

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY
IMPEACHMENT OF THE GOVERNOR OF KERICHO COUNTY HELD
ON WEDNESDAY, 28TH MAY, 2014 AT THE VIP LOUNGE, KENYATTA
INTERNATIONAL CONFERENCE CENTRE AT 10.30 A.M.**

[The Chairperson - Sen. Christopher Obure]

SENATORS PRESENT

Sen. Kiraitu Murungi	-	Vice Chairperson
Sen. Dan Mwazo Mwakulegwa		Sen. Mutula Kilonzo Jnr.
Sen. Fatuma Dullo Adan		Sen. Stephen Sang
Sen. Beatrice Elachi		Sen. Catherine Mukiite Nabwala
Sen. Daniel Karaba		

SECRETARIAT

Ms. Eunice Gichangi	-	Director, Legal Services, Senate
Mr. Anthony Njoroge	-	Director, Litigation & Compliance

IN ATTENDANCE

THE GOVERNOR'S TEAM

Prof. Paul Kiprono Chepkwony	-	Governor
Mr. Peter Wanyama	-	Advocate
Mr. Kimutai Bosek	-	Advocate
Mr. Onesmus Langat	-	Legal Advisor
Mrs. Eunice Mwanza	-	Legal Assistant

THE COUNTY ASSEMBLY TEAM

Mr. Japheth Mutahi	-	Speaker
Mr. Charles Njenga	-	Advocate
Mr. George Ng'ang'a Mbugua	-	Advocate
Mrs. Sharon Mibei	-	Legal Officer

(The Special Committee convened at 10.30 a.m.)

Prayers

*(Members and of the Special Committee and other
other participants introduced themselves)*

The Chairperson (Sen. Obure): Having completed the introductions, I now wish to make some remarks. Hon. Senators, ladies and gentlemen, the Special Committee on the proposed removal from office of the Governor of Kericho County was established on Friday 23rd May, 2014 by a resolution of the Senate. The Special Committee is provided for under Section 33(4) of the County Governments Act, 2012 and Standing Order No.68 (2) of the Senate Standing Orders. The Special Committee is required to:-

(a) Investigate the matter and;

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

Hon. Senators, ladies and gentlemen, as the Hon. Speaker of the Senate observed in his communication to the Senate on Friday 23rd May 2014, the hearing of charges for the proposed removal from office of the Governor is one of the most important and also most salient functions of the Senate under the Constitution. The Hon. Speaker, therefore, urged the Senate to exercise the highest level of responsibility and circumspection on this matter in plenary and also in this Special Committee.

The Special Committee therefore wishes to emphasize that it is cognizant of the gravity of the matter with which it is seized and that it shall accord all parties to the proceedings a full and fair hearing.

The Committee has noted with concern reports to the effect that in the recent past, this matter has been the subject of debate and deliberation in the public domain. The Special Committee urges all hon. Senators and the parties to this matter to desist from discussing this matter while it is still active before the Committee and the Senate and, to allow the constitutional legal processes to take their course. That notwithstanding, the Special Committee hereby restates its commitment to ensuring a fair and just process that is founded on the law. The Special Committee in making its decision shall be guided by the evidence adduced by the parties and the law.

Hon. Senators, ladies and gentlemen, it is important to observe the strict ten day timeline attached to the discharge of the mandate of the Special Committee. The Special Committee, therefore, urges all parties to effectively use the time allocated to them so as to ensure that the Committee concludes its work and reports back to the Senate within the required time.

I now invite the Vice Chairperson of the Special Committee, Sen. Murungi, to present the rules of procedure for the investigation of the proposed removal from office of the Governor.

Thank you.

The Vice Chairperson (Sen. Murungi): Mr. Chairman, Sir, the following are the rules of procedure to guide the proceedings of this Special Committee:-

1. Upon convening of the meeting of the Senate where the charges against the Governor, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, No.17 of 2012 and Standing Order No.65, the Speaker shall report the resolution of the County Assembly to the Senate.
2. The Senate, may, pursuant to Section 33 (3) (b) of the County Governments Act and Standing Order No.65 (1) (b) by resolution appoint a 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.
So, the purpose of this Committee is to investigate the matter and to report to the Senate within ten days whether the Committee finds the particulars of the allegations against the Governor to have been substantiated.
3. Where the Senate does not establish a Special Committee, the Senate shall proceed to investigate and consider the matter in the plenary.
The Senate in this case decided to set up this Special Committee.
4. Where a Special Committee is appointed, the Committee shall, within 24 hours of its appointment elect the Chairperson and the Vice Chairperson from amongst its Members and appoint a date for commencement of the hearing of the evidence for the purposes of the investigation.
5. Upon appointment of a date for commencement of the hearing of the evidence for the purposes of the investigations, the Committee shall:-
 - (a) Invite the Governor to appear and be represented before the Special Committee during its investigations and;
 - (b) Notify the County Assembly of the date of the commencement of the investigation and invite the Assembly to designate the Members of the Assembly not being more than three Members, if any, who shall appear before the Committee to represent the Assembly during investigations.
6. An invitation under Rule 5 may be effected by personal service or by notice in at least all the newspapers in national circulation.
7. Where the Governor chooses to appear before the Committee, the Governor shall be required within three days of invitation under Rule 5, on a date specified by the Committee to file an answer to the charges in the office of the Clerk of the Senate in which the Governor shall set out:-
 - (a) the Governor's response to the particulars of the allegations;
 - (b) how the Governor proposes to appear before the Special Committee; whether in person, by advocate, or in person and by advocate;
 - (c) the names and addresses of the persons to be called as witnesses, if any and a statement by each such witness; and,

- (d) Any other evidence to be relied on.
8. Where the County Assembly chooses to appear before the Committee, the Assembly shall be required within three days of the invitation under Rule 5, on a date to be specified by the Committee, to file within the office of the Clerk of the Senate, documentation –
- (a) designating the Members, if any who shall 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 the addresses of the persons to be called as witnesses if any and a statement of each such witness; and,
 - (d) specifying any other evidence to be relied on.
9. The Clerk of the Senate shall furnish each party with documentation filed by the other party under Rule 7 or 8.
10. The Committee may at the request of the County Assembly or the Governor invite or summon any person to appear and give evidence before the Committee.
11. Where the County Assembly or the Governor chooses not to appear before the Committee, that fact shall be recorded by the Committee and the Committee shall proceed with its investigation without further reference to the Assembly or the Governor, but the Committee may for exceptional circumstances and reasons to be recorded permit a late appearance before the Committee by the Assembly or the Governor.
12. The hearing of evidence once it commences, shall proceed and continue until the Committee concludes the hearing of the matter. So, it has to continue on a day to day basis until we finish.
13. The Committee shall, before the commencement of the hearing of evidence, allocate time for the hearing of the case by the Governor and the case by the County Assembly.
14. Any preliminary question or issue raised by the county assembly or by the Governor shall be argued for not more than 30 minutes unless the Committee otherwise directs.
15. The Clerk shall administer the oath of affirmation in the manner and form prescribed in the schedule to every person who appears to give evidence before the Committee before such person gives such evidence.
16. At the commencement of the hearing before the Committee, the Clerk shall read out the particulars of the allegations.

17. After the particulars of the allegations have been read out, the Committee shall allow an opening statement to be made on behalf of the County Assembly and on behalf of the Governor.

18. An opening statement made under rule 17 shall be for not more than 40 minutes, unless the Committee otherwise resolves.

I think, Mr. Chairman, Sir, you have to look at that.

19. After opening statements have been made, the witnesses on the part of the County Assembly, if any, shall present the evidence of the Assembly. So, it is the Assembly to speak first.

20. In presenting its evidence, the Assembly shall not introduce any new evidence that was not part of the allegations against the Governor by the County Assembly as forwarded by the Speaker of the County Assembly to the Speaker of the Senate. So, no new evidence may be introduced before this Special Committee.

21. After all the witnesses on the part of the Assembly have presented their evidence; the witnesses on the part of the Governor shall present their evidence.

22. Each of the witnesses shall be led in evidence, cross examined and, where necessary and only for purposes of clarification of issues that may have arisen in cross examination, a witness may be re-examined.

23. A Member of the Committee may put a question to any of the witnesses before the Committee.

24. No person other than:

(a) the Governor

(b) a person who has been called as a witness by the County Assembly or by the Governor; and,

(c) a person who is invited or summoned by the Committee to appear and give evidence shall give evidence before the Committee.

25. After all the witnesses have given their evidence, the Committee shall allow a closing statement to be made on behalf of the County Assembly and, thereafter, on behalf of the Governor.

26. A closing statement made under rule 21 shall be for not more than thirty minutes, unless the Committee otherwise resolves.

27. After closing statements have been made, the hearing shall conclude and the Committee shall then proceed to prepare and conclude its report.

28. Pursuant to Section 33(4)(b) of the County Governments Act and Standing Order No.65(2)(b), the Committee shall, within ten days, table its report in the Senate in which

it shall indicate whether it finds the particulars of the allegations against the Governor to have been substantiated.

29. The proceedings of the Committee for the hearing of the evidence shall be held in public, but the deliberations of the Committee shall be held in camera.

30. The quorum of the proceedings of the Committee shall be seven of its Members. So, we have more than the quorum requirement here.

31. Except as otherwise provided in these rules, the Standing Orders – in this case of the Senate – shall apply.

32. Where on a particular question or matter, including but not limited to questions of evidence, materiality, relevance, competency or admissibility of evidence and any questions consequential or incidental thereto, no provision has been made in the Standing Orders or in these rules, the Chairperson of the Committee shall rule on the question or matter and the ruling of the Chairperson shall be final.

33. These rules shall, with necessary modifications, apply to the process for the removal of any other State or public officer in respect of whom the Senate has jurisdiction.

So, these are the general rules; they are in the Schedule and they provide for oath and affirmation which will be administered by the Clerk.

Thank you very much, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): Thank you very much, Vice Chairperson. I will urge everybody to observe those rules of procedure during these proceedings. As we proceed, I know that one of the Members of the Committee has arrived – the Senator for Mandera – and I will ask him to take a brief moment to introduce himself.

Sen. Billow: My apologies, Mr. Chairman, Sir. My name is Sen. Billow Kerrow, the Senator for Mandera County.

Thank you, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): Can I request the Governor to take his seat upfront, please?

(The Governor took his seat)

Thank you, Governor.

Could I now request the Clerk to read out the charges?

The Director, Legal Services - Senate (Ms. Gichangi): Thank you, Mr. Chairman, Sir. The following are the charges.

Governor (Prof.) Paul Kiprono Chepkwony, on 16th May, 2014, the Speaker of the Senate received from the Speaker of the County Assembly of Kericho a letter communicating the resolution of the County Assembly of Kericho that you be removed, by impeachment, from the Office of Governor of Kericho County. The following are the particulars of the allegations leveled against you by the County Assembly of Kericho:-

1. Gross violation of the Constitution and the Public Private Partnership Act, 2013: Irregular agreement between the County Government of Kericho and Bluetechs UK Group.

On 13th January, 2014, the Governor, on behalf of the Kericho County Government, entered into an agreement with a private company by the name Bluetechs UK Group Ltd. The terms of the agreement were that the private company would design, build, finance and operate and, subsequently, transfer to the county 100 Megawatts (MW) solar plant, whereby the proposed generation of 100mw electricity would be implemented in phases and the cost would be US\$1,350,000 per MW. The Public Private Partnership Act No.15 of 2013 gives procedures which need to be followed before entering into such agreements at Section 20. Did the office of the Governor, when entering into agreement, take a diagnostic study into legal, regulatory and technical framework? No.

Article 201 of the Constitution of Kenya, 2010, highlights the principles of public finance which state that:-

“There shall be openness and accountability, including public participation in financial matters;”

There is no evidence that, indeed, public participation was done on any platforms established under Section 91 of the County Governments Act, as the county was to contribute 10 per cent of the consideration, which is US\$135,000 per MW. Likewise, the provisions of Article 201 of the Constitution require that the Assembly, for purposes of openness and accountability, approves such projects; but the approval of the Assembly was not sought in this instance.

Section 22 of the Public Private Partnership Act gives further details on this. This is unlawful; he acted as the accounting officer and yet Section 148 of the Public Finance Management Act read together with Section 2 states that the Committee member for Finance shall be the accounting officer. This means that the Governor abused his office by unlawfully entering into the contract.

Section 61(3) of the Public Private Partnership Act 2013 gives details of this. The word “affordability” as defined by Section 2 of the Public Private Partnership Act is defined to mean:-

“(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 functions for which the agreement relates.

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

The Governor signed the contract by committing 10 per cent of the consideration, hence violating the first condition, as the funds were never budgeted for. Failure to carry out due diligence before entering into this agreement exposed the county to unreasonable burden of getting into debts, hence violating the second condition.

The word “affordability” is also described to mean that the cost of delivering a facility or service in relation to the project of the contracting authority does not impose an unreasonable financial burden on the end users. By failing to conduct public participation and to carry out due diligence, the county cannot ascertain the actual costing of the project. This would then mean that the end users would be subjected to high fees, charges and taxes so as to meet the cost of delivering the service. The Governor, by entering into such contacts, exposed the county to unnecessary risks.

All projects should be procured through a competitive bidding process as is stipulated in Section 29 of the Public Private Partnership Act. Bidding was never done for this project; hence the whole process is an illegality. There were no requests done for qualification of such services as there was no notice or advertisement in any of the newspapers. Even if the Governor privately initiated the investment, there are certain conditions which had to be fulfilled as is stipulated in Section 61, which then need to be proved by the Governor.

Did the county executive establish a fund as is stated in Section 68 of the Public Private Partnership Act? No. The County Assembly never approved any law regarding the establishment of any public private partnership project facilitation fund. The Governor, hence, entered into an agreement without ensuring that there was, indeed, a fund that would be used to prepare for the project; failed to comply with tendering process and project appraisal.

As per clause 1(c) and (g) of the agreement, the county is to contribute 10 per cent of the capital investment and land. The county will lease for a period of 25 years as this is the term period of the contract, 500 acres of land to Bluetechs UK Group Ltd for the project. The exit clause in the agreement states that either party may terminate the agreement by giving six months’ notice. Consequently, assets – which included the land – and liabilities will be apportioned on the basis of the ratio 70:30, whereas the private company gets 70 per cent and the county gets 30 per cent of the same. Section 65(4) of the Public Private Partnership Act states that a project agreement involving the use of a contracting authority property by the private party shall not divest the contracting authority of the responsibility for ensuring the property is appropriately protected against factors which may negatively affect the property, including forfeitures, theft, loss or wastage. In case of the tabulation as per Clause 5(d) of the agreement, the county stands to lose 70 per cent 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.

The fiscal risks shall be managed prudently. The county executive member in charge of finance admitted in the Kericho County Fiscal Strategy Paper 2014/2015 on page 15 that the risks to be put for 2014 included the County Government embracing the public private partnership framework in implementing key infrastructure projects. The CEC member for finance also stated that there are fiscal risks associated with contingent liabilities which, if they materialize, could undermine fiscal discipline. This is in reference to the agreement herein referred to and entered into between the county and a private entity without due process.

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

2. Charge Number two is gross violation of the Public Finance Management Act, 2012, the Public Procurement and Disposal Act and the rules made thereunder, and violation of the Constitution: Irregular agreement between E-plus Medical Service and Kericho County Government.

On 7th January, 2014, the Governor entered into an agreement on behalf of Kericho County Government with E-plus Medical Service Ltd. The terms of the agreement were that the private company was to provide comprehensive emergency services, which include seven ambulances, paramedics and ambulance operators to Kericho County. The contract price was Kshs600,000 per month per unit, which means that the total consideration would then be Kshs4.2 million per month. The contract period was 12 months, which would then amount to Kshs50,400,000.

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;”

There is no evidence that, indeed, public participation was done on any platforms established under Section 91 of the County Governments Act. The consideration was never budgeted for, hence the Governor ought not to have entered into such an agreement. Entering into such a contract violates the provision of Article 226(5) of the Constitution.

The guiding principle of leadership and integrity as highlighted in Article 73(2) of the Constitution includes selfless service based solely on the public interest demonstrated by honesty in the execution of public duties. The Governor was never honest by entering into the said contract with the knowledge that there were no funds for the same, as the money was not budgeted for.

Under the Public Procurement and Disposal Act and the rules made thereunder, any procurement for services such as the present should comply strictly with the provisions of

this mandatory provision. These provisions were not followed in the procurement of the above referenced ambulance services.

The Governor is liable for gross violation of Article 227 of the Constitution by:-

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

Article 10(2)(c) of the Constitution of Kenya pronounces good governance, integrity, transparency and accountability as among the national values and principles of good governance to which every state officer, state organ or any public officer is bound. The Governor of Kericho County has violated this article by failing to ensure adherence to laws and regulations that aid transparent and accountable use of county resources, among them the Public Procurement and Disposal Act and regulations made thereunder, and the Public Finance Management Act, 2012.

3. The third charge is gross violation of the County Governments Act, 2012: Unlawfully recruiting personnel and creating offices in the county, contrary to the provisions of Section 59, 60 and 62 of the County Governments Act.

Pursuant to Section 59 of the County Governments Act, the County Public Service Board is mandated to establish and abolish offices in the County Public Service. This is also referred to in Section 60. The Governor violated the above stated provisions by creating offices on diverse dates from May, 2013 to April, 2014, contrary to the County Governments Act. The offices created as per the letter dated 25th April, 2014, are unlawful as the offices were not established by the County Public Service Board; and neither were they approved by the County Assembly. Furthermore, the offices were not competitively sourced.

The offices are as follows:-

- Advisor, peace and conflict management
- Assistant political advisor
- Assistant chief of staff
- Assistant economic advisor
- Assistant advisor, science, technology, innovation and research.

The Governor went ahead to appoint personal staff who failed to give adequate information which includes copies of their *curriculum vitae*, academic and professional qualifications as required by the Transition Authority (TA) guidelines. The officers

include chief of staff, economic advisor, legal advisor, messenger, gardener and tea person. The Governor also appointed two other unqualified personnel to the position of director, Governor's press and political advisor. All holders of the above cited offices unlawfully drew and continue to draw salaries from the county treasury, thus burdening the ever increasing wage bill. That is the end.

The hon. Governor may kindly state to the Special Committee how he pleads to the charges.

The Governor of Kericho County (Hon. (Prof.) Paul Kiprono Chepkwony): Thank you, Mr. Chairman, Sir. I have listened to the allegations very clearly and I wish to state here that those allegations were never substantiated. I have never been investigated for any of those allegations. As the day progresses, I will be responding to each of them specifically; but I also have my counsel who will take us through some of the detailed responses. So, I deny those allegations.

The Chairperson (Sen. Obure): Very well, your position is that you deny all the three charges?

The Governor of Kericho County (Hon. (Prof.) Paul Kiprono Chepkwony): Yes, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): I am now inviting the parties to look at the next item which is allocation of time. I am specifically requesting you to observe the various times allocated to each of the parties. I request that we observe those times because we have very limited period of time during which we must conclude this and make a report to the Senate. If there is anybody from either of the parties wishing to make a comment on that, you are welcome to do so.

Mr. Peter Wanyama: Hon. Senators, as I said before, my name is Peter Wanyama, the legal counsel for the Governor. A preliminary issue which may touch on time - there is a document which we were supposed to get from the Clerk's office but we felt that we can only receive it with your directions. It is a document which apparently has been received from the County Assembly of Kericho. Up to date, we have not seen that documentation. We want to have a look at it and then we can pick it up from there in terms of timing.

The Chairperson (Sen. Obure): What are you saying? Are you asking for more time to read the documents?

Mr. Peter Wanyama: Mr. Chairman, Sir, the only document which we have received from the County Assembly of Kericho forwarded through the Office of the Clerk is this document which contains particulars of allegations and the rules of procedure. However, yesterday the Clerk called me and told me that there is another documentation which is supposed to be given to us.

The Chairperson (Sen. Obure): Which Clerk?

Mr. Peter Wanyama: The Clerk to the Senate. It is a document that may affect our response and we want to examine it. This is the only document we have received and we believe that it is the only one which is properly on record.

The Chairperson (Sen. Obure): Counsel, you are now in possession of the document?

Mr. Peter Wanyama: I do not have it. However, I have perused from the County Assembly documentation and I have seen that it is a document which we must have as a matter of delivering justice to our client.

The Chairperson (Sen. Obure): Okay. We will do as follows: I order that you be given a copy or copies of those documents, but meanwhile, the programme as indicated will proceed. When we come to the Governor's time and you still feel you need more time, you will tell us at that point.

Let us now proceed to the next item; consideration of preliminary matters. If any of the parties has issues before we go into the proceedings in earnest, you can raise them at this stage.

Mr. Peter Wanyama: Mr. Chairman, Sir, we have a major preliminary issue. Under Section 33 of the County Governments Act, it is provided that the Speaker of the County Assembly shall notify the Speaker of the Senate of the resolution of the decision of the county assembly to recommend the removal of governor from office.

Mr. Chairman, Sir, reading that Section, it says:-

“If a Motion under sub-section (1) is supported by at least two-thirds of all the members of the county assembly, the Speaker (under (a)) shall notify the Speaker of the Senate of that resolution within two days.”

The operative word here is “shall notify” “within two days”. We believe that one of the most important parts of this resolution is the HANSARD proceedings. That is the only evidence that there was a Motion discussed in the County Assembly. Up to date, the Governor has not received a copy of that HANSARD resolution. Secondly, the HANSARD resolution is supposed to be forwarded within two days. If they have forwarded any resolution after two days, then we will be seeking your direction on that particular issue as a preliminary point so that we do not jeopardize our case.

I am saying this with a lot of respect because we believe that the Governor can only respond to the allegations if all documentations are properly before him. These are all documentations as framed by the County Assembly. This is part of the justice which we are seeking before this Senate.

The Chairperson (Sen. Obure): Counsel for the Assembly, what do you say to that?

Mr. Charles Njenga: Mr. Chairman, Sir, it is not true that the resolution was not forwarded within the time prescribed. As we shall have time to lead the Committee through evidence and documentation, that shall be part of the reference material which we shall use. There is a clear correspondence from the Speaker of the Kericho County Assembly forwarding to the Speaker of the Senate the resolution together with the Order Paper and the HANSARD Report of 14th May, 2014. This also has the particulars of the allegations that were made against the Governor. So, it is not true that there has not been compliance on the part of the Assembly regarding that particular provision.

The Chairperson (Sen. Obure): Any other preliminary matters you wish to raise?

Mr. Charles Njenga: Mr. Chairman, Sir, we were served and we do confirm that indeed we were served with the responses by the Governor on 26th May, 2014. Some of the responses are factual in character and they necessitated as a matter of course to avail before this Committee documents that speak to those allegations and to those responses which we have in our possession. They are about two documents and we wish to pray for the indulgence of the Committee to avail them for the record of the Committee. We shall also disclose them to the Governor and his team. We note that the Committee's mandate is primarily investigative, so that enjoins it to admit all material evidence or documents that can facilitate the execution of that mandate. So, we pray that we be allowed to introduce a supplementary list of documents that only respond to issues raised in the responses made by the Governor.

The Chairperson (Sen. Obure): You are asking for permission to introduce new documents?

Mr. Charles Njenga: There are new documents that speak to the responses made by the Governor and it is important that the Committee is seized of all these documents so that as we go along and as we hear evidence and submissions made by the Governor or by ourselves, then there shall be documents that we can refer to and rely on, regarding the allegations made by the Governor in response to the charges.

The Chairperson (Sen. Obure): Do you know what these specific documents are?

Mr. Charles Njenga: Yes, I even have them. I have made a copy to the Clerk of the Senate. So, it is only as a matter of procedure to seek the Chairman's indulgence to introduce them.

The Chairperson (Sen. Obure): Counsel for the Governor, what is your response to that?

Mr. Peter Wanyama: Mr. Chairman, Sir, that is precisely what we are complaining about. Under the rules which the Vice-Chairperson read, it is expressly provided that in presenting its evidence, the County Assembly shall not introduce any evidence that was not part of the allegations against the Governor by the County assembly as forwarded by the Speaker. So, I believe that we need to examine what these documentations are to see if they breach this particular provision. We have seen some of the documents and we

vehemently oppose their introduction because they are introducing new evidence. Secondly, the County Assembly has procured these documents from our bundle of documentation. We forwarded a detailed bundle, then from that list, they impeded documents which we have used for the Governor's defence. So, why can they not just make reference to some of the documents which we have brought here instead of presenting their case by trying to steal that much? So, we vehemently oppose the introduction of that material.

Thank you.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, in response to the comment made by my learned friend, part of the documents that we intend to produce are actually legal authorities. So, they are in the know. There are actually three decided cases that are very relevant to the matters that are before the Committee for investigations. There are also two other documents; one is a gazette notice and the other one are the minutes of the House Business Committee of the County Assembly. They were precipitated by allegations that were made by the Governor in his response. For purposes of investigations of this Committee, it is important that all materials are relevant. We are not ambushing the Governor in any way. He made an allegation in his response that, in all fairness, the County Assembly of Kericho is supposed to respond to and produce documents that it considers relevant to answer to the specific allegations that the Governor has raised. Those are the documents that we are seeking the leave of the Committee on.

The Governor and his team will have ample opportunity to examine these documents and authorities. We are not concluding these proceedings today. Before the close of the investigations, they will have an appropriate opportunity to respond to any issue they may want to respond to. As a matter of fact, if they feel they want to introduce any document to counter whatever the County Assembly has introduced, we are not averse to them having that opportunity.

The Vice Chairperson (Sen. Murungi): Mr. Chairman, Sir, the proceedings before this Special Committee are in the nature of a review to establish whether, indeed, the allegations contain the particulars which were read as substantiated by the evidence that was before the County Assembly at that particular time. The rules are very clear that we will not receive any new evidence.

I would like to request that the Committee be shown the documents that the counsel wants to be admitted. We shall then see whether they introduced new matters or not. We will then make a decision whether to admit them or not.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, we have those documents. But my learned friend has just whispered to me, and I think he has reconsidered his position and feels that he will be kind enough to have himself and the team accept the documents. But we are still able to supply the documents to the Committee. But given the indication that I have just received from my learned friend, he seems agreeable to having the document go in by consent. That is the understanding I get but we have the document with us.

The Chairperson (Sen. Obure): We hear you.

The Vice Chairperson (Sen. Murungi): Let us see those documents because we have to go by the rules. You cannot by consent agree to subvert the rules.

(The documents were laid on the Table)

The Chairperson (Sen. Obure): We have received the documents. Are there any matters of a preliminary nature which you wish to canvass?

Mr. George Ng'ang'a Mbugua: None, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): We will adjourn for a few minutes to look at these documents and the various arguments the two parties have presented. We will need about 15 minutes to do so.

In the meantime, this is also time to break for tea. We will resume in the next 15 minutes.

(The Committee adjourned temporarily at 11.10 a.m.)

(The Committee resumed at 11.40 a.m.)

The Chairperson (Sen. Obure): Welcome back. We have considered the preliminary matters that were raised before we adjourned. I wish to state as follows:

The proceedings from the Speaker of the County Assembly of Kericho were received within two days of the resolution of the County Assembly. That is to say the resolution was made on 14th May, 2014 and received by the Speaker of the Senate - *(Off the record)*. There is no requirement in our opinion and the County Governments Act for the Governor to be given the resolution of the County Assembly within two days.

The County Assembly has submitted supplementary documents. The Governor had initially objected to the documents being produced but has now conceded to the same being produced. The Committee notes that some of the documents being produced are actually documents that the Governor has requested the County Assembly to produce. The other documents are High Court judgments and gazette notices. This Committee, therefore, admits those documents.

The Committee shall, however, not accept any further documents to be submitted in evidence except as may be requested by this Special Committee.

Ladies and gentlemen, we will now proceed to receive the opening statements on behalf of the County Assembly first and later the Governor. You will notice that each party has

been allowed 20 minutes to make those opening statements. I request you to observe time.

Counsel for the Assembly, you may proceed.

Mr. Charles Njenga: Mr. Chairman, Sir, just to be sure, the rules say we have 40 minutes to make our opening remarks.

The Chairperson (Sen. Obure): That is the general rule. However, there is a provision for the Committee to decide otherwise. On this particular occasion, the Committee has decided that each of the parties will be given 20 minutes.

Mr. Charles Njenga: Mr. Chairman, Sir, could I seek for 30 minutes, so that I take up 15 minutes and my counterpart also utilizes the other 15 minutes? We shall strictly observe time.

The Chairperson (Sen. Obure): In that case, you will take ten minutes, you accord him ten minutes.

Mr. Charles Njenga: Very well. We are guided.

For the County Assembly, it is our submission as we open that the charges before this Committee are well substantiated. They are founded on clear facts. They are, as you will see, explicit, manifest and gross violations of the Constitution on the part of the Governor and also of the other laws that are cited in that particular charge.

As I open for the Assembly, I want to remind ourselves of the role of the Senate *vis-à-vis* the concept, aspect and discourse of devolution. Article 96(1) of the Constitution, which you will allow me to refer to provides that:

“The Senate represents the counties, and serves to protect the interests of the counties and their governments.”

The material word here is “protect”. Sitting as Senators, you have a constitutional mandate to protect counties and their governments. The question that may be posed is: From whom are you protecting these counties and their governments? Why do they need protection? Why does the Constitution in its text provide a very clear proactive word “protection” with respect to counties and their governments?

As we open, we submit that this is because of the history that precipitated devolution in this country. The history of misuse of public funds, impunity in the application of public resources and the bad history that we all wish to forget where political goodwill and dispensations determined the allocation of resources. Therefore, when Kenyans sat and decided to promulgate a new Constitution, they enacted the institution of the Senate to sit and protect counties and their governments. As we sit here as an Assembly, we are asking the Senate to protect the County of Kericho because as you will see from the proceedings and the charges, the Governor of the county has set out to violate all applicable laws that

attend to the process of procurement.

On procurement, I do not wish to emphasize on the bad history of procurement in this country. Procurement, as a process, has been used from the inception of this Republic to deprive and disenfranchise the citizens of Kenya. It is, therefore, not a matter that can be wished away. It is a matter of grave concern that the Senate insists to all governors and county executives who execute executive power that they have to strictly comply with the functions and the roles that attend to procurement. If we do not do that, the entire discourse of devolution shall be lost. Procurement shall still be used to disenfranchise the public and enhance private interest at the expense of public interest. It shall further be used to advance impunity.

There is the overriding question of: What does Article 181 of the Constitution anticipate? This is the constitutional basis for the removal of a governor by way of impeachment. It is very clear; one does not even need to interpret it. It is clear from its own text that it is operative whenever it is demonstrated that there is a gross violation of the Constitution on the part of a governor. This also includes any other law. An inclusion of any other law in Article 181 is deliberate because counties are not just governed by the Constitution. There is an entire spectrum of laws that attend to the application of public funds at the county level. So, in the architecture of this Constitution, the people of Kenya determined that where in a county setting there is demonstrated breach of even a single law, gross violation of even a single legislative provision then, without justification, because there cannot be any justification to break law, that forms the basis for the removal of a governor from office. People were very clear that there would be latitude. Article 181 does not anticipate a procedure where a party is given a second chance. Kenyans decided with finality; you break the law, you go out. That is what the County Assembly of Kericho seeks and beseeches this Senate to do.

We shall demonstrate that in procuring solar power for the county, the Governor acted as if there was no regulatory framework or as if there are no procurement laws in this country. He proceeded as if he owns the county. We shall give you evidence on that.

As I close since my ten minutes are quickly running out, there is the question of: What is the role of the Assembly? Assemblies have been vilified, they have been bad mouthed. They have been told: "By asking questions, you are greedy, power hungry, you are extortionists." That is missing the point completely. Assemblies are there in the Constitution and in our statutes to precisely do that; ask questions. In fact, they have a duty to oversight. If they stop asking questions, then we should remove them. They have a constitutional and statutory mandate to question each and every expenditure item. They can question each and every execution that does not comply with the law.

Mr. Chairman, Sir, as you look at the case of the County Assembly of Kericho, we urge you to look at the issues they raise. You will be told that this is a malicious process. Those are the wrong questions. Let the Governor explain and give responses specifically to the questions that have been raised in these charges. At the end of this sitting, it will be clear beyond par adventure that the County Assembly acted dutifully, in the right manner,

followed the law and it has presented a clear case of a governor who should not be sitting and discharging duties of the office of a governor.

I will extensively refer to this decision at my close. This is the advisory opinion of the Supreme Court specifically with regard to the opinion of Chief Justice Mutunga at paragraphs 173 to 174 where he comments on the history of devolution. In fact, he states in the conclusion that:-

“In this present Constitution, the more the checks, the better for governance. The more the questions asked, the better for governance.”

So, we shall be disadvantaging the discourse of governors in this country when we vilify county assemblies for asking questions and bringing forth to the Senate charges against governors which have been well substantiated. We urge that you find, at the end of it, that the charges against the Governor, in consideration of the evidence, have been well substantiated.

I will ask my counterpart to take his ten minutes and then we shall be ready to move on.

Thank you.

The Chairperson (Sen. Obure): Thank you. You may proceed.

Mr. George Ng’ang’a Mbugua: Mr. Chairman, Sir, as we continue our opening statements as the County Assembly of Kericho, I will begin my remarks by pointing out that for evil to flourish, it is enough if the good do nothing.

The County Assembly has been bestowed with a solemn obligation by the County Governments Act and the Constitution to ensure that the County Executive headed by the CEO, who is the County Governor, manages, utilizes and spends resources that have been bestowed upon that county prudently. It is critical to appreciate at the beginning that the essence of oversight and devolution is very central. When there is no oversight mechanism, resources will not be used for the intended purposes and the dream of devolution will be defeated.

The County Assembly was seized of this matter. Evidence was tabled before the Assembly touching on how county resources were committed by the very hand of the Governor, who is the CEO. The evidence bore out one very critical element; that it was not in line with the requirements of the law and was, in fact, in breach of the law.

Mr. Chairman, Sir, in the report by the Special Committee that was looking into the proposed removal of the hon. Martin Nyaga Wambora, the Special Committee, at Clause 100, made a very important observation:

“THAT, the Governor as the chief executive officer of the county has the overall oversight responsibility over affairs of the county.”

The buck starts and stops with the office of the governor. That is why the Constitution deliberately in Article 179 provides that the governor is the chief executive officer. He is not a lame duck or a ceremonial figure head. He is an officer who is reposed with public trust, who has executive powers to take action where he sees instances of threats; to ensure that resources in the county government are utilized happens.

The role of the Governor when it comes to accountability of how funds are utilized in the county is now settled law. That position was restated in petition No.8 again in the matter of Martin Nyaga Wambora vs the Senate and at page 38 of that decision that you will have an opportunity to look at in the fullness of time, the constitutional court restated the requirements of Article 10 of the Constitution on issues of transparency, accountability and good governance when it comes to the performance of the functions of the Office of the Governor.

Mr. Chairman, when we are looking at how expenditure has been made at the county level, the Governor, as the CEO, must at all times be alive to that requirement under Article 10 of the Constitution. Any decision he sanctions must, at all times, be in line with the Constitution. Again, the law has been settled in the case of the International Legal Consultancy Group, Petition No.8 in Kerugoya.

Again, the counsel for the Governor had taken the Senate to court saying that they are not accountable. The law was settled. However, under Section 30 (3) of the County Governments Act, the sole responsibility to account on how resources are used at the county level starts and stops with the office of the Governor. We shall be demonstrating as the County Assembly, in the fullness of time that there is a direct nexus between the evidence we will table before you and the very action of the Governor. The matters before you for investigation are not based on circumstantial evidence, however, evidence in the hand of the Governor who commits the county in contracts, and that contravenes Article 227 of the Constitution, Section 2 of the Public Procurement and Disposal Act, Sections 28 and 29 of the Public Procurement and Disposal Act and Section 148 of the Public Finance and Management Act.

We shall be demonstrating that this is not a witch-hunt. The moment you commit the county into contracts and then you seek to purport that you have revoked – part of the evidence that will be brought before you is that “we realised, on advice, that this was a mistake”. However, you will realise that those contracts were binding and the worth amount of money that county government was bound to expend and there are legal sanctions and accrued liability on the county. The act of the Governor to try and undo “the damage already done” does not exonerate the county from liability in the event they are sued by the parties to those contracts.

We shall be demonstrating that the nexus is there and the charges are clearly framed in accordance with the law. The specific violations of the Constitution and the law are clearly spelt out. The other aspect that we will bring out is that one of the other key requirement when it comes to impeachment is that besides showing the nexus, we will be showing you that the nature of the acts of the Governor that are impugned by the County

Assembly and which formed the basis of a Motion for the proposed removal from office were substantial in nature and were such that they met the required threshold for impeachment under Article 181 of the Constitution.

As I wind up because my 10 minutes are almost done, this is not a witch-hunt. It is always a convenient excuse by the County Executive that where questions of oversight are raised, it is because the County Assembly wanted something and they disapproved the rates. That will always be a convenient excuse. The truth of the matter – truth be told – we are alive to the solemn obligation and duties that this Committee has been called into to investigate this matter.

We are aware that under the Constitution, that the Governor has the right to hold office. Equally, the residents of Kericho County have a constitutional entitlement to ensure that resources that have been committed by the Government of Kenya for improving the livelihoods of the residents of Kericho are realised. Every time there is conflict between those two entitlements, the right of the Governor to hold office is subservient to the right of the residents of the County of Kericho to ensure that resources are spent to enhance their livelihoods. That is what we will be seeking to demonstrate to you in the fullness of time. You will find various allegations, charges and violations are, indeed, substantiated and that as you retire to prepare your report upon closure of this investigation, you recommend to the plenary, in Senate, that, the hon. Governor of the County of Kericho should be removed from office by way of impeachment.

The Chairperson (Sen. Obure): Thank you, counsel for Kericho County Assembly, for the statement. May I now call upon the counsel for the Governor of Kericho to make an opening statement?

Mr. Peter Wanyama: Hon. Senators, my name is Peter Wanyama, legal counsel for the Governor. I will make a few remarks and then my colleague, Mr. Bosek, will also top up on the stipulations.

Hon. Senators, in the impeachment proceedings before you, we will be demonstrating, in defence, that the County Assembly has severely breached its Standing Orders. There is non-compliance to the Standing Orders. We will be demonstrating that the Standing Orders expressly and unequivocally provide that the Motion to impeach a Governor is given to the Clerk who forwards it to the Speaker and once the Speaker satisfies himself that there are enough particulars in that Motion, then he approves it. The Standing Orders also provide that he shall constitute a Select Committee to look into the matter. So, we shall be demonstrating that there is a very serious matter in respect to the conduct of the proceedings of the County Assembly level which this Senate must intervene if not to lay the basis for the proper conduct of impeachment proceedings in this country. That is from their Standing Orders.

Hon. Senators, we will also be demonstrating that there are certain issues that we feel that the County Assembly did not conduct itself in a proper manner. For instance, we have video evidence to demonstrate that during the voting of these proceedings, a Member of

the County Assembly was drunk. This is an allegation of which we have video evidence and there are some of the issues that we have to interrogate for purposes of making sure that we comply strictly to the provisions of the Constitution.

Hon. Senators, we also have sufficient documentation to show that these impeachment proceedings were a knee-jerk reaction. The truth of the matter was that, first of all, the County Assembly has attempted to impeach the Governor before. This is not the first time. The Governor will ably explain that in his opening statements.

Number two, the proceedings were a knee-jerk reaction – truth be told – the Governor filed a constitutional petition in Kericho, No.4 of 2014 where he sought certain dilatory orders against the Assembly. This was a harmless petition where he was saying that he wants the High Court to interpret the provisions of Article 185(3) of the Constitution.

A Member of the County Assembly (MCA) would go to his office at 2.00 pm and say that he will bring a Motion to stop the recruitment of Early Childhood Development (ECD). Indeed, at 2.00 pm, he would come with the Motion. This was a very bad situation in Kericho in terms of how the County Assembly was exercising its powers to oversight the County Executive.

The Constitution provides that the County Assembly shall exercise oversight while respecting the principle of separation of powers. That is all that the Governor sought to interpret in court. We will be showing you video evidence of the Speaker parading Members of the County Assembly. There is a Motion being given to the Speaker to impeach the Governor principally based on that constitutional petition. That is the truth of this matter. We will be demonstrating that in a crystal clear manner.

Number three, we will also be demonstrating – this is the core issue – I will not lecture you on what the High Court has said because you have a special mandate given to you by the Constitution. Your mandate and the one before you are to look at whether these allegations have been substantiated or not. In our submissions, we will be demonstrating that there is no allegation that meets the threshold in Article 181 of the Constitution. There is no single allegation. If you look at the particulars of the allegations that they gave us, you will see, particularly allegation No.1 that there was an irregular process used. We will be asking you to rule in our favour because an irregular act cannot amount to gross violation of the Constitution.

Number three, we will be demonstrating that even where allegations have been leveled against the Governor, the Governor has taken action. For instance, there is a contract that they say the Governor breached. They say that the Governor breached the provisions of the Public Procurement and Disposal Act yet in our documents there is an express correspondence by the Governor where he directs the cancelation of that contract based on the issues that have been raised. Is that one of the issues that will amount to gross violation of the Constitution?

Number four, the Governor was attempting to get for the people of Kericho, a major project in the history of this country in terms of developing the county in terms of its renewable energy development. No contract was signed. What the County Assembly is alleging is that the Governor signed a memorandum of understanding and not a contract. We will be demonstrating in very clear perspective all the requirements in the Public Private Partnership Act which the Governor is yet to comply with. Whatever we have is a memorandum of understanding which is non-binding and is not a legal document. The execution of a contract is very clear. I will invite this Committee, if need be, to summon the Director in charge of Public Private Partnership to explain that process. That is how the issues will be cleared.

Number five, the fact that we have a representative from that company who will testify before this Committee, we will see the importance of the project to the people of Kericho County. All those issues will be explained in very clear perspectives to avoid a situation where the Governor is being crucified for bringing a very good project to the people of Kericho County. We believe that is a project that should be allowed to go on.

The County Assembly will have its time under the Public Private Partnership Act since the proposal was submitted to the Assembly for approval. We will be demonstrating all that in very clear perspectives.

Number six, we will be demonstrating that the allegations against the Governor are not crafted in accordance with the standards which the hon. Senators lay down. There must be specific allegations. These allegations must be tied to specific breaches of the law and the Constitution. We should not generalize allegations. For instance, if we say that the Governor has breached Section 23 of the Public Private Partnerships Act, we must see that in very clear perspective.

Finally, hon. Senators, the allegations we have examined are simply allegations that address issues of a mere administrative in nature and not gross violation of the Constitution. The Senate has already defined the meaning of gross violation of the Constitution. The High Court has also supplemented that meaning and we believe that we must follow the meaning to the letter to avoid a situation where the impeachment processes are abused by county assemblies which are excited with the process.

Remember that the Governor, under Article 38 of the Constitution, has a fundamental right to hold political office. Therefore, the Constitution says that for a Governor to be removed from office, there must be gross violation of the Constitution. The Governor is someone who works with the people. He involves all MCAs in development projects. Coincidentally, the project which the MCAs are complaining about is something they were fully involved in. We have video evidence to show that they were attending the launch. They were consulted and made speeches. So, why the turn around? Why come and say that they were not consulted? We will be demonstrating that in very clear perspective.

The Governor maintains an open door policy and in my view, he is one of the most accessible Governors in this country. More importantly and this is one of the issues, in the proceedings before the Senate, we must ask ourselves this fundamental question. To me, that is what will make these allegations gross. Has money been lost? Has a single penny been paid by the Governor in any of these allegations? Has money been lost? That is where the rubber meets the road. I will be demonstrating that no single penny from county coffers was paid in the allegations in question. We will definitely produce documentary evidence. We will be inviting you, in exercise of the powers given to you under the Constitution to summon the payment officers, if need be, to clarify whether money had been paid by the County Government of Kericho to warrant these allegations.

Thank you, hon. Senators. I will invite my colleagues to make a few remarks.

The Chairperson (Sen. Obure): You have about 11 minutes.

Mr. Kimutai Bosek: Thank you, hon. Chairman. I want, from the outset, to point out to the hon. Senators that these proceedings may turn to be proceedings where the Senate will be considering whether the Governor is on trial or whether the Speaker is the one on trial.

Hon. Chairperson, other than what my colleague has mentioned about the Speaker being so much cautious in ensuring that there were the very basic minimum number of MCAs for purposes of impeachment proceedings, he was reluctant to throw out an MCA who was heavily drunk and rowdy. He did not invoke the Standing Orders of the House to ensure that proceedings were carried out in a dignified manner.

Hon. Chair, we will also be demonstrating that the Speaker, indeed, started the proceedings of the House outside the House where he was the master of ceremony. This was a time when there was a demonstration against the Governor. He invited people to speak very badly against the Governor. He also indicated that he would have the Governor fired.

Hon. Chairman, we will be demonstrating that what he was doing is, indeed, the work of a Chief Whip. He was being a Chief Whip outside the Assembly. We will also be showing that the documents you have allowed the Kericho County Assembly to produce before this Special Committee will end up being subject to criminal investigations.

There are House Business Committee meeting minutes that are purported to have been signed by Members of the House Business Committee and yet, Mr. Chairman, Sir, we have evidence that all the MCAs were out of Kericho. Some were meeting the honourable Members of the National Assembly here in Nairobi, others were in Naivasha and others in Machakos. To date, the Governor has not been given any chance to appear before any select committee and we are saying that the entire process of impeaching the Governor was null, unlawful, irregular and actually predicated by a Speaker who was very excited about impeachment using the advantage of the MCAs, some of whom were

not really able at that time to appreciate the nature of the proceedings that they were part of.

Mr. Chairman, Sir, we will also be posing one question: The notice of Motion which was filed on 30th April 2014, presented before the Speaker, approved on the same date, had five grounds. What reached the County Assembly was only a notice of Motion with three grounds and on the same date; 30th April, 2014, the Speaker found it and we are happy that scientific principles do not lie. The Speaker found it appropriate to post the proceedings of the House on tweeter. We will be demonstrating that he used one man called Pakin Sigei who had fallen out with the Governor to do the trick.

We will also be asking the Speaker during our cross-examination as to what role this man had in the County Assembly. He was a stranger to that Assembly and we will not understand a situation where proceedings in the House which are supposed to be guided – any Assembly is supposed to be a dignified House and that is why it is called the august House – the Speaker went out of his oath of office to involve parties that were not supposed to be part of it with a view to engaging in a witch-hunt campaign which was extremely malicious.

It was not fair for somebody to appear on tweeter when he had not been served. The documents he had been served were not even signed. The Mover of the Motion never signed the allegation. The Governor was served with grounds of allegations that were never signed. When those grounds were being filed, they were five. How did they reduce from five to three? The Speaker must have set up a secret committee to go through it and mutilate it instead of it being amended before the Floor of the House.

We are also going to ably demonstrate that indeed what the Governor is being accused of is neither here nor there. Nobody has quoted a situation where the Governor actually breached the provisions of the Constitution. We are not told that he fired his Deputy Governor against the Constitution; we have not been told that he dissolved the Assembly. What is called “gross violation of the Constitution” is something that ought to be so feasible that even an ordinary Kenyan can be able to look at and appreciate.

We are also going to talk about the Speaker; that he should have actually excused himself from the proceedings in the House because he had shown every citizen of Kericho that he is totally against the Governor and he had no business to preside over the sitting of an Assembly where he had already shown that he was going to be very partisan and biased. The Governor was not going to get any justice.

Finally, we want to make an application that indeed we be allowed to have the investor from the United Kingdom to come and testify. The provisions of Article 125 of the Constitution allow this Special Committee of the Senate to summon anybody, even from abroad, with a view to getting information and evidence so that it may prove the allegation that is before the Special Committee. We are prepared to demonstrate quite ably that the Governor is innocent and he is clean. He has not been summoned by any Committee to answer any allegations of wrongdoing.

Thank you very much, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): Thank you, counsel for the Governor, for the statement. We will now proceed to receive evidence from the County Assembly. Counsel for the Assembly, you will have 40 minutes during this session and an extra one hour and 20 minutes after lunch.

Mr. Charles Njenga: Thank you, Mr. Chairman, Sir. I will start on the first charge where there are specific allegations that the Governor acted in breach of the provisions of the Public Private Partnership Act in entering into an agreement with a company from the United Kingdom that is called Bluetechs UK Group Ltd. That agreement is in page 9 going through up to page 20 of the first bundle submitted by the County Assembly.

The Chairperson (Sen. Obure): That is found on page 121.

Mr. Charles Njenga: I begin my address on this with a reference to Article 201 of the Constitution that provides for the principles of public finance, and I shall also refer to Article 227 of the Constitution. But to the agreement, this is an agreement where a United Kingdom (UK) company was contracted to provide solar power to the County of Kericho, and there is a commencement date provided at the second paragraph, that is from the 13th of January, 2014 until the date of expiry; that is 12th of January, 2039. So, already, we are in for 25 years by way of this contract.

One of the questions raised and which I am sure weighs on your mind is whether this is actually a contract or an agreement that is binding upon the parties. You have been told in the opening statement by the Governor that this is merely a Memorandum of Understanding (MoU). It is not! Even the title itself pronounces itself as a Memorandum of Agreement. This is a binding agreement where parties have determined upon terms to be bound in contract. An MoU does not have the aspect of consideration, so that a party, whether or not proceeds on the basis of that memorandum, does not suffer any consequence, loss or contingent liability if it opts out. You will see, indeed, from the body of the contract at Clause 4(a) that, in fact, the agreement refers to a Memorandum of Understanding. If you allow me to read Clause 4(a) of this agreement so that you will see that this was a process, and this is the final product. It says:-

“This agreement sets out the entire understanding between the parties with respect to the subject matter hereof and supersedes the earlier Memorandum of Understanding.”

Hon. Senators, where is this MoU? Why has it not been disclosed to this Committee? Who has a copy of this MoU that binds an entire county to certain obligations? We submit at the outset that the very exclusion of this document referred to in the text of the agreement by the Governor immediately raises the question as to why they did not deem it necessary to disclose and to discover a material document that could have facilitated an understanding of this agreement. Our submission is that where a party fails to disclose a

document, it can only be assumed – and that law allows that presumption to operate – that, that document is prejudicial to the party who has it. The document clearly says that discussions were held, there was an MoU that now led to this Memorandum of Agreement. So that this is the final product; this is the document that binds Kericho County to the Bluetechs UK Group Ltd.

The elements or the essentials of a contract are well known; they are settled in law; they are basic legal principles: an offer, acceptance of the terms, consideration, capacity to contract and the intention to be legally bound. All those essentials are present in this agreement. You will see from the mutual covenant of the parties that the agreement – and I am still at Article 4(a) – specifically states that it shall supersede all other negotiations or understandings as between the parties. At the first page of the agreement, in the third paragraph where it proceeds from “and whereas” just above that, you will see that the parties to this contract set out in the text – and I just wish to read this text because it is very important for me to go on record:-

“Whereas Bluetechs has declared that it has resources and expertise, the parties hereto desire to agree to the terms and conditions to facilitate the below mentioned investments by Bluetechs within the jurisdiction of the County and that this agreement is designed to set forth mutually agreed and binding terms and conditions to establish a common business framework.”

You do not bind yourself to an MoU; this is a contract in all its formations. It can only be constructed and viewed as a contract. So, what does this contract provide?

Lastly, just for the record, it has an exit clause – that is Clause 5(d) – an exit clause, by way of general understanding of contracts, provides for a remedy, a forum or a mechanism by which one party can get out of a contract. An exit clause anticipates or presupposes that parties are bound by way of contractual obligations, but one of them desires to disengage. If it was an MoU, as you have been told and as the Governor will try and make you believe, why then have an exit clause? A MoU is like a gentleman’s agreement; if I do not want it, I move away. But the moment you put your hand to a document that is binding, then the concept and the consequences of an exit clause immediately accrue.

For the record, the agreement is signed, and the signatures appear at page 10 of the agreement and page 18 of the bundle. It is signed by representatives from Bluetechs and then, if you slip over that page, it is also signed by the Governor of Kericho County and witnessed by the County Legal Officer.

So, Mr. Chairman and hon. Senators, what was this contract about? If you look at Clause 1(a), where the consideration is captured, the parties were contracting and were proposing that they would generate a total of 100 megawatts (MW) of electricity in different phases at an estimated cost of US\$1,350,000 per megawatt.

So, the total contractual sum under this contract, if you were to find it, is just to apply the multiple of a hundred to the sum, that is, US\$1.35 million times a hundred. That is the commitment the Governor was making on behalf of the county. Already in dollar terms, it is a staggering amount, I am afraid to convert it but the point is made that the consideration under this contract was that the county will commit itself to this expenditure by way of the agreed ratios between itself and the private entity and then there would be benefits that would be shared in a benefit-sharing agreement that is not even part of this contract.

Mr. Chairman, Sir, I want to briefly refer you to the commitment of the county. This is where the liability of the county comes in. At Clause 4(g), at page 10 of the bundle, it commences thus:-

“That the parties hereto agree to enter into a benefit-sharing agreement in the ratio of 30 per cent as the county---“

Sen. Billow: Where are you reading from?

Mr. Charles Njenga: Sorry, Sir, it is Clause 1(g) and not 4(g).

Sorry for that. Let me proceed.

“That the parties hereto agree to enter into a benefit-sharing agreement in the ratio of 30 per cent to the county and 70 per cent to the contractor or to the supplier”

Then the commitment of the county would be:-

“The County will contribute 10 per cent of the capital investment and land.”

Ten per cent of capital investment is 10 per cent of this US\$1.35 million per megawatt. We are committing the county to pay 10 per cent capital investment of this cost. If you convert it by simple arithmetic, the 10 per cent would be an approximate of Kshs1.7 billion. That is a commitment by the county in this project by way of funds – direct capital investment and then there is land. Over and above approximately Kshs1.7 billion, the county is also expected to give land. How much land? You may ask. Clause 1(b) provides that the total land required for this proposed 100 megawatts solar power plant is approximately 500 acres. So, we are giving out a direct capital investment of about Kshs1.7 billion but over and above that, we are also topping it up with free land. This land is committed under a lease of 25 years. That is the contribution of the county. That is the commitment that by way of his own hand, the Governor committed the county to.

It should not be in doubt in your mind that upon signing of this agreement, all these terms crystallized, they became effective and if any party, including the County of Kericho, seeks to exit, then the exit clause operates. The exit clause clearly states that if you exit, you have to give six months prior notice and then the assets and liabilities shall be

apportioned on the same basis in the ratio set out in Clause 1(g) above. So, that if you exit now or at any time, the county would stand to lose 30 per cent of the capital investment and 30 per cent of land because that is the sum total of assets invested in the project. The question is; did the Governor, first of all, have capacity to commit the county to this agreement?

The specific violation states: That in entering this agreement, there was express disregard for the provisions of the Public Private Partnership Act. This is a piece of legislation that is important to appreciate because it was specifically intended to regulate the interaction of private entities with public functions, with the very purpose and intention of regulating and limiting the usage of such undertakings to pilfer public funds or to create a situation where there is disadvantage to the public function. There are many public private partnerships that we have in this country including the Lamu Port and the Rift Valley Railways. We have them and we know them but there is a clear regulatory framework under this Act that is set out by the legislature that ensures that in the interaction of public resources by way of public-private entities, the public does not suffer.

So, in engaging Bluetechs, the question we pose is: What is the law that provides for such agreements? This is the law that the Governor acted as if it was not there or as if it did not bind him. The law is clear and you will have occasion to extensively evaluate the provisions of the Public Private Partnership Act but I wish to commence by referring to Section 20 of that Act. It provides that a contracting authority such as the county shall prior to, or before we commit or suffer either direct or contingent liabilities, prior to entering into public private partnership---

The Chairperson (Sen. Obure): Could you clarify which section of the law you are reading?

Mr. Charles Njenga: I am reading Section 20 of the Public Private Partnerships Act. It is Act No.15 of 2013. It commenced on 14th January, 2013.

The Chairperson (Sen. Obure): Please, proceed.

Mr. Charles Njenga: Mr. Chairman, Sir, I am at Section 20 of that law. What I wanted to point out is that the obligation to assess technical issues, legal framework, institutional capacity, financial viability and other primary issues ought to be taken out prior to entering into an agreement. It cannot be done after the fact. It cannot be purported to be taken out after we have agreed, signed agreements, committed funds and after we have signed on the dotted line. Signing should be the last procedure. In fact, in the clear reading of this law, signing is the last procedure. Before you go into signing and before you commit an entity, Section 20 obligates you to undertake a sector diagnostic study and an assessment that covers technical issues, legal framework, institutional and capacity status, commercial, financial, economic issues and such issues as the Cabinet Secretary may stipulate.

The question is, and this is what we should be looking for and we shall be looking for, as we examine the Governor's documents and response: Did he undertake the process anticipated by Section 20 prior to committing the county to this expenditure and prior to signing this agreement? The definite answer that you will see from the documents is that there was absolutely nothing, zero. There was not even an attempt.

The response that we got is that the agreement anticipates a study to be done after its commencement. That would be self defeating. What will you do even if the study revealed that the project is not viable? You will disengage and you will suffer the contingent liabilities provided for under the exit clause. You will have lost 70 per cent of your capital investment. As a matter of law, you will have incurred a liability equal to 70 per cent of the land you committed. This is not personal land or funds. These are monies vested upon the county.

We, therefore, submit; to the extent that the governor has failed to show and undertake any diagnostic study prior to signing this agreement, then on the face of it, even without evaluating any other piece of evidence, there is a breach that calls unto Article 181 of the Constitution and Section 33 of the County Governments Act. There is a breach that entitled the County Assembly to ask those questions and where no responses were made, to take out the processes that are here.

Interestingly, and I am now referring to Section 29 of the Public Private Partnerships Act, this Act is clear. It does not create any ambiguity around and about how procurement should be done under this Act. It speaks to Article 227 of the Constitution that provides for systematic, equitable and fair systems of contracting by all contracting authorities under the Constitution.

It says:

“Except as otherwise provided under this Act, all projects shall be procured through a competitive bidding process.”

The Act says you have to give everybody a chance. You have to include each and every supplier and prospective contractor in the process by way of a competitive bidding process. The process anticipated under Section 29 is well known. You invite tenders, pre-qualify, allow for technical valuations, financial valuations and so on. This is very clear. Everybody knows about this. Anybody who executes public functions now knows. It is a discourse that we have held in public office management over time.

Mr. Chairman, Sir and hon. Senators, did the Governor subject this process of procuring Bluetechs UK Group to a competitive bidding process as required under Section 29? Did he take out a process of procurement that satisfies the applicable law? Did he even try or attempt? The answer is a resounding “no”. If he did, then the response to these particulars would have comprised of those documents. We would have seen technical evaluations, bids submitted, regret letters and so on as provided in our procurement laws. What he has

provided before you are videos to show that the Speaker was in the Assembly and that there was a drunk Member – I do not know how he gauged the drunkenness of a person.

I wish the video he brought to this Committee was the video of this company installing solar anywhere in the world. They do not even have a profile to show that Bluetechs Company has any expertise in solar installation. They did not have the capacity to undertake a project of this magnitude. 100 megawatts by all standards is a lot of power. We are committing the county to an entity that we have not taken out extensive due diligence on.

A plain reading of Section 29 will show that, indeed, the Governor acted in breach of the law. That breach of law entitles this Committee and the Assembly to activate the provisions of Article 181 of the Constitution and for good reason; it has come to a time in the running or management affairs that we can no longer even afford latitude. Can we afford further losses? Can we afford lowering the standards and saying: Yes, it is okay, somebody can make two or five mistakes which are okay? Ten, maybe not. Twenty, yeah! We have come to a point where we cannot countenance even a single error especially in procurement because of the bad history that this country has suffered in the name of procurement and public-private partnerships.

We have a bad disastrous history. That is why the law is very clear. We have legislated extensively on competitive bidding; open, equitable and fair procurement. That is the very discourse and element that by way of his own hand, the Governor obviated. He completely disregarded the entire spectrum of procurement laws in this country. He single sourced. He went to the UK on a trip, talked to directors of this company and suddenly we have a contract. It has been alleged that there was public participation; that the Assembly Members were there. They were not. In fact, from the Governor's own documents, the only letter attempting to show public participation on the part of the Assembly was an invitation to attend a lunch. It said: "Come for lunch at the Tea Hotel." At that lunch, the Governor was signing an agreement. Is that what the Constitution, under Article 201, anticipates as public participation? It cannot be.

What he should show this Committee is proactive reaching out, inquiring, asking for opinions, evaluations, interrogation by experts, discussions and consultative forums about the viability, necessity and priority of such an agreement.

That is standard. In our submissions, we shall show this Committee that the level of threshold and the definition of public participation, as anticipated in our Constitution, is now settled law. The High Court has settled public participation in this country. This is for active facilitation of discussion and inclusion. This is not merely posing for cameras with people.

Hon. Senators, the law was violated with impunity. The law was disregarded as if it never were. There are formal structures under this Act. It is a bulky Act but I am sure you will have an occasion to go through it. It creates specific institutional frameworks that ensure that a project of a public private partnership nature and character goes through a process

that ensures that at the very end, the interests of the public are not in any way disadvantaged. One of the material provisions and I will speak to it now, is Section 64 of the Act. I will speak to that provision.

Before I go to Section 64, let me speak about Section 61 because that extends to the mode of procurement under this Act. Indeed, the Act anticipates situations where a contracting authority can single source and act outside the process of competitive bidding. That process has to satisfy the clear requirements of Section 61. Section 61 is very comprehensive and exhaustive. It has subsections "a" to "d."

Subsection "a" says that there is an urgent need for continuity in construction development and maintenance of operations.

(b) The cost of intellectual property (IP) royalties and such ---

(c) There is only one known supplier.

(d) The Cabinet Secretary expresses an approval.

The Governor's response to these allegations as shall be manifested shortly is that he did not need, at any time, to openly and competitively bid for this process. What he has failed to show this Committee and to show by way of the response that we have is that; under what justification Section 51 he used as a basis of saying he would not apply Section 29 and that he would go under Section 61 that allows him to hand pick a supplier. That justification would be by way of a document. If, for example, we say that there is an urgent need for solar in Kericho, then you would have to justify if there is a breakdown of normal power supply or if there are circumstances that require immediate power injection to the county. Is there a new industry that we have set up? Those are justifications that can be provided in a report. If you are saying that there is only one known supplier in the world for solar power, then you need to show where it is documented.

Where is the industry information that provides that Bluetechs Company has monopoly over the supply of solar? That would justify the operations of Section 61. We submit that to the extent that no justification has been demonstrated by way of documents, evidence as to entitle the Governor to singlehandedly source and sign and contract the supply of power, then there is a clear express of breach of Section 61 and that, in the fullness of time, will be seen as a clear basis of operating Article 181 of the Constitution.

The standards and the basis of impeachment under Article 181 are now set out---

The Chairperson (Sen. Obure): We intend to adjourn at 1.00 p.m., therefore, you have a minute to wind up your thoughts on this particular presentation.

Mr. Charles Njenga: Maybe I can close at this point and continue from there. All I am saying is that the standards applicable in determining whether there is a basis for the removal of a Governor by way of impeachment are now well set out in law and judicial authority. One of them is that you have to demonstrate and establish a direct nexus of the impugned Act with the Governor. The nexus cannot be as clear as a signature of the Governor and not even a delegated appointee but the very hand of the Governor, signed

and sealed; Governor, County Government of Kericho. This, directly and without any other interlocutory, connects the Act to the Governor. We urge, as we continue demonstrating, that by virtue of the provisions of the Public Private Partnership Act, there is clear basis for the charges before this Special Committee. There is clear basis for the removal of the Governor, County Government of Kericho, by way of impeachment. We can proceed from there.

The Chairperson (Sen. Obure): Thank you very much, indeed. We will now break for lunch for one hour and resume proceedings at 2.00 p.m. You will have an extra one hour and 20 minutes after the lunch break.

Thank you. This sitting is adjourned until 2.00 p.m.

(The Committee adjourned temporarily at 1.00 p.m.)

(The Committee resumed at 2.10 p.m.)

The Chairperson (Sen. Christopher Obure): We are back and ready for the afternoon session. It is now 2.10 p.m., so, counsel for the County Assembly will have until 3.30 p.m., to conclude his evidence.

Mr. Charles Njenga: Mr. Chairman, Sir, I proceed from where I stopped. I just wish to refer the Committee briefly – this is an extension of my earlier submission – that there was actually no public participation in the procurement and entering into this contract of agreement. I just wish to refer to the bundle presented by the Governor at pages 62 and 63.

If you have it, Mr. Chairman, Sir, the letter appearing at page 62 addressed to the County Assembly Clerk is the invitation that I was alluding to and this, as we shall see, is a simple invitation for a luncheon at the Tea Hotel on 13th January, 2013. This is the argument by the Governor; “Evidence of public participation by way of Members of the County Assembly; an invitation for a luncheon at the Tea Hotel”. You will see at page 63 if you flip over the page the agenda or the timetable or the schedule of activities or the programme on that 13th January, 2014. The only reference to the agreement at hand is between 1.00 a.m. to 1.30 p.m. This is a cameo appearance or reference: “Introduction and brief presentation of company profile; Bluetechs UK Group”. It is here where he is saying that they disclosed to the Members of the County Assembly the identity of this company and the profile. It took 30 minutes to introduce a company which was intended to undertake a project worth more than Kshs17 billion. A 30 minute presentation certifies in the argument of the Governor the consideration and the requirement for public participation. With respect, this is a mockery of Article 201. This is ridiculous!

This is a document that shows the casual manner in which affairs of the county are being run. This is the very reason why we are here. We refuse this kind of standard in application and in the handling of county affairs. You are committing an entire county; an entire population for 25 years which is a whole generation and all that you can afford in

terms of their input is 30 minutes in a programme at a luncheon. Senators, Mr. Chairman, Sir, as protectors of counties and their governments, it is imperative to evaluate whether this, in your standards; in the satisfaction of the Senate of the Republic of Kenya, this constitutes public participation by a Governor as required by the law. It is not a favour and it is not goodwill, it is a legal imperative; it is a constitutional imperative to ask and involve the people in the affairs of a financial character within a county. This is a further extension of the casualness in which this matter has been handled.

At Page 56, we have a document that purports to be a programme for public consultation meeting. You will see there is a public *baraza* now purported to have been held at Kipsitet Centre and there was a brief presentation. In fact, here they gave it 15 minutes; they halved the time between 2.45 p.m., and 3.00 p.m., but interestingly, this is a meeting – if you look at the date – being held on 15th January this year. By this date, this agreement had been signed. This is no more than a PR gimmick. Why are you consulting people after the fact? Why are we doing public participation ante the fact?

My submission and the position of the County Assembly is that this is a document created and presented intentionally to mislead this Special Committee. There was never consultation, there was never public participation and the evidence has been presented to you by none other than the Governor. This is a concession that my idea as the Governor Kericho County of involving the public, is first, calling them for lunch and doing a 20 minutes presentation and secondly, constituting a public *baraza* and talking to the *wazee*, but after the fact. This is inconsequential, irrelevant and a waste of time. In fact, he should apologize to these people because this is an idle exercise after the agreement was signed on 13th.

Mr. Chairman, Sir, I re-emphasize that under Article 96 of the Constitution, you have a duty to protect counties and their governments from this kind of conduct. That is a duty that you have to rise up to regardless of the moment at all times pro-actively and without any other consideration but the best interest of the members of the county. Counties are at the mercy of the Senate.

If you fail in your duty under Article 96, to insist on better conduct of affairs than this, as demonstrated in these documents where a project of this magnitude is casually handled in a manner that is now clear from these documents, the Senate must act in its mandate to protect the people of Kericho from this kind and this standard of governance. That is a constitutional entitlement that they can ask of you, and they are here to ask of you.

If you go back to the agreement, and I am now just addressing the aspect of risk to the county, you are told that no monies have been paid under this agreement. That is the wrong answer. The question should be: Are there accrued contingent liabilities that can be taken out against the county by way of an action under this agreement? What is the risk? Loss does not occur when you pay money; it occurs when you suffer legally an obligation to pay. That obligation can be realized even ten years later. We have had a whole national debate about Anglo Leasing type of agreements; those things were signed many years ago, but the obligation to pay arose and here, today, we are going through the

motions of whether or not they should be paid. They have been paid because legally, loss does not occur when money passes. It occurs when technically and legally, you bind yourself to an obligation in law to pay. This risk was anticipated by none other than the Governor's own County Executive Committee (CEC) in charge of Finance and Planning. I am just referring to the document at page 20 of the County Assembly's documents, the first volume where there is an extract of the report from the CEC, Finance and Economic Planning. This is a report on the budget of the financial year 2014/2015.

Sen. Billow: Just a minute, Mr. Chairman, Sir. Our numbering is not the same, so could you advise us on which page that is?

Mr. Charles Njenga: Mr. Chairman, Sir, if you look at that document, it was prepared by the CEC, Finance and Economic Planning, Kericho County, basically commenting on the budget for the Financial Year 2014/2015. If you look at the following page, page 21 on my bundle and page 16 bottom right of that report, there is a small headline "underlying risk to the Financial Year 2014/2014 Budget." The CEC Finance and Economic Planning isolates--- I just wish to read this particular text; it is very important because it is coming from a very dutiful officer operating and appointed by the Governor himself.

"The risks to the outlook for 2014 include the County Government embracing Private Public Partnership (PPP) framework in implementing key infrastructure projects. There are fiscal risks associated with contingent liability which, if they materialize, could undermine fiscal discipline and, therefore, for projects to be financed under the PPP forum of vehicle, financial modality will be carefully scrutinized to safeguard the interest of the general public, who in the end will bear the burden."

It summarizes the risk of a technical person addressing his mind to the budget of Kericho County that, yes, there is a risk to our budget because we have entered into an agreement with contingent liabilities that can affect the fiscal discipline and the running of the affairs of the county.

I wish to refer to just one other article or clause in the agreement, 1(h), which I will address very quickly. I will look at that in my addressing the import of Section 65(4) of the Public Private Partnership Act. Article 1(h) - and this is one of the mutual covenants entered into between the county and Bluetechs under the hand of the Governor; it says:-

"The land leased to Bluetechs by the county together with the improvements thereon may, subject to the approval by the county, be used as collateral by Bluetechs in any financial activity provided that at the termination of the aforesaid lease, the same shall be free from encumbrances."

So, we are allowing a private entity to apply county land – 500 acres of county land –as collateral to finance its activities or projects. We have put a rider here, but there would be no legal safeguards in the event that such collateral arose and before it is made and the financier thereof forecloses on this land. We are setting up our land to be auctioned in

case of default because the financier has to recover his money. That is the Governor recklessly exercising his conscience, as the Chief Executive Officer of Kericho County. Is this conduct that you can, as a Senate, term to be conduct of a dutiful, responsible, accountable Governor who deserves to remain in office?

We were told in the opening statement by the Governor and his advocate that in their estimation, he is the best Governor in the country. Of course, everybody is entitled to their own opinions, but empirical facts do not lie. If this is the best that Kenya can offer, then it is a sad day for the country. This cannot be, when there is a Senate that has capacity to interrogate these issues; when there is a Senate that has capacity to protect the people of Kericho County who, now by way of these edicts, risk losing 500 acres of their land.

The law is clear; there is no lacuna in law on such issues. In fact, the Public Private Partnerships Act anticipated the occurrence of such events. At Section 65(4), the law says that:-

“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 that the property is appropriately protected against factors which may negatively affect the property including forfeiture, theft, loss and wastage.”

This is the law, read as it is. The actions of the Governor fly right on the face of a clear statutory obligation, which begs the question: Under Article 181, therefore, does this constitute a gross violation? “Gross” is a standard that this Senate has to set for this Republic. If you say the threat of 500 acres in any county is not gross, it is immaterial and purely administrative, then we can live with that but I cannot for one moment countenance this Senate prescribing such a standard for any county, leave alone Kericho.

Mr. Chairman, Sir, I want to go to the Public Finance Management Act. I am addressing the issue of whether or not, even assuming this was a proper agreement, the Governor had the capacity to sign it in law or whether the Governor was entitled or empowered in law to sign it. I want to refer the Committee to Section 148(2) which designates the County Executive member for Finance as the accounting officer for the county. This is important because there is extensive legislation around the regulation of accounting officers in terms of their roles in procurement---

Mr. Peter Wanyama: Mr. Chairman, Sir, as a lawyer, I cannot sit and see the counsel misinterpreting the provisions of law. What that section says is that the CEC Finance shall designate an accounting officer. If you check the provisions of the County Governments Act, the accounting officer is the chief officer of that particular entity and not the CEC Finance. The CEC Finance is not the accounting officer at all. I just wanted to make that clarification.

Mr. Charles Njenga: These are legislative provisions which I will submit extensively on.

The Chairperson (Sen. Obure): You will be entitled to make a submission on that when you take the Floor.

Mr. Charles Njenga: We shall submit extensively on that. You will read the text yourself, Mr. Chairman, Sir.

I read that in speaking to Section 22 of the Public Private Partnerships Act, as I wind up to allow my colleague to speak to the other violations, it states clearly that when a contracting authority enters into a public private partnership, a person shall not, must not, can never, unless he is the accounting officer of the authority enter into a project agreement in relation to that project on behalf of the authority. If, in the context of Kericho County you were to evaluate Section 22, the question would be; who is the accounting officer for the County Government of Kericho? It is not the Governor but the CEC Finance. So, in the signing action itself, the Governor was clearly exercising an irregularity. The Governor was outside the law.

These are the questions that this Senate must evaluate in determining whether this is the Governor that you would allow to continue serving and discharging the duties of the Office of the Governor in Kericho County. There is referred in the agreement, and I am referring to Clause 1(g), a benefit-sharing agreement that is anticipated under this agreement.

Mr. Chairman, Sir, we have never seen this agreement, if indeed it exists. It is not even in the documents submitted to the Senate Committee. I have seen a draft of the statement to be made by the Governor. This was filed and the statement is there. He says, at the paragraph on the second bullet; the constraints of this agreement are to be included in a comprehensive benefit sharing agreement which is before the Assembly. We are the Assembly and we do not have it. That is a matter of fact. It is not before the Assembly. Who did he give it to? The point here is that this is an attempt to justify a clear gap in an agreement committing the people of Kericho. This is an attempt to mislead the Senate Committee that the County Assembly is seized of this agreement and yet it is not. We do not have that document. Nothing would have been easier than for it to be availed even in a draft form to this Committee but it has not been.

Part of the defence proposed to be made is that - and I am now speaking on Section 2 of the Public Private Partnership Act - that obligates every contracting authority taking out a public private partnership project to ensure that such a project is affordable. Affordability is defined in the letter and the text of the statute to mean that the financial commitment to be incurred by the contracting authority can be made by funds designated within the existing budget of the contracting authority. There has to be a budget that designates funds for this project.

Mr. Chairman, Sir, you will be surprised to know and we have attached the entire budget for the financial year, running from page 30-57 of our bundle, it is an extensive document with all the expenditure items, but I can state this for a fact that there is no allocation in this budget for Kshs1.7 billion to be committed to this project for the supply of solar powered energy. It is a document signed without a clear financial plan or a clear payment plan. There is no clear setting aside of funds. This is a legal obligation that has been desecrated. There is no reference whatsoever. There are formal structures under this statute including the Triple P Nodt under Section 16. These are structures that are intended to filter through a project to the point of approval by the Cabinet.

What is your proof under Section 56? If you read Section 57 of this Act, it is only upon the approval that an agreement should be signed. After approval, that is when we should sign against the dotted lines. That is the law speaking. It is not the Assembly or the Senate. It is the law under which and for which the Governor took oath to safeguard and apply. What has happened?

For the record, I wish to read Section 57 and I will say no more on that. It says:-

“The contracting authority shall, where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act, execute the contract as awarded to that bidder.”

So the signing should not be the first thing if the law was to be applied. It should be the last thing after all the approvals have been taken out and all the necessary safeguards have been inbuilt within that agreement.

What we have before you, hon. Senators, is a gross abdication of duty and application of a clear statute by the Governor. It cannot get more gross than this. There is no single provision of procurement law of the Public Private Partnership Act that has been applied in this project, not a single one. If there is one, nothing would have been easier for it to be isolated and presented in the response made by the Governor. The response is: “MCAs wanted me out, they had a demonstration. The Speaker planned, they went to Machakos.” Those are the responses we are getting. Those are beside the point. These are the questions we must ask because these are the issues. There will be attempts to deviate your focus and mind from these issues. But we have confidence that the Senate, in its capacity, is able to discharge its function.

Lastly, before I sit down, I wish to speak to the rationality of this project. That is one of the imperatives that have to be demonstrated when you are taking out a project. You have to demonstrate that it is prudent in the context in which it is taken. If we are doing a project to procure 100 megawatts of electricity, what need are we responding to? Where will you take all this power? This is like 20 per cent of the entire output by KenGen which produces 80 per cent of our power in the country. This is power that even Kericho County by itself does not have capacity to consume unless they are setting up a nuclear power plant or a ship building factory that consumes such amounts of power. What is the rationale? Where are we taking this power? Are we producing to sell or for own use? Do

they want to farm with it? Such are the justifications expected of an accountable executive. None has been given. In fact, you will see that one of the gaps in this argument, and I am glad one of the Members of this Committee was a Minister for Energy, is that it does not even prescribe the cost of this power. What is the cost per kilowatt hour? What is the tariff applicable? For how much will we pay? This is not stated. It just says: We will produce and the county will get 30 per cent and Bluetechs will get 70 per cent.

If Bluetechs sells the 70 per cent to the national grid, will the county get a proportionate benefit? These are the hard questions that we expect and trust that the hon. Senators shall ask.

Mr. Chairman, Sir, looking at the time, I wish to welcome my colleague to speak on the other one on violation and then, I will finalise on the last one.

The Chairperson (Sen. Obure): Thank you. You still have 45 minutes remaining. There is an intervention from a Member of the Committee.

Sen. Billow: Mr. Chairman, Sir, does the 45 minutes include remarks by both parties?

The Chairperson (Sen. Obure): It is only their time.

Proceed.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, as we continue with this discourse on the matter at hand, allow me as we continue to prosecute the case for the County Assembly, to, at the very outset, remind ourselves of the main consideration as set out in law regarding the question of the proposed removal from office of a governor. I will be referring you to a decision that we shall frequently be referring to which is part of our bundle, that is Petition No.3 of 2014 in the High Court of Kenya at Kerugoya. It is part of the documents already supplied by the County Assembly. It is at page 116.

I will start at page 115. Specific reference is made to the findings in the Supreme Court case of Nigeria, the one that is quoted by the learned judges at page 115; that is *hon. Muyiwa Inakoju & 17 Others v Hon. Abraham Adeolu Adeleke*. In this decision, the constitutional court in Kenya was quoting the observations of the Supreme Court of Nigeria on the question of what constitutes "gross". This is particularly important because as you interact with this matter, one of the questions that will weigh very heavily on you is whether on the basis of the material that we have placed before you as the County Assembly, it meets that standard of "gross".

I will invite the hon. Members to have in mind the ingredients. According to the Supreme Court of Nigeria, one, the act should have an ingredient of being atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme negative conduct. Therefore, a conduct which is the opposite of the above cannot constitute gross misconduct.

Down the line, the High Court of Kenya addressed what constitutes gross violation. The Supreme Court stated as follows: This is at page 115, paragraph 251. I am referring to the quotation at page 115 where the High Court is quoting the observations in the Supreme Court case court of Nigeria. The court says:-

“The following, in my view, constitute grave violation or breach of the Constitution;

- (a) interference with the constitutional functions of the legislature and the judiciary by the exhibition of overt unconstitutional executive power.”

That is not one of the basis that this proposed removal proceedings are premised. “b” is very specific on abuse of fiscal provisions of the Constitution. You will realise that the matter before you turns on abuse of fiscal provisions of the Constitution. One of the provisions is Article 227 of the Constitution which if you allow, I will refer to it.

“Article 227 provides that; where a state organ or any other public entity contracts goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.”

The Kisumu County Assembly is a state organ. It is under obligation to comply with Article 227. That Article---

The Chairperson (Sen. Obure): Did you say Kisumu?

Mr. George Ng’ang’a Mbugua: Sorry, I was to say Kericho. I apologise for that.

Article 227 would be found at Chapter 12 of the Constitution which is titled “Public Finance”. Article 227 directly refers to a fiscal provision in the Constitution. Chapter 12 is very clear on public finance.

We are submitting that the requirement by the County Government of Kericho to comply with Article 227 is squarely meant to be in conformity with the fiscal provisions of the Constitution. Therefore, in line with the Nigerian Supreme Court decision, if an act of a Governor, as we are submitting in this case, contradicts Article 227, then squarely, in terms of the decisions in the Nigerian case, would amount to a gross violation of the Constitution.

As I carry on with my submissions, I will speak to the violation that will be found at page 4 which is gross violation of the Public Finance and Management Act, 2012, the Public Procurement and Disposal Act and the rules therein and the violation of the Constitution. I started by laying a basis that the violation under the Constitution that we impugned for the Governor for Kericho County are found in Article 227 which is under the Public Finance Chapter of the Constitution. When we consider Article 227, we then go to the Public Procurement and Disposal Act, Section 2 which again provides for how procurement of goods and services is supposed to be done.

Under Article 2 of the Public Procurement and Disposal Act, the actions of the County Government of Kericho would achieve the following objectives. Under Section 2(c), such a procedure must achieve competition. That is 2(b) of Public Procurement and Disposal Act. So, we have to interrogate the actions of the Governor on the basis of whether when he entered into an agreement to commit the County Government to hire ambulances as I will demonstrate shortly, that act complied with the requirement of Section 2 that requires that the procedure is fair. Did it ensure that the procedure met the requirement of competition? Our submission is this.

As we consider violation two, which is premised on an agreement that was entered by the Governor, on behalf of the Kericho County Government, with E-Plus Medical Services, first and foremost, that is a contract that was entered by way of a direct procurement. Notice that part of the documents that have been supplied to you by the Governor, there is no response regarding the question of how the contract was entered into. How did the county government identify that E-Plus Medical Service was the entity that would be outsourced to provide ambulance services? If we were to stop there, clearly, the action of the Governor of committing the county government to this particular contract without ensuring that competition has been achieved through competitive bidding contravenes Article 227 of the Constitution and Section 2 of the Public Procurement and Disposal Act.

I will invite hon. Members to look at that agreement as I prosecute violation 2. That agreement will be found at page 23 of the County Assembly bundle, page 22, CAKA. That is the bundle that contains the agreement.

Mr. Chairman, you will notice that in that agreement, a contract was signed on the 7th of January, 2014 between a company which for use of reference I will refer to as E-Plus and Kericho County Government. At page 23, the scope of that contract was for provision of seven ambulances inclusive of paramedics and ambulance operators at a contract sum of Kshs600,000 per month per ambulance. The Kshs600,000 per month per ambulance is what the Governor committed the county to. That translated per year is Kshs50, 400,000.

That contract was signed as you will notice at page 29 in the hand of the Governor. You notice that in that agreement, the commencement date is very clear at page 23 (3). It states: "The commencement of this contract shall be with effect from 20th February 2014 for a renewable period of a year. Parties reserve the right to terminate the contract with a two month advance notice".

So, one of the things we are impugning these agreement for, as a County Assembly, is because there was no competitive bidding. This was a direct procurement. There is no basis that has been laid and you will notice that from the documents that have been submitted by the Governor, that for a direct tendering to happen, first of all, there has to be compliance with the requirements of the law. One of the requirements is to be found at Section 29 (3) of the Public Procurement and Disposal Act.

What does that section say? Section 29 (3) of the Public Procurement and Disposal Act states:-

“A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if the following prerequisites are met:-

1. Obtains the written approval of its tender committee – Have we been provided with any minutes from the Tender Committee of the County Government of Kericho with respect to this procurement of hiring ambulance services to the tune of Kshs50,400,000 a year? No.
2. Records in writing the reasons for using the alternative procurement procedure. There has to be a record as to what informs this direct procurement and that is very deliberate because the whole idea of direct procurement is to defeat competition. It is to defeat openness and transparency which are the key considerations that informed the enactment of the Public Procurement and Disposal Act. So, you realise that that has not been fulfilled.

If you turn to the same Act at Section 74 (3), it again provides for the prerequisites that a procuring entity must satisfy if a direct procurement is to be legally justified. If you are there, you notice that Section 74 (3) states:-

“A procuring entity may only use direct procurement if the following are satisfied:-

1. There is an urgent need for goods, works or services to be procured.

The service to be procured was ambulance service. Was that an urgent need? The onus was upon or is upon the Governor to prove. There has been no allegation in the documents already supplied to us that what informed that procurement was that it was an urgent procurement and secondly, that because of the urgency, other available methods of procurement are impractical. The county had run without this service until 7th January, 2014 when this contract was signed. The Governor was sworn into office towards the end of March 2013. So for a whole year, the county government had run without ambulance services. So, what is this that abruptly has informed this sort of “urgency” that would inform a direct procurement under Section 74?

Our submission is that on the face of it, this service may be very noble and we are not belittling ambulance service as a service or as a need to the county government. But even as the county government procures goods and services, there are no two ways about it; it has to comply with the law.

Mr. Chairman, Sir, one of the other things you will note in this document is; besides this Kshs50, 400,000, at page 25 (4.6), the County Government was also responsible for ambulance personnel, *per diem* during long distance transfers outside the work station and when they will be required to spend the night out of work within the county. Then there is the facilitation of *per diem* at the rate of Kshs3,000 per staff per night. KRCSE+

shall invoice, Kericho County shall reimburse the total *per diem* amount issued at the end of each month. First of all, there is no cap as to how many staff would be engaged on this night travel but it is saying that Kshs3,000 *per diem* will be paid to these staff and that it would be at the expense of the county government. Once they are invoiced, they reimburse. That is besides the Kshs50,400,000.

If you go to page 27 of the same document, it provides how the payment is to be done. It is on Clause 4 (5.4) KRCSE+ will invoice on the 1st of every month for ambulance and personnel. Kericho County agrees to pay by 15th of every month to an account that is shown there. They are even paying in advance. In my understanding, this is an advance payment. You are paying for services that are yet to be supplied, but you are saying that you are okay with that. As a Governor, I am all too happy to commit the county to even be paying for services to be rendered in future.

If you look at the same document – at the termination bit – one of the things that you realize is that it has the ingredients of an agreement; a binding contract. I am saying this because you will see a response from the Governor – I am referring to the response that you will find in the Governor’s bundle at page 24 of this bundle. This is the one that was provided by the Governor. It is paginated and flagged at the side for ease of reference. On page 24, there is a response that this Committee has been treated to. The response there is that a memorandum of understanding was signed on 7th January. At the very least, what this Committee must ask of the Governor is to be candid. To him, it is a memorandum of understanding, but just in case we are looking at a different document from the one that the Governor was looking at, the one he refers as 7th January, 2014 is the agreement that is to be found at page 22 of the County Assembly bundle which you will notice is indicated, “Agreement”. So, deliberately to mislead and cloud the issues, you are told that it is a memorandum of understanding while it is not. I will demonstrate shortly why it cannot by any stretch of the imagination be a memorandum of understanding.

Mr. Chairman, Sir, I would like to refer to in our supplementary documents that we supplied this morning and which have been photocopied and given to the Members. This is a supplementary document for the County Assembly of Kericho. I refer you to the authority at page 5; *Republic v City Council of Nairobi & Another Ex-parte Monier 200 Ltd & 7 others*. We have paginated those authorities, and you will find that authority at page 041. The pagination is at the right hand top side.

In that decision, Mr. Chairman, Sir, it dealt with an issue where parties were making representation or it was not---

The Chairperson (Sen. Obure): Can you just specify the page you are referring to?

Mr. George Ng’ang’a Mbugua: Page 41; the pagination is on the top right corner.

The Chairperson (Sen. Obure): All right; is everybody there?

Proceed.

Mr. George Ng'ang'a Mbugua: If you look at that decision, paragraph 1 on the top, it is written there; on the 28th of March, 2002, the first respondent entered into what the applicants described as a contract with the interested party. The respondents, on their part, said that the deal in issue between the first respondent and the interested party involved the formation of a partnership and was not a contract *per se*. The interested party referred to the transaction as an agreement. This is the court finding; whatever the tag, the parties to the transaction labelled it as a project agreement and memorandum of agreement. So, this answers the first agreement that was referred to by my learned friend, which is written "Memorandum of Agreement." That is the agreement with the UK Company. In this case, the judges are saying that whatever the tag, the parties to the transaction labelled as project agreement and memorandum of agreement, and we believe that looking at it, it is actually a contract by any other name. The point will become clear immediately we now propose to set the essence of the transaction, so that you need to look at the document.

The point here, Mr. Chairman, Sir, is that the Governor can call it anything, but what constitutes what that document is, is the content. We are submitting as follows; that the document is duly executed by the parties; it shows the subject matter – procurement of ambulances – it provides for a consideration, it provides for how the money is to be paid and it provides for a termination. All those constitute the ingredients or the essentials of a valid contract. So, the Governor cannot be allowed – with due respect – to mislead the Special Committee by suggesting that this was an MoU and that it was never an agreement; it is an agreement.

Mr. Chairman, Sir, looking at this document, again, you realize that part of the response that has been given by--- Or perhaps before we go there, one of the other things that we have impugned this agreement for is that there was never, in the budget, a proposal to spend money to procure ambulance services. We have attached in our documents the budget for the Financial Year 2013/2014, and I invite you to look at page 46 of the County Assembly bundle. It has the budget for the County Government of Kericho for the Financial Year 2013/2014; and it is the one that provides for the financial estimates with respect to health services department. Just so that we see whether there was an expenditure item on procurement of ambulance services, you will notice that at page 46, there was never such an item.

So, the Governor knew that he was committing funds belonging to the county when they had not been approved by the County Assembly; when they did not constitute part of what was in the budget. Now, that contravenes not just the Constitution and the public finance provisions, but it also contravenes the County Governments Act; this is section 8, where the County Assembly is supposed to approve the budget and expenditure of the County Government. This is so that before the Governor commits any funds, there is a requirement for approval; that was never done.

But, Mr. Chairman, Sir, you will notice an attempt to mislead and to say that, that expenditure was, indeed, approved. It was not. I am referring to the response by the

Governor which you will notice at page 24 of the Governor's documents; the same page I had referred to earlier. You notice that down the page, the Governor is saying that the commencement date was 20th February, 2014. That, I suppose, is the commencement date for the contract. So, if that, indeed, is correct; that the commencement date was 20th February, 2014, but this is what the Governor is saying:-

"The commencement date was 20th February, 2014; this was budgeted for in the supplementary budget which had already been submitted to the County Assembly. The supplementary budget was anticipated to be approved before the 20th February, 2014." The key word here is "anticipated." So, first of all, you are being told that there is a supplementary budget, but he confirms that it had not been approved. That is why he used the word "anticipated." So, he entered into a contract that takes effect before what he considers to be the budgetary provision for that service when it had not been approved. That is what he says. But we are submitting on that point that if you look at the documents that we have attached, we have attached the supplementary budget, which you will find in the second bundle by the County Assembly at page 75; the one in blue. It is the one which contains the response to the invitation to appear, and then it is paginated.

I invite you to look at page 75, which is the one that contains the supplementary budget with respect to health services department so that we see whether, indeed, there was ever a proposal to have approved a provision to spend money for hire of ambulance services. If you look at that page 75, down there, what was submitted for approval by way of a supplementary budget, you will notice that it is purchase of ambulance, and it was deleted by the County Assembly. So, there was never, even in the supplementary budget, a proposal to have approved resources towards procurement of ambulance services by way of hire. You will notice that even in the Governor's bundle, he has not attached his version of the supplementary budget, because there was never anything like that. So, again, that is a very misleading observation---

Sen. Mutula Kilonzo Jnr.: I am sorry; did you say page 24?

Mr. George Ng'ang'a Mbugua: Page 75.

Sen. Mutula Kilonzo Jnr.: You said it was deleted, where---?

Mr. George Ng'ang'a Mbugua: Yes, if you look at the last column, you will notice that it was deleted. What had been submitted was purchase, so that there was never, from the outset or from the word go, a request to approve a budget to hire ambulances.

So, that is a very misleading statement. Looking at the documents that have been submitted by the Governor, at page 105, this is the County Assembly now submitting the approved supplementary budget to the Governor. You will notice that this was submitted on the 5th March, 2014 and it refers to an approval of the supplementary budget that did not even contain any provision for hire but you can see the action of the County Assembly to approve was on 24th February, 2014 after this impugned agreement for hire of ambulance services had commenced because the commencement date in the agreement was on 20th February, 2014. So, we are saying that even if we were to take his contention

that there was a proposal for that particular expenditure, the approval decision was taken by the County Assembly after the agreement had taken effect. Again, that was contrary to the law.

Mr. Chairman, Sir, if you look at page 106, you notice an internal memo from the County Executive Committee (CEC) member, Health Services, to the Governor and one of the things you notice at paragraph two on hire of ambulances and he is referring to a meeting with the County Assembly. He is advising the Governor. The main agenda was the hire of ambulances versus purchase. He says that they presented their case very clearly to the meeting, however, after all the discussions were complete, the Members said that they will remove the ambulance line item completely from this year's budget. That was the basis. So, there was an ambulance line item for purchase and that they will include it in the next financial year. The County Assembly had a very good reason. This is what they state in the last line and this is a report from the Governor's own CEC, that 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.

Why was this important? It was important because when the Governor now proceeds unlawfully to engage and hire ambulances at Kshs50.4 million, that budget alone is enough to buy ambulances for that county. That is why you notice that what the County Assembly would want to do is to get a view of other counties that have implemented this project so that they can decide whether they are better off purchasing or hiring. All this time, the County Assembly is not even aware that there has been an agreement that has been signed by the Governor committing county funds to the tune of Kshs50.4 million per year.

Mr. Chairman, Sir, you notice that the Governor tries to justify his decision by saying, and this is to be found in his response, that it was terminated. This is at page 26 of the Governor's bundle. The Governor is saying that the Kericho County Governor did not violate the Constitution in any way because he terminated the process of procurement of hiring of ambulance services on advice given after consultation with Members of the County Assembly Health Committee. There are two things here; the Governor knew, when he was entering into this particular illegal agreement, because it was not competitive, that there was no budgetary provision for it. When this matter now arises, he now purports to say that he has terminated on advice.

Mr. Chairman, Sir, one of the things that this Select Committee must take judicial notice of is that the Governor is a university professor and one of the things that he is expected to know, at a bare minimum, is the provisions of the Constitution, the provisions of the Public Procurement and Disposal Act, the County Governments Act and so on. Those are some of the key instruments that he uses in his daily governance of the county. So, he cannot say that he has been advised and now he is trying to remedy the situation by cancelling. Let us also look at the cancellation so that where he now deliberately misleads this Select Committee further, he has attached a letter that you will find at page 107 of the Governor's bundle.

The Chairperson (Sen. Obure): Just a moment. You have only five minutes left and I had the impression that your colleague also wanted to chip into that time.

Mr. George Ng'ang'a Mbugua: Let me try and run through this. This is a very critical part of our evidence just to show mischief, at page 107, the Governor writes to KRCS and I quote:-

“Further to our agreement, I regret to inform you that the same is not capable of enforcement until it has been placed before the Assembly for requisite approval.”

So, he knew that it had not been placed before the County Assembly. He continues to say:-

“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.”

He is now using this to justify or show that he has cancelled. Let us look at the agreement and see the termination clause. It provided for a two-month notice. If you look at the agreement itself, at Clause 7.1 – either party may terminate. So, the termination is purported. We are being told that “forgive me as Governor because I saw my sins and I atoned for them by issuing a termination notice.” The agreement provides for how it can be lawfully terminated. At Clause 7.1 on page 28, if I may read:-

“Either party may terminate this agreement at any time by giving the other party not less than 60 days prior notice.”

The Governor is aware there is a requirement to give a 60 day notice but that letter did not do that. So, there cannot be a termination properly so called unless it complies with Clause 7.1. So, our case is that there has been no termination. If you look at Clause 7.2 of the same agreement, it says:-

“Upon termination of this agreement, all obligations on either party shall come to an end.”

So when a party brings himself under Clause 7.1 and lawfully terminates by giving two-month notice that is when parties are discharged from their obligations. Until now, there has not been that valid termination. Even if this Select Committee were to take it that there has been a termination, it is a purported termination. The County Government of Kericho is still liable under that particular agreement.

One of the things you will notice when we turn to page 108 of the Governor's bundle to show the acknowledgement from the company that had been hired to offer the service, the letter dated 19th February, 2014 and it says; “we acknowledge receipt of your letter dated 15th February, 2014---“ If I may pose there.

Let us see the letter of the purported termination by the Governor. It was not dated 15th February, 2014. If you look at the letter on the preceding page, at page 107, the letter purportedly terminating this contract, you will notice that, that letter is dated 14th February, 2014. These dates are very critical because when you have a letter dated 15th February, 2014. He is attaching a so-called acknowledgment by the ambulance company responding to a letter of 15th February, 2014. Has there been a meeting of minds as to the cancellation? The ambulance hire company, if they were taken to have acceded to the termination, are actually referring to a non-existent letter purportedly terminating the contract. With due respect, this is a make-believe story from the hon. Governor to try and justify his actions.

Mr. Chairman, Sir, as I wind up, so that we can seek the indulgence to take ten more minutes to wind up on the other violations---

The Chairperson (Sen. Obure): I am sorry, that will not be possible.

Mr. George Nga'ang'a Mbugua: Maybe one minute.

The Chairperson (Sen. Obure): We all agreed on this programme. Your time is up.

Mr. George Nga'ang'a Mbugua: Mr. Chairman, Sir, may be one minute so that I can tie up the final submission.

The Chairperson (Sen. Obure): Okay.

Mr. George Nga'ang'a Mbugua: This is on the issue of the accrued liability. My submission is this in response to the allegation that no money is lost. When there has been a contract entered into regardless of whether there has been any service that has been rendered – and this is in respect to the Anglo Leasing contracts – we paid a staggering Kshs1.4 billion many years after the fact. So, the accrued liability in this particular contract is not to be shown by demonstrating that no money has been paid so far. But it is the continuing liability of the County Government of Kericho to be sued under that particular contract and to pay that Kshs50,400,000 that the Governor unlawfully, without any basis and without compliance to the law committed the County Government of Kericho for. That is with respect to that submission.

At this point in time I will, again, very kindly, ask for five more minutes. There is one violation that my learned friend wanted to talk on. With all due respect, if you could allow us, so that we do justice to that violation. I apologise for taking a bit longer.

The Chairperson (Sen. Obure): I am afraid your time for submissions is over. We will be inviting the other parties to step in and make their submissions. I am sorry about that, but that is what we agreed.

Mr. George Nga'ang'a Mbugua: I am well guided.

Mr. Charles Njenga: Mr. Chairman, Sir, with your kind permission, I appreciate the issue of time. There were three charges. We may not get time to submit on the third charge. But if you could allow us, for the record to state the specific documents that the Committee will have to look at with reference to the violations of the County Government Act. We are certain that the Committee will, at its own time, be able to evaluate those documents.

We cannot be faulted for wasting any time. It is only that the documents and the charges are, as it were, quite bulky and we needed to explain them to yourselves. It is only fair to the County Assembly that you allow us to do that for the record, so that, that is not left as if it was never prosecuted.

The Vice Chairperson (Sen. Murungi): We appreciate your concerns regarding the materials you have made available to the Committee. I would like to assure you that the Committee will read each and every piece of paper that has been made available to us. Even if you have not spoken to it, it will be given its due consideration. But in terms of time management, we have to go on in accordance with the timetable that we agreed on in the morning.

The Chairperson (Sen. Obure): We will now proceed to receive the response of the Governor.

Mr. Peter Wanyama: Mr. Chairman, Sir, if you could give us the time indications.

The Chairperson (Sen. Obure): It is now 3.35 p.m. You have 40 minutes. That brings us to 4.15 p.m.

Mr. Peter Wanyama: We are most obliged. Just a clarification; will we have another one hour and 20 minutes?

The Chairperson (Sen. Obure): The position is that you will have 40 minutes today. Tomorrow is all your day.

Mr. Peter Wanyama: I am guided accordingly, Mr. Chairman, Sir.

The Chairperson (Sen. Obure): What you are doing is making a response to what the counsel for the county Assembly said.

Mr. Peter Wanyama: Hon. Senators, again, my name is Peter Wanyama. I am here to make a response on the allegations which have been leveled against the Governor by the County Assembly.

Without wasting much time, I will go to the specific allegation. This is the allegation concerning Bluetechs. At the County Assembly, we are at cross purposes. What we are saying in our response is that the Bluetechs agreement is a non-binding legal document. It

is not a contract which is anticipated under the Public Private Partnership Act for the reason that the legal regime contained in that Act is very clear on how it is supposed to be complied with. Our principle response is that the Bluetechs agreement is a memorandum of agreement. We will be seeking the view of this Committee for the definition of a memorandum of agreement.

According to the legal definition of a memorandum of agreement contained in the law dictionary, a memorandum of agreement is similar to a memorandum of understanding. It lays the basis of the parties to engage and negotiate. It establishes the framework for a meeting of minds. So, our principal submission is that a memorandum is not a binding contract as it were. The submissions will be clear when we examine the documentation which we have provided for in this particular file.

First of all, and for us to complete that point is that this argument is in accordance with the Bluetechs own letter and the legal opinion which was issued to the Governor by the County Legal Officer - we had submitted a copy of the legal opinion and I want to make reference to it. It is a one page memorandum addressed from the County Legal Officer to the Governor.

The document is dated 10th January. This is a separate document on its own. We do not have that document although we submitted it to the Clerk's Office.

First of all, Mr. Chairman, on the second paragraph of that memorandum, there is a typo. It is our wish to confirm to you that the memorandum of agreement is not binding at this stage and "does not" and not "does carry." That is an error that has been pointed to me by the author of this Report, the County Legal Officer.

Our entire submission is that the entire legal and regulatory regime for PPPs in Kenya is very clear. It is contained in a new legal framework known as the Public Private Partnership Act. In this legislation, there are 21 compliance requirements which must be met for any PPP Project to succeed or to conform to the Act.

Sen. Sang: Just for clarification sake, there is something that counsel has mentioned that is a typo which needs to be clarified.

Mr. Peter Wanyama: The second paragraph is the memo which says; I wish to confirm to you that the MOA is not binding at this stage and that is "scary." That is supposed to read; "does carry." That is a grammatical mistake. The rest of the memo says that it is subject to the other regulatory regime; the Environment, Management and Coordination Act, which is also subject to the Public Private Partnership Act of 2013 and the Energy Act of 2006.

Hon. Senators, that fact has been confirmed. This was submitted by the County Assembly saying that it creates a binding obligation between the County Executive of Kericho and Bluetechs Company.

Hon. Senators, there is a letter on record from Bluetechs. If at all there is any doubt as to whether this contract is binding. The person who is supposed to be suing is saying -This is the Governor's response which is clear and unequivocal. It is dated 9th May.

“The project in question is ongoing. In fact, we are surprised why the County Assembly is impeaching the Governor on a project which is work in progress. This agreement is subject to Kenya's regulations. It cannot go through unless it meets all the 21 requirements in the PPP Act”. That is why we are making distinction from the County Assembly submissions. Whereas they are claiming that the contract exists and is binding, we are saying that it does not. The legal framework which governs such type of contracts has 21 other requirements which we are complying with. There are many other requirements in other family of laws which we will seek to comply with. This is what it says on page 96:

The letter is from Bluetechs dated 9th May, 2014. The investor is aware that the project must comply with Kenya's regulatory regime. He says this in the letter.

Implementation of the project is also subject to us meeting all the other regulatory requirements in the county. That is what we want to emphasize. From a legal perspective, that letter has an immense legal implication. Bluetechs can never say that they are suing the County of Kericho on a project which is subject to local regulatory requirements. They can never do that. That letter is very clear about the obligations.

I want to emphasize here that the County Governor of Kericho has been advised and he is aware of the legal regime governing PPPs as contained in the Public Private Partnership Act.

This legal regime, I must say, is new. That is why I said earlier in my remarks that, perhaps, it may be appropriate for us to ask the Director of Public Private Partnership at the Treasury, Eng. Kamau, to explain to us the status of implementation of this Act. What are they doing when it comes to counties implementing this?

If you were to ask him, he would say that they are developing the County Government Regulations to make sure that this Act can be implemented by counties. Still, even this Act is new; there are counties which are still negotiating with investors. For legal and constitutional purposes, only two counties have so far complied; that is the County of Mombasa which has one project that has fully complied with the Act and the County of Nairobi which has two projects which have fully complied with the Act. The level of compliance is gauged by the project being in the national priority list which is published annually by the Cabinet Secretary to the Treasury.

Three months ago, there was the national priority list which is issued under the provisions of this Act which shows that you have complied. The County Government of Kericho is at that initial stage. This one says; we have a memorandum of understanding which we have executed with this investor. So, why can they not seek to comply with the legal framework as it exists in Kenya? The level of compliance begins by setting up the PPP note which is set up under the provisions of this Act. This is the entity at the county level.

Even the Governor does not have the capacity to negotiate the actual contract. The actual contract is supposed to be negotiated by the PPP note which is chaired by the Chief Officer, Finance.

Those are some of the issues that we need to pick up. So, perhaps, if you look at it from that point, the County Assembly was in a rush to frame this as an impeachment issue and yet it is something which is work in progress.

I want to make it clear that the Governor is fully aware of the provisions of this Act. It is premature for them to seek to impeach him on a project which is still under implementation; a project which is subject to the 21 regulatory requirements which are contained in this Act. Perhaps some will be put in the County Government Procurement Regulations which are being developed as we speak.

Number two, the Director of PPP Unit which is an entity at the Treasury, is supposed to provide to us standard form contracts. We cannot execute a contract which does not meet the standard form documentation. So, that memorandum of understanding by any sort of imagination is not a contract as it were. Any contractual arrangement must strictly meet the issues which are in this Act. As I said, they are 21.

Look at the institutional framework; this is the type of project which cannot be implemented without Cabinet approval. We have a problem with this as counties because every project must go through the Cabinet. That is the law. The law says that you cannot implement such a project without Cabinet approval. The Committee of Permanent Secretaries, the Public Private Partnership Committees is the entity which will look at this issue, make that final determination and forward it to the Cabinet for approval for it to be included in the national priority list. So, this is a very long process which we must appreciate.

With a lot of respect, the County Assembly should await the conclusion of the project. Otherwise the Governor has all intentions to comply with this Act. The Senate Committee is there to provide oversight and ask questions and the County Assembly is there to provide oversight within the framework of Article 185, to ask questions about this project because this is a massive project.

Let me now correct the County Assembly – I am happy the former Minister for Energy is here – 100 megawatts is not 20 per cent of power which we generate. That is a lie. It is not a factual position. Kenya generates about 1,750 megawatts of power annually. So, 20 per cent of that is not 100 megawatts of power which the Kericho County plans to generate. Being a lawyer who also works with the energy sector, I am very familiar with the issues there. Some of the issues in the energy sector are that the Government of Kenya had developed what we call a feeding tariff regime. This regime encourages private investors to come and set up electricity projects which can generate power and sell it to the Kenya Power Company. In this particular project, the County of Kericho was anticipating that if this project goes through, and I will really insist that we bring the environment of investment in Kenya by having that political environment conducive, so

that an investor seeing such a project will definitely run away. So, the 100 megawatts of power which the Kericho County - I am not a mathematician, I have just spoken to the experts – wanted in place would have generated the County of Kericho an annual revenue of Kshs153 million net of taxes.

The Chairperson (Sen. Christopher Obure): Over what period of time?

Mr. Peter Wanyama: Annually, Mr. Chairman, Sir. The project is supposed to generate more than Kshs153 million on the sale of surplus energy to the national grid. They were right that 100 megawatts of power cannot be consumed by Kericho County alone, and so ultimately this project will generate extra power which will be sold to the national grid. I am aware that the President is looking into this issue. It is a fact that the Ministry of Energy projects to generate more than 10,000 megawatts of power in the next two to three years. That masterplan includes the policy framework for us as counties to also participate. So, we are encouraging counties to go outside there, generate power and sell some to the national grid.

Therefore, one of the issues we are saying is that this contract would have been subject to the entire legal regime of the energy sector. The legal regime for the energy sector entails many other agreements including the power purchase agreements. All these things will have to be negotiated. So, ultimately, the Ministry of Energy will have to be involved in this project at the tail end. So, it is a project which should be given a chance to be implemented and it is a project which is very good for this country. If Kericho is leading the stage in terms of getting investment in renewable energy development, why can we not give them a chance instead of impeaching the Governor who is at the forefront in leading the county to that path of renewable energy development? I believe it can be achieved. I believe I have persuaded the Committee on that issue in terms of response.

The other allegation is that the County Governor has breached the Constitution and the County Governments Act. I think here we need to have a meeting of minds again with regard to the E-plus agreement. I do not know what is wrong with this agreement. E-plus is a company which is owned by the Kenya Red Cross and that is why you are seeing correspondence here from Abass Gullet, the Managing Director of the Kenya Red Cross. What the County Assembly has said about the back and forth between the Executive and the Assembly is true, on that budget line.

It is principally these issues that have led the County Governor to cancel that contract. If you look at the letter which they were quoting last time; annexure 2 (c) from the Governor's response; it is the Memorandum from Hellen Ng'eno, the CEC Health Services to the Governor. This is where we really see that there is nothing gross. It is utter demonstration of the fact that there is no gross violation of the law and the Constitution. There are issues which have been raised in this contract. The CEC Health is writing to the Governor and then the Governor knowing these issues writes: "The hire of ambulance services is suspended as per the development". That is what he is saying. He is not saying that we are going to execute this contract in any event.

The Chairperson (Sen. Obure): Just explain again which pages you are referring to.

Mr. Peter Wanyama: Mr. Chairman, Sir, it is on page 109 in this document. It is at page 106 in Sen. Billow's documentation. I would like to make a clarification that there was a contract and not an MoU. So, the appearance of an MoU which they took a lot of time to explain is a mistake on our part in our reference. In the other documentation, we are saying that there was no contract; that was an MOU, but in this one we are making an admission that there was a contract between the County Assembly of Kericho and E-plus Medical Services, which is a subsidiary of Red Cross.

Issues have been raised with respect to this contract; that the budget line is not there; the item was deleted from the budget and that it is a project which could not be implemented in this financial year because the County Assembly had deleted that item in the supplementary budget; and they have powers to do so under the Public Finance Management Act. So, what we are saying is that, in light of that development, the Governor does not sit and proceed to direct payments; no! He takes what in law I call a precipitate action; that positive act; that initiative to protect whatever has been done and to remedy the situation and that action of terminating the contract. I submit that if the Governor had done nothing, the county would have been exposed and then it would have been a major issue, which this Committee would have interrogated. Why did the Governor not do anything with this contract, having known very well that the budget line has now been deleted in the supplementary budget? Why did he not take an action?

So, I urge you, hon. Senators, to see in this letter that there is express action by the Governor; it is well documented and it is not disputed that this is the Governor's signature. After that, there is correspondence again from the Government of Kericho; it is in the next page after the one I was making reference to. Now acting on that decision, a letter was drafted for the Governor to sign, where the Governor is now writing to Kenya Red Cross E-plus Ltd – because I said it is a subsidiary of Red Cross – where he is saying that:-

“Further to our agreement dated 7th January---”

They are saying there is an agreement; so there is no point in saying that there was no agreement, because there was an agreement. Of course, the people of Kericho need ambulance services! Whether or not it was costly or cheap, that is a question of fact to be determined upon appropriate analysis and, of course, looking at it from that budget perspective. It is budgeted for, *et cetera*, so that it is a decision to be made in another forum. But what we are saying here is that:-

“Further to our agreement dated 7th January, I regret to inform you that the same is not capable of enforcement.”

I think the County Assembly brought this point out and their submission is that this letter does not terminate a contract. That is what they said. Now, there, it becomes a legal issue.

They said that according to the contract, they must give a 30 days' notice; that was the submission and, therefore, this purported termination is of no effect; it is a nullity. Therefore, they are saying that the County of Kericho is still bound by this contract. That was their submission.

The Chairperson (Sen. Obure): For records purposes, I thought he said two months' notice?

Mr. Peter Wanyama: Yes, two months' notice. Is it two months or 30 days?

(Loud consultations)

Yes, two months' notice; that is what he said; that is sixty days.

So, it becomes a legal issue and this is where now we can argue out day and night. But the point is this; if you have agreed to a contractual arrangement, can parties to a contract again agree not to be bound by the terms of that contract? Can they agree, because our principal submission is that there was a letter which was issued by the Governor and the Red Cross does not object to that letter? It says:-

“We have acknowledged and we look forward to working with you in future.”

What it means is that they have acknowledged the termination and they say “we look forward to working with you in future.” In the next page, this letter says--- This one must be a typo, because it says:-

“We acknowledge receipt of your letter dated 15th February;”

Yet the letter is dated 14th February. For purposes of this Committee, we had actually asked Mr. Abbas Gullet to come and testify, but they said that, that letter is sufficient. We wanted him to come and testify and shed light on this issue, but he said no, he is engaged in other matters and he will not be testifying. He just said that we should produce this letter to show that the Kenya Red Cross services has recognized---

The Chairperson (Sen. Obure): Just say that again, please?

Mr. Peter Wanyama: For the records, the Governor's team sought the Secretary General of Red Cross, Abbas Gullet, to come and testify on this contract, but he said that due to his engagements and the notice period, he will not come. The Governor is the one who sought his presence and he will explain it when he will be giving his testimony. He is the one who issued this letter and in so far as the Red Cross is concerned, the agreement which was executed between the County Government of Kericho and their subsidiary company is of no legal effect any more. It has been lawfully terminated.

The Chairperson (Sen. Obure): Which letter was he referring to; the one of 14th or 15th?

Mr. Peter Wanyama: There is no letter of 15th. What we are saying is that there must be a mistake or a typo, because the letter that the county Governor wrote to him is dated 14th February. Here, we are acknowledging that something may have happened – maybe a mistake or something – which we did not check it out, but there is no letter dated 15th February.

Sen. Sang: Mr. Chairman, Sir, I just want to clarify on that particular issue. Counsel, is it possible that whereas Abass may not make it to come and testify – and I do not think that it is necessary – but can they just do a letter saying that their letter dated – is it 14th? That, that was a typo; and it should have been 14th and not 15th so that we do not need to have him here?

Mr. Peter Wanyama: Absolutely; I think we can do that, Mr. Chairman, Sir. We can improve on that and seek a letter from him even today, then we bring it tomorrow morning. I believe we can do that because we have been having conversations with him.

The Chairperson (Sen. Obure): Okay; fine. That will answer the concerns of Members.

Mr. Peter Wanyama: Absolutely.

Our submissions, Mr. Chairman, Sir, is that from a legal perspective, even though our contract provides for terms, parties in that contract can still agree on how that contract ends. We are not bound by the contract as it is. If the Kenya Red Cross was contesting that issue, then it would have been a major issue; but, here, they are not contesting. They are the ones who are supposed to be complaining, saying that “we signed a contract with the county; why are you terminating it?” They are the ones who are supposed to be complaining, yet they are not complaining. It means that there is a meeting of minds with respect to the termination of that contract. That is, as I said, a legal issue which this Committee may want to look at further.

Again, Mr. Chairman, Sir, on the threshold for impeachment, as I said, on the two allegations that have not been met for the reason that the County Assembly has not demonstrated how the Bluetechs contract - which we call a Memorandum of Understanding (MoU) - has actually violated the provisions of the Public Private Partnership Act. There must be that actual violation of the Constitution and there must be that actual violation of the Public Private Partnership Act. To the extent we are submitting that, that agreement will actually lead to the execution of our contract. To the extent that we have said that there are very many other compliance and regulatory issues to be met – which we have advised the county government to fully comply with – and to the extent that, that fact has been acknowledged by Bluetechs, the partner in this project; and also to the extent that the legal opinion on record, we have demonstrated to a sufficient degree of precision that the County Governor has not violated the provisions of Article 226 of the Constitution and the provisions of the Public Private Partnerships Act. So, what we are saying here is that let us give the chance to the Governor to implement this project. During the implementation, perhaps, we can then see violations – and we doubt whether there will be any violations.

Mr. Chairman, Sir, the issues about cases, first of all, this Senate Committee is competent enough to hear these allegations without resorting to the Nigerian jurisprudence. In Nigeria, they have their own local challenges and issues. So, our submission is that when you look at the authority cited from Nigeria with a lot of circumspection, we look at it carefully. The context in which it was issued, for instance, one of the impeachment cases which they cited revolved around allegations about a Member of County Assembly (MCA) who was not properly nominated. That was the issue. It was not that the Governor had violated their constitution or the law. So, what I want to urge the Committee to look at very critically is the fact that the authority from Nigeria is not binding to us.

We have a mandate to discharge ourselves and what we want to emphasize here is that the threshold for impeachment is a matter of your own conscience. Even though the High Court has said that the impeachment of a Governor is a very serious matter; that there must be issues which are substantial; issues which are weighty, and there must be a nexus between the Governor and those allegations; ultimately, the decision from the US impeachment proceedings – there are Committees we have examined from the US – that, ultimately, it is your own conscience as a Senator to determine whether these allegations meet the threshold. So, there is no mathematical formula for determining whether these allegations meet the threshold or not.

So, Mr. Chairman, Sir, guided by that aspect, our submission is that, on the two particulars which they have submitted, they do not meet the threshold at all.

In our arguments, we will be demonstrating exactly why they do not meet the threshold and lay the basis through video evidence of where we think the county assembly made a mistake because we believe that this impeachment proceeding is a huge mistake. So, we will be demonstrating why they made that mistake but from a legal and constitutional perspective, no threshold has been met.

The Chairperson (Sen. Obure): I would like to tell you that you now have exactly five minutes left.

Mr. Peter Wanyama: Hon. Senators, there is another which was raised and I also believe that it is a legal issue. From the Nigerian case, the Governor is not charged with gross misconduct. So the part of submission where he said gross misconduct means this and that, we urge you to disregard those parts. The Governor is charged with gross violation of the Constitution and law. He is not charged with gross misconduct, so we request that you disregard that aspect.

Mr. Chairman, Sir, again, there is an issue where they say that the Senate Committee must protect counties. They are creating the impression that the Governor is the wrongdoer. Under Section 96 of the Constitution, it is your duty to protect county governments from this issue. What I want to submit here is that the jurisdiction of the Senate with respect to the protection of counties and their interests at the national level is clearly provided for. For instance, when you were having a dispute with the National

Assembly, you went to the Supreme Court on matters concerning the division of revenue, that is a very good way of protecting counties and their interests at the national level. So, the matter at hand is not within such a jurisdiction. It is an issue with respect to provisions of Section 33 of the County Governments Act where you are considering the removal of a governor from office on allegations leveled against him but nothing to do with the protection of the interests of counties because that is done in a different platform. Therefore, on that particular issue, we will urge you to look at the provisions of Article 181 on the two allegations and Section 33 of the County Governments Act. Ultimately, we shall be saying that these allegations based on our explanations have not been substantiated within the intention of Article 181 of the Constitution and also resonating with the intention of Section 33 of the County Governments Act.

Mr. Chairman, Sir, I hope I have made that distinction on the two allegations with sufficient degree of acceptability. Thank you very much for your indulgence and we undertake to produce that letter tomorrow from the Chief Executive Officer (CEO) of Red Cross to just beef up our point and make it crystal clear so that the position is one to be believed by this Senate Committee.

The Chairperson (Sen. Obure): Thank you very much indeed. As you sit down, I will seek two clarifications. The memorandum of agreement between the County Government of Kericho and Bluetechs Company at Clause 4(a) states that the agreement supersedes the earlier memorandum of understanding. The question has been raised here before. In fact, it says it supersedes that earlier memorandum of understanding which shall cease to have any further force or effect. Could your side supply a copy of the earlier memorandum of understanding for our records?

The second point of clarification is; where is the evidence of Bluetechs approaching the County Government of Kericho to initiate the Private Public Partnership project? In other words, how was this project actually initiated?

Mr. Peter Wanyama: Mr. Chairman, Sir, I have consulted the legal officer and he says that we can provide the earlier version of the memorandum of understanding. We can check it out and bring it to the Committee either tomorrow or another day within the timelines.

The Chairperson (Sen. Obure): Now we will ask the counsel for Kericho County Assembly, if there are any clarifications or responses to what your colleagues at the other end have said.

Mr. Charles Njenga: Mr. Chairman, Sir, in respect to all the documents they are saying they will introduce to these proceedings, will the County Assembly have occasion to comment on them officially so that parity of arms, we get a fair shot at whatever new allegations they have? These are new documents and yet you have given strict timelines. In your earlier ruling, you said that you will not admit any more documents. So, how are we supposed to deal with them in terms of if we have comments and responses to them?

The Vice Chairperson (Sen. Murungi): Mr. Chairman, Sir, in terms of where we are on procedure, today was the case of the County Assembly. They were the ones giving the particulars and the evidence supporting the particulars that they have made against the Governor. We just asked the counsel for the Governor to raise any issue even by way of cross-examination, clarify issues as stated by the County Assembly. The Governor will give his evidence tomorrow and once he does so, the counsel for the Assembly would be given time to also seek further clarifications and make comments. So, we will not shut you out. Where we are now is that if you have any minor clarifications to make regarding what has been stated by the counsel for the Governor, this is your opportunity. In court, you are given the opportunity for re-examination. So, it is time now for you to put the record straight if you feel it has in any way been dented by the Governor's counsel.

The Chairperson (Sen. Obure): If you want to take that opportunity, you have 30 minutes to do so. There is something you had not included in your earlier presentation, so wrap up.

Mr. Charles Njenga: Mr. Chairman, Sir, there was one violation that we did not get time to speak to. That is gross violation of the County Governments Act. I will do no more than refer this Committee to the text and particulars as set out in the charge where you see that there is a clear allegation that in creating offices---

Mr. Kimutai Bosek: Mr. Chairman, Sir, sorry, but I wish to raise something.

The Chairperson (Sen. Obure): Yes, go ahead.

Mr. Kimutai Bosek: Will we be given a chance to respond to this fresh allegation? My understanding is that they were to react to our response to their allegations. But apparently, they have gone to the ground you had expressly mentioned that it has to be abandoned.

The Vice Chairperson (Sen. Murungi): We are not saying the ground was abandoned. But we said there were several ways of communicating with the Special Committee. They had been given time within which to frame their issues. Indeed, they had been given two hours within which to manage time and present the evidence supporting the particulars on the three counts that were made against the governor. You managed your time and spoke to two. You did not speak to the third one.

Regarding the third one we said that we are going to look at your documents. The opportunity you have now is merely to clarify on the two issues which the Governor's counsel has responded to. If there are no other clarifications, then we can move on.

You cannot introduce a new argument now because the Governor's counsel will not have time and opportunity to respond to any new statement that you will make.

Indeed, I am being reminded by my learned friend that tomorrow you will have an opportunity to cross examine the Governor, even on the third count, if you want to.

Mr. Charles Njenga: So, what happens to the record with regard to the third charge? Will it be that---

The Vice Chairperson (Sen. Murungi): I have said we are not expunging anything from the record. The Committee will read it and it will make its own opinion from the documents submitted to us.

Mr. Charles Njenga: So will it suffice for me to say that with respect to that charge, we just rely on the documents and the particulars as---

The Vice Chairperson (Sen. Murungi): Yes.

Mr. Charles Njenga: Kindly, may that go on record that the County Assembly with regard to the third charge relies on the particulars of the charge as set out in the charge, the sections of the law cited in the charge and the documents referred to in the same charge. Those documents are in the bundle of documents that has been presented.

The Chairperson (Sen. Obure): I will now give an opportunity to members of---

Hon. Senators: He has not finished.

The Chairperson (Sen. Obure): Sorry, Mr. Njenga, I thought you had finished.

Mr. Charles Njenga: Mr. Chairman, Sir, I have 30 minutes.

The Chairperson (Sen. Obure): I am sorry. You may proceed.

Mr. Charles Njenga: And you have taken one minute from me.

(Laughter)

Mr. Chairman, Sir, it cannot be true that the agreement was not binding. For an agreement to be deemed to be binding in law, there are clear standards which are provided for by the law. They are not a reserve of the minds of the people. When you look at an agreement, and you have to look at these documents in the context of a county, a county has perpetual succession. So we cannot look at these documents with the mind frame that it is a person talking to another person with an understanding that is personal. You have to look at a document and construct it legally so that the document that is before this Committee, the question should be, if I were to take it to a court of law to enforce an action, can it suffice to sustain a cause of action available to either party? As to whether or not it can sustain a cause of action is a matter of law. That is why we are submitting that if you look at a document, and we shall show even by decided cases, it is not what you call it.

The essentials of a contract are well known. You evaluate. Was there an offer and an acceptance? Are the parties capable of entering into a contract? Is there consideration or explicit intention on that document to be legally bound? The word “bind” in the English language has no other construction apart from itself, binding parties to a legal contractual agreement. It cannot be wished away that if a party were to exit this agreement as it is, then the contingent liabilities that can be glimpsed out of the documents must necessarily and as a matter of law attach. It may not be in the tenure of this Governor or the next governor, but the principles of causes of action are clear. This is a contract which binds the people of Kericho County to certain legal obligations which they have to enforce. If they fail, they are exposed to suffer certain consequences.

This is clear. It is not a memorandum. The memorandum is the document that they are saying that after much persuasion by the Committee, they will at least allow you to see it. They did not allow the County Assembly to see it. Maybe they did not regard us with that high regard. But the document that is before this Committee is a contract.

Secondly, and this is my final comment so that my colleague also answers to the other issues, we have been told that there is intention to comply with time. There is good faith. It cannot be binding because the law says that this contract does not satisfy the legal criteria and framework. That is precisely our case. That is a concession that we signed before we satisfied ourselves as to compliance. That is our case. If the Governor says that: I knew that this agreement does not comply with the law. The question that must be asked is: Why rush to sign? What did you stand to gain by signing? Why can you not negotiate, confirm compliance, go through the process, the notes and the unit to the Committee or the Cabinet? Within the contemplation of the law, after approval by Cabinet, come and sign.

Are you admitting that your signing was a vain exercise? This is just a Governor signing for the sake of it; committing a county just for the show or the feel good factor. It cannot be. This was a Governor who intended, for all purposes and intentions to bind the county against the law. It is only that now there is a realization prompted by the County Assembly that: “Hey, Mr. Governor, you cannot do this.” But he has now come to this Senate Committee to say: “Yeah, I knew all along but I signed just for its own sake. One day in the fullness of time, we shall comply.”

Mr. Chairman, Sir, we are talking about lives and livelihoods of a whole county being committed. It cannot be as casual as it is. We urge this Senate to set clear standards of conduct of governance in the context of a county so that we do not play games with the destinies and the entire livelihoods of our county in the name of experimenting, misadventures and speculation that one day the right things shall happen. If he did not do the right thing at the time he was supposed to do it, then the consequences must attach. That is why we are here for the Senate to set the standards because what the Senate will prescribe for this county will also be replicated for all the other counties.

My colleague here will mention the issues raised with regard to the Red Cross contract.

Mr. George Ng'ang'a Mbugua: Thank you. For the sake of time, I will make some brief comments. The letter that my friend referred to from Bluetechs at page 95 of the Governor's bundle, is first of all, important to note that the one dated 9th May, was written after the impeachment proceedings. That Motion for the proposed removal had already been tabled before the County Assembly. That timing is very important. The Motion was tabled and approved on 30th April, 2014. We have a letter on 9th from Bluetechs. The timing after this Motion had already been approved comes into sharp focus. What was the intention of that letter?

Number two, if the intention of that letter was to change the binding character – you will notice that on paragraph 2 of the letter by Bluetechs, they seek to say that the agreement was non-binding.

In the agreement itself, it is important to point out that besides the agreement confirming at Clause 4(a), it constitutes the entire understanding of the parties. Besides also confirming at the recital clause at page 9 that the agreement is mutually binding, this is where the rubber meets the road. Any attempt to amend this agreement----

Mr. Chairman, if you look at page 14 of the County Assembly documents - the one that constitutes the agreement - one of the general provisions for amendments is that no amendment or modification of this memorandum of agreement shall be valid unless maybe in writing and signed by both parties. The agreement on one side says that it is binding and we have seen that from the recital of the agreement. So, if the intention of the Bluetechs letter of 9th was to unilaterally amend the agreement, then the terms of the agreement supersedes that letter.

Any amendments touching on whether the agreement was binding or not had to be mutual. So, we need to see another agreement mutually signed by the Governor and Bluetechs because that is the only way that you can amend that agreement under Clause 3(a). This letter, for whatever it is worth, cannot contradict Clause 3(a) of the agreement. That agreement remains valid. So, that submission is misleading.

On the issue of the ambulances, we noticed that, very conspicuously, if there was a submission missing, it was one with justification regarding whether that procurement was in line with the law. We were never told anything to do with the agreement for hire or ambulance services that complied with Article 227 of the Constitution. You were not told that there was competitive bidding and you were not told how the County Government proceeded to identify that E-Plus should be the company to offer that service. All you were told is that there was an attempt to undo what had been done.

One very important submission that was made is the disclosure by counsel. In fact, there was a direct admission that whatever we said about that agreement was entered into--- It was not done competitively and that was, in no uncertain terms admitted by counsel for the Governor.

The issue of the authority, you were told that the Nigerian decision is not applicable to our local circumstances. I will not belabour the point but only point out that the holding was adopted in our Kenyan situation in the hon. Martin Nyaga Wambora's case, petition No.8.

The constitutional court adopted the findings of that Nigerian Supreme Court decision. So, that has been applied in our local circumstances and the constitutional court has said, abuse of fiscal provisions of the law is, indeed, a ground for impeachment. That authority is very relevant.

In the issue of the Memorandum of Understanding, we would also be very happy to see it. However, suffice to state, the agreement before you supersedes all previous agreements, MOUs and it is an entire self containing document that does not contemplate that there would be any other agreement with respect to the matters contained in the agreement that would be entered into by the parties.

The Chairperson (Sen. Obure): Thank you very much, indeed. I will now give an opportunity to Members of the Committee, Senators, to seek clarifications, make comments or interventions on what they consider necessary.

Sen. Mwakulegwa: Mr. Chairman, Sir, mine is just to get a clarification from the County Assembly. While undertaking the proceedings, was the Governor given any opportunity to appear before any Committee or before the Whole House to defend himself or any other occasion?

Two, I am not a lawyer. However, where two people have agreed, if they withdraw, is there any recourse that one party can go later make a claim? The two of them had already said that it is suspended. Is there any clause that says that after two years, one of them can go and sue the other?

Sen. Nabwala: Thank you, Mr. Chairman. Mine is a question to the counsel for the Governor. I would want him to shed some more light on the cost of land; the 500 acres. I want him to indicate the value of the land and whether the land is available? Was the agreement signed before searching for the land?

Sen. Billow: Mr. Chairman Sir, I had a couple of questions. I know that the Governor will continue with his presentations tomorrow. However, I wanted a clarification from the counsel of the Governor on what he presented regarding the agreement with Bluetechs UK Group.

Mr. Chairman, Sir, I just wanted him to clarify; is the Bluetechs contract - You have used the word contract and memorandum interchangeably - Is that still in force according to the Governor or it is no longer in force? I think I need to get a clarification on that.

In the statements by the counsel for the County Assembly, they stated that the Governor is the CEO of the county vested with all the powers for managing that county and the

buck stops with him and stops with him and so forth. I want you to clarify for me on the decision to contract E-plus or the decision to lease ambulance services. In your view, is it a matter that is within the mandate of the Governor or not in the context of being the CEO?

Sen. Mutula Kilonzo Jnr.: Mr. Chairman, Sir, I have a few questions for the County Assembly. From the evidence produced by the County Assembly, it appears that during the public forum in January, two Members of the County Assembly were present. It also appears from the programme that the Bluetechs contract was signed in public. This means that both of them were present and this was in January 2014. Why would it take four months for the Members of the County Assembly to raise issue with this contract when they were present during the signing of the contract?

Secondly, I am curious as to who drew this contract. It does not appear to show the person who drew the contract at any point; either at the beginning or the end. Did the County Assembly confirm that the 500 acres were clearly identified and where is this portion of land? Two things are curious about this contract; the letter from Bluetechs appears completely unsolicited. Was there a request from the CEC in charge – the lady who is the addressee of the letter – from Bluetechs? The letter is addressed to her and yet it does not appear to refer to any letter or any request from her. Was it a solicited letter?

The opinion dated 10th January, 2014 appears to mention the signing of the contract on 13th. This is very curious because was the County Government itself doubting this contract three days before it was signed? If you look at the opinion which is almost 100 words, there seems to be doubt but it does not mention who raised the doubt about this contract on 10th January, 2014.

The Vice Chairperson (Sen. Murungi): Mr. Chairman, Sir, I believe the County Assembly of Kericho acts in the interests of its electorate; the people who elected their Members to the County Assembly. Is the County Assembly against a project which would generate 100 megawatts of solar power and generate Kshs153 million for the County of Kericho at the end of every year?

Secondly, is the County Assembly of Kericho against a project which would provide emergency ambulance services for the residents of Kericho per the contract which the Governor signed?

In addition to that, if indeed there was that interest, what did the County Assembly do - I believe you have a Finance Committee and other oversight committees in the Assembly – to summon the Governor to explain these contracts; the Bluetechs and the Kenya Red Cross one before you started impeachment proceedings? In other words, other than impeachment, what other oversight activities were undertaken by the Assembly against the Governor?

I have listened to you and we are talking about possibilities. We are talking about contingent liabilities which the activities of the Governor could have exposed the County

Government of Kericho to in future if these contracts were implemented. As of now, how much exposure are we talking about in terms of Kenya shillings and cents? How much has the County Government of Kericho lost through the contracts signed in respect of the solar project and also in respect of the ambulance project?

The Chairperson (Sen. Obure): All the issues relate to the Assembly and therefore tomorrow we will take the Governor on.

Mr. George Ng'ang'a Mbugua: Thank you, Mr. Chairman, Sir. With regard to the question whether the Governor was given an opportunity to be heard, I wish to confirm here and now and the HANSARD is very clear on that, that the Governor was availed an opportunity to appear before the plenary of the County Assembly of Kericho to answer to the allegations touching on the question of his proposed removal. In fact, the record will also confirm that he appeared with his counsel. So, he was given an opportunity to be heard.

On the question of the withdrawal of the parties; whether they can subsequently make a claim, and my answer to that is that a contract can only be terminated in accordance with the termination provisions of that contract. That is why I referred to the notice providing for 60 days because if you do not provide for that notice, then there would be a penalty that you would pay *in lieu* of that notice. If today you want to discharge or you want to terminate a contract of employment with your employee and it provides for 30 days notice, then you pay salary *in lieu* of that notice.

Now the issue as to whether there can be a claim; yes, there can be a claim because what the adverse party will say is that if you are saying that there was a termination, was it in line with what we agreed upon? This becomes even more important. If you look at the Bluetechs agreement, it contains a proviso for amendment. So that if today Bluetechs is to contractually withdraw from that agreement, it must be mutual by way of another agreement.

But any letter coming from one party must be taken to be unilateral. So, tomorrow if a cause of action or a claim is filed in court, what one party would be saying is that this can only be terminated in line with the contract. If the contract provides for a mechanism of termination which was not followed, then there will be a breach of contract and there will be damages payable. That is now our case; that this accrued liability is on the basis of the contract itself, where a party will then go to court – whether tomorrow or next year – and say that as far as we are concerned, the agreement is still binding. If their adversaries say that it is not binding, the onus would be on the adverse party to show that it was terminated in line with the agreement.

The other issue is on the---

The Vice Chairperson (Sen. Murungi): If you could stop there for a moment; I would like to explore that a little bit. In this particular case, it is only Bluetechs which can take

the Kericho County Government either to court or for arbitration for breach of that agreement?

Mr. Peter Wanyama: Yes.

The Vice Chairperson (Sen. Murungi): Now, if Bluetechs says that there will be no liability; that it is not going to take any action against Kericho County, what risks does Kericho County Government run, because the only person who could take them to court says there are no legal issues or obligations arise because of that letter?

Mr. Peter Wanyama: Thank you very much, hon. Senator. The question that should also then be in our minds is: Why was it that difficult for Bluetechs to ensure that, that termination is done in line with the agreement if, indeed, the intention of Bluetechs was to withdraw from the agreement? So that now we have a letter where even questions are coming up as to who even solicited it? So, these questions are arising. At this point in time without even passing judgment on that letter, Bluetechs might just as well say “this agreement provides for how it is to be terminated; we do not even know who this person who has done this letter is; we are not party to it.”

So, Mr. Chairman, Sir, that is the more reason why for the County Assembly to rest easy and to know that the County Government’s funds are still secure and there is a mutual termination provision in line with the agreement. So that if an issue were to subsequently arise, then we would say that, yes, we were satisfied that in terms of the agreement, indeed parties mutually agreed to disengage. But when it is unilateral, an issue can even arise where a party can say “you cannot even say that we are stopped or we waived our right because it was not consensual; it was not mutual.” So, that then becomes a very debatable question, especially when money is involved. So that when we have a correspondence of this nature which even appears very unsolicited on the face of it, then we cannot say that the county government is insulated from future legal proceedings, because it would be very easy for Bluetechs to say “even if you were to say that this letter came from us, there was never a mutual agreement that, indeed, we are disengaging from the contract.”

Mr. Chairman, Sir, on the question asked by Sen. Billow on the decision of the contract of E-plus, whether the Governor has the mandate, the responsibility, first and foremost, to comply with the Act, my understanding of, is Section 28 of the Public Procurement and Disposal Act---

(Mr. George Ng’ang’a Mbugua perused a document)

Mr. Chairman, Sir, I am sorry. Yes, it is the section that talks of the responsibility to ensure compliance with the provisions of the Act. Yes, my reading of that section perhaps would assist in responding to the query by the hon. Senator on whether the Governor would have--- Yes, on one hand, it cannot be disputed that as the CEO, he would have the capacity to enter into a contract with E-plus. As a matter of fact, if you look at the responsibility for compliance under Section 27, is that each employee of a public entity

and each member of board or committee of the public entity shall ensure, within the area of responsibility of the employee or member that this Act, the regulation and any direction of the authority is complied with.

So that my answer would be that even if you were to take the Governor to have the capacity to enter into the E-plus contract, under Section 27, he has a direct obligation to ensure compliance. So that where we impugn his action is not so much that he signed it, because indeed it can be true that he has the capacity because as the CEO, he would have then the authority to sign. But did he ensure that before signing, there was due compliance with this Act as to competition, fairness, transparency and openness of that procurement system that he was seeking to commit the county to? So that, then, an issue of liability would arise because, indeed, what E-plus would argue: Who else other than the CEO would have more authority to bind the County Government of Kericho? And they would be arguing that by entering into a contract with the CEO, it is because there was no other person who had more authority to enter into the contract with us than him and, so, he would indeed have. But we are saying that he had an obligation to, before signing, ensure compliance with the Act.

Sen. Billow: Mr. Chairman, Sir, the reason why I raised that issue is because if you look at Annexure 2© from Helen Ng'eno, which refers to the Health Committee meeting; it is a memo from the CEC Health Service that talks of the meeting with the Health Committee, the focus of that meeting is about the hire of the ambulance versus the purchase. It is not focused on the issue of compliance with the procurement procedures. They did not challenge the process; the issue is really one of management decision whether to buy or to lease. That is why my question, then, is if the Governor has the capacity in law to make that decision, why would your clients then challenge that decision not really on the process because this meeting does not seem to discuss that aspect?

Mr. George Ng'ang'a Mbugua: Thank you, hon. Senator. The challenge mainly was on this; for us, we appreciate that this was a conversation that was hard because when the supplementary budget was brought before the County Assembly, it was on the purchase. In fact, it had not even been disclosed that there has been a contract already entered into. So, the refusal by the County Assembly was "hey, let us weigh the merits and demerits of hiring and purchasing." So that this was not really a rejection; it was for purposes of this particular budget, let us give ourselves time, see what other counties have done, do a pros and cons, seek for evaluation and then determine whether we are better off buying or purchasing. So that now then the issue that arises is, after this, it now turns out that, in fact, an agreement that has taken effect on 20th of February has been entered into. So, these are matters that are now arising subsequent to the fact, which now forms the basis of the complaint of the County Assembly.

Mr. Charles Njenga: Mr. Chairman, Sir, maybe just to add on that particular issue, the position of a Governor as a CEO is really clear; it is constitutional. But the exercise of that office is subject to a constitutional oversight authority and role provided for in the

Constitution and clearly under Section 8 of the County Government Act, where the Governor cannot determine what to spend and how to spend just like that unilaterally.

He has to submit a budget to the County Assembly which has an express statutory mandate under Section 8(6)(c) to approve it so that it is not an autocracy but a spending but limited or checkered by a check system that is in the statute. That is all the County Assembly is saying and insisting on. This is our only hope for good governance.

Mr. George Ng'ang'a Mbugua: I was responding to Sen. Billow's comment.

Mr. Charles Njenga: As he checks, there is a question on whether the Assembly had this document as early as January when it was signed. The answer is no. These were people who were called to a luncheon, a document was signed and they were not given a copy. In fact, from the documents given by the Governor, you will see a letter forwarding that agreement on 28th March, 2014 to the Committee on Energy. That is when the Assembly was seized of the details of this agreement. So, it cannot be said that the Assembly at all times had this document and sat on it. That would be very unfair to the Assembly. Once they were seized of it, they immediately acted upon it.

Regarding the issue of land, there was a commitment to give land but that land had not been isolated in terms of specific area or demarcation. That was now incumbent upon the county to allocate land to the company. That is the commitment we are saying that before you do it, there is a clear legal framework within which such actions are taken out for good measure, that is, to safeguard public interest. As an Assembly, we are not against ambulances, against the project or against electricity. In fact, for the ambulances, if we had 50, the better but there is a clear legal framework that requires that before a commitment to an expenditure is made, there is a confirmation that funds have been allocated in the budget for that purpose so, as you go along in procuring goods and services, you do not incur debts or commit to obligations that you cannot satisfy.

Therefore, in procuring anything, the budgetary allocation--- In fact, it is a statutory obligation to confirm that there is budget for anything you are procuring. It does not mean that the County Assembly is against ambulances. Ambulances are noble and every county needs ambulances but we cannot raise that allegation against every question raised in procurement so that it appears that anyone who raises doubt or questions with regard to building a hospital, for example, is against the hospital. It is not the end that is in question but the process. It is through the process that we, as Kenyans, have suffered. All projects that have been impugned in this country were very noble in intention but the execution gave room for persons who are not acting in the public interest to waste public funds to the detriment of many Kenyans.

Mr. Chairman, Sir, in terms of actual loss, I want to refer to the documents in support of the third charge. If you look at those documents, the complaint there is that there are staff in the Governor's office who are not provided for in the law, they were not competitively hired and they do not have qualifications that match their positions. We have attached payrolls where they are being paid every month over Kshs1 million cumulatively. This is

actual loss over and above the contingent liability that counsel has ably explained. When you bind yourself to an obligation, then legally, it shall materialize at some point.

The Vice Chairperson (Sen. Murungi): Sorry, you have not answered my question. I asked in respect of Bluetechs, it is not a project and in respect of E-Plus, in terms of shillings and cents, what has the County Government of Kericho lost for purposes of record? We appreciate what you have said regarding count number three.

Mr. Charles Njenga: I think that point was ably taken by my counterpart. Yes, we concede that there may not have been actual payment of monies to these entities but the question is, if they took out action, would the county be liable to pay, because that would be more material even from a governance perspective, than the actual parcels of coins and shillings. It might not be paid in the tenure of this Governor but as long as there is a right to pay accruing in favour of another party, then, it is a matter of time; the liability will attach. That has been ably explained and that is the position of the Assembly.

Mr. George Ng'ang'a Mbugua: I think the learned Senator from Meru had made reference to the oversight mechanisms by the County Assembly. If you look at the Governor's bundle at page 106, the memo refers to a meeting in respect to the E-Plus contract for hire. It refers to a meeting that was held by the CEC Finance and Economic Planning. It says: "I attended a Health Committee meeting at the Kericho County---"

So, there was a meeting with the Health Committee of the County Assembly with the CEC where at that point, there was an oversight interaction. As the executive, they were proposing to buy or hire ambulance services, but the County Assembly was saying that they could not pass judgement on that now but let us consult and examine what other counties have done probably to learn from mistakes so that when a decision is made either to hire or purchase, it is an informed decision and to be in the best interest. I believe the correspondence confirms an oversight interaction with the County Assembly with respect to that issue.

The Vice Chairperson (Sen. Murungi): I believe it is after that interaction that the decision to hire ambulances was then later rescinded?

Mr. George Ng'ang'a Mbugua: Yes, we are saying that there was a purported attempt to rescind. We have raised very pertinent issues about the letter. This is why you notice that this is on 14th. As a matter of fact, very interestingly, that memo is done the same day, then the letter, on page 107, to E-Plus is the one that is done on page 107. It says that we shall enter a fresh contract after the matter has been interrogated. Reading that letter, you will notice that on one hand, it speaks of a cancellation and on the other hand, it seems like it is suspending something for the time being. Much more importantly is the issue we have raised about that letter. Even the letter that purportedly is coming from Dr. Abbas and with all due respect to him, we have a letter that is not even responding to the letter by the Governor because of this contradiction with dates. Even if we have to take that there was an attempt to remedy, that is why we were going back to the agreement to say that the only way to safeguard our resources as a county is to ensure, if we were to

disengage, let us go back to the contract we have entered into and we acknowledge that it is binding and then disengage as per that so that we can rest easy that nobody will come tomorrow and slap us with a suit for breach of contract for damages.

The Vice Chairperson (Sen. Murungi): Mr. Chairman, Sir, there was an interaction with the Committee on Health. The Bluetechs UK Group matter was brought to the attention of the Committee on Energy on 28th March, 2014. What action did the Committee on Energy take regarding that contract?

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, I am informed by the representative from the County Assembly that the information received from the Executive is that there were consultations that were on going. No much light was shed on the status of Bluetechs UK Group. What we have is the document and speaking to it on the basis of what it says. But there was really nothing much that came out of the comments from the Executive. There was a lot of prevaricating on exactly what the status was. That is why you even notice this letter that is now before you which Bluetechs UK Group allegedly says it is non-binding. We have, first of all, pointed out it was after the impeachment proceedings had commenced. That is when the letter was done as you notice from the date. It was really not a letter that was in existence or that was shown to the County Assembly at that point in time when they met with the Committee on Energy to show that any party has disengaged.

Sen. Billow: When was the contract or the memorandum availed to your clients?

Mr. Charles Njenga: Mr. Chairman, Sir, it was availed on the 28th March, 2014 by way of a letter dated that date.

We must emphasize that legally - and this is well provided for by the law - one of the reactions available to a county assembly in the face of a breach which they consider to be "gross" is to propose to remove the person who is liable. So, it cannot be taken against them to avail themselves to a mechanism and a procedure provided for by the law. It is not illegal. There is a clear legal framework that when you see that this is wrong on the part of an Executive - in fact, that procedure is not just available against a governor. It is even available against a Speaker and a County Executive member. It is anticipated by the law. We, as Kenyans, determined that we cannot countenance breaches in governance. We gave our county assemblies power to remove them, in the face of a clear breach such as this one, so that it does not appear that applying a legal procedure then attracts vilification on the part of an assembly. That will be unfair even to the rule of law.

Sen. Billow: Mr. Chairman, Sir, we are not in any way suggesting that it is wrong for the County Assembly to have taken whatever action they have taken in terms of impeachment. The argument is, at what point did this memorandum of agreement come to the attention of the Assembly? You said that on 28th March, 2014, that is when the Committee on Energy got an opportunity to look at it. What Members wanted to know is: What transpired? What other action apart from the impeachment which came

subsequently with regards to that agreement that the Assembly took before it came to impeachment? That is the only thing that needs to be clarified.

Mr. Charles Njenga: Mr. Chairman, Sir, in the fullness of time, when we go through these documents you will see the CEC Energy was called. In fact, the issue of this agreement was framed as an issue for response by the Governor before the Assembly. So, he has not been brought here by the Assembly before being heard on this particular issue. It is because there was no satisfactory response that has precipitated a decision that this constitutes a gross violation of the law that entitles the Assembly to apply the procedure provided for under Section 33 and Article 181. That is the position of the Assembly.

The Chairperson (Sen. Obure): Let us have two more interventions before we close.

Sen. Adan: Mr. Chairman, Sir, I just want to follow up from where Sen. Billow Kerrow has left in terms of other measures that you have taken. We understand that there are institutions established by the Constitution that follow up on issues of misappropriation or misuse of offices. A very good example is the Ethics and Anti-Corruption Commission (EACC) and the office of the Auditor General. Has the Assembly ever thought of referring this particular issue at some stage to those institutions before impeachment?

The second question is on the Public Private Partnership Act. Looking at this Act, my view is that it is more of national in terms of its implementation. I have seen the lawyers referring to the Act often when they are doing their submission. Is the County Government held liable in terms of breach of this particular Act?

The Chairperson (Sen. Obure): The last one from Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: I do not think the question by Sen. Billow was answered. We are all Members of Committees of the Senate. Once an issue has been brought to our committees, it is committed for discussion, there are minutes, HANSARD reports and so on. The question that Sen. Billow had asked is whether or not the committee made any deliberations on this matter that was forwarded to them. That is the question that has not been answered.

Mr. Charles Njenga: Mr. Chairman, Sir, I am advised that the Committee sat. We even have minutes to that effect which can be availed as early as tomorrow. The Committee even deliberated on that matter before a private Member took out a Motion to propose the removal of the Governor and framed this as one of the issues. Therefore, the Committee sat, deliberated and made recommendations that can be availed to this Committee in its power to admit documents that are material to its investigative mandate.

On the issue of the application of the Public Private Partnership Act, if you look at that Act, at the definitions and the interpretations at Section 2, it defines what a contracting authority is in the context of that Act. The contracting authority, if I read, for the benefit of the hon. Senator, it says:-

“Contracting authority means a State department, agency, State corporation or a county government.”

So, a county government is bound by the provisions of this Act because it is a contracting authority as anticipated in this Act. That would form a basis of our reference to this Act in our submissions.

The Chairperson (Sen. Obure): Ladies and gentlemen, hon. Senators—

Sen. Adan: I think my question was not answered. I asked whether the County Assembly ever thought about referring the allegations against the Governor to the institutions established by this country before going for the impeachment.

The Chairperson (Sen. Obure): You are referring to the Auditor-General or the Ethics and Anti-Corruption Commission (EACC).

Mr. Charles Njenga: With regard to the issue of audit, routine audits are carried out by the Auditor-General. Those issues will be presented as audit issues. With regard to prosecution or making a complaint in the nature of corruption; EACC, that becomes an option available to prosecute criminal liability with regard to the conduct of the Governor.

It has been settled; even in the ruling made by this Senate that impeachment is a governance tool. It concerns itself with governance so that when the assembly is evaluating itself to ensure governance, it can avail itself to the tool available to it by law.

That is in Section 33 and Article 181. The two are not mutually exclusive. That does not mean that upon this process, that the issue will come to a conclusion or that a complaint cannot be framed before the EACC for their investigations. Those are roles that are purely different in terms of considering and threshold that they require.

The Chairperson (Sen. Obure): Thank you very much, indeed. Ladies and gentlemen, hon. Senators, we have now come to the end of today’s sitting. Today, we have heard the evidence by the County Assembly who have, indeed, prosecuted their case. Tomorrow, we will give the Governor an opportunity to present his evidence and to defend himself.

I want to thank the two sides of this engagement for their cooperation and very exemplary conduct. I thank everybody in this room for a good working environment. Tomorrow’s sitting will start at 10.00 am right at this venue. This sitting is now adjourned.

The Special Committee Adjourned at 5.25 p.m.