any person. Is that the case in Murang'a County Assembly?

Chair, this issue of the purchase of land – I think just to get some clear information, we have had some discussions from both sides – do you know the owner of KENJAB Company? We heard you advertised, you had only two responses, might you by any chance know the owners of this company? The particular issue that was raised by the counsel for the county assembly also is very important. He talked about the tender committee and the sitting by one person who ends up doing valuation again. It is very interesting, some of us come from the counties where we are talking of one acre piece of land going for close to Kshs9 million, is a very interesting one to hear from Murang'a. Just a clarification in terms of the ownership of this company and the person who sat in the tender committee that ends up being the person who gave the valuation.

Finally, Mr. Chairman, Sir, on this particular issue and I want to direct to the county assembly that yesterday you brought in an interesting element that was objected to. As if to suggest that there was an attempt to serve the governor, but that was not successful, and that was objected to and you did not go beyond that. Today when they made their preliminary submissions, they particularly dwelt on that element. When you came up to address us on that particular issue, you never raised anything relating to an attempt to serve like you did yesterday. You only seem to suggest that that is not part of the mandate of this Committee and you avoided. Were there attempts to serve or not?

**Sen. (Prof.) Lonyangapuo:** Thank you, Mr. Chairman, Sir. I am seeking a clarification from the counsel of the Governor regarding the purchase of land. You did not read the whole of this letter. In the minutes, it says that there was only one witness who represented KENJAP Company and the total number of applications was two only. I wanted you to proceed and complete the other part of the statement which says:-

“And only one met the requirements, called KENJAP Company where Ms. ELINCOM Building contractors had a different document”

The Committee would want to know more on what the procurement law says when you reach that particular point which you have used and sat with your committee and found that you only have one and not two. You proceeded to transact the same business without a break.

Secondly, on your submission about Murang’a Investment, you said the auditor only talked about the license. If I am right, you also saw the auditor who did the document saying money was spent on this private entity found in Murang’a County. We need to hear more because money was spent without approval and we want to know what vote you varied the money from.

This you call it stadium. I have read the Controller of Budget’s Report which talks about the Local Purchase Orders (LPOs) and here you are saying that no invoice has been given, which is true. You have been warned in that document that you cannot use LPOs only. I do not know whether you read that because we want to hear a clarification. Do you use invoices for payment or LPOs for payments?

There is a road that moved from Kshs30million to Kshs59million and I did not see in the bundle the tender committee meeting to vary the size of the contract to move from Kshs30million to Kshs59million even if it has not been paid. It may be of interest to know.

Mr. Chairman, Sir, lastly, I come from a community that keeps livestock. That is why I am interested to know. You have a lot of hay. Do you still have that hay you bought? I do not think you have the type of herd that can be found in West Pokot to consume this amount of grass. How many cows do you have in this farm? I find it as a huge supply and it may be of interest because Murang’a is quite a rich county with livestock and the auditor is questioning that there is some money missing either for transportation or for the hay.

I have not been to Murang’a during the day. I just passed the other day on my way to Nyeri. I would have loved to see these accusations by you, that the Governor has branded himself everywhere on the billboards. If it is really true that it is happening and it is okay, then, all these Members of Parliament with 290 constituencies and Constituencies Development Fund (CDF), if the law says you can brand yourself, we will be seeing different faces in the notices along our roads with different names and I do not know what will happen after five years. May you clarify? Unless I did not get you well, counsel, how the Governor appeared in those brands. That was a claim. Is it true that there is only one man’s face appearing in the whole county? That is very interesting.

**The Chairperson** (Sen. Musila): Can you finish, Sen. (Prof.) Lonyangapuo and then we allow Sen. Ong'era and Sen. (Eng.) Muriuki.

*(The Chairperson (Sen. Musila) spoke off record)*

**Sen. (Eng.) Muriuki:** Thank you, Mr. Chairman, Sir. I wish to follow up on an issue raised by Sen. (Prof.) Lonyangapuo; a point which did not come out clearly. There was a very serious allegation made that in the purchase of this land, there were two responsive applicants as it were. During the analysis of the tenders, a third name appeared. Can the counsel clarify that?

**Sen. Ong'era:** Mr. Chairman, Sir, that is the question I wanted to ask. The other one is, Sen. Sang asked if due diligence was done. Can we know who the directors of these companies are because I know it is a practice that is done?

Lastly, yesterday, we had asked if we can be given the statement of 'Shilingi kwa Shilingi' as at 30<sup>th</sup> June 2014. I do not know whether it has been availed.

**The Chairperson** (Sen. Musila): Very well. The clarifications are mixed. There are those for the assembly and those for the Governor side. I ask the Governor's side to start and if you find that something has not been assigned, then you can direct it to the right place. Counsels please proceed.

**Mr. George Ng'ang'a Mbugua:** Thank you, Mr. Chairman, Sir. I will start with the first question that was asked by Sen. Sang. The copy of Minutes that has been attached in our documents is just an illustration of an engagement at a consultative stage. There have been other informal engagements not necessarily documented between the Governor, the county assembly and other stakeholders including the executive. That was just an illustration. It is not the only consultative engagement that has been undertaken by the Governor.

On the right to be heard, that case was not properly exercised because the Governor was not served with the order paper. It might be available as a public document but we still take the view that it is not enough to say it was on the order paper because their standing order No. 67 is clear on the invitation which is what we said was not done for the Governor to appear and present his case.

On the question of the owners of KENJAP Company Ltd, one, with limited liability companies you can obtain a Company Registration Form 12 (CR12) showing a current position of the directors. We can get this information by a mere request from Sheria House.

We even have a copy of the transfer. If it is requested we can avail a copy of the transfer, showing the directors who signed on behalf of the purchaser. We can supply that information. If the Special Committee also wants to get official communication from the office of the company registrar, I am sure by a way of a CR-12 letter, she would be glad

to furnish the current particulars of the directors of that company. That is information that can be availed.

There is the question on the valuation that has been asked by a few Members. But before I go there, there is the issue of the names. I want to bring this matter into perspective; that at the time when the expressions of interest were being opened, there was another proposal that came in via post. This was the third tender that had been posted and received through normal mail. This was done under Section 58(6) of the Public Procurement and Disposals Act. That tender can be availed for verification. So, it was not rejected. Physically, when the tender box was opened, there were two, but there was another that had been posted, which is available for verification. That is why in the minutes for evaluation, you notice there is that tender which can be availed. It had to be evaluated because the evaluation committee was satisfied that it complied with Section 58(6) of the Public Procurement and Disposals Act.

That is why you notice that notwithstanding, that we attached those minutes. I must confess that when I was attaching this document there was no intention to mislead because this is a document that came from us. This is a document that came from us. Why would I have wanted to attach a document that would be adverse? There was so much openness and we had to attach what was in the evaluation report. I have stated that the reference to that third response was because it was received via post as opposed to the tender box. We can avail that document to this Committee because it is very critical.

Regarding the issue that we did that to satisfy the requirement that there must be three tenderers so that it is responsive, that is not correct. I will refer you to the section under Public Procurement and Disposals Act that guided this particular procurement. We said that it is alternative procurement method for requests for proposal that runs from Sections 76, 77, 78, 79, 80, 81, 82 and 83. What I did not get from Counsel is under those various provisions; where it states that if there are not more than the number that he has stated, it is supposed to be non-responsive.

For record purposes, there were three tenderers that were evaluated; only that two had come through the tender box and one had been posted. It was evaluated and we can avail that information. The procedure that was followed was competitive, open and evaluation was done. There is an issue that has been raised to try to show that this process was not above board and I address this--- I am also reminded that---

**The Vice Chairperson** (Sen. Adan): Counsel, I am sorry to interrupt you. The explanation you are giving as to why we did not have three companies initially should have been captured in the minutes. That is the procedure that is required in procurement. If you tell us that you will provide that information later is that valid?

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, first, we look at what the Act provides when it comes to evaluation of those tenders. In the minutes, as at the time when the tender box was opened, there were two tenders. The evaluation schedule on page 155 provides for three entities; KENJAP, ELKOM and Nalpass Quality. The Nalpass Quality



is the tender that was posted and was received via post. The point is that in law I am yet to see a provision under that particular section that guides the nature of this procurement that says that, that particular tender should have been rejected. If you look at page 154 it has been signed by two persons, but the report itself, at page 155, is signed by the chairperson and the member. There is the tender opening for the tenders that had been received that is why you notice that it is signed by the chairman and the secretary. At page 155 there is the evaluation. At the time of the evaluation, the third tender had come through the post.

**The Chairperson** (Sen. Musila): Could you explain why, in the confirmation of minutes on page 155, one Muchunu Wanjohi did not sign the minutes?

**Mr. George Ng'ang'a Mbugua:** Perhaps that is because Muchunu Wanjohi was not present. The minutes were confirmed by Angeline Mwangi and there are members; Lawrence, Edith and Kenneth. Perhaps the reason it has not been signed is because she or he was not present at the time when this particular minutes were being confirmed.

The point I was making is that the evaluation report that you will find provides for the recommendations. First of all, it provides for a schedule that has three tenders. We have explained the appearance of the third tender here. You can see Nalpass Quality Consult, written as "NP." That is explained by page 154, where you will find—

**Sen. (Prof.) Lonyangapuo:** On a point of order, Mr. Chairman, Sir. I want a clarification. Page 154 talks about starting the tender committee meeting, where they were opening. The tenders closed at ten and members opened two tenders and one was locked out. The minutes then say:

"Having no other business the meeting ended with a word of prayer led by Susan Kamotho."

Two people then signed. Page 155, on the other hand, talks about an evaluation report. This must be a different day from this other one, because the other meeting had been closed with a prayer.

I do not think we have different Public Procurement and Disposals Acts for every county. We only have one Public Procurement and Disposals Act. So, when you say that one company sent a bid late, the Public Procurement and Disposals Act states that it does not matter the procedure used to look for the service provider; there is only one route. You cannot say that another tender came late, by whichever means.

**The Chairperson** (Sen. Musila): Let us get those clarifications coming and try to be brief.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, the explanation I gave was that, that tender was sent by post. We are not saying that, that tender was not rejected or it was late.

Mr. Chairman, the tenders that were opened from the tender box were two. Then there was this other tender that came through the post office and it was not rejected. It was considered because it was sent in compliance with Section 58(6) of the Act, so it had to be evaluated. I even went ahead and said that this is a case that we are maintaining. If we are to say that only those two tenders were evaluated, still under the methods that were used, that did not amount to unresponsiveness of the tender. Invitations are sent and then you have, just assuming the third one did not feature anywhere, under the section that we have quoted when we were making our defense, that did not.

Mr. Chairman, this is also important for the record. The Director General of Public Procurement Oversight Authority (PPOA) was also notified of this particular tender. There is a report that was filed under the Act because this was the alternative method of tendering and that letter can be obtained from the Director General's Office. We can also supply that letter. There was nothing sinister about this process.

**Mr. Peter Kimani:** We are just feeling it is unfair for counsel to give evidence on documents that are not here and we do not have a way of responding. If he can just restrain himself to what is here, then we can respond. To be fair about the letters that were written to the Director General is evidence that we do not have a way of dealing with it.

**Mr. George Ng'ang'a Mbugua** Mr. Chairman Sir, let me comment on that before you make a ruling. You notice that when we supplied these documents, there was no further rejoinder that queried that document to enable us, you heard them saying how they are sticklers to the rules. When I put an affidavit and attach documents then you supply me with a document to say; that with respect to this, I am querying this and that. This issue came up on the Floor of this Committee as counsel was submitting.

Mr. Chairman, Sir, you have continuously said that this is an inquiry. I do not see why counsel should be uncomfortable. This is very material. We would not want this Committee to make the inference that there was something sinister. I have stated that this alternative method of tendering for this tender was even reported to the Director General of the Public Procurement Oversight Authority (PPOA). Why did I say that? I said that so that if the Committee, and you have those powers, just the same way you can ask Agnes Odhiambo or Mr. Ouko to furnish you with documents, it is the same way you can ask the Director-General of PPOA whether this tender or procurement was reported to him or not.

**The Chairperson** (Sen. Musila): Just continue with your clarification, counsel, so that we---

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, there is an issue raised about Mr. Warutere, and I want to clarify it. The valuation report alluded to on page 179 of the Governor's bundle was prepared by Mr. Stephen Maina Warutere. He is a Government officer who prepared that report. There is also another gentleman by the name Peter G.

Ngugi, who was an observer and there was a basis for his invitation; upcountry valuers. He was invited by the Institute of Surveyors of Kenya. His name is in the minutes.

There was a report that was done by the Principal Valuer of Murang'a but the Committee under the regulation is empowered to invite an observer that where the man from Kenya Institute of Surveyors of Kenya came in as an observer and made his comments known. I just wanted to make that clarification because they wanted to show that it was one person, they are different. Mr. Warutere and the man from ISK are two different people.

I think there was another issue related to that and Mr. Njenga will respond. Thank you.

**Mr. Browne Nathans:** Mr. Njenga is going to respond to that, but for the sake of Sen. Sang, it was a not a one-off consultative meeting. Justice demands that; he who alleges must prove. They made those allegations, they did not tender any documentation, but out of courtesy and magnanimity, we went ahead to show that it was a consultative process. We not only gave just one incident, if you can check so that we are completely be sure, it shows June 2014 – June, 2015; one is dated 8<sup>th</sup> -10<sup>th</sup> October 2014; the other one is dated Friday 19<sup>th</sup> of September 2014. There is another for Thursday which is dated 18<sup>th</sup> September, 2014. In other words, these were serious consultative meetings that involved everybody from the Speaker to the Clerk and they are all here and they all signed. They never showed any document to that effect. We have gone out of our way to confirm that that is the process of a consultative measure. Mr. Njenga will make some interventions.

**The Vice Chairperson** (Sen. Adan): Before counsel makes his interventions, let us go to page 159 of the Governor's document; the first sentence reads:-

The site was visited and below is the site visit evaluation report. “  
We would like to know where that report is please.

**Mr. George Ng'ang'a Mbugua** Mr. Chairman, Sir, that can be availed, We noted it was a different document, because of the bulkiness of the document, it might have been referred to. It is a different document. The site visit evaluation report can be available.

**The Chairperson** (Sen. Musila): Let us proceed on. It is clarification. You should have recordings of the clarification you are going to make.

**Mr. Charles Njenga:** Few questions were raised about Murang'a Investments Co-operative (MIC). Our response and submissions must be undertaken in the context of the allegations that are made against us. We were not generally discussing the entire co-operative but the allegations that were made against us and the evidence. Our comment was that the evidence that was relied on was the evidence of the Auditor General and was categorical that his query on this project was the lack of licences by Murang'a Investments Cooperative. It is not a deposit taking Sacco so as to be governed by SASRA. That was the comment made by the Auditor General. The question of whether it was facilitated by the county; that was categorically stated yesterday. When you retire,

you will see that the inquiry by the County Assembly itself confirms that indeed the county government has facilitated many other cooperative societies. This is not unique to Murang'a Investments Cooperative.

Secondly, there was the issue of procurement of hay. Going back to the allegation because that is what we were answering; the allegation on question of hay was twofold; first, show us how the procurement was done, and also show us the documents. We have shown the tender committee minutes and the documents. For the comfort of Senators and just for your knowledge, this centre houses over 110 cows. The procurement, as we see in that period, was for almost one whole year. I am glad that you have said that you have never visited Murang'a, I now invite you to visit this particular place and you will see that hay is put into good use and there is value addition.

On the question of the portrait, it is a fair question to be put to the accusers of the Governor because we would expected for such a complaint to be escalated and to be an impeachment issue, that we have an entire bundle as the one before you showing the governors portrait in every shop, market place and every wall; that is a burden of proof that was to be discharged by the accusers of the Governor in that regard. We are saying that it is not true because there is no material before this Senate Committee. Again, I go back to my invitation that if you come to Murang'a, unless you visit his office, you will not see those portraits of the Governor in those places

**The Chairperson** (Sen. Musila): Does the Assembly need some clarification?

**Mr. Mbuti Gathenji:** We will react but before I do this, there is a question about service of the Motion and why there is no documentation. One of the things is what I said there. There is a case pending there and we are still in the process of filing. The portion that you asked is whether there was a prior service. There was a prior service and we have the documentation here from G4S. We will substantiate this during submissions.

**Mr. Browne Nathans:** Mr. Chairman, Sir, with tremendous respect, we are introducing an entirely new bundle of evidence. It should never come from a senior learned counsel.

**The Chairperson** (Sen. Musila): Are you making clarification?

**Mr. Browne Nathans:** This is comical.

**Mr. Mbuti Gathenji:** It is a clarification.

**Mr. Browne Nathans:** He had his case the entire day yesterday and never even referred to that materiality. He is now going around the corner to make further allegations.

**The Chairperson** (Sen. Musila): The question is, I believe a Senator ---

**Mr. Browne Nathans:** He should not be permitted ---

**The Chairperson** (Sen. Musila): Excuse me, counsel ---

**Mr. Browne Nathans:** He should not be permitted to go behind closed doors to make allegations as wild as that, when we have ventilated our matter and put it to rest.

**The Chairperson** (Sen. Musila): Excuse me, counsel. I think ---

**Mr. Browne Nathans:** No! He is laughing. You can even see that he is actually very comical. We must not permit that to ---

**Mr. Mbuti Gathenji:** In just a few minutes ---

**The Chairperson** (Sen. Musila): Order, counsel!

**Mr. Browne Nathans:** We cannot permit that to go on record because it was never dealt with during their case. During our case, they never referred to it. It is an afterthought. We cannot allow that to go on record. In fact, that is forgery.

**The Chairperson** (Sen. Musila): No, counsel! Relax, please. I think, so far, we have done very well. I do not think we want to go that way. Counsel, are you responding to a clarification that has been sought by a Member of the Special Committee?

**Mr. Mbuti Gathenji:** Yes. In fact---

**Mr. Browne Nathans:** As long as it does not have any probative value to our case.

**The Chairperson** (Sen. Musila): No, but you see---

**Mr. Browne Nathans:** On that one, frankly, we strenuously object to the introduction of that evidence.

**The Chairperson** (Sen. Musila): This is where we really have got to be fair because all the clarifications sought from the Governor's side were answered without any intervention. If you find any clarification sought by a Member of the Committee, then, that is where you should have objected.

**Mr. Browne Nathans:** Mr. Chairman, Sir, when we raised ---

**The Chairperson** (Sen. Musila): This is because now ---

**Mr. Browne Nathans:** Permit me to make this point.

**The Chairperson** (Sen. Musila): Excuse me, please!

**Mr. Browne Nathans:** When we made our case at preliminary level, he never responded to that point. So, ---

**Mr. Mbuti Gathenji:** I would like to move that this counsel be disciplined. He has no respect for the Chair.

**The Chairperson** (Sen. Musila): I am asking the Counsel to relax because the counsel for the Assembly is responding to a clarification issue from a Member of the Committee, who is entitled to a response. Unless the Counsel will go out of the clarification that has been sought, then I will rule him out of order. I have not heard anything that has gone outside what Sen. Sang had sought clarification for. Let us agree; we are just about to finish. Let us relax and finish this in the manner that we have been proceeding.

**Sen. Sang:** Mr. Chairman, Sir, you have to also protect us from the counsel. When we, as Senators, ask questions, we have reasons why we ask them. If you can allow us, we have understood. I must even ---

**Mr. Browne Nathans:** Mr. Chairman, Sir, duly guided.

**Sen. Sang:** I must indicate that I thought that at the time the counsel for the County Assembly was responding to that preliminary issue, he should have been able to raise that matter. I was shocked that he did not do that and that is why I was doing a follow-up. So, we appreciate and we have noted but I think it is important just for our own consumption.

**Mr. Browne Nathans:** Mr. Chairman, Sir, I am duly guided with that presentation. Thank you.

**The Chairperson** (Sen. Musila): I think I had already said that and asked the Counsel to proceed.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, I have been asked whether there was other evidence. First, we attempted to say that there was an attempted physical service that was stopped. I am confirming to you now because you have asked. Yes, there was in two ways. First, there was a physical attempt to serve. In the second one when there was a decline to receive, there was a service by G4S.

Now, there is a reason why that evidence was not produced at the time. I have indicated that this matter is pending in the High Court and there is a petition. The issue there is exactly whether there was service or not. We filed limited affidavit for the purpose of fighting the conservatory order which, by the way, we won. In the second part when the Petition comes for hearing, we will place that material before the High Court but we have the document there for service by an independent courier.

**The Chairperson** (Sen. Musila): Right. Can we move on?

**Mr. Peter Kimani:** Mr. Chairman, Sir, we want to stand. I have a few clarifications to make. The first one was about the Order Paper from Sen. Sang. I confirm that the Order Paper for Murang'a County Assembly is normally uploaded one week before the due

date. It is normally copied to the County Secretary and often, the CECs. I am just making a confirmation. That is the clarification as far as the Order Paper is concerned.

Regarding clarification on personal branding, that was the list by Sen.(Prof.) John Lonyangapuo. I will just call him Sen. John since I have problems mentioning that other name because I have a heavy tongue. That is part of the bundle that we have produced. I did not want to go through every page because of the 20 minutes only allocated to us. In Page 465 of the Assembly bundle, there is photographic evidence of two very well done advertisements.

**Sen. (Prof.) Lonyangapuo:** Which page?

**Mr. Peter Kimani:** Mr. Chairman, Sir, Page 465 of the Assembly bundle, I trust it is just around that page. Sorry, because of the pagination. The photographic evidence is there and these are just some of the billboards or signposts that have been photographed for the purpose of just making the point.

Let me also indicate that that have been some comments on in the response by the Governor's side. An argument has been made that the Governor, being the CEO of the county, represents the face of the county. I am sure you will deliberate yourself from that.

Let us now move to Page 465 on the bundle.

**The Chairperson** (Sen. Musila): No, it is Page 458.

**Mr. Peter Kimani:** Mr. Chairman, Sir, sorry. There is a problem with the bundle. We seek your indulgence.

There are two more clarifications that I want to make and it is by way of responding to fellow counsel who has talked about the issue of consultation. The document that Members were referred to on Page 268 of the blue book is the response. We call the Governor's response the "blue book". That was merely a training that was organised for two days. It is not fair for my learned counsel to indicate that that constitutes a policy making or evidence of continuing consultation between the Assembly and the executive. This was just a get-together between the Assembly and the Executive. I just wanted to clarify because it is not fair for it to go on record that it was a policy making meeting.

I have a final clarification in good order because my colleague, Mr. Ng'ang'a Mbugua, has said - I want to be fair to him – that a third bidder came in by post. He quoted Section 58 of the Constitution. If I may take you back to Page 155 --- I want to be fair to him but he also has to be fair to this Committee by stating the truth as it is. I kindly ask Members to look at Page 155. In my thinking, it is a continuation of Page 156. I believe it is only the way the document has been bound.

Counsel, is that correct? I want to do this fairly. Page 155 should be a continuation of Page 156. Just confirm that so that we can play fair.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, I did not say that it is not a continuation, if that is what the record captured. I was just explaining the content of what is in Page 155 and 156 in as far as the evaluation is concerned.

**Mr. Peter Kimani:** Mr. Chairman, Sir, the clarification that I want to make is, if you look at Page 154 which was the tender opening meeting that ended with a prayer, it was held on 23<sup>rd</sup> July, 2013. That was the tender opening. However, that tender meeting of 27<sup>th</sup> November, 2013; two months down the line – the record under Minute MCG02/11-2013-2014 going all the way down – is still very categorical that there were only two responses. So, even two months down the line, the records from the Executive indicate that there were still two bidders. It is not explained.

Perhaps even coming back to Page 155 at the valuation stage – just so that we do not seem to be over-flogging this horse- if you look at the evaluation itself; only Kenjam and Nalpas were evaluated. That is on the second table. The first table indicates three companies – Kenjam, Enokam and Nalpas. When it came to evaluation, somehow, Enokam disappeared such that even going by the clarification, I still submit that this was a fraudulent transaction. That is my stand and I want that to go on record.

Thank you.

**The Chairperson** (Sen. Musila): I thank both of you, counsel, for giving the clarifications that were sought by Members of the Special Committee.

Allow us to move on, now. We have come towards the end. It is time for closing statements and we indicated that it would be 30 minutes but that is the maximum. We will be delighted if you cut your statement; if you think that you have achieved the purpose for which you came here.

I now call upon the Counsel for the Governor to make a closing statement.

**Mr. George Ng'ang'a Mbugua:** So, is it us to start our closing?

**The Chairperson** (Sen. Musila): Yes.

**Mr. George Ng'ang'a Mbugua:** Oh, sorry. I think I had ---

**The Chairperson** (Sen. Musila): Sorry, I beg your pardon. The programme says the statement on behalf of the County Assembly first.

**Mr. George Ng'ang'a Mbugua:** Yes. I was a bit confused.

**The Chairperson** (Sen. Musila): Yes, closing statement on behalf of the County Assembly and then to be followed by the one on behalf of the Governor.



Counsel on the bench, please, continue.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, I am asking, if possible, whether we could just take a five minutes health break. We have been sitted here ---

**The Chairperson** (Sen. Musila): Yes, it is given. I give you 10 minutes. So, be here at 7.30 p.m.

**Mr. Mbuti Gathenji:** Thank you.

*(The Special Committee adjourned temporarily at 7.15 p.m.)*

*(The Special Committee resumed at 7.22 p.m.)*

**The Chairperson** (Sen. Musila): Let us have some order, ladies and gentlemen. I believe we have now taken our break. In fact, we have taken five minutes more than we had allocated. Let us now proceed with the final phase, starting with submissions from the counsel for the Assembly. Please, take 30 minutes or if you can do less, the better. We will then move to the counsel for the Governor, another 30 minutes or less. That is the maximum that I am talking about.

**Mr. Mbuti Gathenji:** Mr. Chairman, Sir, and Members of the Committee present. First and foremost, I would like to thank you on behalf of Murang'a County Assembly for your patience and contribution. I also take this opportunity to thank the counsel for the Governor and the Governor himself for his personal appearance despite his heavy schedule because he is still the Governor under the law. I would also like to thank my colleagues who have appeared with me. To us, this is a very great honour considering the magnitude of the work that we are entrusted to do by the Constitution. However, I would like to make key remarks as far as the case of the Assembly is concerned.

First and foremost, we have read the charges which are in the order of business paper that was presented before you. We have talked about the gross violation of the Constitution, enumerated the offences and the particulars, tendered a bundle of documents that contains our evidence and also given oral evidence. We have also presented our witnesses for cross-examination, both by the counsel for the Governor, Senators and every other individual. We may have shortcomings, we request that when you go on to consider evidence, look at the bundle and consider the oral evidence that was given by the witnesses and look at the evidence in cross-examination and re-examination as well.

We also wish to make a very serious observation, that in rebuttal to our evidence, there were no witnesses called. There was no human face in this Chamber to testify on behalf of the Governor with respect to all the allegations that we have presented before this Committee. There was also no oral evidence accompanying the statement. It is a very serious issue for us and we would like the Committee to make an observation that in the absence of oral evidence to accompany those documents, there is no evidence before you.

I say this because, first and foremost, the allegations are very serious. Some of them ended up being supported by statements from the bar.

At this moment, I request that when you go to deliberate, you will find about 90 per cent of the evidence in support of those documents, if not more, came from the counsels and it came from the bar. That, to me, is a very serious shortcoming in their case. That is the reason why I said that we and the Committee should consider the absence of evidence accompanying the document. The evidence from the counsels trying to explain what the witnesses ought to have said is no substitute for that evidence. Evidence which is not accompanied by the swearing of a witness, it is not evidence before you.

I know I had my challenges and raised them in good time. The Governor did not testify on matters that touched on his own personal behaviour. All the witnesses, especially on the very critical issues – I give an example of the Kshs340 million land transaction. I believe that after you retire for deliberation, you will consider that that evidence coming from the Governor has not been substantiated. You have asked very critical questions that touched on the issue of fraud but there is no answer. For my learned friend, Mr. Wanyama, a fraud is a criminal offence of very serious nature.

The other thing that I would like to make an observation on is that you have been addressed on the issue of threshold. I touched on that and said that every case that comes before you must be considered on its peculiar facts. You are not bound by decisions of other Senate special committees. You also have an obligation to further develop this jurisprudence and you are entitled to make your own decision.

My learned friend referred to the principle of *stare decisis*. It does not apply to you because you are not a court. There is no Senate which is larger than the other. The Committee has 11 Members by law, who are entitled to deliberate without being tied by any precedent at all.

Lastly, I would like to mention that there are some documents that we specifically requested that they should be made part of these proceedings. I understand that some of them have just come from the Office of the Auditor-General (AG). We hope that you will be magnanimous to us and extend the privilege that we did not have and read the documents because there is a specific reason why we asked for them. We do not have any chance any more to examine them or put any question to the witness. We kindly request you to go through those documents from the Office of the Auditor-General (AG).

Lastly, for my part because I am not going to talk more, I would again, like to reiterate that the honour that you have been given – to make this decision – requires that you consider all evidence. We have not come here to accuse or make any judgment. It is for you to make a decision on behalf of not only Murang'a County, but also this nation and contribute to the development of devolution. You are also obliged to ensure that there is maintenance of order in financial management in our counties. So, the responsibility goes beyond what we have said here.

With those remarks, I would like to call my learned friend to complete the details of our submission.

**The Chairperson** (Sen. Musila): Thank you, counsel.

Mr. Kimani, how many minutes do you have?

**Mr. Peter Kimani:** Thank you, Mr. Chairman, Sir and hon. Members, my professional colleagues, the Governor in esteem ---

**The Chairperson** (Sen. Musila): You have 22 minutes, Mr. Kimani.

**Mr. Kimani:** Mr. Chairman, Sir, I must also admit that I have been privileged to prosecute this matter alongside my senior, Mr. Gathenji. I indicated to your staff that I did not know that the Senate is such a friendly place. You have treated us well, we have relaxed ourselves and did this matter well.

I will avoid the legalities in my final comments and I may not even take the 22 minutes because we have talked about this and that. Let me indicate to the distinguished Members that the impeachment Motion before you is a request for you to strike a blow both for the law and devolution.

It is indicated and we were all clamoring for devolution when we will take the services close to the people, they will be able to get what the Government is doing. I want to say without any fear of contradiction that contrary to what you have been seeing in the media concerning our great county, these proceedings have indicated to the members that all is not well there. They gave an example of the land in question which we have indicated the purchase of land worth Kshs340million. We have struggled here between counsel exchanging arguments about this procurement, but when we look at the procurement, it means that anybody could walk into the governor's office and indicate that; "I heard that you bought a piece of land along Kenol Road. What is it all about?" In my find, I thought that, that was the purpose of devolution but look at where we are now, trading legalities, defining points of law and yet Kshs 340 million has been expended. I looked at the budget for 2013/2014 and saw that in the same year, for example, under Early Childhood Programme (ECD), we had only provided for Kshs20 million.

Mr. Chairman, Sir, when we talk about this Motion before you, it is really a question about devolution, where is it going, is it working and what will the Senate do to execute its mandate to nurture and midwife this baby to make sure that the baby stands. The case of Murang'a will be very critical in executing that mandate. If we talk about the Gakoigo Stadium, the hon. Senator indicated that the cost of the project rose from Kshs31 million to Kshs59 million. From the Governor's side, if we asked the Assembly, "can you provide us with the documents showing that we spent Kshs59 million? It is not only about Gakoigo, it is about the baby called devolution and whether it is going to walk, grow and eventually be able to mature.

This Motion has been brought in the name of people of Murang'a, one million people. You really read in the Assembly's bundle in the opening pages where we refer to our County Fiscal Strategy Paper; for example, that Murang'a is a food insecure place from the documents provided by the executive; that it is a place where 80 per cent of the people rely on agriculture despite the challenges. So, the question is: When you talk about a county which you describe in that manner and talk about a figure of Kshs340 million and talk about Kshs28 million going to *Shillingi kwa Shilling*, in my view, this Motion has been brought essentially to ask you that the devolution baby in Murang'a is under threat of being malnourished. I am asking you to protect that baby by upholding this Motion.

Mr. Chairman, Sir, the second comment I want to make is about the threshold and that has been brought out, authorities were quoted, and as a lawyer, I would refer to the learned judges who have made this rulings about the threshold that is being raised. But I want to ask you, kindly, to rethink about the issue of threshold as my colleague, Mr. Wanyama, has very ably argued this afternoon. If you take that we are standing on a junction, at a cross road and one path is that our governors must be held to a very high threshold before they can be held accountable, are we going to realize this devolution issue?

Mr. Chairman, if it is indicated, for example, in this present case, that my good friend, the Governor, in case of Kshs340 million, that it will be held that there is no personal connection, there is no nexus between him and the procurement people; what are we saying? Are we saying that the chief executives can be so far removed from the process, we can come here and deal with the procurement people?

I want to argue that, in my view, and it is my request to this Committee when you retire that we should lower that threshold as far as our County Chief Executive Officers are concerned. I want you to strongly put that in this particular case. The CEOs of our counties, whether we are talking of hay of 20,000 bales not delivered or even Kshs5million; just a mere Kshs5 million not accounted for, or goods not delivered and somebody collected Kshs5 million, I would think that, that thresholds should be such that even on such an amount, this kind of Motion will be carried. If the Senate, as you are about to do; to raise that threshold, then nobody will ever be held accountable. We would rather forget the blessings which are brought about by devolution.

Finally, Mr. Chairman, Sir, concerning the Ward Development Fund, I will just mention that in passing. Had the County Executive, not just the Governor, done what the law says; develop programmes or policies that flow from our CIDP, today, we will not be here. The MCAs will not be fighting to have projects included in the budget and that is what is happening. The MCAs, essentially, because of lack of flow of information, they fight for projects to be included in the CIDP. I want to reiterate that the motive must be seen not in a negative way, but it is a struggle for the aspirations of what devolution is all about; that anybody in Murang'a from any of the 35 wards at any given time, they can meet the MCA, CEC, the Governor and the Speaker and ask them what programmes they have for their wards or how far the bursary fund is. Those are the threshold levels that I want to

ask your Committee when you retire to be alive to and find that these issues are not just about the legalese that my seniors, my colleague and I have exchanged. It is about people's real lives.

I seek your direction at what point we are going to table our submissions and then I can take my seat. Is it now or later?

**The Chairperson** (Sen. Musila): It has to be now as you finish.

**Mr. Peter Kimani:** My final comment, I want to quote the words of the rabbi or the teacher from Galilee, with respect to all faiths, in this house from Luke 12:47. He said that, that servant who knows the will of the master but does not prepare enough or does not obey instructions, then that servant must be beaten with more blows than other people. We ask your Committee to find that the chief servant of Murang'a has not prepared well in terms of the mandate that the Constitution and various legal statutes bind him to and we ask you that this Motion be upheld.

We thank you most sincerely, Mr. Chairman, Members of the Committee, my colleagues and myself, we have fought a good fight.

**The Chairperson** (Sen. Musila): Well done, counsel for the Assembly. Now I request the counsel for the Governor to give their final statement.

**Mr. Browne Nathans:** Thank you, Mr. Chairman, Sir. Before we conclude let us just give each one of our colleagues a few minutes to address each issue. We have agreed to start with Mr. Ng'ang'a, Mr. Njenga and then Mr. Wanyama. Five minutes each or so, then we can conclude on the specific issue that we have put together.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman. Sir, hon. Senators, my colleague on the part of the Assembly, members of the public at the gallery, all protocol observed, it gives me tremendous pleasure to appear before the Senate. It is a forum that I have appeared before. One thing that pleases me most is the friendly nature in which you interact with the Members, very restrained; and you do not get agitated even when there are some exchanges. This happens.

I can see Sen. Sang' there looking at me. Even as colleagues in the legal profession, we will rise on points of objections and almost to a point of exchanging blows. However, the next minute Sen. Sang' will be buying me a cup of tea. We will be exchanging pleasantries. Sometimes our clients do not understand because they think we are adversaries.

We are very grateful. I must express sincere gratitude for the opportunity that you have given us. You have spent your time, you have overstretched your limits to give us opportunity to interrogate all the matters before us. Your tremendous patience cannot go unnoticed. We are grateful that the honourable Governor has been given a chance to state his case.

I will take very few minutes after that introduction. The alleged failure to call oral evidence in itself does not constitute proof of the material that has been placed before a tribunal of the Senate or a court for purposes of determination. I will do no more than illustrate. For instance, when you stand accused and the prosecution calls its evidence, and the particulars of the charges have not been substantiated, at that point in time, even without calling for rebuttal evidence, that court, that tribunal and even this Special Committee can, in fact, even if the Governor had not filed a single document. The fact that witnesses were called does not mean that evidence tendered is admissible or constitutes proof of the particulars.

Under rule 78(c) of the rules of this Special Committee, it is not mandatory that oral evidence must be called. Perhaps, this is a point that may have escaped the attention of the Assembly. In fact, by looking at the documents supplied to us by the Senate, in support of the alleged violation we were sufficiently satisfied that even without calling oral evidence there was no basis upon which those allegations would have been substantiated, based on their own documents.

The burden of proof never shifts. Yesterday, when the witnesses were called, it is not enough to simply come and say that you have certain witnesses. It is what the witnesses say. We were all here when questions were being posed to some of these witnesses. Some contradicted themselves. Some frankly admitted that even what was in the statement of particulars was not their case. However, those are the witnesses that you are being told that they gave evidence that was uncontroverted.

For the benefit of the counsel of the Assembly, with tremendous respect, the probative value of a testimony is tested through cross-examination. That is why we undermined witnesses trough cross examination. So, you can even call a witness who turns against your case by testifying on matters that are not in the particulars of your charges.

You will interrogate the evidence that was tendered as against the particulars and we will be urging you and the Hon. Senators to find that that burden of proof, that substantiation that they are supposed to demonstrate has not being achieved.

In my closing remark, rule 20 is very significant when you are interacting with the presentations that were made before you. For the simple reason, that, if the evidence that was submitted by the Assembly was not part of the Articles or the resolutions that was forwarded to the Speaker or that contained the documents that were in support---. In fact, I will quote verbatim;

“In presenting its evidence, the Assembly shall not introduce any new evidence that was not part of the allegation against the Governor by the County Assembly as forwarded by the Speaker.”

So, there are allegations and evidence. Even as you look at that big bundle, you will need to, first of all, be satisfied that what were forwarded to the office of the Speaker are

actually the documents that are in that big bundle. If there was no such evidence, then the rules set by this Honourable Senate clearly say that that particular evidence is null and void. This is significant because you have now been told that there is an alleged document on attempted service; he did not go further than that. It came from an intervention. It is an appreciated intervention. It is the answer that intervention elicited that is critical for this special Committee to look at, when interpreting that particular issue. Was it packed? This is because they were aware that the issue of the right to be heard and whether an invitation to appear was done was very critical all through.

However, you are now being told that because of a pending court case. I am glad that Mr. Gathenji said we even won the application for conservatory order. So, they got the ruling that clearly said that this forum is capable of interrogating those matters as to whether the Governor was given a right to be heard. So, they knew that is an issue that would come up. Why was that document, not part of the documents that were submitted?

On the issue of whether the charges have been substantiated as required, listening, for instance, to the submission that has been made on the issue of land, sometimes I could not understand whether it is the tender committee or the Governor who was on trial. We have gone through documents where questions were raised. This transaction happened in the year 2014. In fact, you will see from the documents when it commenced. It even commenced in 2013, went on to 2014. The county government is not saying that there was appropriation of monies to that piece of land. However, there is something you have not been told.

Mr. Chairman, Sir, at the committee level in the Assembly, was there any attempt to query this particular procurement by asking for documents because the Assembly has the initial or original oversight role before the Senate comes in by way of impeachment? Procurement happens every day. Therefore, when you look at 2013 extending to 2014, it forms the basis of impeachment towards the end of the year 2015. If they queried the manner in which that procurement happened, and because anybody can be a whistle blower, did they alert the Ethics and Anti Corruption Commission (EACC) to go and send investigators to request for these documents for purposes of interrogating whether that particular procurement complied with the law? For instance, the documents requested for issue about the third bidder; was there any attempt to request or query how the bidder came in and the documents to show the tender that was submitted?

I would like to relate that to the findings by the Senate in the Chepkwony report, paragraph 26(1), that Committee report says “ this committee further recommends that before initiating impeachment proceedings, the county assembly considers other oversight mechanisms that are available.” There are issues that were raised during Governor Chepkwony’s impeachment, but the Senate asked itself a pertinent question of whether the matter could have been dealt with at the Assembly level.

In our case, we are using the issue as an example. If there is any other query that they may have on any procurement, it should have been demonstrated that those are the

mechanisms that they, first and foremost, engaged or employed, but no action was taken. That they asked for certain documents, but were not provided. We felt sufficiently public spirited that law enforcement agencies on matters of corruption were also involved or were asked to come and ask for documents with respect to that procurement. That has not been done. What we see is that almost two years later, is when it is being laid as a foundation of an impeachment. Our question is: Why was that particular procurement not a basis of impeachment in 2013, but is the basis of an impeachment in 2015? What could be the motive? Could there be anything more than just the issue of a piece of land?

In paragraph 261 of the Chepkwony's report, the Senate went on to say that: "Impeachment need not be the default oversight tool to be applied to every and any violation of the Constitution." We are not saying that there is any violation, but our case is that it has not been demonstrated. In instances where you might find that there are issues over the manner in which certain procurement was done, they ought to be reminded that before they escalate the matter to this level of impeachment, can you demonstrate that at the local level that you have dealt with this matter or this matter is not capable of being dealt with at that level.

Mr. Chairman, Sir, the issue of nexus is very important. The Wambora report is product of this Senate's work, but it is important that when you look at the report that recommended the impeachment of Governor Wambora, there were letters that were in the hand of – I am saying this because in that matter, I was acting on behalf of the County Assembly of Embu, it is a matter I am well versed with – of the Hon. Governor. Part of the reason the issue of nexus came up besides the issue of general accountability was that there was a document in the personal hand of the Governor. What you have not been shown in support of all those violations is a document authored, for instance, on the issue of that procurement that the Governor authored and said; use this method and not the other or carry out procurement in a certain way and not in the other way.

Besides that is the issue of threshold. You may find irregularities, but that does not constitute gross violation. In the Chepkwony impeachment hearing, Mr. Wanyama took you through what the Senate has done before in as far as this issue is concerned. He went down to describe what constitutes gross violation.

Although we have been told that you are not bound, but I must respectfully submit that if there will be no good reason for this Committee of the Senate, if there is anything that has been put before you to demonstrate why that case was distinct from this one. Even when we say that there should be a departure from precedence, the first thing should be; can you show us why we should depart from that precedence? There is an argument that if it is a decision from the High Court, it may not bind the High Court because it is from a court of concurrent jurisdiction but it can persuade.

Because this Committee is not reinventing the wheel, you have dealt with this matter in the Wambora and Chepkwony impeachment. The recommendation and the findings of your colleagues are very material so that there can be consistent jurisprudence that is churned out by the Senate. That is very critical so that when one interrogates the



reasoning of the Senate, one does not wonder; how come this one was treated differently? I have just shown one example that in the case of Governor Wambora's impeachment, unlike this other case of Chepkwony, you got a document on the issue of maize that had been authored by the Governor and was in the hands of the Assembly.

Mr. Chairman, Sir, without any proof that this particular impeachment should be dealt with differently from the way other impeachment processes have been dealt with; I urge you to be persuaded by the findings that were made by your colleagues in the impeachment of Governor Chepkwony. Critically, nexus is material because on the basis of what the law says, and the material that has been presented before you to say whether that is there and, of course, the issue of nexus. There are other decisions of the court which I do not want to go into because they were highlighted.

Mr. Chairman, Sir, you were told that no answer came from the Governor. However, I find that submission very interesting, that merely because the Governor did not take the seat to rebut, he has admitted those allegations. I imagine that is not the proposition that the learned senior for the Assembly just because the Governor did not take that seat to testify, then everything goes. Nothing could be further from the truth. The burden cannot shift and I must point that out because one of the other points that was raised on the issue of advertisement that even after their own witness said that he does not go by the particulars, we were asked that in the figure we admitted of Kshs181 million, I must put this into perspective because it came up and I made an intervention.

What we have stated in our response on account of that expenditure, we did not have an expenditure for advertisement. Instead, we had an expenditure for communication which takes care of expenditure for communication and takes care of public participation, advertisement you run in the newspaper advertisement. However, what was suggested by Counsel is that even the Kshs181 million that we referred to, we did not provide proof or rather it was not in compliance with the amount that was appropriated. However, were those particulars that were in the charge sheet? Where you have to remind them that they cannot depart from their case is simple because if you allow them to do that, they will ambush us. For instance, by saying that they should have disapproved or presented evidence on the Kshs181 million, that one we have admitted. That was not their case. We still have to hold them to their case

Mr. Chairman, Sir, on the issue of protection of devolution, the Senate is not there to protect the County Assembly. It is true that under Article 96, it has a very key role which is to protect county governments. We agree that it has a very important role when it comes to matters oversight, but what is the concept of county? I think that there is no better way of protecting this county government than promoting a harmonious way of county executive working together with the county assemblies. I am impressed that in the Chepkwony report, for instance, the Committee recommended urgent reconciliation initiatives. That this would, perhaps, be a very important learning experience for all of us. It was not be easy for this Committee, the assembly and the Governor either. However, there are issues and lessons that we can learn from this process.

Mr. Chairman, Sir, you can even recommend, for instance, that there be a reconciliation initiative that were suggested in the case of Governor Chepkwony. The County Executive had worked better with the Assembly, but we suggested that this or that be done. That would also be in keeping with the work that you have been assigned by Article 96, so that you are not seen to have abdicated your role of promoting devolution and protecting County Government.

In as much as the Assembly will say that we need to be protected, remember that County Government constitutes the executive and the Assembly so that you also have a role in protecting the Assembly so when there are issues that might create a wedge, you also have an important role to promote harmony in a manner in which those two organs of the county government operate.

In my humble submission, even where you find that things would have been done better, I urge you with tremendous respect that you be very slow and reluctant to recommend the drastic action of removal of the Governor from office. I believe that what we saw in the recommendations of the report from the Auditor-General and from the office of the Controller of Budget that this is work in progress. Can we nature this nascent concept of devolution or county government which are still at the infancy stage because we are all learning?

We are yet even to conduct our second election under this new Constitution. Can we assist them in doing things better by suggesting recommendations, and I believe there would be no better way of resolving this issue than making such recommendations. Otherwise, I am most grateful, the remaining minutes I will donate to my learned friend.

Thank you for the opportunity.

**The Chairperson** (Sen. Musila): Thank you counsel.

**Mr. Browne Nathans:** Thank you Mr. Chairman, Sir. We consulted sufficiently and we feel that our brother has done justice to the subject. I only want to add the following two things: The pains I want to urge you to feel. I invite you to feel not just the pain but to feel upset and genuinely angry that for the last three weeks, one county assembly, one county government and one county called Murang'a has been at a stand still. Because of the actions that were precipitated by our colleagues from the assembly, we spend energies, expenditure unbudgeted for, to sit from 10.00 a.m., until nearly 10.00 p.m., simply to deal with issues that ought to have been canvassed at the county assembly.

We are dealing with the rigors of the law sounding very learned, very intelligent for no reason because we are not. One person who is more intelligent that has not been invited here but we have always referred to as "*Wanjiku*", has suffered and will suffer. In fact, the blackmail that has been dealt to the entire process is when the Controller of Budget came and said they will not give the Kshs700 million. How much pain are you feeling? I am feeling more pained than anybody else on earth that "*Wanjiku*" has formally been denied the money.

Had these two colleagues sat to discuss the Ward Development Fund, for example, and the impediments to implementation of whatever it is that the MCAs had wanted to do is so drastic---. So, they will have to go back to the drawing board. That Act has now to be repealed. We have to go through a long process for the county executive to go round. They have not been paid for two months from the reports that we have heard. If you check the gallery here, these are men and women who have to board buses and *matatus* to come and listen to things they ought to have listened to – first of all not even at all – at the county assembly. That pain must be expressed through express deliberations that you must make and have a final determination and say: “We will not be party to this denial of service to that person who made us who we are; Senators, governors, Members of the National Assembly or the Presidency for that matter”.

Mr. Chairman, Sir, we owe it to those who formulated the principles that govern the devolution at this country and the region and beyond. Service delivery is the cornerstone. I urge this very able Special Committee of the Senate of the Republic of Kenya to have no emotion, partiality but serve that lady and I am sure the gentleman we call *Wanjiku*, and have mercy upon that soul, and say we will come to your aide.

These two, for example, under even Article 159 (2) (c), I think that is where it is if I am to be corrected on alternative dispute resolution mechanisms, could be invoked and say you go out there and, in fact, during tea break and I can make this disclosure. I had a quick chat with the Majority Leader who is the mover the Motion and she said they do not even understand why we are here. My learned colleague here said as much as we do not even know why we are here, because had we resolved these issues down at the county assembly level, we would be very far.

Mr. Chairman, Sir, without even involving anybody to comment on what I have just said, this is my personal thought, I just want to close by encouraging us as a country to resolve issues more amicably than we have seen. These are good intentioned people, let us go out there and preach the gospel of defending devolution.

With those remarks, I want to conclude since my colleague referred to the Holy Bible and I think I cede here I cannot ask that I be forgiven to make reference to the book of Genesis. I referred to it yesterday and I am not going to do what Sen. Madzayo asked and I will not repeat. But frankly, if God asked Adam what he had done and God is the know it all. He still called out Adam three times; Adam, Adam, Adam. The county assembly Speaker could not have easily called; Mwangi, Mwangi, Mwangi, where are you, come and talk to me. That would have been much easier than to drag all these women and men here on *matatus*, they are going back at around 9.00 p.m., and it is very painful. You do not even know whether they are going with the *matatus*, let alone the bus fare.

So, we are subjecting the populace of this republic to untold sufferings for no reason. We have demonstrated now we are going to a case of the Kshs700 million as that is our case; malice. We encourage this not to be displayed here.

Finally, a man who was not given a chance to speak, he has been dragged out of his office - he swore to protect the Constitution and protect devolution - has not been working, and so have the MCAs. They have denied the populace service. I urge you to find that this matter has no basis, this petition ought to be not just thrown out but as a good example to members to county assemblies throughout the Republic, they must never be encouraged to use ill-motives, ill-will and bad intentions to come and canvass issues – in fact, even resulting in the Controller of Budget telling them there is no money for them.

I want to thank my colleagues, my senior learned here, Mr. Gathenji, he used to be Chairman of the Kenya Society for the Blind, he used to invite me to play a bit of golf with him, and I apologize if I spoke out of turn to him. I want to thank everybody who has been on my team, in particular, Mr. Benson Wairegi. He is the legal advisor to the Government and the able eloquent gentleman, Mbugua, Peter Wanyama - you cannot even say anything about him; he is the father of prosecution of devolution matters - and Mr. Njenga.

I thank them and I thank you Senators for listening to us.

**The Chairperson** (Sen. Musila): Do I take it that we are done? Hon. Senators, Members of this Special Committee, ladies and gentlemen, we have come to the end of the public hearings by the Select Committee and I want to thank all of you for your patience. It has been a long and fruitful two days. I want to thank the County Assembly of Murang'a and their counsel for their participation and their submissions in this hearing. I similarly thank the governor and his counsel for their participation and submissions. I appreciate and thank Members of the Committee for their dedication to duty, I think we have all observed that the distinguished Senators have been prompt and have been available all the time.

I thank you colleagues.

The Select Committee will now retire and consider the matter in accordance with the Standing Order No. 68 of the Senate Standing Orders and as required by the constitutional mandate of the Senate in this matter. In terms of the way forward, allow me to inform you and in particular the counsel; for the respective parties as follows:-

1. The Special Committee shall, pursuant to Standing Order No. 68 (2) (b) of the Standing Orders of the Senate, report to the Senate on whether it finds the particulars of the allegations against the governor to have been substantiated at a Special Sitting of the Senate to be held tomorrow 6<sup>th</sup> November, 2015 at 3.00 p.m., in the Senate Chamber.
2. In accordance with Standing Order No. 68 (4) (a) of the Senate Standing Orders, should the Special Committee report that the particulars of the allegations against the governor have not been substantiated, further proceedings shall not be taken by the Senate in respect of the allegations

3. In terms of Standing Order No. 68 (4) (b) of the Senate Standing Orders, should the Special Committee report that the particulars of any allegation against the governor have been substantiated, the Senate shall after according the governor an opportunity to be heard, vote on the charges.

It is important, therefore, to note ladies and gentlemen and in particular counsels for the Governor, that if the particulars of any allegation against the Governor is substantiated, the Governor shall be accorded an opportunity to be heard during tomorrow's special sitting of the Senate to be held in the Senate Chamber, Main Parliament Buildings. Counsels are, therefore, advised to make such arrangements as may be necessary in this regard.

Finally, it is important to reiterate and assure you all and in particular the residents of Murang'a County that the Committee shall discharge its mandate impartially and in accordance with the Constitution, as I indicated from the beginning, yesterday.

I thank you ladies and gentlemen and now wish to declare this session closed.

*(The Special Committee adjourned at 8.30 p.m.)*