

REPUBLIC OF KENYA



THE SENATE

ELEVENTH PARLIAMENT

Paper Laid  
by Hon Sen. Obure.

03/06/14  
*[Signature]*

Approved  
*[Signature]*

3/6/2014

THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED  
REMOVAL FROM OFFICE OF PROF. PAUL KIPRONO CHEPKWONY, THE  
GOVERNOR OF KERICHO COUNTY

3<sup>RD</sup> JUNE, 2014

*[Signature]*

## PREFACE

**Mr. Speaker Sir,**

Honourable Senators will recall that at the special sitting of the Senate held on Friday, 23<sup>rd</sup> May, 2014, the Honourable Speaker of the Senate, by way of a Communication from the Chair, informed the Senate that he had received correspondence from the Speaker of the County Assembly of Kericho communicating the approval of a Motion by the County Assembly of Kericho to remove from office, by impeachment, the Governor of Kericho County.

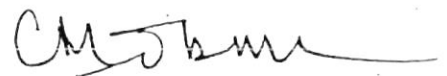
**Mr. Speaker Sir,**

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

*THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 14<sup>th</sup> May, 2014 the County Assembly of Kericho approved a Motion "to remove from office, by impeachment," the County Governor of Kericho County;*

*AND FURTHER, WHEREAS by a letter dated 15<sup>th</sup> May, 2014 (Ref: KCA/Gov/Vol.(1)) and received in the Office of the Speaker of the Senate on 16<sup>th</sup> May, 2014, the Speaker of the County Assembly of Kericho informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;*

*AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b) the Senate, by resolution, may*



*appoint a special committee comprising eleven of its Members to investigate the matter;*

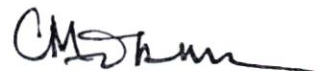
***NOW THEREFORE***, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b), the Senate resolves to establish a special committee comprising the following Senators –

1. *Senator Kiraitu Murungi*
2. *Senator Stephen Sang'*
3. *Senator Daniel Karaba*
4. *Senator Fatuma Dullo*
5. *Senator Beatrice Elachi*
6. *Senator Billow Kerrow*
7. *Senator Danson Mwazo Mwakulegwa*
8. *Senator Christopher Mogere Obure*
9. *Senator Abdirahman Ali Hassan*
10. *Senator Catherine Mukiite Nabwala*
11. *Senator Mutula Kilonzo Junior*

*to investigate the proposed removal from office of the Governor of Kericho County and to report to the Senate within ten (10) days of its appointment on whether it finds the Particulars of the Allegations to have been substantiated.*

**Mr. Speaker Sir,**

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



1. *Senator Kiraitu Murungi;*
2. *Senator Stephen Sang’;*
3. *Senator Daniel Karaba;*
4. *Senator Fatuma Dullo;*
5. *Senator Beatrice Elachi;*
6. *Senator Billow Kerrow;*
7. *Senator Danson Mwazo Mwakulegwa;*
8. *Senator Christopher Mogere Obure;*
9. *Senator Abdirahman Ali Hassan;*
10. *Senator Catherine Mukiite Nabwala; and*
11. *Senator Mutula Kilonzo Junior,*

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

**Mr. Speaker Sir,**

Section 33(4) of the County Governments Act, 2012 and standing order 68(2) of the Senate Standing Orders mandate the Special Committee to-

- (a) investigate the matter; and*
- (b) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated.*

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

**Mr. Speaker Sir,**





The Special Committee held its first meeting on the afternoon of Friday, 23<sup>rd</sup> May, 2014, immediately following its establishment. Pursuant to standing order 183, owing to the urgency of the matter at hand, at that meeting, the Committee conducted the election of its Chairman and Vice-Chairman. Senator Christopher Obure and Senator Kiraitu Murungi were elected unopposed to the positions of Chairman and Vice-Chairman, respectively.

**Mr. Speaker Sir,**

Section 33 and standing order 68(3) of the Senate Standing Orders provide that the Governor shall have the right to appear and be represented before the Special Committee during its investigations. Pursuant to these provisions of the law, the Committee invited both the Governor and the County Assembly to appear and be represented before the Committee. Both parties were represented by Counsel in the proceedings.

**Mr. Speaker Sir,**


The Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to the Committee in the execution of its mandate.

The Committee further extends its appreciation to the parties to the matter; namely, the County Assembly of Kericho County and its Advocates and the Governor of Kericho County and his Advocates for their well-researched and eloquent submissions in this matter. The Committee also appreciates the media for the coverage of its proceedings during the course of the investigations. Further, the Committee acknowledges the members of the public who expressed great interest in the proceedings, sitting through the hearings as they keenly followed the proceedings in the matter.

**Mr. Speaker Sir,**



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

SIGNED:  .....

SEN. CHRISTOPHER OBURE, M.P.  
(CHAIRPERSON)

DATE: 3rd June 2014 .....

XXXXXXXXXXXXXXXXXXXXXXXXXXXX



## 1.0 INTRODUCTION

### 1.1. Background

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 14<sup>th</sup> May, 2014, the County Assembly of Kericho approved a Motion “to remove from office, by impeachment,” the Governor of Kericho County.

2. Article 181 of the Constitution provides as follows-

#### *Removal of a county governor*

(1) *A county governor may be removed from office on any of the following grounds—*

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

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

*(c) abuse of office or gross misconduct; or*

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


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

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

#### *Removal of a governor*

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

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



- (a) *the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*
  - (b) *the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
- (3) *Within seven days after receiving notice of a resolution from the speaker of the county assembly—*
- (a) *the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*
  - (b) *the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
- (4) *A special committee appointed under subsection (3)(b) shall—*
- (a) *investigate the matter; and*
  - (b) *report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
- (5) *The governor shall have the right to appear and be represented before the special committee during its investigations.*
- (6) *If the special committee reports that the particulars of any allegation against the governor—*
- (a) *have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*
  - (b) *have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*
- (7) *If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (8) *If a vote in the Senate fails to result in the removal of the governor, the*





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

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

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

4. By a letter dated 15<sup>th</sup> May, 2014 (Ref: KCA/Gov/Vol./I) which was received in the Office of the Speaker of the Senate on 16<sup>th</sup> May, 2014, the Speaker of the County Assembly of Kericho informed the Speaker of the Senate of the approval of the Motion for the removal from office of the Governor of Kericho County by the County Assembly of Kericho and further forwarded to the Speaker of the Senate the following documents in respect of the Governor-

- (1) the Particulars of Allegations thereon and related annexures;
- (2) the Order Paper in respect of the business conducted by the County Assembly on 14<sup>th</sup> May, 2014; and
- (3) the Hansard Recording of the proceedings in respect of the Motion for the removal from office of the Governor from office.

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



6. In terms of Article 181 of the Constitution, section 33(3)(a) of the County Governments Act and standing order 68(1)(a) of the Senate Standing Orders, the Speaker of the Senate is required, *within seven days after receiving notice of a resolution from the Speaker of a County Assembly, to convene a meeting of the Senate to hear charges against the Governor.*
7. In this respect, by *Gazette* Notice No. 3378 dated 20<sup>th</sup> May, 2014, which was published in a Special Issue of the *Kenya Gazette* published on 20<sup>th</sup> May, 2014, the Speaker of the Senate convened a special sitting of the Senate for Friday, 23<sup>rd</sup> May, 2014 at the Senate Chamber on the First Floor of the County Hall Building in Nairobi, commencing at 2:30 p.m. Pursuant to standing order 29(5) of the Senate Standing Orders, the Speaker specified the business of that sitting to be the hearing of the charges against Prof. Paul Kiprono Chepkwony, the Governor, Kericho County.
8. The *Gazette* Notice is attached as *Annex 2*.
- 1.2. **The Special Sitting of the Senate held on Friday, 23<sup>rd</sup> May, 2014**
9. The special sitting of the Senate was held on Friday, 23<sup>rd</sup> May, 2014. The Order Paper of that sitting is attached as *Annex 3*. At that sitting, the Speaker of the Senate, by way of a Communication, informed the Senators that he had received communication from the Speaker of the County Assembly of Kericho relating to the approval of the Motion by the County Assembly of Kericho for the removal from office of the Governor of Kericho County. The Communications made by the Speaker of the Senate on that day are attached as *Annex 4(a) and (b)*.
10. Thereafter, the Senate Majority Leader gave Notice of and thereafter moved the following Motion-





**THAT, WHEREAS**, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 14<sup>th</sup> May, 2014 the County Assembly of Kericho approved a Motion “to remove from office, by impeachment,” the County Governor of Kericho County;

**AND FURTHER, WHEREAS** by a letter dated 15<sup>th</sup> May, 2014 (Ref: KCA/Gov/Vol./I) and received in the Office of the Speaker of the Senate on 16<sup>th</sup> May, 2014, the Speaker of the County Assembly of Kericho informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

**AND WHEREAS**, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b) the Senate, by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

**NOW THEREFORE**, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b), the Senate resolves to establish a Special Committee comprising the following Senators –

1. Senator Kiraitu Murungi
2. Senator Stephen Sang’
3. Senator Daniel Karaba
4. Senator Fatuma Dullo
5. Senator Beatrice Elachi
6. Senator Billow Kerrow
7. Senator Danson Mwazo Mwakulegwa
8. Senator Christopher Mogere Obure

*CM Obure*

9. *Senator Abdirahman Ali Hassan*
10. *Senator Catherine Mukiite Nabwala*
11. *Senator Mutula Kilonzo Junior*

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

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

1. *Senator Kiraitu Murungi;*
2. *Senator Stephen Sang’;*
3. *Senator Daniel Karaba;*
4. *Senator Fatuma Dullo;*
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10. *Senator Catherine Mukiite Nabwala; and*
11. *Senator Mutula Kilonzo Junior;*

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

## 2.0 METHOD OF WORK



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

**2.1. Meetings of the Special Committee**

13. The Special Committee held its first meeting on the afternoon of Friday, 23<sup>rd</sup> May, 2014, immediately following its establishment. Pursuant to standing order 183, owing to the strict timelines attached to the execution of the mandate of the Special Committee, at that meeting, the Clerk of the Senate conducted the election of the Chairperson and Vice-Chairman of the Committee. Senator Christopher Obure was elected, unopposed, as the Chairman of the Committee while Senator Kiraitu Murungi was similarly elected unopposed as the Vice-Chairman of the Committee.

**2.2. Indicative Programme of Events**

14. Following the conduct of the election at the first meeting of the Committee, the Committee considered an Indicative Programme of Events which is attached as *Annex 5*. The Committee observed that in terms of section 33(4)(b) of the County Governments Act, 2012 and standing order 68(2)(b) of the Senate Standing Orders, the Committee had only ten days within which to investigate the matter in respect of the Governor and thereafter to report to the Senate on whether it found the Particulars of the Allegations against the Governor to have been substantiated.

15. It was evident to the Committee, at that early stage, that bearing in mind the nature of the proceedings anticipated in the hearing for the removal from office of the Governor, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.

**2.3. Invitations to Appear**



16. The Committee observed that section 33(5) of the County Governments Act, 2012 and standing order 68(3) of the Senate Standing Orders provide that *“the Governor shall have the right to appear and be represented before the special committee during its investigations”*.
17. The Committee further observed that the County Assembly, as the originator of the Resolution for the removal of the Governor had by the letter to the Speaker of the Senate dated 15<sup>th</sup> May, 2014 filed, together with the Resolution of the County Assembly, a number of documents in respect of the Resolution. The Assembly therefore had the option not to appear before the Committee and to rely entirely on the written documentation filed with the Office of the Speaker. However, the Committee observed that in the interests of justice, it would also be necessary to invite the Assembly to appear before the Committee, if it so desired, and to produce further evidence, if any, be it written or oral evidence.
18. Having made these observations, and taking into account the limited time available, at its first meeting held on 23<sup>rd</sup> May, 2014, the Committee resolved to invite the Assembly and the Governor to appear before the Committee for the hearing of the evidence. Copies of the Invitations to Appear are attached as *Annex 6(a) and (b)*. The Invitations to Appear were duly served on the parties and both parties were represented at the hearing as follows-
- (a) Mr. Charles Njenga and Mr. George Nganga Mbugua of the firm of M/s Muchoki Kangata Njenga & Company appeared on behalf of the County Assembly;
  - (b) Mr. Peter Wanyama of M/s Manyonge Wanyama & Associates Advocates and Mr. Kimutai Bosek appeared on behalf of the Governor.





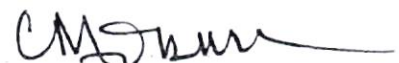
19. The Invitation to Appear to the County Assembly required the Assembly, where it chose to appear before the Committee, by 26<sup>th</sup> May, 2014 , to file with the Office of the Clerk of the Senate, documentation-

- (a) designating the Members, if any, who would attend and represent the Assembly in the proceedings before the Special Committee;
- (b) indicating the mode of appearance by the Members before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) specifying any other evidence to be relied on.

20. In the Invitation to Appear, the Governor was requested to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Governor was informed that he would be required, by 26<sup>th</sup> May, 2014, to file an answer to the charges with the Office of the Clerk of the Senate in which the Governor would set out-

- (a) the Governor's response to the Particulars of the Allegations;
- (b) how the Governor proposed to appear before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) any other evidence to be relied on.

21. In addition to the documents submitted by the Speaker of the County Assembly to the Senate by the letter dated 15<sup>th</sup> May, 2014, the County Assembly further filed a



Response to the Invitation to Appear on 26<sup>th</sup> May, 2014 to which was attached various annexures and which is marked as *Annex 7*.

22. On 22<sup>nd</sup> May, 2014, Counsel for the Governor filed with the Office of the Clerk of the Senate a document titled “Responses by Governor Prof. Paul Kiprono Chepkwony on the Particulars from the County Assembly”, which is marked as *Annex 8*, and a Statement by the Governor, which is marked as *Annex 9*. On 26<sup>th</sup> May, 2014, Counsel for the Governor further filed-

(a) a list of witnesses and witness statements – attached as *Annex 10*;

(b) a bundle of video recordings – *Annex 11*; and

(c) a list of persons that the Governor requested the Senate to summon to the Committee as well as documents which the Governor requested the Senate to direct the County Assembly to produce. These are marked as *Annex 12*.

23. During the Conference of Parties, the County Assembly further requested and was allowed to file additional documentation which contained a *Gazette* Notice and various court decisions as well as the minutes of the House Business Committee and a record indicating the allowances paid to the members of the Committee. Counsel to the Governor did not object to the production of the documents and the Committee admitted the documents. The bundle is attached as *Annex 13*.

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

24. It was noted that Article 181 of the Constitution, section 33 of the County Governments Act, 2012 and standing order 68 of the Senate Standing Orders did not provide sufficient detail on the procedure to be followed by the Special Committee in the conduct of its investigation. It was further noted that previous Special Committees of the Senate that had carried out similar mandates had



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

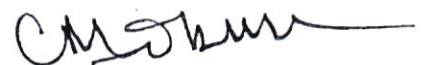
25. The Committee therefore adopted the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor on 23<sup>rd</sup> May, 2014 as had been applied by the previous Special Committees. The Rules, which are attached as *Annex 14*, regulated the procedure of the Committees on a number of critical matters in respect of which the County Governments Act and the Standing Orders were silent.

### 3.0 THE CONFERENCE OF PARTIES

26. The Conference of Parties was held on 28<sup>th</sup> May, 2014. This provided the opportunity for the formal introduction of the Counsel for both parties to the Special Committee. At that meeting the Special Committee presented a Programme for the Hearing which is attached as *Annex 15*.

### 4.0 READING OF THE CHARGES

27. Pursuant to rule 16 of the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor, the hearing before the Committee commenced with the reading out, verbatim, of the Particulars of the Allegations against the Governor. The Charges are set out at page 3 of *Annex 1*.
28. Before addressing itself to the specifics of the Charges, the Special Committee commenced by considering the issue of the matters antecedent to the filing of the Notice of Motion at the County Assembly of Kericho and the propriety of the procedures at the County Assembly of Kericho.



5.0 MATTERS ANTECEDENT TO FILING OF THE NOTICE OF MOTION AT THE COUNTY ASSEMBLY OF KERICHO AND PROPRIETY OF THE PROCEDURES AT THE COUNTY ASSEMBLY OF KERICHO

29. The Governor of Kericho County, in his response to the allegations against him by the County Assembly of Kericho, first took issue with matters that happened prior to the filing of the Notice of Motion at the County Assembly as well as the procedure used to impeach him at the County Assembly.
30. The Governor testified, and his Counsel submitted, to the Special Committee that the County Executive of Kericho had in April 2014 filed a constitutional Petition against the Speaker of the County Assembly of Kericho and the County Assembly of Kericho at the High Court of Kericho. This Petition, being constitutional Petition No. 4 of 2014, sought an interpretation of the constitutional functions of the County Executive *vis-à-vis* the County Assembly. The Governor's Counsel in the impeachment proceedings also represented the County Executive of Kericho in the High Court Petition.
31. The Governor testified, and his Counsel submitted, that the County Executive had taken the view that the County Assembly of Kericho had overstepped its mandate as set out at Article 185(3) of the Constitution of Kenya which provides as follows:

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

32. The County Executive of Kericho, in filing the Constitutional Petition, had taken exception to the County Assembly of Kericho's actions of passing Motions that stopped the execution of Executive functions. This, the Governor charged,

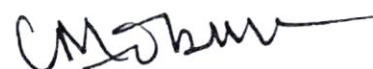
violated the principle of separation of powers. The County Assembly of Kericho was accused of exercising its powers in an arbitrary, malicious, unreasonable, erratic, capricious and haphazard manner. In particular the Governor complained that the County Assembly had passed, among others, the following Motions that unlawfully hampered the exercise of Executive authority:

(a) A Motion passed on 20<sup>th</sup> February 2014 urging the Kericho County Public Service Board to stop the recruitment of ward administrators until the Kericho County Public Service Board avails to the Assembly the criteria or grounds used in short listing the candidates for the position of ward administrators.

(b) A Motion passed on 5<sup>th</sup> March 2014 seeking the County Assembly to vote on the distribution of ECDE teachers among the 30 wards in the County of Kericho.

(c) A Motion passed on 12<sup>th</sup> March 2014 stopping the Department of Early Childhood Education and Vocational Training of the County Executive of Kericho from implementing a bursary scheme for needy students in the County by stopping the issuance of bursary forms to the said needy students.

33. The Governor further accused the County Assembly of Kericho of convening meetings with officials from a foreign country which he alleged was an exclusive power of the County Executive. Other accusations against the County Assembly of Kericho included-

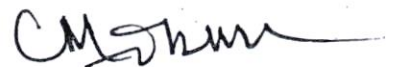




- (a) arbitrarily and capriciously recommending the removal of members of the County Executive Committee and County Public Service Board; and
  - (b) harassing, intimidating and shouting at public officers in contravention of the national values and principles of governance set out at Article 10 of the Constitution.
34. The Governor submitted that the County Executive of Kericho filed the Constitutional Petition solely with the noble intention of obtaining clear directions from the High Court on the Constitutional roles and boundaries of the County Executive *vis-a-vis* the County Assembly as it is the High Court that is mandated by Article 165 of the Constitution to interpret the Constitution. To demonstrate the County Executive's noble intentions in filing the Petition, the Governor pointed out that the County Executive did not seek any costs in the Petition.
35. The Speaker of the County Assembly of Kericho and some of the Members of the County Assembly, the Governor testified, were unhappy to the filing of the Constitutional Petition. The Petition came up for hearing on 30<sup>th</sup> April 2014. After attending Court on the matter, the Speaker of the County Assembly of Kericho and some Members of the County Assembly led a demonstration against the Governor of Kericho County for ostensibly filing the Constitutional Petition to stop the County Assembly from working and chanted slogans to the effect that Governor Chepkwony must go.
36. The Governor further stated that on the same day, 30<sup>th</sup> April 2014, a Motion was prepared seeking the impeachment of Governor Chepkwony. This Motion was posted on the internet with the intention of ridiculing the Governor. Some Members of the County Assembly also vowed to teach the Governor a lesson that he would never forget.



37. Following the demonstrations in Kericho town and the impending impeachment becoming public knowledge the Myoot Kipsigis Council of Elders decided to intervene and convened and appointed a twelve person Committee to consult extensively with the County Executive and the County Assembly with a view to reconciling their differences. The Council of Elders recommended that the County Executive withdraws the Constitutional Petition it had filed while the County Assembly stops the impeachment process.
38. The County Executive of Kericho complied with the recommendation of the Kipsigis Council of Elders and withdrew the Constitutional Petition. The County Assembly of Kericho however declined to stop the impeachment proceedings and on 9<sup>th</sup> May 2014 served the Governor of Kericho with a letter requiring the Governor to appear before the County Assembly on Wednesday, 14<sup>th</sup> May, 2014 at 2.30 p.m.
39. The Governor in his testimony in chief complained that the document containing the allegations against him was not signed to authenticate its source and its purpose. He further complained that the Motion he had seen on 30<sup>th</sup> April 2014 contained five (5) allegations against him but had no particulars of the charges yet the Motion he was served with on 9<sup>th</sup> May, 2014 had three charges (3) as well as particulars. This led the Governor to wonder how the Speaker of the County Assembly of Kericho had approved the Motion without particulars and how the charges reduced to three and particulars were subsequently inserted. The Governor therefore charged that the Speaker of the County Assembly had been actuated by malice and pent up emotions to approve the motion.
40. However, during cross-examination, the Governor admitted that he had been served with all charges and particulars against him on the 9<sup>th</sup> May 2014.





41. The Governor further alleged that a female nominated Member of the County Assembly approached him prior to the impeachment hearings of 14<sup>th</sup> May 2014 and solicited bribes both on her behalf and on behalf of other Members of the County Assembly in order to “*save the Governor*” from the impeachment proceedings. He had however not reported this incident to either the police or the Ethics and Anti-Corruption Commission.
42. The Governor averred that the impeachment proceedings at the County Assembly did not comply with the County Assembly of Kericho’s Standing Orders, the County Governments Act 2012, the rules of natural justice and the Constitution of Kenya in that-
- (a) The County Assembly did not constitute a select Committee to investigate the allegations as required by Standing Order No. 63.
  - (b) The Select Committee or any of the Committees has never summoned the Governor to appear before it to answer to any allegation. Article 195 of the Constitution provides for the unqualified and unequivocal powers of the County Assembly and its committees to summon any person to appear before it.
  - (c) In approving the notice of motion for impeachment, the Speaker acted in violation of standing order 63 of the interim standing orders in that-
    - (i) a Select Committee had never been established to investigate the allegations against the Governor;
    - (ii) the Governor had never been summoned and/or required to appear before the select Committee;
    - (iii) the Select Committee had never prepared a report;
    - (iv) the impeachment proceedings in the Assembly could only be based on the report of the Select Committee; and





(v) the Governor had never been served with the report of a Select Committee.

43. The Governor further faulted the proceedings before the County Assembly on the basis of the meeting of the House Business Committee that approved the impeachment motion. Governor Chepkwony charged that, though the County Assembly Speaker alleged that the House Business Committee sat on 9<sup>th</sup> May, 2014 and approved the Motion for introduction in the Order Paper for Wednesday, 14<sup>th</sup> May, 2014, such a meeting never took place. The Governor averred that there was no House Business Committee meeting on 9<sup>th</sup> May, 2014 and if there was a meeting, there was no sufficient quorum for the meeting because-

- (i) on 8<sup>th</sup> May 2014 there was a meeting of all women elected and nominated leaders in Naivasha. All women MCA's from Kericho County Assembly were paid per diem to attend the meeting at Naivasha; and
- (ii) the other male members of the Committee were in Nairobi and Naivasha for meetings.

44. During the hearing the Governor attempted to call Charles Ng'etich, a Member of the County Assembly of Kericho, to testify as to the meeting of the House Business Committee held on 9<sup>th</sup> May, 2014. This Special Committee however refused to allow Charles Ng'etich to testify without leave of the County Assembly or its House Business Committee on the basis that such testimony would violate the provisions of section 19 of the National Assembly (Powers and Privileges) Act, Cap 6 of the Laws of Kenya which states as follows-

*Evidence of proceedings in the Assembly or any committee not to be given without leave*

*(1) No member or officer of the Assembly, and no person employed to take minutes of evidence before the Assembly or any committee, shall give evidence elsewhere in respect of the contents of those minutes of evidence or of the contents of any document laid before the Assembly or that*



*committee or in respect of any proceedings or examination held before the Assembly or that committee without special leave first obtained.*

45. Article 196(3) of the Constitution further provides as follows-

*Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.*

46. While section 17 of the County Governments Act stipulates as follows-

*Powers, privileges and immunities of a county assembly  
The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly.*

47. The Governor averred that the proceedings to remove him from office were extremely malicious having been precipitated by the decision of the County Executive of Kericho to file Constitutional Petition No. 4 of 2014 wherein the Executive complained that the County Assembly was breaching the principle of separation of powers when exercising its oversight roles.

48. The Special Committee has considered the complaints raised by the Governor as to the matters that occurred prior to the bringing of the Motion of impeachment against him before the County Assembly as well as the complaints that the Kericho County Assembly breached its own Standing Orders in the process of impeachment and further that he never received a fair hearing before the Assembly.

49. On the allegations of malice and inappropriate behavior on the part of the Speaker of the County Assembly of Kericho and the allegation of solicitation of bribes by a Member of the County Assembly of Kericho, the Special Committee finds that these matters, though important, are outside the purview and scope of the

instructions that the Committee received from the Senate. The Governor should report these matters to the relevant authorities for further investigations.

50. The Committee notes that standing order 63 of the Interim County Assembly Standing Orders states as follows-

*(1) Whenever the Constitution, any written law or these Standing Orders-*

*(a) requires the County 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 County Assembly considering the matter and shall be entitled to legal representation;*

*(b) requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person-*

*(i) At the date and time to be determined by the Speaker;*

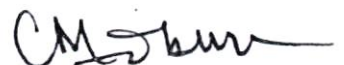
*(ii) For a duration of not more (than) two hours or such further time as the Speaker may, in each case determine; and*

*(iii) In such other manner and order as the Speaker shall, in each case, determine.*

*(2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion.*

51. The Governor contended that standing order 63 made it mandatory for the County Assembly to appoint a Special Committee to first hear the Governor prior to the Assembly, in Plenary, hearing the Governor. The Committee finds that a proper reading of the Standing Order does not support this position. The Committee observed that the procedure for removal of a Governor is set out at standing order 60 and was followed. Standing order 63 deals with removal of a member of a County Executive Committee.

52. The County Assembly, as is the case with the Senate under section 33(3)(b) of the County Governments Act, is free to decide whether or not to appoint a Committee to consider the matter. The most crucial principle under standing order 63, and



indeed under Articles 47 and 50(1) of the Constitution, is that the Governor must be given a fair trial which includes the right to be heard and to have adequate time and facilities to prepare a defence.

53. The Committee has noted the Governor's admission that he received the charges and supporting documents on 9<sup>th</sup> May 2014 and that he appeared before the County Assembly, together with his Counsel on 14<sup>th</sup> May 2014, and defended himself against the allegations. The Committee finds that there was no breach of the constitutional requirements for fair administrative action and the right to be heard.
54. In any event, it is important to note that the County Assembly is a fully fledged Legislature albeit at the devolved level. The laws and principles applicable to Legislatures apply in full to the County Assembly of Kericho.
55. In the case of *Kiraitu Murungi & 6 others vs Hon. Musalia Mudavadi & Another, Nairobi HCCC No. 1542 of 1997*, the Plaintiffs filed a suit against the First Defendant, the Minister for Finance and the Second Defendant, the Speaker of the National Assembly. The Plaintiffs sought a permanent injunction to restrain the Speaker from permitting any debate of the financial statement by the Minister for Finance. Ole Keiwua, J. held that under section 4 of the National Assembly (Powers and Privileges) Act, Parliament has **absolute immunity from process and members of Parliament cannot sue and be sued for what they speak in Parliament. Their reports of what is spoken in Parliament cannot be produced in the court as a matter of course. Similarly, the Speaker, under section 29 of the Act is immune from the court's jurisdiction. The learned judge further held that as the suit was based on the breach of standing orders those breaches were not actionable under section 29 of the Act.**





56. As the impeachment proceedings herein are quasi-judicial in nature, the Senate cannot question the actions of the Speaker of the County Assembly of Kericho acting in the exercise of any power conferred on or vested in the Speaker by the Standing Orders. Indeed a legislature makes its own rules of procedure and can chose to override the same rules of procedure if the circumstances warrant the same.

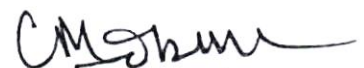
57. There are many legal precedents, both local and international, on the principle that only a legislature can judge the conformity of its actions with its own rules of procedure. The Special Committee wishes to cite a few as follows:

58. In the *Nairobi HCCC No. 394 of 1993, Raila Odinga vs Francis Ole Kaparo and the Clerk of the National Assembly*: The Plaintiff alleged that the Second Defendant allowed unauthorized individuals to enter Parliament and to illegally participate in the election of the Speaker of the National Assembly *'thereby rendering the said election illegal, null and void'*. In upholding the doctrine of parliamentary privilege, the court relied on the English case of *Stockdale v Hansard [1839] 9 Ad. & El* at page 209 where their Lordships observed as follows:

**'Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere'**

59. Justice Bosire (on page 8) observed as follows-

**'It is trite law that a provision of the law ousting the jurisdiction of the court from inquiring into conduct of an institution or person must be construed strictly. However, to require that the court goes to the extent of examining the composition of participants in an Assembly which the**



pleadings clearly state to be the National Assembly will be more than strictly constructing the section and will be rendering an inappropriate emphasis to technicality. It will clearly be an affront to justice and commonsense'.

60. In Erskine May's, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (9<sup>th</sup> edition) at page 172, the case of *Barnardiston v Soame* (1674) is quoted. Lord Chief Justice North said-

"I can see no other way to avoid consequences derogatory to the honour of the Parliament but to reject the action, and all others that shall relate either to the proceedings or privilege of Parliament, as our predecessors have done. For if we should admit general remedies in matters relating to the Parliament, we must set bounds how far they shall go, which is a dangerous province; for if we err, privilege of Parliament will be invaded, which we ought not in any way to endamage. But in the same argument he alleged "that actions may be brought for giving Parliament protections wrongfully; actions may be brought against the clerk of the Parliaments, searjeant-at-arms, and Speaker, for aught I know, for executing their offices amiss, with averments of malice and damage; and then must judges and juries determine what they ought to do by their officers. This is in effect prescribing rules to the Parliament for them to act by"

61. Seerval H.M. in his treatise "*Constitutional Law of India: A critical Commentary* (3<sup>rd</sup> Edn" observes that the declaration in Article 9 of the English Bill of Rights (1888) sets out the right of each House at page 1821..... "to be the sole judge of the lawfulness of its own proceedings even where the procedure of a House, or the right of its members to take part in its proceedings was dependent on the



statute. For such purposes, the House can as stated by May in his treatise, “practically change or practically supersede the law”.

62. In **Prebble v New Zealand Television Ltd (1995) 1AC 321**, the Judicial Committee of the Privy Council made its pronouncement on the purpose and effect of parliamentary privilege espoused in Article 9 of the Bill of Rights 1688 of England. They observed that in addition to according participants in parliamentary proceedings immunity from liability for statements made by them in the course of those proceedings-

*“the provisions of Article 9 also ensure that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the house by suggesting (whether by direct evidence, cross-examination, inference or submission) that the action or words were inspired by improper motives or were untrue or misleading.”*

63. The Governor further complained that the County Assembly had not facilitated public participation in the consideration of the charges against him and had therefore breached the provisions of Article 196(1) of the Constitution which provides as follows-

*196. (1) A county assembly shall—*

- (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and*
- (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.*

64. The Committee observed that the phrase “other business” under Article 196(1)(b) of the Constitution could not be given a wider meaning than legislative business in accordance with the *ejusdem generis* rule.

65. The Special Committee notes that impeachment proceedings are quasi-judicial in nature. The procedure is similar to that in a criminal trial with the following elements present-

- (i) charges are framed and put to the Governor;
- (ii) the Governor pleads to the charges;
- (iii) evidence is adduced against the Governor;
- (iv) the Governor defends himself against the charges; and
- (v) the County Assembly decides whether to impeach the Governor or not.

66. Article 259 of the Constitution provides guidance on how the Constitution is to be interpreted and states as follows:

*(1) This Constitution shall be interpreted in a manner that—*

- (a) promotes its purposes, values and principles;*
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
- (c) permits the development of the law; and*
- (d) contributes to good governance.*

67. The Special Committee finds that impeachment proceedings are different from recall proceedings as set out under Article 104 of the Constitution where the electorate has the right to recall a Member of Parliament before the end of their term of Parliament. If the intention of the Constitution was to provide for the views of the people of a County to be taken as part of impeachment proceedings then the Constitution would have provided for the same; perhaps there would have been provision for recall proceedings against a Governor as opposed to impeachment proceedings.

68. Impeachment proceedings are concerned with the gross violation of the Constitution and other laws. This is a matter of law and fact. The only

interpretation of Article 196 that promotes the purpose of the Constitution and contributes to good governance is that the public participation envisaged in impeachment proceedings is having the proceedings open to the public so that they are aware of the charges against their Governor and the defence that the Governor raises in response thereto.

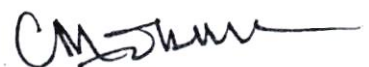
69. The Special Committee is alive to the fact the jurisprudence in Kenya is that of supremacy of the Constitution. Thus, while the County Assembly of Kericho is the sole judge of the propriety of the proceedings before it, the Special Committee has a duty to defend the Constitution in line with Articles 3(1) and 94(4) of the Constitution which provide as follows:

*“3(1) Every person has an obligation to respect, uphold and defend this Constitution.”*

*“94(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.”*

70. The Special Committee has not found any breach of the Constitution by the County Assembly in its consideration of the charges against the Governor of Kericho. The Speaker of the County Assembly of Kericho forwarded the resolution of the County Assembly to impeach the Governor to the Speaker of the Senate on 16<sup>th</sup> May 2014. The Special Committee cannot go behind the resolution to establish the procedural propriety as the County Assembly is the sole judge of the propriety of its procedures. It is only in the case of a breach of the Constitution that the Special Committee would be clothed with the mandate to intervene and point out the infringement. The effect of such an infringement would depend on the infringement itself and the peculiarities of each case.

### 5.1 Oversight and Separation of Powers



71. One of the Governor's complaints is that the County Assembly has overstepped its mandate as spelt out under Article 185(3) of the Constitution of Kenya which provides as follows:

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

72. The Special Committee notes that the issue of oversight is yet to receive a proper judicial interpretation. It is a relatively new concept in our jurisprudence and the Committee can only note as follows:

73. The Oxford Advanced Learners Dictionary defines the word "oversight" as: *the state of being in-charge of something or somebody*. The Concise Oxford English Dictionary describes the word oversee as *to supervise a person or their work*. Further it describes the word 'supervise' to mean *observe and direct the execution of a task or activity or the work of a person*. The Collins English Dictionary describes the word 'oversight' to mean *supervision*. It further describes the word 'supervise' to mean *to direct or oversee the performance or operation of something or somebody or to watch over so as to maintain order*.

74. Article 1(2) of the Constitution of Kenya states that *"The people may exercise their sovereign power either directly or through their democratically elected representatives."*

75. Both the Governor and the Members of the County Assembly are elected by the people. It is important that each of these organs of devolved government work together in harmony in order for the people to realize the benefits of devolution. The County Assembly must allow the Governor to perform the Executive functions of that office without attempting to micro-manage or take over the



powers of the Governor. In return the Governor must be accountable to the County Assembly for the exercise of those powers as provided under Article 174(a) of the Constitution which stipulates that one of the objects of devolution is to promote the democratic and accountable exercise of power.

76. The Governor contends that the County Assembly has overstepped its mandate therefore breaching the principle of separation of powers. It is therefore important to briefly analyze the principle of separation of powers. Alex Carrol in *Constitutional and Administrative Law*, 5<sup>th</sup> edition, Pearson Longman states as follows at pages 36-37:

**“Writing in 1748, the French Jurist, Montesquieu, argued that “there can be no liberty” and there would be an end to everything “if legislative, executive and judicial powers of government were to be exercised by the same person or authority” (*L’Esprit des Lois*, 1748). Similar sentiments had been expressed previously by the English political philosopher John Locke. He wrote that it “may be too great a temptation to human frailty ... for the same person to have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law both in its making and execution, to make their own private advantage” (*Second Treatise of Civil Government*, 1690).**

77. The purpose of the principle of separation of powers is therefore to prevent the concentration of state power in one individual or institution. But does this mean that each arm of government shall operate, so to speak, in a silo and strictly remain in its sphere of power?

78. It has been found that the concept of a pure separation of power could prove unworkable in practice. At pages 79-80 of “Unlocking Constitutional &



Administrative Law” Jacqueline Martin & Chris Turner, Hodder Education, 2010 state that:

“A pure separation of powers would insist that the three organs of government be completely separated and constitutionally isolated from each other. This would entail that the three elements of the state are institutionally separate from each other with each organ performing a specific and exclusive constitutional function. Furthermore, individuals should only form part of one organ. This prohibits, for example, the courts making legislation and thereby performing a legislative function ... In contrast to a pure separation of powers, there are various graduations of the doctrine whereby the functions/organs of government may be largely separate (to varying degrees), but interrelate and check and balance each other (eg judiciary checks and balances legislative power). This less than pure separation of powers – a weaker and partial separation – acknowledges the political reality that the machinery and practice of government requires that state institutions have to work with one another. In fact, Barnett has argued that a pure separation of powers could prove to be unworkable in practice, as it could lead to constitutional deadlock between the institutions. Under a weaker version of the separation of powers, the tensions and checks and balances between the three state institutions aim to ensure that state power is not abused, by ensuring that it is not all concentrated in, and controlled by, one particular state organ. This necessarily makes it more difficult for each branch of the state to carry out its particular function, as it is checked and balanced by the other branches.”

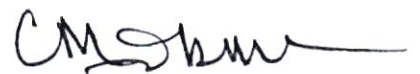
79. S. A. de Smith in *Constitutional and Administrative Law*, 2<sup>nd</sup> Edition, Penguin Education at pages 39-40 states as follows:

“And a rigorous segregation of functions may be highly inconvenient. In many countries subscribing to versions of the separation of powers doctrine,

rule-making powers have been vested in the Executive because it is manifestly impracticable to repose such powers exclusively in the Legislature ... In Britain we have a Cabinet government with a parliamentary Executive; the Law Lords act both as judges and legislators; the Lord Chancellor is a Minister as well as head of the Judiciary and an active member of the House of Lords in its legislative capacity. Legislative powers are delegated by Parliament to members of the Executive (the Queen in Council and Ministers); powers to determine justiciable controversies are also confided in Ministers and other non-judicial agencies. Indeed, there never was a time in English constitutional history when the functions of government were neatly compartmentalized.”

80. The Constitution of Kenya, 2010 does not prescribe a pure separation of powers between the three arms of government and there are instances where the Constitution itself specifically provides for overlap, for instance-

- (i) The President (Executive) is involved in the legislative process and assents to Bills passed by Parliament into law as provided for at Article 115 of the Constitution;
- (ii) Impeachment proceedings in respect of the President are undertaken by Parliament even though they are quasi-judicial in nature.
- (iii) The powers and privileges of Parliament provide for Parliament, through its powers and privileges committee to exercise some judicial function when disciplining its members.
- (iv) The Judicial Service Commission, which is comprised of Judges, exercises some executive functions as set out at Articles 171 and 172 of the Constitution.
- (v) The Supreme Court exercises legislative functions when it makes rules for the exercise of its jurisdiction under Article 163(8) of the Constitution.



- (vi) The Courts make “Judge made” laws in the course of exercising their judicial function of interpreting the law.
- (vii) Constitutional Commissions have been created to perform “executive functions.”

81. There shall therefore be situations where the County Assembly, in exercise of its functions, may stray slightly into the realm of the County Executive and vice-versa. This should not cause conflict between the two arms of Government and such situations should be resolved through dialogue and consultation. The principle of dispute resolution set out under Article 189(3) of the Constitution should also apply to disputes between the County Executive and County Assembly, as it provides that-

*In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*

82. The separation of powers between the different arms of Government is a cardinal principle which must be embraced as the basis for smooth management and coordination of Government activities. Each arm of Government, in discharging its mandate must do so with civility and respect for the other arms of Government. Mutual respect between the various arms of Government forms the foundation for harmonious relationship in Government and will enable each organ to discharge its mandate in a healthy and conducive environment.

## **6.0 THE CHARGES AGAINST THE GOVERNOR OF KERICHO COUNTY**

83. We now address ourselves to the specifics of the Charges against the Governor of Kericho County.



6.1 GROSS VIOLATION OF THE CONSTITUTION AND THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013

84. The following were the specific matters canvassed under this Charge-

(a) Irregular Agreement between the County Government of Kericho and Bluetechs UK Group Limited

85. The County Assembly in the Particulars of Allegations stated that the Governor, on behalf of Kericho County Government, entered into an Agreement with a private company by the name Bluetechs UK Groups Limited. The Agreement is attached at page 120 of *Annex I*. The terms of the Agreement were that the private company would design, build, finance, operate and subsequently transfer to the County a 100 MW solar plant whereby the proposed generation of 100 MW of electricity would be implemented in phases. The cost would be 1,350,000 USD per MW.

86. According to the County Assembly, section 20 of the Public Private Partnerships Act provided for the procedures which would require to be followed before entering into such Agreements. Section 20 of the Public Private Partnership Act, 2013 provides as follows –

*A contracting authority shall prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following –*

- (a) *technical issues;*
- (b) *legal, regulatory, technical framework;*
- (c) *institutional capacity status;*
- (d) *commercial, financial and economic issues; and*
- (e) *such other issues as the Cabinet Secretary may stipulate.*





87. The County Assembly averred that the office of the Governor had failed to undertake a diagnostic study into the legal, regulatory and technical framework when entering into the agreement and had entered into the agreement prior to fulfilling the requirements under section 20. The County Assembly took the view that although the legal framework was clearly set out in the Act, the Governor had chosen to disregard the law.
88. In his response, the Governor stated that the agreement in question was a *Memorandum of Agreement or Understanding* and not a contract. The Governor referred to the Cambridge Dictionary and stated that it defined a Memorandum of Agreement as “*a document that records the details of agreement between two companies or organizations which has not been legally approved*”.
89. The Governor further stated that a Memorandum of Agreement was not legally binding but carried a degree of seriousness and mutual respect, stronger than a gentleman’s agreement. The Governor noted that a Memorandum of Agreement is a first step towards a legal contract and further noted that in the United States, a Memorandum of Agreement is synonymous with a letter of intent, which is a non-binding written agreement that implies that a binding contract is to follow. The Governor further noted that a Memorandum of Agreement was more formal than a verbal agreement, but less formal than a contract and that an organization could use a Memorandum of Agreement to establish and outline collaborative agreements, including service partnerships or agreements to provide technical assistance and training. According to the Governor, a Memorandum of Agreement may be used regardless of whether or not money is to be exchanged as part of the agreement.
90. The Governor was therefore of the view that no legal contract had been entered into between the County Government of Kericho and BlueTechs UK Groups





Limited. He therefore stated that "it [was] just a gentleman's agreement at a serious level".

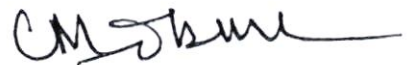
91. The Governor referred to Clause 1(i) of the Agreement which provided as follows—

*The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require considerable outlay of funds. The commencement of the project will be subject to the outcome of the study.*

92. On the question as to whether the Memorandum of Agreement was binding, in submissions before the Special Committee the County Assembly stated that the Memorandum of Agreement had all the essentials that are necessary and characteristic of a contract and that it was therefore a binding agreement that provided for rights and liabilities of both parties to the contract.

#### **Observations of the Committee**

93. To shed light on the matter of Public Private Partnerships and the law and procedure governing such partnerships, the Special Committee invited the Director of the Public Private Partnerships Unit, Eng. Stanley Kamau, to appear before the Special Committee, which he did on Thursday, 29<sup>th</sup> May, 2014.
94. One of the issues addressed by the Director was whether the Memorandum of Agreement between the County Government of Kericho and Bluetechs Ltd. was a mere memorandum or a binding agreement. The Director was categorical in his response. He stated that the Memorandum of Agreement had all the features of a binding contract. In particular, he observed that the Memorandum of Agreement provided, at paragraph 1(g) for a revenue sharing formula, it provided at paragraph 1(g) for the cost attached to the project and it also contained a termination clause.



95. The Committee further took note of the Judgment in High Court Miscellaneous Application No. 1406 of 2004, Republic versus city Council of Nairobi and others, a Judicial Review matter which was cited by the County Assembly and in which a similar question had arisen. In that matter, the Applicants took the view that the 1<sup>st</sup> Respondents had entered into a “contract” with the Interested Party. For their part, the Respondents argued that what had been entered into was not a contract per se, but involved the formation of a “partnership”. The Court studied the agreement between the parties and arrived at the conclusion that that it contained the essential ingredients of a contract.
96. After hearing both parties and their interpretations on the binding nature of the contract, the Committee finds that despite the name given to the agreement – “Memorandum of Agreement” - and despite the common definitions and description of a Memorandum of Agreement, an analysis of the provisions of the Memorandum of Agreement revealed that it was more than an agreement; it was a binding agreement with contractual rights and obligations. In this regard, the Committee noted the following phraseology of the Memorandum of Agreement-
- (a) the preliminary recitals in which the contract states that “this agreement is designed to set forth mutually agreed and binding terms and conditions to establish a common business framework”;
  - (b) clause 1(a) which provides for the consideration for the Agreement as follows: “the total proposed generation of one hundred (100) megawatts of electricity will be implemented in phases and could be at different sites at an estimated cost of one million three hundred and fifty thousand dollars (USD 1,350,000/-) per mega watt”;
  - (c) clause 1(g) from which they cited the following provision: “the parties hereto agree to enter into a Benefits Sharing Agreement (BSA) in the ratio of 30% the county and 70% Bluetechs. The County will contribute



10% of capital investment and land. The BSA will have a tenure of 25 years subject to renewal”; and

(d) clause 5(d) – the exit clause – which provides that “either party hereto can terminate this Agreement by giving six (6) months prior written notice to the other. Consequently assets and liabilities will be apportioned on the basis of the ratio intimated in 1(g) above”.

97. Although the parties to the Agreement (the Governor and Bluetechs Ltd) maintained that they had not intended to be bound by the Memorandum of Agreement, the Committee found that the provisions of the Memorandum of Agreement left no doubt that the Agreement met all the essentials of a valid contract and that the parties intended to be bound by the provisions of the Memorandum of Agreement.

(b) **Violation of the Provisions of Article 201 of the Constitution**

98. Further, on the matter of the alleged irregular agreement between the County Government of Kericho and Bluetech UK Groups Limited, the County Assembly referred to Article 201 of the Constitution and stated that the Article highlights the principles of public finance and states that there shall be openness and accountability including public participation, in financial matters. Article 201 of the Constitution provides as follows –

*The following principles shall guide all aspects of public finance in the Republic—*

*(a) there shall be openness and accountability, including public participation in financial matters;*

*(b) the public finance system shall promote an equitable society, and in particular—*

*(i) the burden of taxation shall be shared fairly;*

*(ii) revenue raised nationally shall be shared equitably among national and county governments; and*



- (iii) *expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;*
- (c) *the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
- (d) *public money shall be used in a prudent and responsible way; and*
- (e) *financial management shall be responsible, and fiscal reporting shall be clear.*

99. According to the County Assembly, the Governor contravened the provisions of Article 201 by failing to seek the approval of the County Assembly prior to entering into the public private partnership agreement and therefore failed to ensure *openness and accountability* in the process.

100. The Assembly further stated there was no evidence that the Governor conducted public participation under any platform established under section 91 of the County Governments Act particularly in view of the fact that the County was to contribute ten percent of the consideration which amounted to 135,000 USD (one hundred and thirty five thousand US Dollars) per MW. Section 91 of the County Governments Act provides as follows –

*The county government shall facilitate the establishment of structures for citizen participation including—*

- (a) *information communication technology based platforms;*
- (b) *town hall meetings;*
- (c) *budget preparation and validation fora;*
- (d) *notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
- (e) *development project sites;*
- (f) *avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or*
- (g) *establishment of citizen fora at county and decentralized units.*






101. In response, the Governor stated that during the signing of the agreement on the 13<sup>th</sup> January, 2014, stakeholders, who included, members of the County Assembly, County staff, community representatives and other stakeholders, were invited. The Governor referred to the following documents –

- (a) the letter of invitation to the Clerk of Kericho County Assembly dated 10<sup>th</sup> January, 2014 attached as page 63 of *Annex 8*;
- (b) the programme of the meeting at Tea Hotel on 13<sup>th</sup> January 2014 attached as page 63 of *Annex 8*;
- (c) a photograph of the signing ceremony outside Tea Hotel attached as page 64 of *Annex 8*; and
- (d) the DVD containing BlueTechs function at Tea Hotel on 13<sup>th</sup> January, 2014, which is part of the bundle of DVDs attached at *Annex 16*.

102. The Governor also informed the Committee that public consultations and participation were carried out in Kipsitet on 15<sup>th</sup> January, 2014 and referred to the programme for a Public Consultation meeting which is attached at page 66 of *Annex 8*. The Governor noted that in both forums, the details of the Memorandum of Agreement had been provided and that those details included the contributions by the County, that is, the ten percent contributions that were to be contributed by the County Government to the project.

103. The Governor also noted that the County Executive had also kept abreast the following House Committees on the proposed project as part of enhancing public participation –

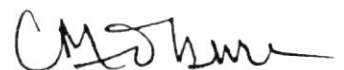
- (a) the Energy Committee;
- (b) the Trade Committee;
- (c) the Budget and Appropriation Committee; and




(d) the Planning Committee.

104. In this respect, the Governor referred to a letter from the Governor to the Chairperson of the Committee on Energy of the Kericho County Assembly dated 28<sup>th</sup> March, 2014 in which the Governor requested for a date on which the County Executive Committee Members concerned would make a presentation before the Committee – page 67 of *Annex 8*. The Governor also referred to a letter from the County Assembly of Kericho inviting various County Executive Committee Members to a meeting of the Committee on Agriculture, Environment and Natural Resources at which the proposed solar project was to be discussed – page 69 of *Annex 8*. On the basis of this, the Governor stated that details of the investment had been openly shared with the County Assembly and further noted that in all stages of the process the approval of the County Assembly would be sought.
105. The County Assembly, in its submissions, took the view that the threshold of public participation as required by the Constitution had not been met. In arriving at that conclusion, the County Assembly argued that the programme of the meeting at Tea Hotel that the Governor sought to rely on as evidence of public participation on the project (attached as page 63 of *Annex 8*), apportioned only thirty minutes to Bluetechs Ltd. to make a presentation titled: “*Introduction and Brief Presentation on Company Profile*”. Further, the Assembly argued that although evidence of a public *baraza* held at Kipsitet, Soin Ward, was attached and referred to by the Governor (attached at page 66 of *Annex 8*), the *baraza* was held on 15<sup>th</sup> January, 2014, a date after the execution of the Memorandum of Agreement on 13<sup>th</sup> January, 2014. The Assembly argued that the *baraza* was therefore aimed at misleading the public as the Agreement was already in place.

Observations of the Committee



106. Public participation is a central and cross-cutting pillar in the Constitution. Article 10 of the Constitution includes, as part of the national values and principles of governance, “*participation of the people*”, “*inclusiveness*” and “*transparency and accountability*”. Further Article 174 provides for the objects of devolution which include the promotion of democratic and accountable exercise of power.
107. As to the nature, extent and threshold of public participation, this matter has been canvassed before the Courts. In High Court Constitutional Petition No. 454 of 2012, **Commission for Implementation of the Constitution versus Parliament**, the question arose in the context of public participation on the Leadership and Integrity Act, No. 19 of 2012. The Court held that “*the National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public.*”
108. The question therefore should be whether a public body has afforded a “*reasonable level of participation*” to the public. In the matter at hand, the Committee observed as follows on the evidence presented by the Governor in respect of public participation-
- (a) The meeting at Tea Hotel on 13<sup>th</sup> January 2014 was the signing ceremony for the Memorandum of Agreement. This was the day on which the Memorandum was executed. It was not a day on which the public was to be educated on the project, its viability, its pros and cons, etc, and neither was it a day dedicated to receipt of views from the public.
- (b) The public *baraza* at Kipsitet was held on 15<sup>th</sup> January, 2014 – two days after the execution of the contract.





(c) The correspondence between the Governor and the County Assembly on the project is dated 28<sup>th</sup> March, 2014 – more than two months after the execution of the contract.

109. The Committee further took note of the provisions of section 91 of the County Governments which place an obligation of the County Government to establish structures for public participation in order to ensure effective and meaningful public participation. These structures include-

- (a) *information communication technology based platforms;*
- (b) *town hall meetings;*
- (c) *budget preparation and validation fora;*
- (d) *notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
- (e) *development project sites;*
- (f) *avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or*
- (g) *establishment of citizen fora at county.*

110. No evidence was adduced before the Committee by the Governor to suggest that the County Government of Kericho had established any of such structures or that any such structures had been used for public participation on the Bluetechs project prior to the execution of the Memorandum of Agreement.

111. The Committee found that the Governor had not met the threshold of public participation required under Article 201 of the Constitution. There is no evidence of involvement of the County Assembly or the public before the execution of the Memorandum of Agreement. The County Assembly and the public were brought





on board on the day of the execution of the Memorandum of Agreement that had far-reaching consequences on the County and that involved a considerable outlay of funds and the provision of land belonging to the County.

112. The Committee therefore found that the Governor had contravened Article 201(1) of the Constitution which requires "*openness and accountability, including public participation in financial matters*". The processes prior to the execution of the Memorandum of Agreement were kept away. It was evident to the Committee that the processes did not meet the standard required by Article 201(1) of the Constitution.

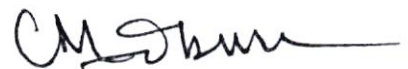
(c) **Violation of Section 148 as Read with Section 2 of the Public Finance Management Act, 2012**

113. The County Assembly referred to section 22 of the Public Private Partnerships Act which provides as follows –

*Where a contracting authority intends to enter into a public private partnership, a person shall not, unless he is the accounting officer of the authority, enter into a project agreement in relation to that project on behalf of the authority.*

114. The County Assembly stated that the Agreement was executed by the Governor. According to the County Assembly, such execution was unlawful as the Governor was not an accounting officer in terms of section 148 as read with section 2 of the Public Finance Management Act, 2012.

115. Section 2 defines an accounting officer, in respect of a county government entity as follows: "*accounting officer*" means an accounting officer of a county government entity referred to in section 148".



116. Section 148 of the Public Finance Management Act provides as follows –

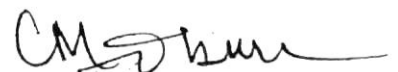
- (1) *A county executive committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.*
- (2) *Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.*
- (3) *A county executive committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of the Constitution.*
- (4) *The Clerk to the county assembly shall be the accounting officer of the county assembly.*
- (5) *A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service.*

117. According to the County Assembly, the Governor abused his office by unlawfully executing the contract on behalf the County Government yet he was not an accounting officer.

118. In response to this allegation, the Governor stated that no contract had been entered into and that what was executed was a Memorandum of Agreement which, as the Chief Executive Officer of the County, he was mandated to execute.

#### **Observations of the Committee**

119. Having established that the Memorandum of Agreement was a binding contract as between the parties, it is evident to the Committee that on the basis of section 22 of the Public Private Partnerships Act and sections 2 and 148 of the Public Finance Management Act, the Governor was not competent to execute the Memorandum of Agreement on behalf of the County Government of Kericho. The Agreement ought to have been executed by an accounting officer.



(d) **Violation of Section 61(3) of the Public Private Partnerships Act, 2013**

120. The County Assembly referred to section 61(3) of the Public Private Partnership Act, 2013 which provides as follows –

*A contracting authority shall not consider a project for procurement under this section unless it is satisfied that –*

- (a) the project shall provide value for money;*
- (b) the project shall be affordable; and*
- (c) the appropriate risks are transferred to the private party.*

121. The County Assembly referred to the definition of the word “affordability” under section 2 of the Public Private Partnership Act, 2013 which defines the word as follows –

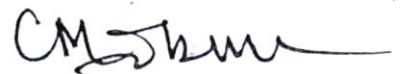
*“affordability” means that-*

- (a) the financial commitments to be incurred by a contracting authority in terms of a project agreement can be met by funds –
  - (i) designated within the existing budget of the contracting authority for its function for which the agreement relates; and*
  - (ii) assigned to the contracting authority in accordance with its relevant future budgetary allocation.**

*Provided that the commitment shall be sustainable and shall not impose an unreasonable burden to the contracting authority; and*

- (b) the cost of delivering a facility or service in relation to the project by the contracting authority does not impose an unreasonable financial burden on the end users;*

122. According to the County Assembly, the Governor signed the contract by committing ten percent of the consideration hence violating section 2 of the Public Private Partnerships Act in that the funds were never budgeted for. In this respect, the County Assembly referred to the County Government’s Budget (page 142 of *Annex I*) and stated that the project was not provided for in the budget. The



Assembly thus stated that the Governor had executed the Agreement with no plans in place on the financing of the project.

123. On this, the Governor stated that the project was part of the County Integrated Development Plan which had been presented to and approved by the County Assembly. The Plan included an aspect on energy which generally provided for hydroelectric power and solar energy.

124. He further stated that there was no contract in the first place and that consequently the ten percent was never committed. The Governor further stated that the implementation of the project was due to be subjected to an extensive and final feasibility study and regulatory compliance was anticipated. The Governor referred to section 1(i) on page 4 of the Agreement which provides that –

*The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require considerable outlay of funds. The commencement of the project will be subject to the outcome of the study.*

125. The Governor while referring to the Memorandum of Agreement also stated that the implementation of the project was anticipated to commence between nine to twelve months from the time of signing the agreement. This therefore meant that commencement, if approved, would fall within a different financial year, as provided in section 1(f) of the agreement which states as follows –

*It is further mutually agreed that there will be a period of 9-12 months from date the aforesaid lease takes effect entirely for pre-operational purposes.*

#### Observations of the Committee





126. The Committee observed that the Governor's position was that the requirements of section 61(3) of the Act would be complied with and that an extensive and final feasibility study and regulatory compliance would be undertaken.
127. However, the Director of the Public Private Partnerships Unit explained that a feasibility study is a condition precedent to the execution of a contract on a Public Private Partnership. It is only after a feasibility study has been conducted and approved that the tendering process would commence which would then lead to the preparation and execution of a contract. It was not therefore possible, the Director stated, to first enter into a binding Agreement that committed the County to various obligations and thereafter with a commitment already in place, to conduct a feasibility study. The feasibility study is intended to inform the tendering and contracting process.
128. On this basis, the Committee finds that section 61(3) of the Public Private Partnerships Act was breached. It is further clear from section 20 of the Act that—

*A contracting authority shall, prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following—*

- (a) technical issues;*
- (b) legal, regulatory and technical frameworks;*
- (c) institutional and capacity status;*
- (d) commercial, financial and economic issues; and*
- (e) such other issues as the Cabinet Secretary may stipulate.*

129. This was not done.

(e) **Violation of section 29 of the Public Private Partnerships Act**



130. In addition, the County Assembly stated that all projects should be procured through a competitive bidding process as stipulated under section 29 of the Public Private Partnership Act which provides as follows –

*(1) Except as otherwise provided for under this Act, all projects shall be procured through a competitive bidding process.*

*(2) In procuring and awarding a contract to a private party under this Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity in accordance with the guidelines made under this Act.*

131. According to the County Assembly, no competitive bidding was ever done for this project hence the whole process was an illegality. The County Assembly stated that the Governor had not attempted or even tried to comply with the requirements of section 29 of the Act, further stating that the Governor had single-sourced Blue Techs Ltd. They therefore took the view that the procurement of Blue Techs Ltd was undertaken in complete violation of section 29 of the Act. The Assembly challenged the Governor to produce evidence that would prove otherwise.

132. According to the County Assembly, even where the Governor opted to proceed by way of single-sourcing rather than competitive procurement, section 61 of the Act set out various conditions to be met, as follows-

*(1) A contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where –*

*(a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical:*

*Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or*

*the result of an unreasonable failure to act by the contracting authority;*

- (b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial;*
- (c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or*
- (d) there exists any of the circumstance as the Cabinet Secretary may prescribe.*

*(2) A contracting authority shall, before commencing negotiations with a private party under this section –*

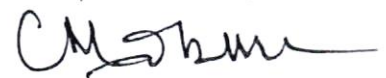
- (a) prescribe a criteria against which the outcome of negotiations shall be evaluated;*
- (b) submit the proposal to the unit for consideration and recommendation;*
- (c) upon obtaining the recommendations of the unit, apply for and obtain approval from the Committee to negotiate the contract; and*
- (d) conduct the negotiations and award the tender in accordance with the prescribed process in the regulations to this Act.*

*(3) A contracting authority shall not consider a project for procurement under this section unless it is satisfied that-*

- (a) the project shall provide value for money;*
- (b) the project shall be affordable; and*
- (c) the appropriate risks are transferred to the private party.*

133. The County Assembly argued that the Governor had not indicated the specific paragraph of section 61(1) of the Act that applied to the agreement executed with Bluetechs Ltd.

134. The Governor, in response to these matters, stated that the project was a privately initiated proposal hence it did not require to be subjected to competitive bidding as per section 61(1) of the Public Private Partnerships Act 2013.



### Observation of the Committee

135. On the procurement processes applicable to a Public Private Partnership, the Committee found the position of the County Assembly to be an accurate rendition of the law. The Public Private Partnerships Act makes extensive provisions on the processes required for the procurement and award of a contract to a private party. Competitive bidding is the default procurement method provided for in the Act. However, section 61 provides for an exception to open tendering but only where either of the four conditions set out under paragraphs (a) to (d) of section 61(1) have been met.
136. As the County Assembly observed, in the Bluetechs Ltd. matter, although direct procurement or restricted tendering had been used as the procuring method, the Governor had not explained the specific condition under section 61(1) by which the restricted tendering was undertaken. The Committee therefore found that the procurement had not met the requirements as to competitive bidding and in that respect, the procurement was not in accord with the Public Procurement and Disposal Act.

#### **(f) Loss of Land and other Risks**

137. The County Assembly stated that clause 1(c) and (g) of the Agreement provided that the County was to contribute 10% of the capital investment and land. The County would lease, for a period of twenty five years, five hundred acres of land to Bluetechs Ltd. for the project. The Assembly further noted that the exit clause in the Agreement stated that either party may terminate the agreement by giving six months' notice and consequently, assets which included the land and liabilities would be apportioned on the basis of the ratio of 70:30 where the private company would get seventy percent and the county would get thirty percent of the same.





138. As to risks associated with the land, the County Assembly made reference to paragraph 1(h) of the Agreement which provides that *“the land leased to Bluetechs by the County together with improvements thereon may, subject to approval by the County, be used as collateral by Bluetechs in any financial activity provided at the determination of the aforesaid lease, the same shall be free of any encumbrances”*. The Assembly argued that this provision allowed a private company to use the County’s land as collateral and that this had the potential of resulting in a situation where the land could be lost. The County Assembly stated that in order to avoid and avert such situations, the Public Private Partnerships Act had provided a framework that ensured that the interests of the County and her people were protected. This framework, the Assembly stated, had not been observed in the subject project.

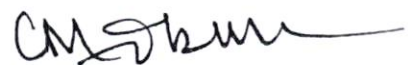
139. The County Assembly cited section 65(4) of the Public Private Partnerships Act, 2013 which provides as follows -

*A project agreement involving the use of a contracting authority’s property by the private party shall not divest the contracting authority of the responsibility for ensuring the property is appropriately protected against factors which may negatively affect the property including forfeitures, theft, loss or wastage.*

140. According to the County Assembly, in case of termination, as per clause 5(d) of the Memorandum of Agreement, the County stood to lose seventy percent of the land property notwithstanding the period or term of the contract, hence exposing the County to loss or wastage by entering into such an agreement.

141. In response, the Governor referred to clause 5(d) of the agreement which was the exit clause and which provides that –

*Either party hereto can terminate this Agreement by giving six (6) months*



*prior written notice to the other. Consequently assets and liabilities will be apportioned on the basis of the ratio intimated in 1(g) above.*

142. The Governor was of the opinion that there was no indication in the Memorandum that supported the County Assembly's position. The Governor stated that the ratio of 70:30 was part of the Benefits Sharing Agreement. The Governor noted that the basis of the County Assembly's allegation that that the County stood to lose 70% of the land was not clear.

143. Further on risk, the County Assembly referred to section 107 (1) of the Public Finance Management Act 2012 which provides as follows -

*In managing the County Government public finances, the County Treasury shall enforce the following fiscal responsibility principle –*

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

144. According to the County Assembly, the County Executive Committee Member for Finance had admitted in the Kericho County Fiscal Strategy Paper 2014/2015 (page 132 of *Annex I*) that the risks to the output for 2014 included the County Government embracing the Public Private Partnership framework in implementing key infrastructure projects. The County Executive Committee Member for Finance had also stated that there were fiscal risks associated with contingent liabilities which, if they materialized, could undermine fiscal discipline. The County Executive Committee Member made specific reference to "*projects to be financed through the PPP financing modality*" which according to the Executive Committee Member would be "*carefully scrutinized to safeguard the interest of the general public, who, in the end will bear the burden*".

145. In response, the Governor stated that the Advisory by the County Executive Committee Member for Finance would be adhered to in the subsequent events and


processes and that there was no attestation of refusal by the Executive to comply with the Advisory. The Governor further stated that the County Executive Committee Member for Finance gave a precaution that the projects to be implemented under the arrangement of the Public Private Partnership would be scrutinized to safeguard the interests of the general public.

146. The Governor also responded by stating that the project was a proposed project and that the only stage concluded was the signing of the Memorandum of Agreement. The Governor also stated that the other processes were ongoing, including compliance with the Public Private Partnership Act. The Governor further stated that no money had been lost nor any liability incurred on the part of the County Government of Kericho. In this regard, the Governor referred to a letter from Bluetechs Ltd. dated 9<sup>th</sup> May, 2014 in which the Bluetechs stated that “the Governor of the County Government of Kericho and/or any representative of Bluetechs UK Group Ltd. has not signed the BSA and as such the County has not incurred any liability. The letter is at page 95 of *Annex 8*.

#### **Observations of the Committee**

147. On the matter of risks attendant to a Public Private Partnership, the Director of the Public Private Partnerships Unit informed the Committee that owing to such risks and the losses that may be suffered by the public, the Public Private Partnerships Act had established comprehensive and rigorous procedures to be observed before a contract for the execution of a Public Private Partnership Agreement is executed. The procedure, as detailed under sections 16, 17, 18, 19 and 20 of the Act, includes-

- (a) establishment, by a contracting authority, of a Public Private Partnership Node which would, among other things-
  - (i) identity, screen and prioritize projects;



- (ii) prepare and appraise each project agreement to ensure its legal, regulatory, social, economic and commercial viability;
  - (iii) undertake the tendering process in accordance with the Act;
  - (iv) monitor the implementation of the project;
- (b) undertaking of a sector diagnostic study and assessment covering the following areas-
- (a) technical issues;
  - (b) legal, regulatory and technical frameworks;
  - (c) institutional and capacity status;
  - (d) commercial, financial and economic issues; and
  - (e) such other issues as the Cabinet Secretary may stipulate.

148. In the Bluetechs Ltd. matter, these procedures were not observed. Although the Governor stated both in his written and oral evidence that the entire project would be subjected to the legal and regulatory framework under the Act, it was clear to the Committee that these requirements of the Act were not to be complied with after the execution of a contract but prior to the execution of such contract. Consequently, the Committee found that by failing to observe these procedural requirements, the Governor had exposed the County to potential risks and losses.

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

**(a) Irregular Agreement Between E-Plus Medical Service and Kericho County Government**

149. The County Assembly stated that on 7<sup>th</sup> January 2014, the Governor entered into an agreement on behalf of Kericho County Government with a company, E-Plus



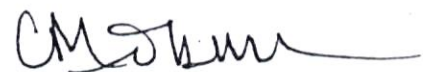
Ltd. The Agreement is attached at page 134 of *Annex I*. According to the County Assembly, the terms of the Agreement were that the private company was to provide comprehensive emergency services which included seven ambulances, paramedics and ambulance operators to Kericho County. The County Assembly further stated that the contract price was Kshs. 600,000/= (Kenya Shillings six hundred thousand shillings) per month, per unit, which meant that the total consideration would be Kshs. 4,200,000/= (Kenya Shillings four million, two hundred thousand shillings) per month. According to the County Assembly, the contract period was for twelve months which would then amount to Kshs. 50,400,000/= (Kenya Shillings fifty million, four hundred thousand).

150. The County Assembly observed that Article 201 of the Constitution highlights the principles of public finance which state that there shall be openness and accountability, including public participation in financial matters. The County Assembly stated that there was no evidence that indeed public participation was undertaken on any of the platforms established under Section 91 of the County Government Act. Section 91 provides as follows-

*The county government shall facilitate the establishment of structures for citizen participation including—*

- (a) information communication technology based platforms;*
- (b) town hall meetings;*
- (c) budget preparation and validation fora;*
- (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
- (e) development project sites;*
- (f) avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or*
- (g) establishment of citizen fora at county and decentralized units.*

151. In response, the Governor stated that public participation was undertaken through the County Integrated Development Plan process where teams went to all the



wards in Kericho County to engage the public on the Plan. He referred to chapters seven and eight of the County Integrated Development Plan which stated that provision of ambulance services was one of the most common felt health needs by the residents throughout the County.

152. When asked whether the County Assembly, which acts in the interests of the residents of the County was against the provision of ambulance services to the County, the County Assembly through its Counsel responded by stating that it was not against the procurement of ambulance services but that it had a duty to ensure that the relevant laws and procedures were complied with. The laws regulating procurement are examined below.

(b) **Budgeting for the Contract**

153. The County Assembly stated that the contract for the procurement of ambulance services was never budgeted for. In this regard, the Assembly referred to the Kericho County Government Financial Budget Estimates for the Financial Year 2013-14 appearing at page 158 of *Annex I* and stated that there was no item on the estimates relating to the contract with E-Plus.

154. The Assembly stated that by executing a contract in respect of a project that had not been provided for in the estimates, the Governor had breached the Constitution and the County Governments Act which provide for the role of a County Assembly in considering and approving the budget of the County Executive.

155. According to the County Assembly, in the circumstances, the Governor ought not to have entered into to such an agreement and by doing so, he had contravened the provision of Article 226(5) which provide as follows -

*If the holder of a public office, including a political office directs or*



*approves the use of public funds contrary to the law or instructions, the person is liable for any loss arising from that loss whether the person remains a holder or not.*

156. In response, the Governor stated that the contract was signed on 7<sup>th</sup> January, 2014. The Governor referred to the commencement clause which stated that the contract would take effect on 20<sup>th</sup> February 2014 and would continue in force for one year subject to termination or renewal.

157. The Governor further stated that the contract was budgeted for in the Supplementary Budget which had been submitted to the County Assembly and which it was expected would be approved before 20<sup>th</sup> February, 2014. The Governor also stated that on 13<sup>th</sup> January, 2014 the Acting County Executive Committee Member for Health, the County Executive Committee Member for Finance and Economic Planning and the Kericho County Assembly Health Committee had held a meeting to discuss the same matter and that the Committee was convinced about the hiring of the ambulances.

158. From the response, the County Assembly took the view that by indicating that the contract had been provided for in the supplementary budget, the Governor had in fact confirmed that the expenditure on the E-Plus project had not been approved by the County Assembly and that the County Executive could only anticipate its approval in the supplementary budget. The Assembly referred to the County Government of Kericho Supplementary Budget Estimates for the Financial Year 2013-14 (*page 75 of Annex 8*) and observed that although the item "*purchase of ambulances*" was provided for, no amount of money had been allocated to this item for the financial year 2013-14. And that in any event, what was provided for was "*purchase*" as opposed to hiring as contemplated in the E-Plus contract.

159. The Assembly further stated that the approval of the Supplementary Estimates by the County Assembly of Kericho occurred on 24<sup>th</sup> February, 2014 yet the contract was to commence on 20<sup>th</sup> February, 2014. The Assembly therefore argued that even if the approval had been given, the approval would have been *ex post facto*, after the fact.
160. The County Assembly made reference to the reasons cited for the lack of allocation of any monies to the purchase of the ambulances by the County Assembly. In a letter by the County Executive Committee Member for Health to the Governor, it was reported that *"the members said they will remove the ambulances line item completely from this year's budget, and that they will include it in the next financial year. They also said that the next budget will be made after visiting counties that have bought and those that have hired [ambulances] in order to get a balanced opinion"*.

#### **Observations of the Committee**

161. From the evidence presented to the Committee, the sequence of events relating to contract by the County Government of Kericho with KCRS E-Plus is as follows-
- (a) The contract was signed on 7<sup>th</sup> January, 2014 by the Governor, for the Kericho County Government and the General Manager of the KCRS-E Plus Ltd.;
  - (b) By a memo dated 14<sup>th</sup> February, 2014, the County Executive Committee Member for Health informed the Governor that she had attended the Health Committee meeting at the Kericho County Assembly on that day whose main agenda was the hire of the ambulances versus purchase of the ambulances. She reported that after discussions, the members *"said that they will remove the ambulances line item completely from this year's budget, and that they will include it in the next financial year. They also*



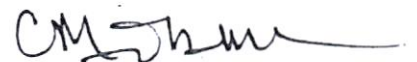
*said that the next budget will be made after visiting counties that have bought and those that have hired in order to get a balanced opinion”.*

(c) By a letter dated 14<sup>th</sup> February, 2014, the Governor informed KRCS E-Plus that the agreement of 7<sup>th</sup> January, 2014 was “*not capable of enforcement until the matter has been placed before the Assembly for the requisite approval. This is therefore to cancel the agreement and inform you that we shall enter into a fresh contract after the matter has been duly interrogated by the County Assembly*”.

(d) By a letter dated 19<sup>th</sup> February, 2014, the Secretary General acknowledged receipt of the letter of the Governor and stated “we look forward to working with you in the future”. It was observed that in this letter the Secretary General made reference to a letter by the Governor dated 15<sup>th</sup> February, 2014 which was stated by the Assembly to be in-existent. In response to this, the Governor tabled a letter dated 28<sup>th</sup> May, 2014 which clarified that the Secretary General was indeed referring to the letter of the Governor dated 14<sup>th</sup> February, 2014.

162. The Committee observed that the contract between the County Government of Kericho and KRCS E-Plus was executed on 7<sup>th</sup> January, 2014, at a time when there was no budgetary provision for the contract. Although a proposal had been made for budgetary provision in the Supplementary Budget, the Supplementary Budget had, at the time of execution of the contract, not been approved. When asked to explain this during cross-examination, the Governor stated that he had not expected that the County Assembly would delete the line item relating to the contract in the Supplementary Budget.

163. It was evident to the Committee that the contracting on the KRCS E-Plus contract preceded budgetary approval for the contract. The Governor committed the County Government of Kericho before ascertaining and ensuring that funds had



been made allocated to the procurement. The Governor, from his evidence, seems to have assumed and taken as a given the approval of the County Assembly for the ambulances and hence entered the contract before such approval was given.

164. On this matter, section 26(6) of the Public Procurement and Disposal Act provides as follows-

*A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.*

165. In this procurement, the Committee observed that the contract was executed before any funds had been *set aside in the budget of the County Government*. In the end, after the deletion of the line item on ambulances by the County Assembly, no funds at all were set aside for the project. The procurement process was therefore concluded before the funds were allocated to the procurement. The Governor's action therefore breached section 26(6) of the Public Procurement and Disposal Act.
166. The Committee however observed that on 14<sup>th</sup> February, 2014, seven days after the execution of the contract, on receiving the report from the County Executive Committee Member for Health on the decision taken by the County Assembly to delete the line item on ambulances from the Supplementary Budget, the Governor took prompt and decisive action to immediately cancel the contract with KCRS E-Plus by the letter dated 14<sup>th</sup> February, 2014 to KCRS E-Plus. The Committee further observed that the Kenya Red Cross had acknowledged the letter of cancellation. It was also noted that the contract having been cancelled on 14<sup>th</sup> February, 2014, six days before the commencement date for the contract, no financial loss had been occasioned to the County Government of Kericho.

**(c) Procurement Procedures Relating to the Contract**

167. In addition, the County Assembly stated that under the Public Procurement and Disposal Act and the rules made thereunder, any procurement for services such as the present one should comply strictly with the provisions of these mandatory provisions. According to the County Assembly, these provisions were not followed in the procurement of the above-referenced ambulance services.
168. In particular, the County Assembly referred to section 2 of the Public Procurement and Disposal Act which sets out a number of objectives of the Act, which include promotion of competition and ensuring that competitors are treated fairly.
169. The Assembly stated that the contract with E-Plus Ltd was a direct procurement and that there was no indication how E-Plus had been identified. The Assembly further stated that the County Assembly had been committed in the procurement of E-Plus through a direct procurement without a competitive process. The Assembly further stated that in the case of a direct procurement, section 29(3) of the Public Procurement and Disposal Act provided that-

*(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity-*

- (a) obtains the written approval of its tender committee; and*  
*(b) records in writing the reasons for using the alternative procurement procedure.*

170. It was the County Assembly's contention that none of the requirements of section 29(3) of the Act had been met prior to the execution of the contract with E-Plus. The Assembly argued that although on the face of it the project was a noble project, the law on procurement still had to be complied with.



171. The Governor, in his Personal Statement before the Committee, confirmed that there was indeed a contract entered into between the County Government, which he had signed on behalf of the County Government, and the Kenya Red Cross Services. In cross-examination, the Governor indicated that he had signed the contract as the Chief Executive Officer and that prior to entering into the contract he had not sought the approval of the Tender Committee. Counsel for the County Assembly asked the Governor to confirm that there was no competitive tendering for the provision of the ambulance services, to which the Governor responded "*that is true*".
172. The Governor explained that the Kenya Red Cross being a statutory body, the contract between the County Government and the Kenya Red Cross was not subject to the Public Procurement and Disposal Act.

### **Observations of the Committee**

173. That there was a contract between the County Government and Kenya Red Cross Society is not in doubt, and neither is it contested by both parties. The contestation lies in the procedures antecedent to the signing of the contract. The County Assembly's position is that the relevant procurement laws and procedures were not observed in the procurement contract. The Governor's response is that the subject contract did not fall within the ambit of the Public Procurement and Disposal Act.
174. The Public Procurement and Disposal Act, Cap. 412A, is described in the long title to the Act as an Act "*to establish procedures for efficient public procurement*". Section 2 of the Act further states that "*the purpose of the Act is to establish procedures for procurement and disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives-*
- (a) *to maximize economy and efficiency;*



- (b) to promote competition and ensure that competitors are treated fairly;*
- (c) to promote integrity and fairness of those procedures;*
- (d) to increase transparency and accountability in those procedures;*
- (e) to increase public confidence in those procedures; and*
- (f) to facilitate the promotion of local industry and economic development.*

175. There is no doubt, and there was no disputation from the Governor, that the County Government of Kericho is a public entity as defined in section 3 of the Act. Under section 3, the Government, or any department of the Government, falls within the definition of a public entity. The Public Procurement and Disposal Act is therefore applicable to procurement in the Kericho County Government.

176. Section 4 of the Act further provides for the application of the Act as follows:

- (1) This Act applies with respect to—*
  - (a) procurement by a public entity;*
  - (b) contract management;*
  - (c) supply chain management, including inventory and distribution;*
  - and*
  - (d) disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.*
- (2) For greater certainty, the following are not procurements with respect to which this Act applies—*
  - (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he were an employee;*
  - (b) the acquiring of stores or equipment if the stores or equipment are being disposed of by a public entity in accordance with the procedure described in section 129 (3) (a);*
  - (c) the acquiring of services provided by the Government or a department of the Government.*
- (3) For greater certainty, the following are procurements with respect to which this Act applies—*
  - (a) the renting of premises, except as described under subsection (2)*
  - (c);*



- (b) the appointing, other than under the authority of an Act, of an individual to a committee, task force or other body if the individual will be paid an amount other than for expenses;*
- (c) the acquiring of real property.*

177. It is noteworthy that the Governor stated that the procurement contract between the County Government of Kericho and the KRCS-E Plus did not fall within the ambit of the Act as KRCS E Plus is a statutory body. However, statutory bodies are not, under section 4(2) of the Act, exempted from the application of the Act. Thus, even procurement contracts entered into by public entities with statutory bodies fall within the scope of the Public Procurement and Disposal Act and are therefore subject to the procedures stipulated under the Act.
178. The Act and the Regulations made thereunder set out, in elaborate detail, the procedures to be followed whenever a public entity seeks to enter into procurement contracts.
179. In the contract with KCRS E-Plus, the Governor stated that there had been no open tendering or competitive bidding; that KCRS E-Plus was single-sourced. This mode of procurement is described under section 29(3) of the Act as "*restricted tendering or direct procurement*". That provision stipulates that before using such procedure, the procuring entity would require to meet the following pre-conditions-

- (a) obtain the written approval of its tender committee; and*
- (b) records in writing the reasons for using the alternative procurement procedure.*

180. During cross-examination, the Governor stated that in the procurement contract with KCRS E-Plus he had not sought the approval of the Tender Committee. This omission, whether motivated by ignorance, negligence or ill-motive, clearly

violates section 29(3)(a) of the Public Procurement and Disposal Act. Further by failing to record the reasons for using the alternative procurement procedure, the Governor breached section 29(3)(b) of the Public Procurement and Disposal Act.

181. The Committee further observes that by entering a contract without a competitive process and the Governor had failed to meet the standards set in the Public Procurement and Disposal Act, specifically those relating to-

- (a) maximizing economy and efficiency – section 2(a) of the Act;
- (b) promoting competition and ensuring that competitors are treated fairly – section 2(b) of the Act;
- (c) promoting the integrity and fairness of those procedures – section 2(c) of the Act;
- (d) increasing transparency and accountability in those procedures – section 2(d) of the Act; and
- (e) increasing public confidence in those procedures – section 2(e).

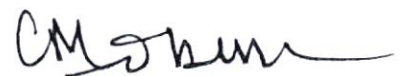
### 6.3 GROSS VIOLATION OF THE COUNTY GOVERNMENTS ACT

#### Unlawful Recruiting of Personnel and Creating Offices in the County Contrary to the Provisions of Sections 59, 60 and 62 of the County Governments Act

##### (a) Unlawful Establishment of Offices

182. According to the County Assembly, the County Public Service Board is mandated to establish and abolish offices in the County Public Service pursuant to section 59 of the County Government Act which provides as follows-

*(1) The functions of the County Public Service Board shall be, on behalf of the county government, to-*



- (a) *establish and abolish offices in the county public service;*
- (b) *appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;*
- (c) *exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;*
- (d) *prepare regular reports for submission to the county assembly on the execution of the functions of the Board;*
- (e) *promote in the county public service the values and principles referred to in Articles 10 and 232;*
- (f) *evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;*
- (g) *facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;*
- (h) *advise the county government on human resource management and development;*
- (i) *advise county government on implementation and monitoring of the national performance management system in counties;*
- (j) *make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.*

183. The County Assembly also referred to sections 60 of the County Governments Act which provide as follows -

*60. (1) The County Public Service Board shall establish a public office within the county public service if it is satisfied that –*

- (a) the establishment of the public office shall serve public interest in line with the core functions of the county government;*
- (b) there exists no other public office in the county public service discharging or capable of discharging the duties for which the county is requested to establish another office;*
- (c) upon the establishment of the office, the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures;*
- (d) the establishment of the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the county*



- public service or occasion unfair competition for staff among county public bodies;*
- (e) the establishment of the office shall not confer unfair advantage to a group of or individual serving public officers;*
- (f) the county government entity has prudently utilized offices previously provided in its establishment; and*
- (g) funding for the office to be established is duly provided for.*

184. Section 62(2) of the County Governments Act provides as follows -

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

185. According to the County Assembly, the Governor breached sections 59, 60 and 62 of the County Governments Act by creating offices on diverse dates from May, 2013 to April, 2014 contrary to the County Governments Act. According to the Assembly, the offices created as per the letter dated 25<sup>th</sup> April, 2014 are unlawful as the offices were not established by the County Public Service Board nor approved by the County Assembly. The County Assembly stated that the offices, which were not competitively sourced, were as follows -

- (a) Assistant Peace and Conflict Management;
- (b) Assistant Political Advisor;
- (c) Assistant Chief of Staff;
- (d) Assistant Economic Advisor; and
- (e) Assistant Advisor, Science, Technology, Innovation and Research.

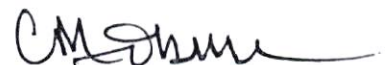
186. According to the County Assembly, the Governor also appointed two other unqualified persons to the position of-

- (a) Director Governor's Press; and
- (b) Political Advisor



187. The County Assembly was of the opinion that all the holders of the above cited offices unlawfully drew salaries from the County Treasury thus burdening the ever increasing wage bill.
188. In response the Governor stated that with regard to the allegations relating to the illegal establishment of offices, with the establishment of County Governments after the elections of March 2013, Governors came into office when there were only two cadres of staff at the County level: staff under the former Local Authorities and staff deployed to the Counties to man some critical positions.
189. The Governor further stated that the Transition Authority had issued guidelines on the cadre of staff to be in place once the Governor was in office. According to the Governor, the guidelines provided that the Governor would identify the persons to be appointed to the positions, and that the appointments would be regularized by the County Public Service Board once they were in place. These positions included -
- (a) Chief of Staff;
  - (b) Economic Advisor;
  - (c) Legal Advisor;
  - (d) Political Advisor;
  - (e) Director, Governor's Press Service; and
  - (f) Support Staff (Personal Assistant, Personal Secretary, Gardener, Cook, Driver and Messenger).
190. The Governor was of the opinion that these positions were effectively established by the Transition Authority and did not need to go through the Assembly as required under section 62 of the County Governments Act for approval.

191. The Governor pointed out that the guidelines issued by the Transition Authority did not indicate that the Governor could not recruit other personnel when there was need. The Governor also referred to section 31(d) of the County Government Act which provides that the Governor "*shall have such powers as may be necessary for the execution of the duties of the office of governor*".
192. According to the Governor, the other positions set out under the guidelines issued by the Transition Authority were to be filled competitively once the County Public Service Board was in place as required by sections 59 to 61 of the County Governments Act. The Governor stated that some of the positions had since been filled including the appointment of Chief Officers, Chief Budget Officer, Chief Economist and the Head of Human Resource Management, among others.
193. During the hearing, the question was posed to the Governor as to why he had established these offices without the involvement of the County Assembly despite the provisions of section 62(2) of the Act. The Governor stated that the officers serving in those offices were assisting in the execution of much needed functions and that when the offices were established, the officers, like all other interested persons, would undergo the interview process.
194. With regard to the appointment of Assistant Advisors, the Governor stated that the appointments were made following the realization that the volume of work in the Governor's office kept increasing as the citizens started dealing with the County Government in earnest. The Governor further stated that the Advisors at this time were virtually one-man offices and considering that an officer takes leave or may be indisposed at times, it was apparent that some of the officers under the Governor's personal staff would require assistants. The Governor was of the



opinion that the Transition Authority did not in any way suggest or imply that the Governor could not recruit the Assistants.

195. The Governor further stated that in order to meet the objectives of the relevant laws in promoting the interests of the County and facilitating necessary development, he felt that there was a need to have a Research Advisor. In the Governor's opinion, the disturbances which had been witnessed in the County particularly during election time warranted the appointment of an Advisor to look into issues of peace and conflict resolution. The Governor was of the opinion that no investor would want to have anything to do in a County that is perennially going through never ending cycles of violence and further stated that peace was seen as a critical component in the establishment of a strong foundation for economic development.

#### Observations of the Committee

196. The Committee observed that the County Public Service Board had, by letters dated 19<sup>th</sup> February, 2014 and 17<sup>th</sup> April, 2014 (attached on pages 110 and 109 of *Annex 8*, respectively), sought advice from the Transition Authority on the following matters-
- (a) The extent to which a Governor may establish or create positions under his office;
  - (b) The discretion of the Governor to fix salary entry points for his appointments;
  - (c) Whether the Board is obligated to regularize such appointments; and
  - (d) To what extent section 32(d) of the County Governments Act could be used in appointing officers to work under the office of the Governor over and above the officers provided for under the Transition Guidelines.





197. The Transition Authority responded by a letter dated 23<sup>rd</sup> April, 2014 (attached at page 172 of *Annex I*). The Authority stated that-

- (a) A Governor has no mandate to establish or create offices of any kind;
- (b) The discretion to fix salaries and entry points in the public service remains the discretion of the Salaries and Remuneration Commission;
- (c) A Board is not competent to regularize a nullity; and
- (d) The Transition Authority guidelines were based on the specific needs that existed at the time the Governor's assumed office.

198. The Authority further stated that "*it is recognized that one year later, other needs may have developed. It is important that the County Public Service Board avoids the creation of large informal structures*". And further, "*in the circumstances, my advice would be that if it is absolutely necessary, the Board may create offices within the County Public Service...the officers may then be deployed in the office of the Governor to perform identified functions*".

199. In light of section 62(2) of the County Governments Act, the Committee observed, as had been advised by the Transition Authority, that the Governor had no authority or mandate under the law to establish any office within the County Government. The power to establish such offices is vested in the County Public Service Board which, whenever it intends to establish an office, must seek the approval of the County Assembly. No evidence was presented to the Committee that indicated that this procedure was complied with in respect of the establishment of the offices complained of by the County Assembly; namely-

- (a) Assistant Peace and Conflict Management;
- (b) Assistant Political Advisor;
- (c) Assistant Chief of Staff;
- (d) Assistant Economic Advisor; and



(e) Assistant Advisor, Science, Technology, Innovation and Research.

200. In the end, it appeared that the Governor conceded to this position. He stated, both in his oral and verbal submissions that following the receipt of the advisory of the Transition Authority by the letter dated 14<sup>th</sup> April, 2014, the County Public Service Board and the Governor's office were undertaking the following specific actions—

- (a) positions which the County Government felt were essential in the interests of the people of the County and its development would be established procedurally and filled competitively; and
- (b) officers who met the requirements for the positions would apply for the positions if they so wished.

**(b) Inadequate Information on Staff and Appointment of Unqualified Personnel**

201. The County Assembly further stated that the Governor went ahead to appoint personal staff who had failed to provide copies of their curriculum vitae and academic and professional qualifications as is required by the Transition Authority guidelines. The offices cited were-

- (a) Chief of Staff;
- (b) Economic Advisor;
- (c) Legal Advisor;
- (d) Messenger;
- (e) Gardener; and
- (f) Tea Person.

202. On this the Governor responded by stating that this was not true. The Governor stated that the documents relating to the personnel were in their respective files at the Registry and had been availed to the County Public Service Board. From the



evidence adduced by both parties, it appeared to the Committee that this matter had been settled.

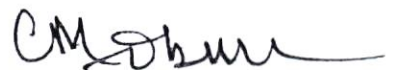
203. The County Assembly further stated in the Particulars of Allegations that the Governor had appointed two unqualified persons to the positions of-

- (a) Director Governor's Press; and
- (b) Political Advisor

204. Concerning the recruitment of Political and Economic Advisors without the qualifications given in the guidelines issued by the Transition Authority, the Governor stated that the exposure of the two individuals in their careers put them in a position where they were actually overqualified for the positions to which they were appointed by the Governor.

205. The Governor also stated that the Political Advisor was someone who had spent most of his working life as a trade unionist to the extent of rising to the level of a National Chairman of Kenya National Union of Teachers and would "*obviously be several times more competent than a young man with any first degree that has been jobless for five years*".

206. With regard to the appointment of the Economist, the Governor responded by stating that the economic mainstay of the majority of the residents happened to be tea farming. The Governor was of the opinion that "*the appointment of a person who has risen to the highest level in one of the multinationals in the sector could not have been a mistake*". The Governor further stated that "*the appointee [had] vast experience including in processing, value addition and research [and] could deliver more to the County compared to a job seeker with a degree with a degree in economics*".



### Committees Observations

207. On the matter of the unqualified personnel, the Committee observed that despite the explanations given by the Governor, questions had been raised by the County Public Service Board in the letter to the Governor dated 25<sup>th</sup> April, 2014 (attached at page 172 of *Annex I*) on the qualifications of the Director Governor's Press and the Political Advisor. It was evident that these officers had not met the qualifications required of their positions. It was however observed that the Governor had stated that he and the County Public Service Board would seek to take the necessary remedial action.

### 7.0 THRESHOLD FOR IMPEACHMENT

208. Impeachment is a constitutionally specified means by which an official accused of unlawful activity may be removed from office for misconduct. The word "impeachment" derives its roots from the Latin language and expresses the idea of being caught or entrapped. The concept of impeachment was originally a power of the British Parliament, invented in the 14<sup>th</sup> century, to control royal appointees. It was a function of Parliament sitting as a court. The House of Commons would prosecute (impeach) before the House of Lords. The concept of impeachment was later adopted by many of the American colonial Governments and state Constitutions. As a process, impeachment is a formal inquiry aimed at making public officers accountable to the people based on the principle that public office is a public trust.

209. The United State of America Constitution provides that the House of Representatives "*shall have the sole power of Impeachment*" (Article 1 section 2) and that "*the Senate shall have the sole power to try all impeachments ...(but) no person shall be convicted without the concurrence of two-thirds of the Members present.*" (Article 1 section 3). The President, Vice President and all civil officers of





the United States are subject to impeachment. Impeachment is a fundamental component of the constitutional system of “*checks and balances*”.

210. In the USA the House of Representatives charges an official by approving, by majority vote, articles of impeachment. Impeachable offences in the US are “treason, bribery, and other high crimes and misdemeanors.” To be impeached and removed from office, the House of Representatives and the Senate must find that the official committed one of these acts. A committee of representatives, called “managers”, acts as prosecutors before the Senate. The Senate Chamber serves as the courtroom. The Senate becomes jury and judge, except in the case of presidential impeachment trials when the Chief Justice of the United States presides. The penalty for an impeached official is removal from office. In some cases, disqualification from holding future office is also imposed. There is no appeal.

211. While contributing to the debate at a convention held on 8<sup>th</sup> February 2012, Senator Miriam Defensor Santiago of the Senate of the Philippines in a keynote address said that, **“an impeachment trial is a unique process, because it is a hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain constitutional government, through the removal of an unfit official from a position of public trust.”**

212. The Special Committee can do no more than agree with the exposition by the Honourable Senator from Philippines. The punishment meted out by an impeachment is loss of political office. Article 38(3)(c) of the Constitution of Kenya gives every person the right to hold political office as follows:

*“Every person has the right, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

213. That right to hold office is however subject to the provisions of Article 181 of the Constitution which provides that a County Governor may be removed from office for gross violation of the Constitution or any other law, or where there are serious reasons for believing that the County Governor has committed a crime under national or international law, or for abuse of office of gross misconduct or physical or mental incapacity to perform the functions of the office of County Governor.
214. What then is the threshold or standard of proof required for a Governor to be removed from office?
215. Yale Law professor Charles Black Jr. in “Impeachment: A Handbook” states as follows:
- “Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere ‘preponderance’ of an ordinary civil trial, but perhaps must be satisfied with something less than the ‘beyond a reasonable doubt’ standard of the ordinary criminal trial, in the full literal meaning of that standard. ‘Overwhelming preponderance of the evidence’ comes perhaps as close as can to denoting the desired standard.”**
216. In the United States there has been debate on the burden of proof required in impeachment proceedings. The argument of beyond reasonable doubt, that is, the highest threshold in proving a case has been argued by those facing impeachment proceedings. On the other hand the members of the Houses of Senate and Congress have argued for a lower standard of proof.

*CM Johnson*

217. The argument on the appropriate standard of proof in impeachment proceedings was played out in the 1986 Senate impeachment trial of Judge Harry Claiborne (Gray & Reams, The Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne , Volume 5), where the Attorney's of the judge filed a motion to designate beyond a reasonable doubt as the applicable standard for the Senate in reaching its determination. In support of the motion they argued that the constitutional language made it clear that an impeachment trial was in the nature of a criminal proceeding; the standard of proof in all criminal trials is beyond a reasonable doubt; historically impeachments have been conducted in the nature of a criminal proceeding; and the consequences for the defendant were grave, requiring the prosecutors to be held to the highest standard of proof, beyond a reasonable doubt.

218. The response of the House Managers in opposition to the Claiborne motion noted that the reasonable doubt standard was designed to protect criminal defendants who risked forfeitures of life, liberty and property. Such a standard was inappropriate, they maintained, because the Constitution limits the consequences of a Senate impeachment trial to removal from office and disqualification from holding office in the future, explicitly preserving the option for a subsequent criminal trial in the courts. The end result was that the Senate refused to impose the beyond reasonable doubt rule as the Senate standard.

219. In summary the United States Senate has traditionally left the choice of the applicable standard of proof to each individual Senator. While rejecting a motion to make the criminal standard the standard in the Claiborne impeachment, the discussion made clear that it was simply a decision to allow each member to make that choice and not a repudiation of the standard itself. Individuals might apply that or any other standard of their choice. A walk through history and an examination of



the discussions of legal commentators may aid individuals in weighing their choices, but provides no definitive answers. Indeed, such an exercise is perhaps most useful in highlighting basic questions that members will want to ask themselves when searching for the appropriate standard.

220. Micheal J. Gerhardt, visiting Professor of Law, Duke University, in "The Special Constitutional Structure of the Federal Impeachment Process", while reviewing the impeachment trial of then US President Bill Clinton states as follows on the issue of threshold-

The first such feature of the constitutional allocation of power for impeachment and removal is that it facilitates and rewards a pragmatic or flexible analysis and impedes a formalistic analysis of the fundamental questions at the core of President Clinton's impeachment proceedings- whether his misconduct constituted a "high crime or misdemeanor". A pragmatic analysis of this issue entails balancing various practical considerations or factors, including the magnitude of harm that an impeachable official's misconduct has caused society or the constitutional order, the nexus between the official's duties and his misconduct, public opinion, and other possible avenues of redress, such as electoral process or legal proceedings. In contrast, a formalist analysis employs rigid criteria for, or extremely well-defined elements of impeachable offences, such as treating every violation of the federal criminal law or every breach of the public trust as justifying removal. By vesting the impeachable authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision making. Members of Congress are pragmatists who can be expected to



decide or resolve issues, including the appropriate tests, by recourse to practical rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are not exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority....

Moreover, if formalist reasoning were the norm in impeachment proceedings, many questions posed by the President's misconduct would not have been nearly as heart-wrenching or politically divisive as they were. Removal would have been extremely easy and straightforward. In addition, the American people flatly rejected the strict liability notion of impeachment; most Americans acknowledged that the President had broken the law, but still did not regard his misconduct as constituting an impeachable offence or as justifying his removal. Most Americans favoured a less rigid approach that balanced the harm and wrongfulness of the President's misconduct against the public interest or welfare.

221. In the Supreme Court of Nigeria case of Hon. Muyiwa Inakoju & others –v- Hon. Abraham Adeolu Adedeke S.C. 272 of 2006 it was held as follows:

*“A Governor as a human being cannot always be right and he cannot claim to be always right. That explains why section 188 talks about gross violations. Accordingly, where a misconduct is not gross, then section 188 weapon of removal is not available to the House of Assembly.”*

222. In Kenya it is useful to note the provision of Article 73 of the Constitution which deals with the responsibilities of leadership:

**Responsibilities of leadership**

73. (1) Authority assigned to a State officer—

- (a) is a public trust to be exercised in a manner that—
  - (i) is consistent with the purposes and objects of this Constitution;
  - (ii) demonstrates respect for the people;
  - (iii) brings honour to the nation and dignity to the office; and
  - (iv) promotes public confidence in the integrity of the office; and
- (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
- (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
- (c) selfless service based solely on the public interest, demonstrated by—
  - (i) honesty in the execution of public duties; and
  - (ii) the declaration of any personal interest that may conflict with public duties;
- (d) accountability to the public for decisions and actions; and
- (e) discipline and commitment in service to the people.

223. In a recent case in the High Court being Petition No. 3 of 2014 Hon. Martin Nyagah Wambora & 4 others –v- The Speaker of the Senate and 5 others the High Court held as follows:

*“To our minds therefore, whether a conduct is gross or not will depend on the facts of each case having regard to the Article of the Constitution or any written law alleged to have been violated. We find that it is not every violation of the Constitution or written law that can lead to the removal of Governor, it has to be a gross violation.*





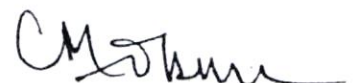
of Kericho for the Governor to be removed from office. The Special Committee notes that during the impeachment of the Governor of Embu County on 13th May 2014 the Special Committee considering the matter found as follows:

“The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me”. This response by the Governor does little to “promote public confidence” in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of Article 73(2)(d) of the Constitution which requires that State Officers are guided by the principle of “accountability to the public for decisions and actions.”

## 8.0 FINDINGS OF THE SPECIAL COMMITTEE

227. Having considered all these matters, it then fell to the Special Committee to discharge its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders. Section 33(4) of the County Governments Act, 2012 and standing order 68(2) of the Senate Standing Orders mandates the Special Committee to-

- (a) investigate the matter; and
- (b) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated.





228. The Committee found as follows on each of the Charges-

**8.1. CHARGE ONE: GROSS VIOLATION OF THE CONSTITUTION AND THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013**

229. This Charge was founded on the Memorandum of Agreement dated 13<sup>th</sup> January, 2014 between the County Government of Kericho and Bluetechs UK Group Ltd. The Agreement had been executed by the Governor on behalf of the County Government of Kericho.

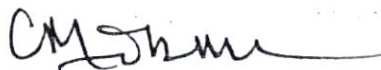
230. An analysis of the evidence that was presented to the Committee, both written and oral, left no doubt that the Governor had indeed contravened both the Public Private Partnerships Act, 2013 and the Constitution. In particular, the Committee established the following contraventions of the law-

**(a) Irregular Agreement between the County Government of Kericho and Bluetechs UK Group Limited**

Although the parties to the Agreement (the Governor and Bluetechs Ltd) maintained that they had not intended to be bound by the Memorandum of Agreement and that therefore no binding contract had been entered into, the Committee found that the provisions of the Memorandum of Agreement left no doubt that the Agreement met all the essentials of a valid contract and that the parties intended to be bound by the provisions of the Memorandum of Agreement. The Special Committee therefore found that the Agreement was entered into without reference to the procedures set out in the Public Private Partnerships Act, 2013.

**(b) Violation of the Provisions of Article 201 of the Constitution**

The Special Committee found that in respect of the Memorandum of Agreement with Bluetechs Ltd., the Governor had not met the threshold



of public participation required under Article 201 of the Constitution. There was no evidence of the involvement of the County Assembly or the public before the execution of the Memorandum of Agreement. The only attempts at public participation, including the involvement of the County Assembly, occurred after the execution of the Memorandum of Agreement. The Special Committee therefore found that the Governor had contravened Article 201(1) of the Constitution which requires “openness and accountability, including public participation in financial matters”. Despite this, the processes antecedent to the execution of the Memorandum of Agreement were kept away from the County Assembly and the public.

**(c) Violation of Section 148 as read with Section 2 of the Public Finance Management Act, 2012**

The Special Committee found in terms of section 148 as read with section 2 of the Public Finance Management Act, 2012, the Governor was not an accounting officer for the County Government of Kericho and consequently, he was not competent to execute a binding Agreement on behalf of the County. By so doing, the Special Committee found that the Governor had breached section 148 as read with section 2 of the Public Finance Management Act, 2012.

**(d) Violation of section 61(3) of the Public Private Partnerships Act, 2013**

The Special Committee found that the Governor had contravened section 61(3) of the Public Private Partnerships Act, 2013 which sets out pre-conditions to be met before a Public Private Partnership is entered into. Although the Governor’s position was that the requirements of section 61(3) of the Act would eventually be complied with, the law

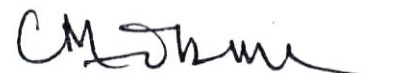
required that section 61(3) of the Act be observed before the execution of an Agreement.

**(e) Violation of section 29 of the Public Private Partnerships Act, 2013**

The Governor admitted that Bluetechs UK Ltd. was single-sourced; there was no competitive bidding. Although section 61 of the Act provides for instances where restricted tendering may be undertaken, the Governor did not demonstrate before the Special Committee the specific condition under section 61(1) by which the restricted tendering was undertaken. The Special Committee found that the Governor had contravened section 29 of the Public Private Partnerships Act, 2013 which requires that except as otherwise provided for under the Act, all projects be procured through competitive bidding.

231. On the whole, the Special Committee found that the Governor, in executing the Memorandum of Agreement with Bluetechs Ltd., had acted in a naïve and ignorant manner, oblivious to the legal regime governing Public Private Partnerships. The Governor rushed to enter into a binding Memorandum of Agreement, thereby committing the County and her residents to a retinue of obligations and risks without giving attention to the relevant laws and processes and without consulting the people of Kericho County.

232. Although no losses or liabilities had accrued to the County, the Committee had no doubt that the Governor had not complied with the provisions of the Constitution and the Public Private Partnerships Act. The question before the Committee was whether the contraventions by the Governor constituted "*gross violation*" of the Constitution and the Public Private Partnerships Act as provided for under Article 181 of the Constitution.



233. The Committee found that although the Constitution and the Public Private Partnerships Act had been contravened, the contraventions did not meet the threshold of “*gross violation*”. The Special Committee therefore found that the first charge of gross violation of the Constitution and the Public Private Partnerships Act, 2013 was not substantiated.

**8.2. CHARGE TWO: GROSS VIOLATION OF THE PUBLIC FINANCE MANAGEMENT ACT 2012, THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE RULES MADE THEREUNDER AND VIOLATION OF THE CONSTITUTION**

234. This Charge was founded on the matter of the contract between the County Government of Kericho County and KCRS E-Plus which was executed on 7<sup>th</sup> January, 2014. The Committee established the following contraventions of the law-

**(a) Budgeting for the Contract**

The Special Committee found that the contract between the County Government of Kericho and KCRS E-Plus was executed on 7th January, 2014, at a time when there was no budgetary provision for the contract. Further, although a proposal had been made for budgetary provision in the Supplementary Budget, the Supplementary Budget had, at the time of execution of the contract, not been approved; the line item on ambulances had been deleted. In the end, after the deletion of the line item on ambulances by the County Assembly, no funds at all had been set aside for the project. The procurement process was therefore concluded before the funds were allocated to the procurement. The Special Committee found that the Governor’s action contravened section 26(6) of the Public Procurement and Disposal Act which requires that “*a procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in*



*its budget to meet the obligations of the resulting contract”.*

**(b) Procurement Procedures Relating to the Contract**

During cross-examination, the Governor stated that in the procurement contract with KCRS E-Plus he had not sought the approval of the Tender Committee for the procurement. This omission, whether motivated by ignorance, negligence or ill-motive, clearly breached section 29(3)(a) of the Public Procurement and Disposal Act. Further by failing to record the reasons for using the alternative procurement procedure, the Governor contravened section 29(3)(b) of the Public Procurement and Disposal Act.

The Committee further found that by entering a contract without a competitive process the Governor had failed to meet the standards set in the Public Procurement and Disposal Act, specifically those relating to-

- (a) maximizing economy and efficiency – section 2(a) of the Act;
- (b) promoting competition and ensuring that competitors are treated fairly – section 2(b) of the Act;
- (c) promoting the integrity and fairness of those procedures – section 2(c) of the Act;
- (d) increasing transparency and accountability in those procedures – section 2(d) of the Act; and
- (e) increasing public confidence in those procedures – section 2(e).

235. It was of great concern to the Special Committee that the Governor, the Chief Executive Officer of Kericho County, had entered into the contract with KRCS E-Plus in complete violation and disregard of the Public Procurement and Disposal



Act, Cap. 412A and the Public Finance Management Act, 2012 and the Regulations made thereunder as well as the Constitution. It appeared to the Committee that the Governor was either totally oblivious to the laws and processes on procurement, or if he was aware of their provisions, he believed that as the Chief Executive Officer of the County, the laws did not apply to him or to his office. The legal and regulatory framework on procurement is binding on all public entities; it is not optional, it is not to be applied where it is convenient to a public officer or a public entity and ignored where it is perceived to create obstacles to achieving desired results.

236. The Special Committee observed that the Governor had eventually terminated the contract before the commencement date of the contract and no losses and liabilities had accrued to the County Government of Kericho.

237. The Special Committee then considered the matter of whether the violations established met the threshold of “*gross violation*”. The Committee found that although the Public Finance Management Act 2012, the Public Procurement and Disposal Act, Cap. 412A and the Rules made thereunder and the Constitution had been contravened, these violations did not rise to the level of “*gross violation*” of the Constitution and the law as set out under Article 181 of the Constitution. The Special Committee therefore found that the Charge of Gross Violation of the Public Finance Management Act 2012, the Public Procurement and Disposal Act and the Rules made thereunder and the Constitution was not substantiated.

### 8.3. CHARGE THREE: GROSS VIOLATION OF THE COUNTY GOVERNMENTS ACT

238. This Charge related to the unlawful recruitment of personnel in the County Government and the unlawful creation of offices in the County Government of

Kericho contrary to sections 59, 60 and 62 of the County Governments Act, No. 17 of 2012. The Special Committee found as follows-

**(a) Unlawful Establishment of Offices**

The Special Committee found that pursuant to section 62(2) of the County Governments Act, the Governor had no authority or mandate under the law to establish any office within the County Government. The power to establish any such office is vested in the County Public Service Board which, whenever it intends to establish an office, must seek the approval of the County Assembly. No evidence was presented to the Committee that indicated that this procedure was complied with in respect of the establishment of the offices complained of by the County Assembly; namely-

- (a) Assistant Peace and Conflict Management;
- (b) Assistant Political Advisor;
- (c) Assistant Chief of Staff;
- (d) Assistant Economic Advisor; and
- (e) Assistant Advisor, Science, Technology, Innovation and Research.

**(b) Appointment of Unqualified Personnel**

The Committee found that the persons appointed to the offices of Director, Governor's Press and Political Advisory had not met the qualifications required of their positions.

239. **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 County Public Service Board was in the process of taking remedial**





measures on these personnel-related matters. 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. The Special Committee therefore found that although the County Governments Act, 2012 had been breached, the breaches, more in light of the ongoing remedial processes at the County-level, did not rise to the level of “*gross violation*” of the Constitution and the law as set out under Article 181 of the Constitution.

240. The Special Committee therefore found that the Charge of Gross Violation of the County Governments Act, 2012 was not substantiated.

#### 9.0 RATIONALE FOR THE SPECIAL COMMITTEE’S FINDINGS

241. The Special Committee notes that in the matter of the proposed impeachment of the Governor of Embu County (the Wambora Case), the Special Committee considering the matter found as follows-

“... the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me”. This response by the Governor does little to “promote public confidence” in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of Article 73(2)(d) of the Constitution which requires that State Officers are guided by the principle of “accountability to the public for decisions and actions.”

242. Holding the Governor of Embu County to account seemed to be a lost cause.



243. In the present matter, the Special Committee finds that the Governor has not abdicated his role as Governor. The Governor did not deny his role in the allegations made against him. He put forward a case explaining that he was guided by the best intentions for the County. He has however breached the law as a result of a combination of factors, including: the challenges of navigating the transition to devolved government, poor judgment, inadequate professional advice or over-enthusiasm. These challenges, if recognized and acknowledged, can be remedied. The Committee did not find in the Kericho Governor an individual hell bent on violating the law, or abdicating responsibility, but rather one who in his drive to achieve certain results, has contravened the Constitution and a series of statutes. Considering that the constitutional and statutory provisions on impeachment do not supplant other criminal and civil remedies available at law, it is not the view of the Committee that in the present matter the appropriate remedy for dealing with such a Governor is removal from office.

244. All does not appear to be lost. The view of the Committee is that if, going forward, the Governor seeks professional advice and abides by it, the County of Kericho shall be the richer for it. The pragmatic thing to do is therefore to allow the Governor to continue holding office but issue a severe reprimand. This we do in no uncertain terms. The situation in Kericho County must change.

#### **10.0 OTHER RECOMMENDATIONS OF THE SPECIAL COMMITTEE**

245. In the course of the hearing on this matter, the Special Committee observed a number of matters, outside of the specific Charges against the Governor of Kericho County on which it made a number of recommendations.

##### **(1) The Memorandum of Agreement between Kericho County Government and**



**Bluetechs Ltd.**

246. It was evident from the evidence before the Special Committee that the Memorandum of Agreement between Kericho County Government and Bluetechs Ltd. had been entered into hastily and recklessly. The many rigorous and detailed processes under the Public Private Partnerships Act, 2013 that ought to have preceded the signing of the Agreement were ignored. This was a case of putting the cart before the horse. What then should be the fate of the Agreement between the County and Bluetechs Ltd?
247. During the hearings, the Director of the Public Private Partnerships Unit advised that the entire process should be terminated and that it should start afresh. The Special Committee agrees with this position. The Agreement is beset by too many legal and procedural challenges which it may not be possible, at this stage, to salvage. In order to protect the interests of the people of Kericho County, the Special Committee hereby recommends that the County Government of Kericho, while considering all relevant legal provisions, without delay, terminates the Memorandum of Agreement with Bluetechs Ltd.

**(2) The Technical Capacity and Advice Available to the Governor**

248. In the course of the hearing it was evident to the Special Committee that the Governor had acted in complete violation of and disregard of not only the procurement laws and procedures but also the legal regime governing Public Private Partnerships. It was as if these laws and procedures did not exist or did not apply to the Kericho County Government.
249. The Special Committee was concerned about the technical capacity and advise available to the Governor within the County Executive. The Governor, before assuming the office of Governor, served as Professor of chemistry. While this did not preclude the Governor from holding the office of Governor, it was necessary

that various technical competencies be availed within his office so as to ensure the effective and lawful discharge of the mandate of the office.

250. In particular, the Special Committee was concerned that matters relating to investment in the County were literally falling apart while the Deputy Governor, a former chief executive officer of the Kenya Investments Authority, was a person with vast knowledge and experience in investment matters. One would imagine that this would therefore be an ideal County where the investment laws and procedures would therefore be fully adhered to. *Was the Deputy Governor involved in these investment matters? Was her advice sought? What advice, if any, did she render and, was it observed or ignored?* These are questions that remained unanswered but that were of great concern to the Committee.

251. The nature of legal advice issued to the Governor was of concern to the Special Committee. The laws on procurement and on Public Private Partnerships were flouted with abandon, yet there was a Legal Officer in office responsible for rendering legal advice to the Governor. It was clear to the Special Committee that this was an office that urgently required to be revamped and staffed with personnel who are qualified and competent to offer independent and professional legal advice to the Governor. Without such an officer, it is unlikely that the Governor will get the legal matters right.

252. The Special Committee observed that this was an area in which legislation that would be binding on all the forty-seven Counties was required so as to ensure the provision of unquestionable legal services in all the Counties. The Special Committee therefore recommends that the Standing Committee on Legal Affairs and Human Rights urgently develops and proposes to the Senate legislation to provide for the office of County Attorney.

253. The Special Committee was further concerned about the advice rendered, if any, by the Procurement Office. Was the Procurement Office ever consulted, with what result? Had the office rendered advice on the procurement of Bluetechs and KCRS E-Plus? Was the advice taken?

254. By and large, the Special Committee observed that the Governor required an efficient and effective secretariat. It was not lost on the Committee that there were allegations that the County Assembly had in some instances failed to consider and approve the establishment of various offices for unduly long periods of time. The Special Committee recommends that in order to ensure the success of Kericho County, the Executive and Assembly and the County Public Service Board work hand-in-hand to ensure the establishment of the key offices and the engagement of appropriate officers.

### **(3) The Legal Regime on Public Private Partnerships**

255. The Director of the Public Private Partnerships Unit took the Committee through the law and the procedures governing Public Private Partnerships. It was evident to the Committee, from the presentation by the Director, that the laws and regulatory framework on Public Private Partnerships are still at a nascent and embryonic stage. In February 2014 the Public Private Partnerships Unit issued guidelines to all contracting authorities, including Kericho County, on the establishment of Public Private Partnership Nodes. The Committee was informed that the Unit had commenced civic education and awareness exercises across the Counties. The Unit had also met with the Council of Governors which had expressed various challenges arising out of the law. The Unit was also working closely with some of the Counties on their Public Private Partnership projects.





256. Because Public Private Partnerships are a common feature in the Counties, the Committee recommends that the Public Private Partnerships Unit hastens and prioritizes the awareness processes in the Counties.

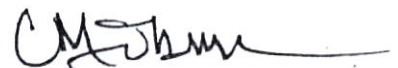
257. The Committee further recommends that the Public Private Partnerships Act, 2013 be reviewed in order to ensure that it fully takes into account devolution and that the necessary Regulations be put in place. Further, the Committee recommends that as much as possible, the functions of the National Treasury with regard to Public Private Partnerships, which are presently resident solely in the National Treasury, be decentralized so as to ensure access by the Counties. Without this, the National Treasury will become the obstacle to the vision of many of the Counties.

**(4) Oversight Mandate of the County Assembly**

258. The Special Committee observed that the County Assembly of Kericho had remained extremely vigilant in its oversight mandate. Various Motions challenging the actions of the Governor had been filed and passed in the Assembly. Further, the Special Committee was informed that this was not the first time that the matter of impeachment had arisen in Kericho County. Apparently, in 2013, barely four months after the Governor took office, there had been an attempt at impeachment.

259. The Committee appreciated the oversight mandate of the Assembly. Indeed without effective oversight over the County Executives, devolution will certainly fail.

260. However, the Special Committee recommends in the case of Kericho County, and indeed for all Counties, that the oversight tool of impeachment should be applied only where-



- (i) The allegations are serious, substantial and weighty;
- (ii) The violation is a flagrant and glaring violation;
- (iii) There is a nexus between the violation and the Governor;
- (iv) The violation led to harm, loss or damage to society;
- (v) The violation has led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.

261. The Committee further recommends that before initiating impeachment proceedings, the County Assemblies consider the other oversight mechanisms that are available to legislatures the world over and which are also at the disposal of the County Assemblies. Impeachment need not be the default oversight tool to be applied to every and any violation of the Constitution and the laws. However, the Special Committee hastens to add, that where in terms of Article 181 of the Constitution impeachment of a Governor is called for, the Senate will certainly execute its constitutional mandate in that regard.

**(5) Reconciliation Amongst the Leadership in Kericho County**

262. There is urgent need for reconciliation amongst the leaders in Kericho County. The Committee observed a virtual breakdown in relations between the County Executive and the County Assembly. Sadly, this state affairs appears to have commenced immediately after the General Elections and has continued to persist. It is unlikely that Kericho County and her people will reap the fruits of devolution in such an environment.

263. The reconciliation efforts by the Myoot Kipsigis Council of Elders and the religious leaders are acknowledged and appreciated. However, the Special Committee urges and recommends urgent reconciliation initiatives in the County.

The Special Committee further urges the Senator of Kericho County, in exercise of his mandate under Article 96(1) of the Constitution, to take a lead role to bring together the County Executive and the County Assembly of Kericho County. Without this, the people of Kericho County will be the ultimate losers.

#### **11.0 CONCLUSION**

264. **In conclusion, the Special Committee, having executed its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders found as follows-**

- (a) On the first Charge of gross violation of the Constitution and the Public Private Partnerships Act, 2013, the Special Committee found that this Charge was not substantiated.
  
- (b) On the second Charge of gross violation of the Public Finance Management Act 2012, the Public Procurement and Disposal Act and the Rules made thereunder and the Constitution, the Special Committee found that this Charge was not substantiated.
  
- (c) On the third Charge of gross violation of the County Governments Act, 2012, the Special Committee found that this Charge was not substantiated.

*CM John*

