

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE  
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY  
IMPEACHMENT OF THE GOVERNOR AND DEPUTY GOVERNOR OF  
EMBU COUNTY HELD ON MONDAY, 10<sup>TH</sup> FEBRUARY, 2014 AT THE  
AMPITHEATRE, KENYATTA INTERNATIONAL CONVENTION  
CENTRE AT 10.00 A.M.**

[The Chairperson - Sen. (Dr.) Khalwale]

**SENATORS PRESENT**

Sen. Kipchumba Murkomen	-	Vice Chairperson
Sen. Kimani Wamatangi		Sen. Zipporah Kittony
Sen. (Prof.) Wilfred Lesan		Sen. Naisula Lesuada
Sen. Peter Mositet		Sen. James Orengo
Sen. Boy Juma Boy		Sen. (Eng.) Hargura Godana
Sen. Judith Sijeny		

**SECRETARIAT**

Mr. Jeremiah Nyegenye	-	Clerk of the Senate
Ms. Eunice Gichangi	-	Director, Legal Services
Mr. Anthony Njoroge	-	Director, Litigation & Compliance
Mr. Boniface Lenairoshi	-	Principal Clerk Assistant I
Mr. Zakoyo Mogere	-	Principal Clerk Assistant I
Mr. Ahmed Hassan Odhwa	-	Senior Research Officer

**IN ATTENDANCE**

**GOVERNOR'S TEAM**

Hon. Martin Nyaga Wambora	-	The Governor of Embu County
Mr. Wilfred Nyamu	-	Advocate
Mr. Peter Wanyama	-	Advocate

**DEPUTY GOVERNOR'S TEAM**

Ms. Dorothy N. Muchungu	-	The Deputy Governor of Embu County
Mr. Julius Njoroge	-	Advocate
Mr. Kibe Mungai	-	Advocate

**COUNTY ASSEMBLY TEAM**

Hon. Kariuki Mate	-	The Speaker, Embu County Assembly
Hon. Ibrahim Swaleh	-	Deputy Speaker, Embu County Assembly
Mr. George Ng'ang'a Mbugua-		Advocate

Mr. Charles Njenga - Advocate

*(The Committee convened at 10.00 a.m.)*

*Prayers*

*(The Chairperson (Sen. (Dr.) Khalwale) introduced himself and other Members of the Committee)*

**The Chairperson** (Sen. (Dr.) Khalwale): Ladies and gentlemen, I would like to remind the plenary of the mandate of this Committee. In accordance with the Senate resolution establishing the Committee in accordance with Section 33(4) of the County Governments Act, 2012, and Standing Order No.65(2) of the Senate Standing Orders, this Committee is required to investigate the matter of the proposed removal from office of the Governor of the County of Embu and the Deputy Governor of the County of Embu and report to the Senate within ten days whether it finds the particulars of those allegations against them to have been substantiated. That is the mandate of the Committee; nothing more, nothing less.

The timelines are very tight indeed as the Committee must report to the Senate not less than 14<sup>th</sup> February 2014. I will, therefore, be appealing to everyone to co-operate so as to enable us to meet this strict timelines. If it helps us, may I take this opportunity to give all the parties the assurances of this Committee, the Speaker of the Senate and the entire Senate, that you will be accorded a full and fair hearing. So relax and let us proceed.

I notice that the Governor and his team have just arrived. Do not ask me how I know it is the Governor; it is because he was my colleague in the other Parliament. Welcome, hon. Wambora. Governor, we are not terribly impressed that you have come late, but all the same, you are welcome. We have made a bit of progress, we have done the introductions. So, maybe to loop you in, I want the head of your team to rise and introduce who is on your team.

*(The Governor of Embu County and his team introduced themselves to the Committee)*

**The Governor of Embu County** (Hon. Martin Nyaga Wambora): I would like to apologize to the Committee. We were trying to organize ourselves day and night in order to be able to appear before this Committee.

**The Chairperson** (Sen. (Dr.) Khalwale): Governor, we had already gone through a recital of the mandate of this Committee. You are joining us at a stage when now we want to look at the rules of procedure. You will remember that we posted them to you earlier on but all the same, we want to take this opportunity to invite the Vice Chairperson to now go through the rules on my behalf.

**The Vice Chairperson** (Sen. Murkomen): Thank you, Mr. Chairman. We are just going through the rules again for the benefit of the other members of the public, but they were already posted to the parties in good time.

(1) Upon convening of a meeting of the Senate to hear the charges against the Governor, pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, and Standing Order No.65, the County Assembly Speaker shall report the resolution of the County Assembly to the Senate – which has already been done.

(2) The Senate may, pursuant to Section 33(b) of the County Governments Act and Standing Order 65 1(b) by resolution appoint a Special Committee to-

(a) investigate the matter – which has already been done – 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. This must be done by Friday.

(3) Where the Senate does not establish a special committee, the Senate shall proceed to investigate and consider the matter in plenary. As I have already indicated, the first option has already been chosen by the Senate.

(4) Where a special committee is chosen, the Committee shall within twenty-four hours of its appointment-

(a) elect a Chair and a Vice-Chair; which is myself and Sen. (Dr.) Khalwale;  
(b) appoint a date for the commencement of the hearing of evidence for the purposes of investigation, which is today, tomorrow and the day after.

(5) Upon the appointment of a date for the commencement of the hearing of the evidence for the purpose of investigation, the Committee shall-

(a) invite the Governor to appear in person or through representation;  
(b) notify the county assembly of the date of commencement of the investigation and invite the Assembly to designate the members of the Assembly, being not more than three members, if any, who shall appear before the Committee to represent the Assembly during the investigation – All these have been done and that is why we are here today.

(6) An invitation under Rule 5 shall be effected by personal service and shall be published at least in two newspapers of national circulation. This was done.

(7) Where the Governor chooses to appear before the Committee, the Governor shall within three days of invitation under Rule 5, file the answer to the charges to the office of the Clerk to the Senate in which the Governor shall set out-

(a) the Governor's response to particulars of the allegation;  
(b) how the Governor proposed to appear before the Special Committee; whether in person or by advocate;

- (c) the names and address of the person to be called as witnesses if any, and a statement by such witness;
- (d) and any other evidence to be relied on.

Again, I want to confirm that the Governor was able to do this within the requisite time.

(8) Where the County Assembly chooses to appear before the Committee, the Assembly shall, within three days of the invitation under Rule 5 file with the office of the Clerk of 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 members before the Special Committee; whether in person, by advocate, or in person and by advocate;
- (c) indicating the names and addresses of the persons to be called as witnesses, if any, and statement by each such witness;
- (d) specifying any other evidence to be relied upon.

Again, the County Assembly has done the same.

(9) The Clerk of the Senate shall furnish each party with the documents filed by the other parties 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. These are the options that the parties can exercise.

(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 reasons to be recorded, permit a later appearance before the Committee by the Assembly or the Governor.

(12) The hearing of the evidence, once it commences, shall proceed and continue on consecutive days until the Committee concludes the hearing of the matter.

(13) The Committee shall, before the commencement of the hearing of the evidence, allocate time for 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 the Governor shall be argued for not for more than 30 minutes, unless the Committee otherwise directs.

(15) At the commencement of the hearing before the Committee, the Clerk shall read out the particulars of the allegations.

(16) 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 under Rule 17 shall be for not more than forty minutes, unless the Committee otherwise resolves.

(19) After the opening statement has been made, the witnesses on the part of the County Assembly, if any, shall present the evidence of the Assembly.

(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.

(21) After all the witnesses on the part of the County 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 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 the witnesses have given their evidence, the Committee shall allow the 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 the closing statements have been made, the hearing shall conclude and the Committee shall proceed to prepare and conclude its report.

(28) Pursuant to Section 33(4)(b) of the County Governments Act and Standing Order 65(2)(b), the Committee shall, within ten days table its report in the Senate in which it will indicate whether it finds the particulars of the indications against the Governor to have been substantiated.

(29) The proceedings of the Committee for the hearing of 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.

(31) Except as otherwise provided in these Rules, the Standing Orders shall apply.

(32) Where on a particular question or matter including but not limited to questions of evidence, materiality, relevancy, 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 of removal of any other state or public officer in respect of whom the Senate has jurisdiction.

There is also a Schedule which is an oath of affirmation attached therein.

Thank you Mr. Chairman, Sir.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you, Mr. Vice-Chair. Ladies and gentlemen, I now want to spend a few minutes clarifying how we will make good use of time. This is important, parties, you have limited time and, therefore, you should organize yourselves to the very best and to your advantage. So, as soon as this session is over, I will allow for a health break to allow you, parties, to organize yourselves. We will resume at 11.00 am from the health break. That will give you some time to organize yourselves. Thereafter, we will invite the Clerk to read the charges against the Governor. We will then move to opening statements on behalf of the Embu County Assembly and on behalf of the Governor. We expect that you proceed in the same manner as specified in the rules that have been read to you by the Vice Chairperson. At the end of that session, we will break and again for a health break for lunch. We will then reconvene at 2.00 pm and this is when we will hear evidence by the Governor; if you have witnesses for cross examination and re-examination on the Governor's matter.

We will break at 3.30 pm and still on the Governor's matter, we will hear evidence by the Governor; the evidence of witnesses, cross-examination and any re-examination.

For purposes of clarify, you will notice that we have given very limited time to the County Assembly. This is because the County Assembly has indicated that it does not have witnesses neither will it call any.

In the afternoon, we will give the Governor sufficient time. We will give him more time after tea just in case he is not done before we break for the day. Tomorrow, we will have hearing of evidence by the Governor; evidence of witnesses, cross-examination and re-examination. We will have tea break at 10.30 a.m. tomorrow and when we resume at

10.45 am, we will have hearing of evidence by the Governor; if he will have witnesses for cross-examination and re-examination. We will then break for lunch and resume at 2.00 p.m. tomorrow and that will be time for the closing remarks, on behalf of the Embu County Assembly and the Governor.

At 3.00 p.m., we will have closing remarks by the Chairperson and at 3.30 pm, we will reconvene to read charges to the Deputy Governor.

There is an indication that the Deputy Governor will not call witnesses but if she has changed her mind, she will inform us. You better inform us early so that we make time. In the absence of you calling any witnesses, then we will get submissions by the County Assembly counsel.

On Wednesday, we will allow, at 9.00 a.m. for one hour, the Deputy Governor's counsel to make submissions. We will then go for a break and at 10.45 a.m, we will reconvene so that the Chairman can make closing remarks. On Thursday, this Special Committee of the Senate will meet to consider and adopt the Report.

On Friday, 14<sup>th</sup> February, 2014, this will be a reserved day for the tabling of the Report of the Committee at a Special Sitting of the Senate. That will bring to an end the process.

I would like, as we go for a break, to indicate that it is important for all of you to know that impeachment proceedings are administrative in nature. Therefore, you should be relaxed. This is the first step in a process that seeks to right an alleged wrong in governance. It is not a civil matter or a criminal process. What is at stake is the good governance of a public office.

Thank you very much.

We will be serving you tea and lunch and you will be shown where to go. If you have any brief comment that you want to make on what has transpired now, you are free to go ahead. However, do not go into the substance of the matter. You will have ample time to do that as soon as we resume. If you have issues regarding time allocation, convenience-- - I can see Mr. Kibe there. You had indicated that you would not have witnesses. In case you want to call witnesses, this is the time for you to organize yourself so that we arrange time for you accordingly.

I will start with the County Assembly. Do you have any comment?

**Mr. Charles Njenga:** Mr. Chairman, Sir, we do not have specific comments regarding the mode of proceedings but on your comment that you will allow parties to introduce witnesses as we go along, I think directions should be taken as to how that will be appropriated into the procedures that have been settled. We shall want to be given notice of such witnesses.

**The Chairperson** (Sen. (Dr.) Khalwale): The witnesses that we will allow to appear here will be in accordance with the rules. You have the rules and they are very specific. We will not deviate from them in any way. Is there anything else?

**Mr. Charles Njenga:** I have nothing else.

**Mr. Wilfred Nyamu:** Members, we have noticed that the County Assembly does not wish to call witnesses. However, this is a matter where the accusers have occasioned the proceedings. The documents that they brought before this honourable Committee are the ones that will be considered.

In the circumstances, I request and pray the honourable Committee to consider summoning, at least, the Mover of the Motion and the Speaker so that they give evidence and take us through the circumstances under which this Motion was commenced and produce the relevant documents. These are documents that cannot speak for themselves. The Committee cannot be expected to take judicial notice of the documents that have been introduced before it by the County Assembly.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you very much. As I said, from the very beginning, you should be very free. That amounts to an application. Come out of tea and make that application. We will make a consideration and if it is our decision, and if it is our decision that we allow that application to go through, then your request will be granted. At the appropriate time, make that application. When the County Assembly makes an application, you will also have an opportunity to speak to it.

**Mr. Kibe Mungai:** Mr. Chairman, Sir, I thank you for this opportunity. There are three issues that we need to raise at this stage. The first one is that given the materials that we have in our possession and the nature of the submissions we will be making, it appears to us that the time allocated to the Deputy Governor, 9.00 am to 10.30 am on Wednesday may not be sufficient for us to deal with the issues of all the submissions. We will be urging the Committee to consider, at least, to award us 30 more minutes so that we do justice to all the issues that will arise.

**The Chairperson** (Sen. (Dr.) Khalwale): Since we have made quite a bit of saving on time by way of the County Assembly not having witnesses, we will grant you that request because you must be given time to be heard in the same way that the Governor has been given time. Therefore, when that time comes, we will be flexible.

**Mr. Kibe Mungai:** Thank you very much. That is fine. The second issue is to confirm that we will not be calling witnesses. Therefore, we will stick to those submissions. The third issue which is relevant, given the nature of our response to the proceedings of this Committee, is that we have raised the issue of lack of clarity on whether or not the Deputy Governor is supposed to be under the jurisdictions of the Committee under Article 181 of the Constitution. We have also notified the Committee of the fact that the Deputy Governor has filed a constitutional reference seeking interpretations of those provisions of the Constitution.

We would like to seek guidance on how we will proceed in view of that issue. We have, of course, indicated that we are ready to deal with the charges that have been framed so far but, of course, without prejudice to what is our constitutional right. We should be assured that what we are being subjected to is a process that, indeed, the Constitution permits the Deputy Governor to be submitted to it. Therefore, the guidance of the Committee would be very relevant for us to fully represent our client in these proceedings.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you very much. Clearly, the third issue is substantive. Therefore, we will need, when your time comes that you spend time to prosecute it properly and we will rise to the occasion. I can assure you on that.

I now wish to invite hon. Senators who may have remarks, comments or questions to the parties. I will give the one who catches my eye first.

**Sen. Orengo:** Mr. Chairman, Sir, mine is a house-cleaning matter. I just wanted to know from the parties whether there has been an exchange of documents. For example, I wanted to know whether the County Assembly has served the Governor with all the documents and *vice versa*, if the Governor has served his documents to the County Assembly and *vice versa* so that when we start, there will be no problem about service of documents. Each party knows that it should have, in its possession, those documents.

**The Chairperson** (Sen. (Dr.) Khalwale): County Assembly, do you have them?

**Mr. Charles Njenga:** Mr. Chairman, Sir, hon. Senators, on the part of the County Assembly, we wish to confirm that we have duly served all the documents that we will be relying on to the counsel appearing for the Governor and the Deputy Governor. We have also been served with the documents that the Governor and the Deputy Governor will be proposing to rely on. The only issue I wish to add is that we only have a list of three witnesses that the Governor proposes to call.

Therefore, we are taking it that those are the only witnesses that will be called. If there are additional witnesses, Mr. Chairman and hon. Senators, this may amount to ambush if they are called to testify and yet we have no statement on exactly what they will say. Suffice to state, we have our house in order and we have been served with the documents by the other parties.

**The Chairperson** (Sen. (Dr.) Khalwale): The rules we have are meant to cushion you from being ambushed. You will not be ambushed.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, and hon. Members, we have served a bundle of documents and some witness statements. Earlier, we had written a letter by which we had requested that we be indulged in form of witness statements; some of which we had to collect at night from witnesses that had to travel from upcountry.

Those statements have been forwarded to the Clerk's office. They will be shared with the County Assembly in due course. This was not deliberate, but the same was occasioned by the time we were served with the invitation. Besides, we received a copy of submissions by the County Assembly after 6.00 o'clock. We noticed from the same that it was necessary, just to ensure that justice is done, that we come up with a supplementary list of documents which will not prejudice any party. The same has also been filled. We compiled the same overnight. We were actually retiring at 4.00 a.m. Those documents are important to enable hon. Members to come up with an informed decision on this matter in the interest of justice.

**The Chairperson** (Sen. (Dr.) Khwalwale): It looks like we are almost starting to go into what should be canvassed during the trial. Eventually, the Committee will make decisions on all those things you are saying but we will be guided by only one thing. We will put emphasis on what is substantive for purposes of maximum benefit. So, your time will come for the same.

**Mr. Kibe Mungai:** Mr. Chairman, although the rules do not seem to expressly provide for it, in our view, it is necessary that we should also be furnished with the documents filed by the Governor because when you look at both charges, it is obvious that the role of the Governor and Deputy Governor in all these matters is what they are calling co-superintending in whatever allegations that have been made against the Governor. Therefore, I urge that we get all the documents that have been filed because they are necessary for us to defend the Deputy Governor in the matter.

**The Chairperson** (Sen. (Dr.) Khalwale): Governor, would you have any objection in them being served with those documents?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we have no objection sharing any documents that we have with any of the parties, even the members of the public, if they wish.

**The Chairperson** (Sen. (Dr.) Khalwale): It is so ordered. The Clerk will serve you with those documents.

Any other hon. Member with an issue? Yes, Vice Chair!

**The Vice Chairperson** (Sen. Murkomen): There was an indication that they will call seven witnesses, unless I got it wrong. The first information that we got is that we will call more than three witnesses. The counsel for the Ccounty Assembly is saying they have indication for three witnesses. Is that harmonized?

**Mr. Wilfred Nyamu:** We have issued an abstract of lists of witnesses. We are calling seven, not three. We do not understand where they got that from.

**The Chairperson** (Sen. (Dr.) Khalwale): Okay. We will deal with it in the trial---

**The Vice Chairperson** (Sen. Murkomen): Not trial!

**The Chairperson** (Sen. (Dr.) Khalwale): Yes, in the investigation. Trial, in quotes!

Let us now take a break. We will adjourn temporarily and convene at 11.15 a.m.

*(The Committee adjourned temporarily at 11.00 a.m.)*

*(The Committee resumed at 11.15 a.m.)*

**The Chairperson** (Sen. (Dr.) Khalwale): Order, ladies and gentlemen. We resume and straight away open with the Governor's matter. I now invite the Clerk of the Senate to read the charges. These charges are many and detailed. So, I want to advise that since we all have the records, the Clerk may only give the highlights, such that it is also clear to the public that is following this matter.

*(Consultations)*

We want to change that a little because of the nature of these proceedings. These are very weighty issues. Therefore, we cannot attempt to highlight. I am advised that we go through it slowly, we read everything. I want to advise the Governor that he will take oath at the appropriate time.

Mr. Governor, while they are reading your charges, I would like you to move here and take this seat, so that you face me.

*(The Governor of Embu County (Hon. Martin Nyaga Wambora)  
moved to the respective seat)*

The charges are on your file: CAE1. That is your reference.

Clerk, you may proceed.

**The Clerk of the Senate** (Mr. Nyegenye): Hon. Martin Nyaga Wambora, on 30<sup>th</sup> January, 2014, the Speaker of the Senate received from the Speaker of the County Assembly of Embu a letter communicating the resolution of the County Assembly of Embu that you be removed from office of Governor of Embu County for gross violation of the Public Procurement and Disposal Act, 2005, the County Governments Act, 2012, the Public Finance Management Act, 2012, the Constitution of Kenya, 2010 and for abuse of office.

Particulars of violations:-

**(1) Violations of the Public Procurement and Disposal Act, 2005 and Regulations, 2013.**

- (a) Lack of procurement committees for the County Executive as outlined in Section 26(4) of the Public Procurement and Disposal Act, 2005 and Regulation 7, the Public Procurement and Disposal County Governments Regulations, 2013.
- (b) Failing and/or neglecting to observe the threshold set for the procurement method used as set out in the First Schedule of the Regulations.
- (c) Commencement of procurements for works for rehabilitation of Embu Stadium without ensuring that there are sufficient funds set aside in the budget to meet the obligations contrary to Section 26(6) of the Public Procurement and Disposal Act, 2003.
- (d) Not complying with the Act and regulations as outlined in Section 27(1) of the Public Procurement and Disposal Act.
- (e) Superintending of a procurement of motor vehicles without evidence of adherence to procurement procedures.

## **(2) Violation of Public Finance Management Act**

- (a) Section 121.

Under this section, the County Government is required to carry out all procurement of goods, services and disposal of assets in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act.

The County Executive has been carrying out all their procurement services without a tender committee in place. When the Assembly Committee proposed interdiction of members of the tender committee, no one was interdicted as there were no holders of such offices. This indicates that all procurement at the county executive where the Governor and his deputy are head and deputy head respectively, have been ongoing without this crucial committee.

This is blatant abuse of office. These officers are liable under Article 226 (5) of the Constitution and Section 196 of the Public Finance Management Act, 2012. In addition, these officers do not deserve to hold any public office as they do not pass the integrity test.

### **(b) Violation of Section 166**

Since inception of operation of the County Government of Embu, the County Assembly has never received any quarterly report from the County Treasury. The County CEO has always been aware of this and has done nothing to effect submission of these reports.

- (c) The Report of the Auditor-General on accounts of the County Government of Embu for the period of March to June, 2013 is a serious indictment of the state of affairs in the management of finances of the County Government. Pages 27 to 63 of the report contains instances of gross violations of the Public Finance Management Act and the Public Procurement and Disposal Act.

**(3) Violation of the County Governments Act, 2012**

- (a) Appointments/Advertisements for the positions in the county executive that have not been approved by the County Assembly in contravention of Section 62(2) of the County Governments Act, an action taken by the County Public Service Board on the instructions of the office of the Governor. Advertisement in the *Daily Nation* of 9<sup>th</sup> August, 2013 marked as CAE4. The filling of most of the positions resulted in termination of services of staff seconded by the Transition Authority (TA) in accordance with the Transition to Devolved Governments Act, 2012.
- (b) The Report of the County Public Service Board for the period ended December, 2013 shows that some people were appointed without its approval and some had not even applied for the respective posts. The report goes on to enumerate purported office holders.
- (c) Failing and/or neglecting to develop for the approval of the County Executive Committee the organization of the County Government and its various departments contrary to Section 46 resulting in management confusion in the entire County Executive arm.
- (d) Failing and/or neglecting to sign and cause to be published notice of all formal decisions made by the County Executive Committee or the Governor, contrary to Section 30(2)(1), making it difficult for the public to put the Government to account.
- (e) Failure to design or cause to be designed a performance management plan in accordance to Section 47 resulting to poor delivery of public services contrary to Section 116(2) and Section 117.
- (f) Disregard of provisions of Section 4(2) County Governments Act by authorizing the use of county symbols that have never been authorized by the County Assembly.

**(4) Violation of the Constitution**

The County Governor is the Chief Executive Officer of the County as per the provisions of Article 179(4). Members of the County Executive Committee are accountable to the Governor for the performance of their functions and exercise of their powers. The County Assembly has thus held the Governor responsible for:-

1. Non-adherence of provisions of Article 227, Constitution of Kenya, 2010. That is: Failing and/or neglecting to ensure that contracts for goods or services are issued in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Particulars:-

1. On diverse dates in 2013, the Governor, being the Chief Executive Officer failed and/or neglected to stop the rehabilitation of Embu Stadium and purchase of maize seeds without adherence to the lawful procurement procedure. Almost every county contract has been secured by one company since county inception
2. Disregarding the national values and principles of governance contrary to Article 10 of the Constitution of Kenya, especially the rule of law, accountability and transparency.

Particulars:

Failing to ensure that the necessary laws are adhered to and, in particular procurement laws, the County Governments Act and the Public Finance Management Act.

The Governor, indeed, went on to defend the County Secretary despite the blatant disregard of the law.

3. Disregard to the provisions Article 232 of the Constitution.

Particulars:

Article 232(1(a) - High standard of professional ethics. The Governor wrote a letter to the County Speaker alleging that the County Secretary had stepped aside while on the ground, the County Secretary was still in office. The Governor, indeed, went on to call a press conference where he said that the County Secretary was to be investigated while in office. There is no evidence that the County Secretary ever stepped aside or was interdicted.

- 4. Contravention of Chapter Six on Leadership and Integrity by failing to ensure that all the necessary laws are adhered to thereby eroding public confidence in the integrity of the office.**

Particulars:

- (a) Procurement of works for Embu Stadium and purchase of motor vehicles without following the laid down procedures and the recruitment of county directors in the various portfolios contrary to Article 73(2) (a).
- (b) Organising a county delegation on a study tour to Rwanda. This was organised in anticipation of the impeachment proceedings/Motion to buy the hon. Members against the Motion. This is an absolute abuse of office and use of public funds to actuate personal interest.
- (c) Failing and/or neglecting to provide full and regular reports on matters relating to the county contrary to Article 183(3).

- (d) Failing and/or neglecting to ensure that public money is used in a prudent and responsible way contrary to Article 201.

Particulars:-

- (a) Failed or neglected to stop the procurement of goods at inflated prices. The lawful procurement procedures were also not followed.

### 5. Abuse of Office

The Governor, by virtue of the provisions of Section 39(1), is the overall Accounting Officer and has failed to interdict the County Secretary as per the recommendations of the County Assembly. In disregard to this, the Governor went on to defend his county secretary through his two affidavits, his press statement and paying for airtime on a local media station *Wimwaro* to defend the County Secretary.

**The Chairperson** (Sen. (Dr.) Khalwale: Is that all?

**The Clerk of the Senate** (Mr. Nyegenye): Yes, Sir.

**The Chairperson** (Sen. (Dr.) Khalwale: Thank you very much.

Hon. Members, anybody with anything to say about the charges? You have all heard the charges. I notice you have no comment on the charges so far.

Governor, I now want to invite you to resume your original seat.

*(The Governor of Embu County (Hon. Martin Nyaga Wambora)  
resumed his original seat)*

We now want to open the case. We want to receive opening statements, on behalf of the County Assembly of Embu. Is the lead counsel there?

Looks like Mr. Nyamu has something to say. Go ahead.

**Mr. Wilfred Nyamu:** Hon. Members, firstly, when you look at the rules that have been formulated by this House, only allegations in respect to what happened as at the time of commencement of these proceedings ought to be part of the charges.

Hon. Members bring allegations, especially in the charge in respect of abuse of office---

**The Chairperson** (Sen. (Dr) Khalwale: You can indicate which page on that charge sheet is the abuse of office charge---

**Mr. Wilfred Nyamu:** My lord, from the issue of the trip to Rwanda, which---

**The Chairperson** (Sen. (Dr) Khalwale: Order! Order! Since you are addressing me, I would rather you use the word “Chairman;” not “my lord.”

**Mr. Wilfred Nyamu:** Very well.

**The Chairperson** (Sen. (Dr) Khalwale: But you are perfectly in order to think that I can rise to those levels.

*(Laughter)*

I can assure you that I have no intentions---

**Mr. Wilfred Nyamu:** I am properly guided.

Hon. Members and the Chairperson, I wish to draw your attention to the charge No.iv on the issue of organizing a delegation to Rwanda. These impeachment proceedings were commenced on the 16<sup>th</sup> of January; that is when the Notice of Motion was tabled by a Member, culminating in the resolution. The letter by which the honorable His Excellency the Governor communicated the arrangements for the trip to Rwanda is dated 27<sup>th</sup> of January. So, obviously, as at the time of commencement of these proceedings, that particular letter had not been generated to warrant entertainment of this particular charge.

**The Chairperson** (Sen. (Dr) Khalwale): Counsel, I think you are running ahead of yourself. What you are saying are the things you are going to address now when we give you time so that you speak to each and every one of the charges; you dismiss some of them, you agree with some of them; you clarify points and you table your evidence the way you are attempting to do. So, do not run ahead of yourself; you are going to be given time and we will hear you in full.

**Mr. Wilfred Nyamu:** Hon. Chair, I am properly guided, save that I thought when we commenced these proceedings, we commenced the same on the basis of the charges that can stand before this Special Committee, so that those charges under the rules that cannot stand are dealt with and probably removed from the proceedings.

**The Chairperson** (Sen. (Dr) Khalwale): Counsel, it does not look very difficult to me; what you are saying is what you will be allowed to do; yeah? To put it in the traditional African way, if you are accused of stealing a goat on Monday and the goat actually got lost on Tuesday, those are the things you will report to the elders and say: “Look, if you are saying that I stole the goat on Monday, how come the owner of the goat found it stolen only on Tuesday?” So, your time will come; take it easy!

But my Vice Chair wants to add something.

**The Vice Chairperson** (Sen. Murkomen): Mr. Chairman, Sir, I think your goat analogy has settled the issue, so I do not need to add anything. Only that my concern then was, which specific rule? In any case, you know the charges or the communication that we

have to the Speaker forms part and parcel of the accusations against the Governor. Therefore, if what you are saying is correct – just as the Chairperson has said – it aids your case and you can make that submission at the right time.

**The Chairperson** (Sen. (Dr) Khalwale): Before I give you this chance, Sen. Zipporah, I had seen Sen. Orengo. The Vice Chairperson has spoken Sen. Orengo's mind. Yes, Sen. Zipporah?

**Sen. Kittony:** Mr. Chairman, Sir, what I would have liked to say is that you should get your facts correct so that when you answer, you answer from the first one to the end, the way the Clerk read the accusations. So, I think you have time to tell us whatever you think is not right in the proper manner.

**The Chairperson** (Sen. (Dr) Khalwale): That is well taken. Thank you.

So, the lead counsel from the County Assembly should take the podium and as you move to the podium, Sen. Orengo has something to say.

Proceed, Sen. Orengo.

**Sen. Orengo:** Mr. Chairman, Sir, I have just noticed something which we could have dealt with in the morning. If you look at the programme, we are going to hear an opening statement on behalf of the County Assembly. That is what we are scheduled to deal with first after reading the charges. Now, that being the position, when is the County Assembly actually going to present its case, because you know these are just opening statements? I would wish to know then the manner in which they are going to present that case. Because all through these proceedings, the onus is on the County Assembly; they should not assume that somebody else is going to present that case. But, of course, if they wish to say nothing, I have no problem. Are they satisfied with just making opening statement without getting an opportunity to present the case itself? That is what is worrying me.

**The Chairperson** (Sen. (Dr) Khalwale): Sen. Orengo, this is why we are making the opening statements. In their opening statements, we believe the lead counsel is going to tell us how much time you will require to lead us through the charges.

**Mr. Charles Njenga:** In fact, we have not provided for that in our programme.

**The Chairperson** (Sen. (Dr) Khalwale): Okay. There is a corrected version of the programme, which I have; which was corrected and the Clerk has done exactly that.

**Sen. Orengo:** This is the latest programme I have---

**The Chairperson** (Sen. (Dr) Khalwale): He has cancelled by hand.

**Sen. Orengo:** Okay.

**The Chairperson** (Sen. (Dr) Khalwale): Yes, he cancelled by hand. At 2.00 o'clock, we will start by the County Assembly giving evidence.

So, it is very well done.

Yes, Counsel? Counsel, you have time to make the presentation, but if you choose to proceed, then you will also make the indication. But remember you have time at 2.00 o'clock now to put your case. Now you have 40 minutes; if you think you can complete everything in 40 minutes, well and good.

**Mr. Charles Njenga:** Mr. Chairman, Sir, and hon. Members, what we shall start with and maybe to put Sen. Orendo in perspective are the manner in which the Assembly proposes to proceed with its case. Before you and before the Committee is a summary of all the charges. That summary sets out the Motion that was proposed in the County Assembly; it has a Hansard of the proceedings that proceeded before the County Assembly; it has documents supporting all the charges that have been made against the Governor. Now, all these documents as read together constitute the allegations that have been made against the Governor.

The County Assembly is of the position that the documents presented together with the proceedings that proceeded before the County Assembly substantially and comprehensively set out the substance and the extent of the charges against the Governor. They have nothing useful to add by way of evidence and what we shall then do, hon. Senators, is that at the close of these proceedings, having heard the response of the Governor to the specific allegations set out, we shall summarize by way of a closing submission on all these issues, together now with the law that applies. I hope that, that is acceptable and that it will be appreciated by this Committee.

**The Chairperson** (Sen. (Dr) Khalwale): Just hold on there for a moment. I will give you the chance; just hold.

Yes, you can now address me.

**An hon. Senator:** He has finished.

**The Chairperson** (Sen. (Dr) Khalwale): You have finished?

**Mr. Charles Njenga:** Now, that was in specific response to the inquiry that had been made by Sen. Orendo on how we propose to proceed with our case. But I now wish to make the opening statement on behalf of the Assembly.

**The Chairperson** (Sen. (Dr) Khalwale): You now wish to make your statement?

**Mr. Charles Njenga:** Yes; our opening statement.

**The Chairperson** (Sen. (Dr) Khalwale: You are welcome.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I will begin with where we stopped before we went for the health break. But what is before this Committee is not a criminal or a civil trial; what we have before this Committee as defined by the law is an investigation; it is an evaluation of the materials presented before this Committee by the County Assembly of Embu. It is a summary of what informed the Motion to impeach the Governor from the position of the Governor of Embu County. We shall urge this Committee to carefully analyze all these documents and satisfy itself that, indeed, those Motions, in particular the one against the Governor, together with the documents in support thereto, have substantiated the violations complained about.

We will see, in these documents, specific questions raised in regard to exercise of executive authority within the county; questions raised with regard to application of funds and resources available to the county with specific instances cited. In that regard, the County Assembly elaborately sets out the basis of the complaint with regard to the procurement of works for the facelift of Embu Stadium together with procurement of maize seeds for planting by farmers in the County of Embu.

Mr. Chairman, Sir, you will note from these documents that it is not denied that--- Let me pick out the issue of the maize seeds; that these maize seeds actually never germinated; they were bad seeds, and that has been certified by a Government report. So, as of necessity, the question that falls for the Governor and the Executive to explain is how they were procured, how they came to be supplied to the people of the County of Embu, and how funds were applied for seeds that had been condemned.

Of course, the question we will pose is: What is the basis of the Motion by the County Assembly? My answer to that is a position of the whole concept of devolution. Devolution, hon. Senators, can be a very academic concept. It has been spoken about, written about, debated and all that; we have been through the motions. But what is the essence of devolution as anticipated in the Constitution and the laws of Kenya? With the simplicity of the people of the County of Embu, we appreciate devolution to mean calling our leaders to account for the application of the resources available to the county. It is as simple as that to us.

It is identifying what has been set aside for the use of the people of the County of Embu and whether, indeed, those vested with the power and the obligation to exercise and apply those resources have met the threshold and the standards set out in the law in the application of those resources. With the evaluation of those two considerations, we have come to the realization and to the result which is well documented; that there has not been any accountability on the part of the office of the Governor; there has not been any explanation of how funds have flowed into the county and they have been expended in the manner and for the purposes that are anticipated.

With regard to the first charge, the Assembly states that there is no evidence whatsoever within the County Executive structure which falls under the Governor of there being in

existence a tender committee. The reason why we emphasize “a tender committee” is because we understand and we know that in the process of procurement and sourcing of various goods and services in the public domain, it rises or falls at procurement. We get it or we miss it at procurement. The devil or the angel in that project is in the procurement process and, therefore, we pause to ask if, indeed, seeds were procured, where are the specific members of this tender committee that undertook these particular processes?

This is a very specific charge and we would have expected, in response thereto in the very bulky bundle of documents submitted to us by the Governor, to find appointment letters of members of these tender committees; we would have expected to find names appointed at various times to these tender committees. Hon. Senators, if you have occasion to go through all these documents, you will not find a single letter appointing any person to be a member of the County Executive of Embu Tender Committee.

If, indeed, and for arguments’ sake, there was a tender committee, then the next question that we will pose for answer by the Governor will be; where are the documents that ordinarily attend to procurement of any goods and services within a public entity, which are well set out by the Public Procurement and Disposal Act and in the regulations, specifically the regulations that apply to counties? These are laws that are in the public domain.

Tender documents in any such process will, for example, include certified copies of the advertisements, approvals to procure, tender buying registers, bid bonds, letters appointing tender opening committees, technical evaluations, adjudication minutes for tender boards, notification of awards and probable regrets to those who did not succeed; acceptance letters of award; we all know them. So, as you look at the documents presented in response to these charges, we will ask this Committee to establish if any of these documents are in that bundle in respect to the cited instances where goods and services were procured and where those particular procurements have been questioned specifically by the County Assembly.

The role of the Governor within the law is, among many things, to lead; and to lead is a legal obligation. It is not benevolence or goodwill to the county. It is a legal obligation demanded for by the law. Being the custodian of all the executive power within a county, the Governor cannot say before this Committee: “It is not me; it is the county secretary. It is not me; it is the chief officer. It is not me; it is the county executive committee member in charge of finance.” That is not a defence available to the Governor. Indeed, the Constitution specifically provides that the Governor is a chief executive officer responsible for all affairs within a county.

The County Governments Act proceeds to elaborate on this and provides that the Governor, among other things, is accountable - accountable is a very functional word – for the management and use of all resources within a county. That is Section 30 of the County Governments Act. The question that this Committee will have to invariably answer is whether, in consideration of the generality of all these charges, the particulars set out, documents presented and disclosed to all the parties; whether the Governor has

been accountable for the management and use of the resources available to the County of Embu. The County Assembly of Embu is of the position – which is very informed – that indeed the Governor has not been accountable. For that reason, and as set out in that Motion, his position as Governor is no longer tenable.

The people of Embu, represented by the County Assembly, have demanded by way of this Motion, that accountability will no longer be a favour. Accountability cannot be postponed. We are about three years old into the new Constitution and Governors have been in place for almost one year now. The excuse that we are still going through orientation on all these things is dead. It is not available to any public officer who is now serving in this new dispensation. Therefore, the threshold as set out in the law and procurement regulations has to be observed at all times and by all officers.

You will have occasion to go through a report by the Auditor-General – an independent office established under this Constitution. That particular document is an audit by that office in regard to various things, including application of funds within the County of Embu. The findings include that there have been irregular award of contracts for repair works, specifically in the Town Hall and offices of the Probation Department. These are works costing Kshs3 million and Kshs12 million respectively. The Auditor-General finds that there has been an unwarranted disqualification of interested bidders, favouritism in consideration for responsiveness of tenders, lack of financial and technical evaluation of contracts, irregular reallocation of funds, lack of formal contracts with contractors, irregular procurement procedures and non-disclosure of bid prices.

These are not the findings of the County Assembly of Embu, but the Auditor-General who sits here in the capital city and audits all counties. They are there in your bundle. We urge that you consider them in evaluating the Motion and resolutions made by the County Assembly of Embu.

So, the long and short of the case made by the County Assembly shall be and is: As we go through the evidence that shall be presented before this honourable Committee, we shall have occasion to cross-examine and evaluate all these evidence and at the end, the claims that we make now shall be substantiated and established. I do not wish to go into the details, because as the Chairperson directed, we are not doing our case as at this point. But we have filed a summary of all these charges, as conceived and presented by the County Assembly. It sets out in brief the particulars and basis. We urge that as you listen to the evidence and consider these documents that are before you, you go through it. It will be helpful because it condenses and collapses the case of the County Assembly in a way that can be appreciated very fast.

I will invite my colleague, maybe just to comment on one or two things in the opening, and then we shall close and abide by whatever directions that the Chairperson shall give.

Thank you, Mr. Chairman, Sir.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Members, I am sure that there might be areas for which you want to seek clarifications. Would you like to do it now or we let them finish before we start?

**Hon. Senators:** Let them finish!

**The Chairperson** (Sen. (Dr.) Khalwale:): Okay!  
You can proceed!

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman and the hon. Members, as a County Assembly, we are perfectly aware and alive to how weighty the proceedings that are before you are. We cannot delude ourselves of the fact that we are here before you, as godfathers of devolution, and when acts of misfeasance are undertaken with abandon by the holder of the office of the Governor, it then behooves the entire membership of the county to take action.

Mr. Chairman, Sir, the Motion as was presented before the County Assembly was substantiated through documents that are before you. I do not wish to take you through the material that you all have had occasion to look at, but suffice it to state that this is not a witch-hunt. There is every good intention with the mover of the Motion before the County Assembly and resolution as was passed by the County Assembly and forwarded to the Speaker of the Senate for further action.

What drives the proceedings as commenced by the County Assembly is to ensure that the dream of devolution is achieved. That can only be achieved through transparency in the manner in which public funds are utilized. The substance of the proceedings or inquiry that you have been called upon to carry out touches on the resource that will enable the dream of devolution to be achieved. The moment there is threat in the manner in which that very resource is being utilized, then we, in the fullness of time, will be urging you to make a recommendation to the Senate that the person who bears the ultimate responsibility to ensure that, that object is realized must take responsibility. It is our case that the Governor and Deputy Governor, as the chief executive and deputy chief executive bear that ultimate responsibility.

The provisions of the Public Procurement and Disposal Act are very clear, and I do not intend to go through the various sections. But I would just urge you that as we interact and conduct this inquiry, to appreciate that under Section 2 of the Public Procurement and Disposal Act, which governs how goods and services are procured by public entities, it underscores the importance of transparency in procurement processes, competitiveness, fairness and openness in those procedures, so that we do not have cronies of office bearers being the beneficiaries of contracts at the expense of the public. This is because then what will happen is that poor services will be rendered and the whole objective of devolution will be thwarted. We shall be demonstrating in the fullness of time that, that is what the Governor and his deputy have done with abandon. How on earth you can procure---

**The Chairperson** (Sen. (Dr.) Khalwale): Order! Order! I would like you to appreciate that we are now on the matter of the Governor. So, anything that you want to say about the deputy, just reserve it for its right time. We want the record to be clear that we are on the Governor.

**Mr. George Ng'ang'a Mbugua:** Well guided, Mr. Chairman, Sir.

If a public entity can proceed to procure goods and services without a tender committee, as envisaged in law, then there cannot be a better demonstration of abuse of office than that. What you will see, as part of the documents supplied, is an attempt to validate what had been irregularly done by the Governor. We shall be seeking to show that the composition of the purported members of the tender committee that has now been supplied to the hon. Members, were actually persons that were never appointed in the first place. We shall also be seeking to demonstrate that when the County Assembly made specific recommendation about action that needs to be taken against persons that the County Assembly considered should have been reprimanded for breaching the law, the Governor deliberately did not take action. So, the County Assembly did not just wake up one morning and decide that there has to be a proposal of impeachment of the Governor. No!

We shall be demonstrating, in the fullness of time, that an attempt to correct those wrongs was made by the County Assembly and no action was taken. So, subsequently when the resolution was passed by a whopping 20 out of 22 Members of the County Assembly – that is more than the two-thirds threshold – it just goes to show that there must have been substantive basis for those recommendations.

Mr. Chairman, Sir, under Section 30 of the County Governments Act, the Governor has a responsibility to provide leadership. When leadership is lacking, then you have chief officers doing or taking actions that have the consequence of making the public lose funds and the Governor proceeds to actually swear an affidavit to support an officer against whom action has been recommended to be taken. Is that not complicity? Then the Governor has the audacity of writing a misleading letter to the Speaker of the County Assembly, that someone has left office of the county secretary, when that has not happened. So, clear dishonesty touches on the principles of good governance; values that we consider very critical to holders of an office. That is what has been violated.

Mr. Chairman, Sir, we shall be seeking to demonstrate to you, as I wind up my remarks, that this being the first impeachment process that is before the Senate, and the Senate being accused unfairly so, that it is an arm of Government that is irrelevant, you are so relevant in ensuring that the matters that we are complaining about against the Governor, do not happen again. That can only be done by fairly and objectively looking at the matters before you and documentation that I am sure you will have an opportunity to look at. I believe that in the fullness of time, you will agree that the resolution made by the County Assembly to propose the impeachment of the Governor and his deputy was well taken. It is only by so doing that this Senate will remain relevant, by ensuring that

persons whose actions are likely to thwart the very essence of devolution are told a big “no.” That is the case of the County Assembly.

Mr. Chairman, Sir, thank you very much for giving us time to address you.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you very much, counsel for the County Assembly.

Hon. Members, I want to allow you. You will take note of the issues being raised and then you come and respond at once.

I will start with my Vice-Chair.

**The Vice Chairperson** (Sen. Murkomen): Thank you, counsel of the County Assembly. As part of your opening statements, you have eloquently referred to a number of documents, which include minutes of various committees, report of the Auditor-General, among others. In my file – and I have checked with the other colleagues’ files – those documents have certain basic errors. First, some of them are not signed. If you look at the minutes of 16<sup>th</sup> January and so forth, they are not signed; neither are they authenticated in the manner in which you know documents are authenticated. Do we assume that this is how documents are supposed to be or is it that we have these documents by mistake? Can you address yourself to this issue of signing of some of the minutes and authenticating, because we have a document here which is a photocopied document of the report of the Auditor-General, but there is nothing to show that it was actually ordered by the Auditor-General? You are lawyers and you know what we are saying when we ask that.

**Sen. Lesuuda:** Mr. Chairman, Sir, that is the exact question that I wanted to raise as well. There are issues to do authentication and also the signing of some of the minutes. It is clear from the statements of the counsel that they will not be bringing any witness who could even authenticate that these minutes are the true minutes of the meetings that took place. So, do we take them as they are?

**Sen. Orengo:** Mr. Chairman, Sir, I just wanted to come back to the issue raised by the Vice-Chair on documents, and particularly bring to the attention of counsel for the County Assembly that even within the Senate and the National Assembly – although we do not go strictly by the rules of evidence, but admission of documents – there are some thresholds that must be met. So, in view of what you stated, you will not be calling witnesses. We need to be clear about that.

The other more important issue that I want the County Assembly to think about and probably, raise in their submissions at a later stage is that I am glad that they are saying that this is not a witch-hunt. That gives me comfort, but if you look at the report that they are referring to, of the Auditor-General, there are accusations against the Assembly itself, that touch on the highest officer in the Assembly, in the name of the Speaker.

At least, this is where I can get some evidence. Here, somebody is being mentioned by name and the amount of public money which has been lost. We also have recommendations of the Auditor-General on pages 32 and 33. We should bring this matter into perspective because you cannot bring material before us and use it selectively against the Governor. There is also a lot of material against the Assembly itself. So, the impeachment is being made in the hands of persons who do not have quite clean hands. I want to be addressed on that so that in my mind I can be satisfied that this is not a witch-hunt. Otherwise, I would expect that something should have been said about the Assembly itself.

**Sen. Wamatangi:** Mr. Chairman, Sir, I have three short issues I want clarified. The first issue is with regard to the first counsel's comments on the County Assembly. He was referring to documents when he alluded to the fact that there were seeds that were purchased, but did not germinate. He said the evidence is in the documents. Therefore, it is important for them to point out which document in the bundle they are referring to.

Secondly, regarding the second counsel, he wound up his presentation by saying that the Senate would require to remain relevant by looking at this case in a particular way. I want to clear that and, probably, allude to the fact that the Senate has its role well cut out in the Constitution. Certainly, we are relevant.

I am also concerned with that issue of signing of documents. When I look at the report of the Auditor-General it is signed. So, it is that threshold that we would want to adopt. Is it certification or signing?

**The Chairperson** (Sen. (Dr.) Khalwale): I believe that is it. I also have one or two things for clarification. You told us at the beginning that there was no tender committee. But might you have come across any technical report that certified seeds as fit for planting?

The second point is that a critical piece of your evidence is the report by the Auditor-General. For the record, I would like you to clarify whether this was a routine normal national exercise that was going on in all counties or was it a special audit that you requested for as the County Assembly of Embu? If it was a special audit, it meant that you were responding to something if, indeed, what you were doing was not witch-hunt? What is it that you were responding to that prompted you to ask for a special audit from the Auditor-General?

The last thing I would like you to clarify is that you have referred to a list which is not known to us as "purported" tender committee which is being introduced here. Are you confirming that nowhere in Embu was this list ever made available to you?

To add a small comment on what my colleagues have said, it is the feeling of the Chair, and I am directed, that yours were opening remarks. If there are any particular documents that you now want to commence on and inform this Committee and if there is a reason minutes might not have been signed and you can justify, you will do that in your main presentation. For the good reason that if you did not, then those minutes would not be

part of evidence because they would not be admissible. They would be in no way any different from what you are calling the “purported” tender committee list. Finally, the Senate is not going to become relevant by making a decision that favours the County Assembly of Embu neither will it become relevant by making a decision that favours the case of the Deputy Governor or Governor. It is relevant because the Constitution of Kenya makes it so and it stays so.

Thank you, you can now respond.

**Mr. Charles Njenga:** Mr. Chairman, Sir, let me clarify that it is the position of the County Assembly of Embu that this Senate, having been well anchored in the Constitution, is very relevant. We do not take it lightly and our appearance here before this Senate is an honour so that the issues that are relevant to the people of the County of Embu, down there at the local level can be articulated before this august House and its Committee.

Having said that, on the specific issue of the documents, you realize that these were documents that were forwarded straight from the Office of the Speaker, County Assembly of Embu, to the Clerk of the Senate, and they have been photocopied over time to ensure that all parties have copies. Therefore, if there is any particular document that is in the hands of the Chairperson or Members that is not signed, you could kindly point it out to us by way of a note and we shall produce the signed document. This is because the volume that I have from the County Assembly of Embu primary documents and their files, including the report of the Auditor-General, are all signed. In fact, the Auditor-General, Mr. Edward Ouko, signed this report on 5<sup>th</sup> December, 2013.

The resolutions and the recommendations of the specific committees of the County Assembly that were investigating these particular instances that invited certain investigations have been signed. I have the signed copies with me, but probably, so that we can all be on the same page, you could kindly favour us with a list of any document in the bundle supplied--- I appreciate that is upon us to supply proper documents and all I am saying is that if there is a document---

*(Loud consultations)*

**The Chairperson** (Sen. (Dr.) Khalwale): Order! Members, let us not interject. Let him finish what he has to say, seek for permission then we shall give you an opportunity to speak. If we interject, we will confuse the witness.

Proceed, Mr. Charles Njenga.

**Mr. Charles Njenga:** Mr. Chairman, Sir, all I am saying is that maybe in the mechanical exercise of photocopying and production of all these bundles, some pages might have been missed out. Maybe the signature pages or the wrong primary document was copied together. We have all the documents with us, signed and properly executed and available for supply to all the members of the Committee. My bundle, the one stamped by the

Clerk of the Senate as received, has all documents signed. Maybe it is an error arising from photocopying and all that, but which we can easily remedy.

As to reference to specific documents and as the Chairperson has rightly pointed out, we were just opening and giving opening remarks of the draft and generality of our case. We shall go to specific documents when given time so that whatever allegations that were made can be properly referenced with documents. That we shall do. All the issues that we have raised in our opening remarks, we shall substantiate them at the time of doing our case according to the time that we shall be given because all the documents are here.

With regard to certain documents that have been referred to by hon. Members, you realize that some of these documents have been supplied by the Governor. There is a bundle supplied by the Governor. Those are his documents and we cannot substantiate any of the claims in them. We shall cross-examine on them. However, I can confirm that in our documents, there is no references to any money spend irregularly by the Office of the Speaker of the County Assembly of Embu. Those are details that we shall come to when doing the specific details of our case.

**The Chairperson** (Sen. (Dr.) Khalwale): We do not want to belabour it, but Sen. Orengo has something burning. I want to give him chance now.

**Sen. Orengo:** It is okay, Mr. Chairman.

**The Chairperson** (Sen. (Dr.) Khalwale): This is my advice to you. You will have ample time at 2.00 p.m. to correct some things of concern here. We are not challenging you. We want you to be clearer so that when we are making a decision we use your evidence and not assumptions. So, my advice is, you should go through the file and see which documents are not signed. For example, the minutes that you have called CAE1 are not signed. So, go through them so that at that time you justify why it should be part of your evidence. If possible, you can certify the photocopies.

**Mr. Charles Njenga:** Let me consult with my client.

**The Chairperson** (Sen. (Dr.) Khalwale): We do not want to face a situation whereby we are challenged on the Floor of the Senate that the evidence is of our own creation as a Committee. We want them to be certified by you and that is same to the Governor and Deputy Governor.

**Mr. Charles Njenga:** Mr. Chairman, the application of that to all of us is very appropriate and we shall do our part.

**The Chairperson** (Sen. (Dr.) Khalwale): For you to be fair to the Governor, Sen. Orengo was not referring to any document given by the Governor. The issue of accountability of the Speaker of the Assembly was raised in the report of the Auditor-General. It was not the Governor's document. So, Sen. Orengo was wondering aloud and correctly so; how come the impeachment is selective.

**Mr. Charles Njenga:** Mr. Chairman, we shall set the record straight, hon. Senators. Thank you for your guidance.

**The Chairperson** (Sen. (Dr.) Khalwale): We want you to address it. It is important.

**Sen. Orenge:** Mr. Chairman, I brought it up because you made a statement that it is not a witch-hunt and that you have a report you are relying on. In fact, it looks like you are relying on that report heavily. So, I just wanted to know for my own comfort that, indeed, there was no witch-hunt.

**Mr. Charles Njenga:** As the Chairperson has said, when we reach the specifics of our case, we shall, indeed, give you comfort on that.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you very much. We are aiming at closing this session at 1.00 p.m. Do you have some issues? Please, wrap it up because are now eating into the time of the Governor.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, first, it is a clarification that I would wish to give to hon. Senators regarding the comment made by the hon. Senator for Kiambu on the relevance. I may have been quoted out of context. This hon. Senate is not going to become relevant because of deciding one way or the other. What I meant is that the consideration of this matter by the Senate and the ultimate decision that would be made by the Senate is a very important role that the Senate is meant to play in the Constitution to oversight devolution. Therefore, I wish to withdraw it and make that clarification.

Secondly, it is on the issue of the tender committee and the word I used, that is, "purported". What we shall be demonstrating in our submission is that the constitution of the tender committee under the Public Procurement and Disposal County Government Regulations, 2013, provides for the procedure of appointment of those persons, including formal appointment letters. We shall be seeking to show that those formal appointment letters are lacking and, perhaps, that maybe the context within which we used the word "purported". These are matters that we shall be going into detail as we argue the case of the County Assembly.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you for the corrections. Governor, it is now your time. Hon. Members, it is important that we listen to the Governor because when we come from lunch we shall go straight to the matter at hand.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, hon. Senators, thank you for this opportunity that you have given us to come up with opening remarks.

Firstly, I wish to notify the hon. Senators of this Committee that the Governor is here in response to summonses by this Senate. In view of the fact, he respects and recognizes the role of the Senate in this matter and in devolution in general, without prejudice to

proceedings pending before the High Court at Embu, petition No.1 of 2014 and in the High Court of Nairobi, Constitutional Petition No.51 of 2014. I am saying this because it is important that we state we are here without prejudice basis as those proceedings are still pending in court, and that is with due respect to this Committee.

**The Chairperson** (Sen. (Dr.) Khalwale): Order! You are perfectly in order to make that remark and that is why if you read your letter carefully from the Senate, you were invited and not summoned. If you were summoned, it meant that there would be consequences if you do not come. The fact that you were invited, means that we were giving it to you to either choose to come and have an opportunity to be heard or you miss that wonderful opportunity to be heard as provided for in the Constitution. So, relax because nobody is going to fix you because you came here.

**Mr. Wilfred Nyamu:** Much obliged, Mr. Chairman, Sir. I thought it was important to state so that nobody in future would say that my client waived his rights under those proceedings by coming to this Committee.

Hon. Senators, the nature of these proceedings calls for considerations based on certain statutes. These statutes that we are going to invoke in these proceedings are the Public Procurement and Disposal Act, 2005 and the regulations thereunder. We shall also be relying on the County Governments Act, No.17 of 2012. The Public Finance Management Act, No.18 of 2012, the Constitution of Kenya, 2010 and by extension we shall also invoke the Anti Corruption and Economic Crimes Act, 2003 and the Public Officer Ethics Act, 2003. Those are some of the statutes that we shall humbly request that this Committee applies.

Hon. Members, the Motion pursuant to which these impeachment proceedings were commenced was so bare that it did not even have specific allegations. It merely mentions violations of statutes aforesaid. Basically, it is worth to inform this Committee that the Governor of Embu was not even served with a copy of the notice. Basically, he was oblivious of the contents of the Notice and the allegations that were against him. This Committee is obliged to look at the process adopted by the County Assembly in arriving at these resolutions so that it may ascertain as to whether it was an exercise conducted in good faith or whether or not there was witch-hunt or politics being brought to the Senate's arena.

Hon. Members, through the evidence which I am going to provide which includes a bundle of documents, we are also going to make an application after this statement so that we may bring in a supplementary bundle of documents which we have as I had indicated earlier on and I was directed that we make a specific application. We shall do so immediately thereafter if we are allowed.

Mr. Chairman, Sir, through the evidence we have, we are going to prove that the Governor under the Procurement law, the County Governments Act and the Public Finance Management Act, had limited or no role on procurement and that officers mandated under those provisions of the law are accountable both under those statutes and

also under Article 226(5) of the Constitution of Kenya, 2010. Nevertheless, we are also going to show that the Governor had no role, either actual or imagined in respect of any allegations made by the County Assembly. We have underlined the word “imagined” because there was no act of omission that has been committed by the County Government.

We shall also, through documents, show and demonstrate that there is a threshold matrix for procurement entities in Kenya so that in terms of allegations, we prove that there was, indeed, misconception in terms of what is alleged to have been omitted by the County Government.

In respect to appointment of officers, we shall proceed to prove that under the law, there is a County Public Service Board that works independently of the Governor on matters of appointment and none of the Members of that particular Board has been faulted. We shall also through evidence prove that even as the Governor was expected to deal with the County Secretary in terms of the resolution that was made by the County Assembly, he was also alive to the provisions of Section 52 of the Anti-Corruption and Economic Crimes Act in terms of suspension of an officer, pending charges before court.

Mr. Chairman, Sir, we urge this Special Committee to consider applying in relation to abuse of office, the threshold set by the ingredients and definitions under both the Penal Code and the Anti Corruption and Economic Crimes Act in relation to abuse of office so that it is not going to be a mere case of abuse of office before the Senate, devoid of those ingredients. We urge this Committee at this preliminary stage based on the submissions and the documents availed by the County Assembly through the firm of Muchoki Kang'ata, Njenga and Company Advocates to consider whether or not there is any *prima facie* case of abuse of office by the Governor. We urge the Members to apply those definitions that we have requested.

Also, in line with the rules of evidence which are also applicable in this Committee, although strictly the Evidence Act does not apply, we urge the Committee to apply the threshold provided under the Rules of Evidence where documents have been produced and honoured. If not, there has to be another specific mode of ensuring that they are admitted under the Rules of Evidence so that when the County Assembly purports to say that it has brought documents before this Committee and it has nobody to produce those documents, I would urge the Committee Members to be very conscious.

This Committee is empowered by virtue of Rule 10 of its rules to summon any witness that will be required for purposes of these proceedings. As it is, under the rules themselves, the Committee may pose questions to any witness on its own without having to be prodded by any particular party so that it would be proper for the Committee, if it finds it appropriate to even summon certain witnesses from the County Assembly. To us, failure to attend these proceedings and come up with statements and avail themselves for cross examination is tantamount to showing that, indeed, they are not certain on whatever allegations that they have leveled against the Governor.

I would also urge this Committee to apply the threshold applied by the select committee which was appointed by the House of Representatives in the State of Connecticut, in the impeachment proceedings against Governor John Rowland in 2004. There was also a threshold that was applied in the impeachment proceedings against President Richard Nixon in 1972 and also impeachment proceedings that were held in Nigeria in respect of Governors Erasid Ladoya and Peter Obi of Oyo and Anabia States, respectively.

Hon. Senators, impeachment proceedings in respect to an office of this kind ought not to be taken lightly. These are proceedings that may affect, not only the individual Governor, but also the County of Embu and the devolved system of Government as a whole, where there is a manner in which these proceedings may be carried and tomorrow we have a permanent committee of the Senate to hear impeachment proceedings which would actually inhibit and affect the work of the Senate.

It is incumbent upon yourselves in these proceedings, considering that they are the first proceedings commencing in this country in respect to a Governor, to apply extremely high levels of caution, wisdom, professionalism and impartiality lest a fiasco ensues in respect to the principles of separation of powers. That is independence of the county executive in the whole country from the county assembly, thereby occasioning a devolution phenomenon.

Hon. Senators, I urge this Committee to give the Governor an opportunity to also make a statement. But before then, I would urge my colleague to address this forum for five minutes on a particular issue on devolution. Besides, I would want to also bring to the attention of hon. Senators that the audit report that is being referred to extensively by the county assembly is an audit report that was not for the period that the Governor has been in control of the finances. It is in respect of a period where the Transition Authority (TA) has been in control. There has been misconception which ought not to occasion misinformation and misrepresentation before this Senate Committee.

I hereby invite my colleague, Mr. Peter Wanyama to say something.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Senators, you will again wait for the whole team to finish and then you raise issues. Do I take it that you are applying to have Governor Wambora to be given an opportunity to speak?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we had agreed in my opening remarks and as we had indicated in our letter that I shall appear together with the Governor. The hon. Governor wishes to make a statement albeit for ten to 15 minutes.

**The Chairperson** (Sen. (Dr.) Khalwale): It is okay. You do not have to make any application because he has not waived that right. He is free to come and make a brief statement when he is not on oath. When we put him on oath, it will be different. He could just make a general statement.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, before I conclude, I would at some point seek clarification from my learned colleagues as to whether there is going to be time for them to argue their case before submissions, where they have no witnesses.

**The Chairperson** (Sen. (Dr.) Khalwale): It is even on the timetable they are going to do so in the afternoon. Do not do their case; just pursue your case. If you think they are looking weak, it is in their interest.

**Mr. Peter Wanyama:** Hon. Senators, this is a matter which hinges on the provisions of Article 181 of the Constitution of the Republic of Kenya. The allegations which have been brought against the Governor in accordance with the provisions of Article 181 of the Constitution of Kenya are allegations where the Governor has grossly violated the Constitution or any other law, where the Governor has abused the office or grossly misconducted himself, and then the Constitution goes ahead to say that Parliament, which includes the Senate, will enact a legislation to provide for the procedures. If you go to the procedures of the County Governments Act which is the substantive legislation giving us guidance in terms of this process, it is express, clear and unequivocal under Section 33 Paragraph 4 on the removal of the Governor, that these allegations must be substantiated. The allegations with respect to the breach of the Constitution or law, the allegations in relation to misconduct or abuse of office must be substantiated.

At the very least, therefore, during these proceedings you will hear from us that the allegations against the Governor have not been substantiated at all. The meaning of “substantiated” under the Oxford Advanced Dictionary, and I want to read it from my phone, is “of considerable importance, size or worth, of substantial amount”. So the question which we will be seeking to demonstrate for the Governor is whether these allegations which had been put by the County Assembly meet that constitutional and statutory threshold. Are these allegations which are capable of being brought before a Senate of the Republic of Kenya? You will see from our evidence that these allegations, first of all, are completely contradictory. They do not in any way show anywhere where the Governor has been directly involved in this process. Remember this is a county government. There are whole structures which have been set up to implement devolution. So, you cannot just bring a mere allegation from the market place and then you say that the Governor is responsible. Of course, you understand the principle that the Governor is the Chief Executive of a county. What that means is that he is presiding over a whole institutional framework where there is a multi layered system of accountability and that is why Article 126 of the Constitution has even gone ahead to provide that whenever there is any loss of public funds, that officer is individually and personally responsible.

If you look at some of the allegations, they are allegations which the Governor cannot be responsible for. Secondly, we are implementing a multi level system of governance where there are challenges in the devolution process. The multi level system of governance which we have borrows heavily from the South African regime. We have institutions which have been set up at the county level, the national level and the sub-county level. In this process, I want to highlight that you will see that from these

allegations which have been put, there are certain issues which can basically be attributed to the fact that there are challenges in the transitional period.

For instance, if they say that the Governor has not enacted a legislation of taxation, that he is imposing tax on the people of Embu without legislation. Is that not a challenge in the devolution process? Is that not an issue which the Constitution has clearly stipulated on how it should be handled? For instance, we have agencies in the Government, the Kenya Law Reform Commission (KLRC), the Commission for the Implementation of the Constitution (CIC) the Transition Authority (TA), the Attorney-General, The Treasury, the Ministry of Devolution and Planning. All these institutions are helping counties to take off. Before we have taken off, allegations have already been raised. That is completely premature. The allegations do not meet the constitutional and statutory threshold at all. They are not fit to be brought before the Senate of the Republic of Kenya.

Hon. Senators, we will also be highlighting, in our defence – this one goes to the same issue of substantiation – in your own individual minds, as you sit to write that Report to forward to the Senate for it to either accept or reject, what will be going on in your mind? I am talking about the standard of proof. In the American jurisdiction where this matter has been substantially determined, the question has been, what is the standard of proof that Senators must use to gauge the allegations that have been brought with respect to the impeachment of a public official?

The Governor enjoys sovereign power. He is an elected person by the people of Embu. Therefore, the standard of proof to remove a Governor must be so high that it leaves no doubt at all on whether he committed the offences that have been laid before this Senate Committee today. That means that if you look at these allegations, you must be satisfied in your own individual capacities on their strength, substantive and colossal. If the allegations are vindictive, a witch-hunt and malicious then you must dismiss them. You must dismiss them.

The Embu County Assembly, for whatever reason, cannot bring a Motion to the Assembly and they do not give the Governor his right to be heard and then go ahead to present substantive issues about the position of the Governor without the allegations being strong. That is why I am urging this Committee, during these investigations, to consider that important and fundamental point.

Number three, this Committee is not auditing the procurement process of the Embu County Assembly. This Committee is not auditing the compliance to the Public Finance Management Act by the Embu County Assembly. This Committee is not auditing the compliance to any other legislation by the Embu County Assembly; rather it is looking at whether the Governor was involved in any of the allegations that have been invoked before the Committee. That is why we will be urging that you exercise extreme caution and draw a thin line where there is violation by the Governor and violation by the County Public Service Board. If the County Public Service Board has violated the law, is this

something that the Governor is individually responsible for? In these allegations, you can see many of these instances.

If the tender Committee has perennially been selecting one bidder, is that a decision that the Governor can be responsible for in terms of Article 181 of the Constitution of Kenya? Definitely not! Hon. Senators, in our evidence, we have demonstrated, factually, clearly and unequivocally that these are not allegations that should bring the Governor before the Committee. You cannot! There are systems of accountability. The law is very clear. For instance, the Public Finance Management Act is very clear on who is the Accounting Officer at the County Government. The Governor is not the Accounting Officer. He is the overall head of the county. In fact, there are instances in law where he can be prevented by the Accounting Officer from authorizing payment. Therefore, can you put these allegations to the Governor? You cannot. To the extent that the allegations by the County Assembly Members put some of these issues to the fore shows you clearly that there is some witch-hunt. There are issues that the County Assembly wants to settle with the Governor. That is not what the Governor will be responding to.

So, in a nutshell, we will be demonstrating that in these proceedings, we want to see from the County Assembly, and indeed, we have evidence, of the direct and personal culpability of the Governor. We want to see the direct and personal culpability of the Governor.

**The Chairperson** (Sen. (Dr.) Khalwale): Order! I want you to try and sum up. I have allowed you a lot of time.

**Mr. Peter Wanyama:** Hon. Senators, that is, principally, our response on the nature of these allegations at a general level. We will be bringing clear, express and unequivocal evidence to demonstrate that the allegations are completely frivolous, utterly vexatious and, probably, vindictive.

I am most obliged, hon. Senators. Thank you for giving me the opportunity.

**The Chairperson** (Sen. (Dr.) Khalwale): You are welcome.

**The Governor of Embu County** (Hon. Martin Nyaga Wambora): Thank you, hon. Chairperson. I will start by thanking the Senate Committee and the Senate itself for two reasons; one, for giving me this wonderful opportunity to be heard. This is an opportunity I was completely denied by my Members of the County Assembly (MCAs). I thank you for that.

Secondly, I thank the Senate for using its discretion very wisely. You had discretion not to have a Senate Committee which would have put me in total mess. I have a chance to be heard because of the use of your discretion to have this Senate Committee which will give me a lifeline.

Having said that, I will be very brief on who is this Wambora who has been vilified to an extent that my kin have been wondering what has happened to me. Our former President, Daniel arap Moi sent his aide to find out what has happened to his District Commissioner who used to take care of his harambees. He used to trust me with all his money and I would account for every cent. I told his aide to tell him that Wambora is still the same one that he knew and will never fail to account for any shilling.

Wambora is a devoted religious and spiritual person. I started as an altar boy during Holy Masses every Sunday. I have been a very devoted Seminarian. I almost became a priest. Therefore, my values are still intact. I am still a devoted practicing religious and spiritual person to date.

Secondly, my life has been that of a law abiding civil servant for 25 years as a District Officer (DO), District Commissioner (DC), Deputy Provincial Commissioner (DPC) and as a Deputy Under-Secretary. I have talked about Baringo, Lamu and all the others. I do not want to dwell on those issues. As a Deputy Secretary and a Chief Finance Officer, as a Deputy Director of Budget, I was fished from the Ministry of Finance by the former Permanent Secretary of Provincial Administration and Internal Security because he had many problems with the Public Accounts Committee (PAC). I worked for him for six years, administering billions of security funds in the Office of the President. I have never been summoned by the Public Accounts Committee even once. There are now people who think that I am a corrupt person. It is a pity.

My kin are disappointed. I want to defend myself and my political career for ten years starting with my life as a Member of Parliament for Runyenjes. I was rated number one in 2006/2007 for proper use of the CDF money. That record is still there. It is only Mr. Peter Kenneth who has taken over from me. The Chairman knows that my record was very good in the use of CDF.

I have been a Chairman of a political party, NARC (K). In 2006, I am the one who mobilized a lot of funds which enabled NARC(K) to win two by-elections. Nobody faulted me about the use of funds.

Three, I was the Chairman, Kenya Ports Authority (KPA) for two years during which I came up with a 20-year master-plan which is being used up to now. You may remember before I saw this that while I was at the Jomo Kenyatta International Airport (JKIA), in two and a half years, we got three international awards because of good use of funds in development.

The second terminal, Greenfield--- Under my Chairmanship in 2012 with the assistance of my Committee, we fought for the tender not to be given since it did not meet our threshold in terms of financial evaluation even though it could have been legally correct. There was only one bidder who was technically qualified. We wanted the tendering process to be repeated. I fought hard and it is not a corrupt person that can do that.

I will end there. That is the real Wambora. Hon. Members, I will comment on two issues that have hurt me very much owing to the untruths. One is about the vehicles we have bought, for instance, from the Cooper Motor Corporation (CMC) and Toyota Kenya which were bought against a Government supply branch contract. We have put that evidence as annex NM Wambora II. All the other counties have done the same. Government Ministries have done the same. We did not have to tender when we could use a Government contract which had been availed by the national Government. The records are there. We did not see the need to waste time.

Four, with regard to procurement committees since 4<sup>th</sup> March to date, we have listed all the names of the Members. We have done 80 pages of that to show that they were real Members and not bogus Members. They used to get allowances and argue. We have shown the minutes to prove that it is ridiculous that a Government can run without tender committees. There were two tender committees by the Transition Authority (TA) officials. There was also a Committee of Principal Officers when the TA officials left.

We now have the fourth committee which comprises of chief officers who are the accounting officers. Those are the people who have been doing all the tendering. We are being told that it is only one person who gets the tenders. We have given an annex to show that over 40 tenders have been awarded to different people.

With regard to issues of organization charts, we were the first ones to chart the way. We were the first to invite national consultants to the county in 2013 May. We did a comprehensive report which we forwarded to the County Assembly in June. They have never approved that. The County symbols are things that we forwarded to the County Assembly and to date, have not been approved. We had to use those symbols and the logo and the flag because we had organized an important international conference where international participants were attending. I can assure you, hon. Chairperson and Senators and our record of endorsement of international investors of Kshs441 billion has not been beaten. This is not because Embu is unique. It is because these are people who know the Governor of Embu as a man of integrity. I do not compromise.

These issues I am being accused of regarding tenders, I was looking at the records last night; these are things I did not know about. Some of the people who were overthrown in the tenders are my friends. I did not know that – validly so - since the Governor is not supposed to interfere with the tendering process. I will never do it. I am waiting for the report by the Ethics and Anti-Corruption Commission (EACC) with regard to those who have messed up with the tendering process from the time we took over power. I will not shield anybody. I still stand by that.

I will now turn to issues of abuse of office. These are the notes I am getting from the County Assembly. There was no problem with the County Secretary being summoned. She asked for time to prepare in writing and to appear with officers because she is not a procurement person. She wanted to appear with the people who had supplied the seeds, but she was denied. When she asked for time, she was told that she must leave for investigations. I did not receive a letter with regard to that, but a copy. What kind of a

respect is that when people do not even do a copy of a report regarding a senior officer when they want me to interdict when the letter has already been written to the EACC? I got a copy and studied it. I had a press conference and said that the lady must be given a chance to be heard. Those are the rules of natural justice. However, since I believe in harmony between the County Assembly and County Executive, I persuaded the lady to step aside. I asked her to go on leave and she is still on leave.

I submitted my letter on 16<sup>th</sup> to the County Assembly which was somehow hidden until they had this Motion. The letter was there. We have witnesses from other assemblies who will show what happened and the flaws in the voting procedures. The witnesses are here and you will be hearing them.

Regarding abuse of power, I want to say one of two things. The same Auditor-General Report that has been quoted here says something else about the County Assembly. It says:-

“They claimed meal allowances and yet they had been given night out allowances thus resulting to double payment of allowances which was contrary to governing regulations which is contrary to governing regulations. Details are as per appendix 4.

The risk is misuse of public funds. During the period under review, the County Assembly spend Kshs4.05 million in payment of sitting allowances, meals and travelling allowances. These amounts were charged under subsistence without regard to the rules governing subsistence allowances.”

Now, let the Auditor-General do his job. Let the EACC do their job and we will abide by their results. That is all we are asking.

In conclusion, I would like to state as follows. The Embu County Assembly has accused me of a number of issues of procurement which I have nothing to do with. These belong to Accounting Officers. I am not one.

Secondly, the process of impeachment conducted by the Embu County Assembly was highly flawed. One, they violated the cardinal rule of natural justice and the right to be heard.

Three, the Assembly did not serve me with a Notice of Motion neither did it furnish me with the charges of accusations. These were provided to me by the Senate. *Asante sana* Senate. The method of voting was coercive through signing in view of other MCAs. If this process of voting had been through secret ballot, they would not have raised the figure of 22. The voting method of the impeachment proceedings which have terrible consequences ought to be secret ballot. This was not the case.

Five, all the accusations against me were based on malice and mischief after my County Executive unearthed irregular payments of the County Assembly Service Board of Embu Ref: No: MNW11, Letters by Controller of Budget, Salaries and Remuneration

Commission and by the Transition Authority on pages 263 to 270. Those letters are in that document. They are clear and they point to the irregularities. It is after my County Executive pointed out this issue on 30<sup>th</sup> December that hell broke loose. That is when war was declared. There is evidence to show that war was declared by the Embu County Assembly Speaker.

That is when things went ballistic. So, there is more than meets the eye. It is not a question of the stadium or the seeds which the Governor has nothing to do with or the issue of appointments which is the work of Executive. County Assembly approval is only required in matters of creation and abolition of new offices, but not in terms of employment.

Finally, Mr. Chairman, Sir, the impeachment accusations by the County Assembly of Embu do not reach anywhere near the threshold prescribed by the Constitution of Kenya, Article 181, on a convicted crime, not an imagined one. The Nigerian Governor and the Senator of Illinois who sold the senatorship after President Obama left the post were all indicted. They were convicted by the Senate because they had committed convicted crimes. I have not committed any crime. I am not sick; I am healthy as you can see.

On abuse of office, heeeeh! I do not know; who abused the office?

*(Laughter)*

I have not spent a cent to benefit myself or anybody else. That is the definition of abuse of office. The Auditor-General, the office of the Salaries and Remuneration Commission, the Controller of Budget and the Chairman of the Transition Authority - the letters are before you to see who has abused the office, not Wambora.

Finally, an impeachment process that is decided by 20 MCAs who never consulted their ward residents intended to acquire power through the back door against a popularly elected innocent Governor who enjoys confidence of thousands and thousands of his county residents is a tragedy of the times. This is more a serious tragedy because the threshold of impeachment has not been reached in my case.

Hon. Senate Committee, the whole Senate, our hon. Upper House, I have hope and it is my expectation that you will give me justice.

Thank you. *Asante*.

**The Chairperson** (Sen. (Dr.) Khalwale): I will now allow a few clarifications following the Governor's opening remarks and that of his team.

Yes, Vice Chairperson.

**The Vice Chairperson** (Sen. Murkomen): Thank you very much, counsels of the Governor and the Governor himself. One of you said something which has been repeated

severally, about whether the charges have been substantiated. If you read the relevant section, this is the process of substantiating them. Therefore, it must not look like we have made any decision yet. We are now in the process of substantiating. That is why you have a chance to make your case.

If you look at the procedure, you will realise that at the County Assembly level, which is the same for the President at the National Assembly level, it is only when it comes to the Senate--- That is why the option of the Committee as the Governor said clearly, comes in. The process which we are now going through, that is the inquiry and the investigation, deals with substantiation. So, you should not be worried about anything. You should just make your case because it is through this process that we are going to make a decision whether the allegations have been substantiated or not.

**Sen. Wamatangi:** Mr. Chairman, I am also in support of what the vice-chair has said. I also want to clarify that the County Governments Act in Section 33(1) says that at the county assembly level it does not provide for the Governor to be either summoned by the County Assembly or heard at the County Assembly. It is actually at the Senate where you get a hearing.

Hon. Governor, I also have a concern that I would like to be addressed by your first counsel. I want to refer to a specific statement that he made. He said that the Governor is not responsible for appointments because under him there is a County Service Board. What does he mean by saying “under the Governor, there is a County Service Board and then say the Governor is not responsible?” In pursuit of that, the point I want cleared is, I thought that for the benefit of clarity, your counsel would be addressing himself to what was alleged by the County Assembly when they alluded to Section 30(3)(f) which says the Governor is accountable.

My last point is to the first counsel who said that the Governor could not dismiss the County Secretary because he was aware of the anti-corruption law. After saying that, it is also privy to the Committee that the documents that have been lodged, there is a letter which the counsel referred to. It was written on 27<sup>th</sup> in which the Governor has alluded to the stepping aside of the same officer. In an affidavit in the High Court, the Governor goes ahead to say that he is unable to sack the County Secretary because of a pending court order.

Lastly, you asked us to rely on a case of the Governor of Connecticut during the impeachment proceedings. I looked at the bundle that you have supplied to us; I did not see those annexures. If you ask us to refer or rely on documents that you have not supplied to us, it does not help the case.

**The Chairperson** (Sen. (Dr.) Khalwale): Yes, Sen. Mositet.

**Sen. Mositet:** Mr. Chairman, first, let me thank the Governor of Embu County for telling us about himself. At least it has come out that he has been a good servant. I believe the

people of Embu and the Committee will not look at you with bad eyes, so that you think that we have already judged you.

Lead counsel of the Governor, you indicated that the report which the County Assembly relies on is the auditor's report. You went on to say that audit report was covering the period when the Governor was not in charge. Did I hear you say that?

**Mr. Wilfred Nyamu:** The Transition Authority (TA) was in charge. That is the period between March and June.

**The Chairperson** (Sen. (Dr.) Khalwale): Order! Counsel, we will give you time to reply. Let me organize the meeting so that we move faster.

Sen. Mositet, are you done?

**Sen. Mositet:** Mr. Chairman, the Governor and the counsel also indicated that there are four committees since March. Is it in order to show that a particular committee was appointed on this date and then they served up to a particular date and then another committee took over from there, that way up to the fourth committee?

On the issue of the County Assembly, have you ever written to the Governor on the appointments of the tender committees?

Those are the three issues I want to raise.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Members, be careful not to go to the real issues of the real trial.

Yes, Sen. Lesuuda.

**Sen. Lesuuda:** Mr. Chairman, Sir, mine is not a question, but an observation. I also wish to make a brief comment. Listening to the counsel and the Governor, I would like to comment and say that what the County Assembly did and what we are doing right now are processes that are provided for by the Constitution. When we make reference and say "people in the market sat and decided", we should have some respect. The same way we respect that you have a right to be heard and a right to answer to the allegations that have been made by the County Assembly. They have a right and followed the process. There is just that respect that all this is a process that is provided for by the Constitution.

There is also the issue of "threshold". I am sure the Chair will assure the counsels that this Committee is capable of looking into these issues. We will look at the issues of threshold and give justice.

**The Chairperson** (Sen. (Dr.) Khalwale): I want to make two comments. Before I do so, let me allow Sen. Orenge.

**Sen. Orenge:** I thank the Governor and his team for that eloquent presentation. I was taken a little back by the assisting counsel. Probably, the HANSARD will bear me out, I may be wrong, when he said the sovereign power belongs to the Governor. The sovereign power is the people. It is the exercise of that power that is delegated. I hope the Governor does not operate on the basis that those powers belong to him. That will be a dangerous thing.

Having said that, I want counsel to help me later in consideration of the issues that they have raised. They referred to Article 181 of the Constitution in addressing the threshold. You should look at Article 181 together with Article 182 which talks about vacancy in the office of the County Governor. Under Article 182(1)(d), you will find that where there is a conviction, the office of the Governor may become vacant by virtue of that Article. But under Article 181(1), there is no such requirement. You should look at that carefully in relation to similar provisions in the Constitution.

My basic question is, and I think it was raised by the County Assembly, is the issue of accountability. The Governor is the head of the Government in the county. The Constitution says so. If systems do not work in a county, where do people turn to? That is a basic question. If the whole Government has become a cesspool where does the buck stop? This is why the issues of accountability are being raised, that ultimately if the Government of Embu cannot work or function, then the buck stops with the Governor. He is the one who appoints the Executive Committee, even the County Service Board. He appoints, but this is approved by the County Assembly. So, that question of accountability is important to educate us on that issue in relation to Article 181 where that Article does not talk about a conviction, it talks of a violation. It is a violation of any other law. The Constitution is fairly broad. I do not know whether a violation of a traffic offence or law would qualify. So, look at it broadly because under a parliamentary system Parliament would have just met or the County Assembly would have just met and passed a vote of no confidence. But under this system, at least, there is a process where some thresholds have to be met. But they do not go beyond what is stated in the Constitution. It may just be an issue of governance, accountability and where the buck stops.

Mr. Nyamu, I would be glad to hear you on this.

**The Chairperson (Sen. (Dr.) Khalwale):** That will come in evidence when we will be delving into the real issues. But over and above what Sen. Orenge and my other colleagues have said, I would like you, during evidence, to convince us, when you tell us that the auditing question is about a period when it was the TA that was in control and not the Governor. To the best of our knowledge, the Governor took charge as soon as he took oath. Since this audit is about 3<sup>rd</sup> March to 30 the June, by that time the Governor had long assumed office, he was operational. So, you must convince us that he was not responsible. Give us evidence that he was in office for the three months and somebody else from the TA was doing his work.

Secondly, you are claiming that this is witch-hunt, it is vindictive. Give us evidence to demonstrate that, indeed, it is witch-hunt; it should not just be a claim.

Thirdly, Peter, you raised the difficult issue of the burden of proof. Yes, am I am reliably informed that this is a difficult issue even amongst you the learned friends. That it has been a debate over the years in the whole world. I have been advised by Mr. Njoroge that when it will come to the issue of burden of proof, we will be guided by the fact that this is neither a civil process nor a criminal one. He has told us that in a criminal one the proof must be beyond reasonable doubt. In a civil one, it is on the balance of probabilities. So, it is somewhere in between because it is neither that nor this. We are going to apply that. You cannot then dismiss it just because you want your own standard of burden of proof.

Finally, this is just a question of perception. Lead counsel of the Governor, you are worried that if this process proceeds we might end up having a permanent committee of the Senate on impeachments. We will not be tired. Even if all the 47 counties bring this kind of work, we are going to do it because the Constitution demands of us that we do it. What is important is that we come with an open mind, not with a view of wanting to remove or save a Governor. I am sure with time, once we do 10, 20 or 47 of them, we will have set a standard and people will shy off in thinking that this is an easy route to take.

Well, for most of you there were comments which will come up in evidence, including what Sen. Wamatangi said.

I now want to adjourn the meeting for a lunch break. Before I do so, I wish to make the following announcements.

One, witnesses and all parties, apart from members of the public and the media, your lunch is served at Tin Tin Restaurant. Senators will proceed to the Senate restaurant as usual. We are breaking for one hour. We will be back at 2.35 p.m.

It seems there is something burning from the counsel.

Proceed, Mr. Nyamu.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, I wish to make an application in relation to certain documents that I mentioned in view of Article 159(2)(d) of the Constitution. I am requesting that we be allowed to bring in a supplementary bundle of documents which we have within the Committee sittings so that the Committee whose proceedings are based on equity and good faith may be abreast with all the happenings in the county Government, where the allegations are concerned.

**The Chairperson (Sen. (Dr) Khalwale):** Okay! This is how we shall guide you. Make 16 copies just in case when we make a determination, we will rule that the documents are admissible. The reason I am saying this is because I want to allow the other party and also these hon. Members to also speak to your application. I will then be guided to decide whether it is admissible or not. So, during the interval, just make 16 copies to be on

standby. If it is admissible, then we will share them out. If it is not, then it dies there. So, you have been heard, but the matter will be dealt with after lunch.

*(Loud consultations)*

Hon. Members, you will speak to the other issues after lunch. So, let us adjourn for lunch.

*(The Committee adjourned temporarily at 1.40 p.m.)*

*(The Committee resumed at 2.50 p.m.)*

**The Chairperson** (Sen. (Dr) Khalwale): Ladies and gentlemen, I would like to call this session back to order. We adjourned when there was an application going on. Lead Counsel for the Governor, have you concluded your application?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we had not concluded our application. We had just mentioned that we were going to make an application in relation to documents that are contained in a supplementary bundle of documents.

**The Chairperson** (Sen. (Dr) Khalwale): You make the application and also give us reasons a particular document should come in and why it is coming late. What it is and what it is speaking to? Summarize each of the documents that you are introducing and then I will give an opportunity to the County Assembly to respond.

**Mr. Wilfred Nyamu:** Hon. Chairperson, Sir, and Members of the Committee, I wish to make an application based on Article 159(2)(d) of the Constitution of Kenya, which provisions govern these proceedings; as these proceedings are, by nature, *quasi-judicial*. We have documents that we brought in the morning which are very important in view of the fact that we were served with a write up from the County Assembly last night at 7.00 p.m. That particular write up or the submissions that were served upon us talked about certain allegations that although the same are contained in the five allegations, we found it necessary to put in a supplementary list of documents so that this honorable Committee may appreciate our submissions through the documents themselves.

Hon. Members, you will bear me witness when we say that in these particular proceedings and the manner in which they have been commenced, time is of the essence and sometimes we are forced to beat deadlines in a situation whereby documents are supposed to be sought from various departments of the County Government. So, it is imperative that delay is inevitable. We will request for indulgence and we know that no prejudice will be suffered to any of the parties if any of these documents are produced. The documents, as it is, relate to the allegations that have been leveled against the Governor. Document No.1 is a document that sets the threshold matrix for procuring authorities which appears from page 1 to 12 of the document.

Perhaps, Mr. Chairman, Sir, if you allow, I would give each hon. Member a copy so that as we make our application, they are able to appreciate.

**The Chairperson** (Sen. (Dr) Khalwale): Yes, you can circulate the document so that we are on the same page.

*(Mr. Wilfred Nyamu laid the documents on the Table)*

**Mr. Wilfred Nyamu:** Hon. Chairperson and hon. Members, the second bundle of documents contains minutes in evidence of reallocation of funds, which will go deep in demonstrating that the County Government of Embu did not procure for the refurbishment of the Stadium when there were no funds. The other bundle of documents is a progress report on county preparedness for assumption of office which document was actually prepared by the Transition Authority (TA). That bundle is from page 49 to 77.

The fourth document is the County Assembly Requisition of Funds. There is also the court order obtained by the County Secretary in Nairobi Judicial Review No.17 of 2014, which served to affect the Governor's position in terms of acting as per the resolutions. We also have further witness statements which by our letter dated 8<sup>th</sup> February, 2014, we had sought indulgence owing to the fact that some of the witnesses are coming from far and wide and they are breaking from their weekend for purposes of taking statements.

Mr. Chairman, Sir, for purposes of these proceedings and in order to enable hon. Members to grasp and comprehend the Governor's response, we have come up with a better explained document as opposed to what had been filed there earlier to beat the deadline, but its contents being the same; which does not affect the answer that we had made to the allegations. So, we urge hon. Members, in the interest of justice to allow us to put in these documents.

We have an abstract of list of documents outlining all the documents that we endeavor to rely upon and documents that are now with the hon. Members for ease of reference, which abstract we wish to file as well.

Mr. Chairman, Sir, you will appreciate that there are challenges that we have faced owing to the timelines. These challenges are not confined to the County Government and the Governor only, but also I have been discussing with my learned friends and they do appreciate that they have a document that they are using which is neither paginated nor flagged. For ease of reference, actually we had even discussed it off record. However, we would request the hon. Members to give us some time so that we may come up with more organized sets so that these proceedings will now be easily guided.

That is all I wish to state.

**The Chairperson** (Sen. (Dr) Khalwale): County Assembly on this application?

**Mr. Charles Njenga:** Mr. Chairman, Sir, on behalf of the County Assembly, we will oppose the application to introduce a supplementary list of documents at this stage.

Mr. Chairman, Sir, and hon. Members, the deadlines cited by counsel apply to all of us; they apply to the Committee and to the County Assembly. The initial invitation made to all parties to appear in these proceedings was made way back on the 6<sup>th</sup>. In fact, on the 6<sup>th</sup>, there was a public notice published in the newspapers for all parties who intend to appear in these proceedings and the manner in which they should file their documents. As at that time, the County Assembly had already deposited the Motion and all the supporting documents with the Clerk of the Senate. As such, even the Governor had notice of those documents. The problem and the predicament that we shall put all of us to if we allow additional documents is that, first of all, the decision by the County Assembly to appear in the manner that we have now appeared. The decision not to call witnesses was informed by the materials that were served upon us and the import thereof. So, if there is introduction of new material, new facts, new dimensions and perspectives that are in contest in this matter, then that shall invariably invite us to reconsider whether the same position that we took initially in terms of documents and witnesses is going to be tenable for us to prosecute the complaints and the Motion as framed in the charges that have been read out.

We appreciate the tenor of Article 159, but the issue of notice of documents to all parties is, in our opinion, not a technicality. That is a substantive issue because it goes down to the preparedness of the other party to respond to specific issues of fact or specific issues of law that have now been introduced or are proposed to be introduced to these proceedings.

Mr. Chairman, Sir, one of the documents that counsel proposes to introduce is in regard to County Assembly requisition of funds. This is a document that is strange to us. We, as advocates, would need to take instructions on that to find out whether, indeed, such a document issued from the County Assembly, their response and comments to all the allegations set out in that 20-page document and that, to be fair, will inevitably call for time for that purpose. And as the Chairperson started by saying, this is not a trial. This is an investigation; this is an inquiry so that the material before court as disclosed by the County Assembly and as responded to by the Governor should be sufficient to enable the Committee to establish whether, indeed, any of the violations have been substantiated.

Lastly, Mr. Chairman, Sir, as I rest, if this Committee finds that either party, by way of evidence or by way of documents, has gone outside the ambit and the purview of the charges, complaints or the violations as initially framed, then it retains the prerogative and the discretion to disregard any such material. So, at least, the Governor and his legal team should give the Committee that benefit of doubt that it shall be able to look at all the documents. If any goes outside or proposes to introduce new allegations, then by operation of law and by clear application of the rules, the Committee shall not have any regard to it.

**Sen. George Ng'ang'a:** Mr. Chairman, Sir, just to add on to what my learned friend has said in response is, perhaps, just to clarify---

**Sen. Orengo:** On a point of order, Mr. Chairman, Sir. Because we have got very limited time, can the teams organize themselves so that if there is an issue like this, then the lead counsel should address us. Otherwise, if it is an open door policy, we will continue to take a lot of time. I know that deliberations of these issues also need time at the end of it. So, I think they should organize themselves so that they do not have to speak all of them on any point because the application before us is really a technical one. I think one counsel is sufficient.

**The Chairperson** (Sen. (Dr) Khalwale): So because you had already started, I will remember that and remind you that. So, make it very brief.

**Mr. George Ng'ang'a:** Mr. Chairman, Sir, it is just in one sentence that the fact that the application is predicated on an allegation that there is a document that we served yesterday. That document that counsel may be referring to did not introduce anything factual. As a matter of fact, it was just a summary of the County Assembly's case. So, if the basis upon which the application is then made is that document, there was absolutely nothing factual that the County Assembly introduced which would have warranted the filing of additional documents.

Mr. Chairman, Sir, I am sure all of us have that document. It is just a summary and nothing factual.

Lastly, Mr. Chairman, Sir, looking at the rules and in particular Rule 7, it really does not envisage a situation where the application in the manner made by the counsel of the Governor can be made given that these are time bound proceedings. We had prepared to deal with the case as filed or, rather, the response as filed by the Governor. Now when the documents are introduced at this latter stage, then it changes the foundation of our case.

Lastly, perhaps, is looking at that list. It has not been even suggested that, with due diligence, those documents could not have been filed together with the response that was filed by the Governor. I have seen reference to a court order. I have also seen reference to some matrix. What I have now seen and which was more surprising, is additional witness statements. Now, those are matters of facts.

Now, those are matters of facts which then, perhaps, if allowed by this honourable Committee to be tendered, then it would actually take us at a surprise and ambush, and that would be prejudicial to the case of the county assembly. So, we oppose that application.

**The Chairperson** (Sen. (Dr.) Khalwale): What is not too clear on my mind is that you have documents which you have already submitted and you had not authenticated some of them. Now, when it will come to you requesting that you be allowed to authenticate, then the Chair rules you out; literary your case now will be thrown completely off. Would you give and take, so that they be allowed the application that they are giving and you also be given space to authenticate and maybe rearrange your case accordingly? Would it

be asking for much? This is what you should tell me and then I will ask the hon. Members and we make a ruling quickly.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, with due respect, the authentication aspect will not be adding anything more than what is already part of the record. So, in all fairness, our request to authenticate is simply just introducing the same document. We will be introducing a signed document which is entirely in your hands. If you rule that those documents or this further witness statement should be admitted, we would then be compelled to make a request that we be afforded sufficient time to also take instructions on these documents. The danger here now will be that these are time-bound proceedings and tomorrow, perhaps, there was a schedule that this honourable Committee was meant to address. The timelines within which this matter should be concluded may now not be realized. That is the danger.

**The Chairperson** (Sen. (Dr.) Khalwale): We want to allow hon. Members to speak to this. I think that Sen. Orengo is ready.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, before that may I be allowed to respond just as it is usual in all proceedings. I am surprised by the position taken by my learned counsel given that under Article 50 of the Constitution which would apply to these proceedings, the Governor ought to be allowed to exhaust all mechanisms possible and to ensure that he comes up with proper response. The implications of an impeachment on him, as an individual, are quite serious. Basically, when they say that they will be forced to introduce witnesses, we will have no problem with that. This Committee ought to be properly informed, so that it makes an informed decision. Sometimes it may even find it appropriate to even call for documents from the county government or county assembly by itself. So, basically, documents that are brought for purposes of informing this Committee would not prejudice any party. Even in courts, we file supplementary lists of documents, supplementary affidavits or further affidavits. Basically, this is nothing new at all.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Members, is anybody ready?

**Sen. Orengo:** Mr. Chairman, Sir, I think that this was your response to appear before the Special Committee. This is additional to the original bundle as brought to the Senate. This was received in the Senate yesterday at 2.00 p.m. As much as you say that this is just a summary, I see a number of very new documents. They are about six of them. Will you consider that to be the case, as you put it at the assembly? Were these matters put before the assembly or is this something that you are coming up with now? This is an investigation. We should not shut out any evidence that may help us come to a just and fair conclusion, so long as nobody is prejudiced.

But on top of it, is that even the very fact that somebody is undergoing impeachment, you remember what happened in the case of Nixon. Once he realized that impeachment proceedings were to take place, he resigned. Not that he believed that he was innocent, but just the very fact of going through this process. So, I am of the opinion that even in a

trial, particularly if it is quasi-criminal, would you want a man charged with an offence and he comes in possession of some evidence which will help him deal with the issues that you have raised? Would you want to shut him out? I know that we have got those rules and are time-bound, but this is the very first day when I thought that we can give and take.

If the documents which have been produced are not necessarily going to change the substance of the case--- What I am seeing here are documents, some of which are public. If you wanted them, probably, even counsel may produce them by way of referring to them as public documents. So, I think that we should not close the door in these proceedings, because we are in an investigation. If we are of the view that the charges have been substantiated, the Governor will still have another chance before the Senate. He cannot be shut when he comes to the Senate. So, why not do that work here than push it to the Plenary of the Senate?

**Sen. Wamatangi:** Mr. Chairman, Sir, I think the application by the Governor, in view of the rights that are accorded to him by the Constitution of this country, is well admissible. It is in good faith. It is also in the interest of this Committee to capture all the evidence and information that may be necessary for us to come to a fair conclusion. In the same breath, I think that it is also important that the import of admitting that new evidence be well reflected to the other party, so that then they also be accorded the time that they might need to go through those documents and adduce their own defence, so that we also do not prejudice their case. In my thinking, what both parties may require to know is that if that admission is made, then they will have to, probably, spend more time and maybe burn the midnight oil for them to have been treated fairly.

**Sen. Sijeny:** Mr. Chairman, Sir, I just have one question. Counsel for the Governor, have you just supplied the County Assembly Counsel with the documents or did you have prior access before we took the break?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we have actually given them the document and they have it as it is. Initially, when we indicated that we were going to make the application, we did not find time to give them the document before we went for lunch. But they now have it.

**The Vice Chairperson (Sen. Murkomen):** Mr. Chairman, Sir, since it is important for us to go to the bottom of this case or investigation, why do we not say that these documents are useful? We need to get every document, but then the county assembly team should give an indication to the Committee whether, on an account of these documents, they need to call another witness. Even us, as a Committee, we will then adjust to say: "Okay, this is how we wanted to proceed, but because of these documents, the county assembly is willing to call so-and-so. But let us know in good time; maybe at the end of the day or the first thing tomorrow morning. We can create that time and, therefore, we will demand the flexibility of the county executive side – the Governor's team.

If you will be required to revert back even after the scheduled time for purposes of responding to those issues that require specific witness. I am not the one prosecuting the case for the county assembly, but for me, I guess that the county assembly is the one that is making their case. They have already done it in terms of what they did in the county assembly. Anything that helps the Governor to defend himself should be admissible. Really, the stakes are far much higher on the Governor's side now because the county assembly had done fairly a thorough job in the house.

We had the advantage of--- aside from just relying on the documents from the county assembly, we verbatim proceedings also of the county assembly where actually the matter was prosecuted. But we have nothing from the Governor. This is his first forum for him to make his case and whatever document can help, I think we should be flexible in that regard. The county assembly may have more time, if they need, over and above the time scheduled to respond to whatever extra information that is in this document.

**Sen. Boy Juma Boy:** Mr. Chairman, Sir, I would like to ask the counsel for the Governor whether these documents introduce new evidence or they are trying to support the already supplied evidence.

**The Chairperson** (Sen. (Dr.) Khalwale): Counsel, that is a direct question. You can take it now.

**Mr. George Ng'ang'a Mbugua:** Mr. Chairman, Sir, this is a supplementary list of documents. The bundle are meant to further support and try to bring up a situation where we have further evidence in support of our defence. So, basically, the response to the allegations has not changed. We are actually firming up our position.

**Sen. (Prof.) Lesan:** Mr. Chairman, Sir, in the interest of time, so that we do not take more time making these decisions, maybe we can take this last new bundle of documents that have been brought. The counsel for both parties must assure us that they will not introduce more documents. We can adjust the time that we have and deal with the ones that we have and not accept more.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Members, the Constitution in Article 50 guarantees all Kenyan citizens a fair hearing. In Article 159(2) D, we are guided by the same Constitution that undue attention to technicalities or procedure should not interfere with the quality of work. Hearing what Senior Counsel Orengo, Sen. Judy and my Vice-Chair – also legal minds - have said, I am persuaded that admitting these documents will enrich the process. Therefore, either this afternoon, evening or by tomorrow morning, if there are any adjustments that you need by way of time and request for admission of other pieces of evidence or calling in witnesses, place that request and we shall bend backwards and allow you.

As for the Members, it should not worry us too much, even if the counsel of the Governor is being clever. This is because at report writing we shall be able to assess that this evidence which is now being brought belatedly is an afterthought; trying to counter a

genuine approach to the case of the county assembly. So, I rule that we admit the documents and allow the county assembly to make their requests when they so wish. Can we proceed?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, with due respect, there are some authorities that we had cited during the opening remarks. We urge the Committee not to construe the same as documents. These are authorities to be used for purposes of submission, so that parties may not misconstrue that to be further evidence.

**The Chairperson** (Sen. (Dr.) Khalwale): No! No! That is straightforward. All these are very intelligent and highly learned people. That is not a big story.

Thank you so much.

County assembly, I hope that you are not in a state of shock. It is now time for you to rise and argue your case.

**Mr. Charles Njenga:** Mr. Chairman, Sir, we are not. But just before your invitation for us to rise---

**The Chairperson** (Sen. (Dr.) Khalwale): I would like to invite you to take the podium over there. Speak from the podium when you are leading your evidence.

*(Mr. Charles Njenga took the podium)*

**Mr. Charles Njenga:** Mr. Chairman, Sir, just before your invitation for me to rise and present our case and on the ruling that you have made with regard to documents, especially the additional documents now supplied to us immediately we resumed; and in consideration of your finding that the county assembly may need to re-evaluate its presentation in view of these new documents, I think that in all fairness, it would only be proper for us to rise and prosecute our case after considering whether or not the inclusion of these documents will need us either to proceed just by way submissions or file a witness statement by one of the witnesses or just to re-evaluate whether, indeed, we are still safe. The problem is that we have not read this document. Immediately we resumed this document was placed on our desks. So, I cannot even tell you what page 50 has, yet in my submission as I prosecute the county assembly's case, I ought to refer to specific responses made by the Governor. I think that, that is very prejudicial to the county assembly.

**The Chairperson** (Sen. (Dr.) Khalwale): Continue!

**Mr. Charles Njenga:** Mr. Chairman, Sir, I seek directions so that together with fellow counsel and the representatives we can go through this document and see whether we need to add any other material with regard to how I was supposed to--- I was actually very prepared to prosecute.

**The Chairperson** (Sen. (Dr.) Khalwale): No problem! That is a fair request. Roughly how much time will you need to go through, so that we make a decision whether to adjourn in your favour?

**Mr. Charles Njenga:** Let me just consult for a minute.

**The Chairperson** (Sen. (Dr.) Khalwale): Yes, counsel.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I have consulted and we feel that even one hour only, we can raise sufficient response to this particular document. It is a 98-page document. In all fairness, one hour is not a lot of time to digest 98 pages.

**The Chairperson** (Sen. (Dr.) Khalwale): Yes, Sen. Lesuuda, do you have an intervention.

**Sen. Lesuuda:** No, Mr. Chairman, Sir.

**The Chairperson** (Sen. (Dr.) Khalwale): So, you are asking for one hour?

**Mr. Charles Njenga:** Yes, Mr. Chairman, Sir.

**Sen. Lesuuda:** Mr. Chairman, Sir, we were consulting with Sen. Orenge and we feel that this is a response from the Governor while the County Assembly already had its case. We feel that one hour is quite some time because either way they already have the case. It is the Governor who is now making submissions to defend himself. I think one hour would be too much.

**Sen. Orenge:** Mr. Chairman, Sir, the County Assembly must have a conviction whether they have a case against the Governor or not. If you came here and you are not convinced that he committed these offences then I do not understand why we are here. You had that opportunity at the Assembly, you put your documents together, you prepared the articles of impeachment and the person who needed notice to defend himself is the Governor. He has come here at our invitation to respond to the charges. Therefore, the way we should go is that you should prosecute your case, present your evidence and when the Governor responds, we will give you a final bite to respond to that case. If it was a criminal trial, you would present your case, and you know these charges are bordering on criminal conduct, the Governor would choose whether to respond by saying something or by saying he has nothing to respond. So, when he or his counsel takes the witness box, we would interrogate him on what he is saying in response to you. If you are going to have a situation where we shut him to have a response and your proceedings in the county assembly went on and he was not a part of it. You had a whole day and, in fact, had an adjournment to ensure that you had a water-tight case against him. If we are going to have a situation where the Governor says anything in response, then you go to consult, it gives me the impression that you are not quite sure about your case. That is what I am worried about.

**Sen. Wamatangi:** Mr. Chairman, Sir, I would like to note with a lot of concern that this is a matter that is in public domain and the people of Kenya have a lot of interest in it. Therefore, it is important that as we proceed with this matter, even by perception itself, what the people of this Republic get out of this process - they should read absolute fairness in the entire process. As we have said that we are going to accord the Governor the opportunity to be heard and introduce his evidence, it is also important that if the County Assembly requires 30 or 40 minutes be granted, it is not asking for the whole ten days to go through this process. They should also go back to Embu and say that they got a fair hearing such that when this Committee arrives at its decision and the Governor is found to be free of all these charges, then it would be perceived to be so. If he is found to be culpable then he should be found to be so in a fair process. Therefore, it is important to let the people of this country read this process. It is also important for the Senate to conduct these proceedings in absolute “transparency”.

**The Chairperson** (Sen. (Dr.) Khalwale): Very well! It is not a very difficult issue. On the weight of equity having given the Governors the opportunity to get their extra documents admitted, equity will then demand that we also give something back to County Assembly. They are requesting for one hour. They are not asking for too much. I have listened to all of you, you are supporting that, but you are worried that one hour is too long, so I decide that we give you 45 minutes to go and prepare then we come back. In the meantime, we shall adjourn for 45 minutes during which time we can have a cup of tea.

**Mr. Charles Njenga:** Thank you, Mr. Chairman, Sir, for your kindness.

*(The Committee adjourned temporarily at 3.25 p.m.)*

*(The Committee resumed at 4.20 p.m.)*

**The Chairperson** (Sen. (Dr.) Khalwale): Distinguished Senators, we now want to resume from where we left. The first stage is to invite the lead counsel from the County Assembly to give an indication of how long he would like to take.

As he takes the podium, we would try as much as possible to listen to him in silence so that we do not interject too much. When it comes to the time of us seeking for clarifications, each clarification would have a maximum of two minutes so that we do not end up making long speeches ourselves. Our business is just to listen and understand.

**Mr. Charles Njenga:** Mr. Chairman, Sir, on behalf of the County Assembly of Embu, we proceed to submit on the particular violations and charges and presented.

About the time, I will make my presentation for about 30 minutes and my colleague will also present on two of the violations. In total we shall take one hour.

**The Chairperson** (Sen. (Dr.) Khalwale): That is granted. Take an extra measure to ensure that when you refer to a document, we are all on the same page.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I will try and do that although we may have some difficulty because the initial document as forwarded by the County Assembly does not have pagination, but I will refer to the document as marked by the County Assembly.

**The Chairperson** (Sen. (Dr.) Khalwale): Before you proceed, I can see the lead counsel for the Governor is agitating for something.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, I wish to seek clarification and also direction on this matter. These proceedings are in the nature of quasi-judicial proceedings. For that matter, the rules of evidence have got to apply. As it is, I believe my learned friend endeavours to present evidence and documents for purposes of digestion by Members. As it is, much as they may not want to call witnesses, they have to frame some means through which they endeavour to produce documents. For example, I would be in a predicament to cross-examine my learned friend when he produces documents because documents have to be produced. It would be tantamount to belittling these particular proceedings, if any party endeavours to by-pass the rules of evidence where documents are concerned. If they want to say that it is their submission they wish to do, let us know that they are submitting, then we shall be so guided and we shall also prepare submissions. If they are producing documents for purposes of this Committee's digestion then the rules of evidence have got to apply.

**The Chairperson** (Sen. (Dr.) Khalwale): You can say that is a hurdle that we must overcome. I want to fall back to colleagues. What are your thoughts on this? Rules of evidence? Most of you have had an opportunity to be in court.

**Sen. Wamatangi:** Mr. Chairman, Sir, as we also rely on guidance from the lead counsel and the senior counsel in our team and the legal team in the Senate, we have also said that this not per se a hearing, it is an investigation. Probably, we will have to look at how all evidence is going to be heard. In my approach of this matter, justice does not only have to be done, but it must be seen to be done. So, I would hardly be looking forward to an opportunity whereby we would be locking out evidence. That is a hurdle we must jump. Probably, you will indulge. How is the County Assembly going to approach the matter as we get guidance on it? But I think it is an important matter to address level-headedly for purposes of perception.

**The Chairperson** (Sen. (Dr.) Khalwale): Anybody else? County Assembly, would you like to comment?

**Mr. Charles Njenga:** Yes, Mr. Chairman, Sir. The process that we are in is guided by statute and statute prescribes that once the County Assembly makes that resolution to propose to impeach or remove a governor, it has to forward that resolution together with all the documents relied upon in making that resolution. By virtue of that provision and by virtue of the County Assembly forwarding these documents to this Committee, to that extent this Committee is properly seized of all these documents. We do not have the lead counsel produce them because statute invites the County Assembly to present them

to the Clerk of the Senate together with the Motion and the resolution that was carried. It is not now for us to re-litigate or re-argue the Motion that was before the House in the County Assembly of Embu again before this Committee.

All that, the Committee is supposed to do is to evaluate all these documents as presented together with our presentation on the law that applies to these documents and make a determination on whether the allegations have been substantiated. So, I think the documents as presented are properly admitted before the Committee. That is the same spirit with which the Committee allowed the Governor to bring in more material and more documents so that all the documents that relate and pertain to this matter are available to all the Members, then the Committee will decide one way or the other on whether the charges have been substantiated. That is my take on it.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you, counsel.

Yes, Kibe Mungai.

**Mr. Kibe Mungai:** Mr. Chairman, Sir, I am begging leave to the Committee to make a presentation on this because it is something that affects the proceedings and would also affect the Deputy Governor. I am constrained, but ordinarily, I would have taken the position of the Governor with whom we suffer the same fate. However, I am constrained to agree with my learned colleagues that strictly speaking, the proceedings before this Committee are not a trial. Therefore, I would have great concern of the extent to which the Evidence and the Rules of Evidence should apply. I take it and that is why we want to rest it as it is; that the case of the County Assembly succeeds or falls on the basis of the documents that they used to make their decision. Therefore, I would take it that the documents that were supplied to us are validly on record and we shall use them. There is no need for any extra procedures to place them formally before the Committee. I hope by that I do not prejudice the Governor's case. That is the mode that I would wish to be followed when it comes to the Deputy Governor.

**Sen. Orenge:** Mr. Chairman, Sir, I am just wondering about Mr. Kibe Mungai--- I agree with him broadly on the law that, actually, it is this Committee which is investigating. In fact, we can go out there and look for evidence. Is it your position that the County Assembly having presented the case as it is, we would have the responsibility to go out there, using what they have presented as leads towards making a determination which means we fully investigate the matter or what you mean is that we just look at the documents as presented and there ends the matter? If that is the case, then we are not really investigating.

**Mr. Kibe Mungai:** I think my understanding is that during this session, substantiation would really require them--- because they have used documents which they may require to substantiate on the basis of whatever way the Committee chooses the substantiation to take because there was no hearing that was conducted for purposes of the Governor and Deputy Governor. By substantiation of the charges, my understanding is that the Governor and the Deputy Governor have now had an opportunity, using documents or

without documents, to answer to allegations levelled against them. It may well be that there is need for the Committee to seek further clarification on the basis of the documents that are now before the Committee.

Up to this stage, for purposes of the Deputy Governor, I can say that we want to base our case solely on the documents that have been produced by the County Assembly. I am not sure whether there would be anything else that would be arising on the account of documentation. Again, I am ignorant of the documents by the Governor and what else maybe required as a result of their responses.

Therefore, do not limit it to saying that something else may be necessary and something else may not be necessary. To the Deputy Governor, I believe we are satisfied and we want to base our responses on the basis of what is before the Committee.

**The Vice Chairperson** (Sen. Murkomen): Mr. Chairman, Sir, I also think that, first of all, we are borrowing Section 33 of the County Governments Act, from Section 145 of the Constitution which is the removal of the President by impeachment. I do not think as such, you can see that from the constitutional provisions on impeachment of the President, the process begins with the National Assembly, and God forbid – it could one day happen – this Article could be used against the President. I do not think it would be right to say, for example, the House of Senate would be trying to try the National Assembly and taking them through a procedure where specific Members of the National Assembly will come and defend the case to the extent as though it was their own case. I think it is about reliance on the documents that have been presented in that House.

So, if you look at Section 33 of the County Governments Act and juxtapose it with where it was borrowed from, which is Article 145 of the Constitution on impeachment of the President, I think it suffices that the County Assembly has done their part. The reason we needed them to do oral presentation here and which they would have chosen not to appear so that we just rely on those documents that have been presented is for purposes of clarification of certain issues and documents. So, this Committee will choose whether to admit a certain document or not. We can even go out of our way to call any person, including the Auditor-General, and so forth, on our own without even going through the County Assembly.

I, therefore, want to request the Governor's team to treat this issue as investigation. If we go by the thought that it is a full trial, we might put ourselves in unnecessary restrictions when it comes to Rules of Evidence under the Evidence Act. If you heard what the Chairman said in his introduction remarks, this is neither a criminal nor a civil trial. It is somewhere in between; you cannot strictly say whether it is a criminal trial or a civil trial. We are just investigating and if there is any information that can assist us in that investigation and is admissible in Parliament, and which has been authenticated as required by Parliament, then we should be able to use such documents.

**The Chairperson** (Sen. (Dr.) Khalwale): Before we make a ruling, I would like to give the last chance to the counsel of the Governor.

**Mr. Wilfred Nyamu:** Hon. Members, with due respect to the comments that have been made, some of the hon. Members who happen to be learned friends, it is important to also appreciate the implications of any decision that will be made by this Committee, especially to my client; where documents are being relied upon, in a situation where no witness is being brought to introduce the documents, yet they have an opportunity to cross examine the Governor and his witnesses. As it stands, the rules themselves presuppose a situation whereby the County Assembly and the Governor may present evidence and will be subjected to cross examination. How do you bring in documents for consideration in a situation where they are not tested?

The origin of the documents has not been authenticated; the documents have just been brought here. There is likely to be a miscarriage of justice. With due respect, I do appreciate the sentiments raised by my learned friend. His line of defence as we have seen is totally parallel to the Governor's line. That is something that this Committee ought to appreciate so that when their time comes, they may endeavour to move in the direction that they want to move. If they wish to continue with the matter without having to test the veracity of the documents that are being held against them, but on our part, we are cautious.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you counsel. We hear you! Let us start from the invitation both of you received. The invitation you received is similar to the one the other parties received. In that invitation, we were very clear. We wanted the Governor or the County Assembly or the Deputy Governor to come with their advocate or with a witness or witnesses or without. If they would have chosen not to come, we would still have proceeded on the strength of the documents they deposited with us. Secondly, they chose to come. Having chosen to come, they have chosen not to present witnesses and that is their style. You should not worry about their case. I can see Mr. Kibe Mungai might have a similar style. If your style is that you use witnesses, again, that will not be taken away from you. You should go right ahead.

From what you are saying, you are giving the impression that unless the documents are introduced by witnesses, they are not as strong. Surely, I am not on your side or in your corner. If I was in your corner and I was having a situation whereby the documents they are bringing look weak because they were not introduced by a witness, it is to your advantage. Why should it worry you? You just do your case. These Senators are not imbeciles. They are going to analyze these things at report writing stage. So, keep your cool. By the way, the proceedings here do not in any way obstruct your desire to go to the High Court and beyond. As you said at the beginning, what we are doing here is without prejudice. Take it easy and let us proceed. We believe the route to go is not to block any attempt to look for evidence, which is what we are looking for. That is why we admitted the documents.

Finally and this is important, the way you have spoken from the podium here, it is so sentimental, and you remind me of a case when I was in court and people were making their submissions. You should argue like that when you are making your final

submissions and we will listen and record and act in line with those nice submissions that you have just made. Maybe I should call that presentation passionate. The passionate way you have put it, it is clear that we will have to give it the way that it deserves.

**Sen. Orengo:** Mr. Chairman, Sir, I also thought that the other way of dealing with it is that we are reacting to a resolution which has been presented to us using legal and constitutional means. The fact that this case is here, there has been a process before and that process has ended up or resulted in us having these documents. We have no alternative, but to proceed on the basis of the resolution which was passed. Once that resolution is passed by the county assembly and they have brought the articles of impeachment and so on, we have no alternative, but to investigate on the basis of what we have. So, even if we had to push the County Assembly to presents their case in any other way, it is extremely difficult because, so far, we are acting within the four corners of the statute; the County Governments Act and the Constitution. What value we put on documentation, I think that you can address us at the end. But now we are acting on the resolutions of the County Assembly. Once they made that resolution, then we had no alternative, but to proceed the way we are proceeding.

**The Chairperson** (Sen. (Dr.) Khalwale): I am sorry we have to make progress. I now want to invite the County Assembly to commence. I know Mr. Wanyama, you will be able to bring up your topic later on.

**Mr. Peter Wanyama:** Mr. Chairman, Sir, just a matter of procedural clarification.

**The Chairperson** (Sen. (Dr.) Khalwale): I have ruled.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I wish to proceed with the business of the day. I thank you for the directions that you have made today with regard to the mode of proceeding. What we have before you are charges which have been well particularized in the bundle that is supplied to all the Members of the Committee. What is annexed to that bundle are documents that now evince the facts supporting these particular charges. I propose to take the first two particulars of violations together because they are intertwined.

I begin with the first one which principally raises the issue of the institutional framework within which procurement has been done within the county executive of Embu under the stewardship and the leadership of the Governor of the County of Embu. Of particular concern and specific challenge that precipitated these proceedings is the failure within that institution as a procuring entity to have in place a tendering committee. To contextualize this concern, allow me to go back to the law. It is always good to go back to the law. Rule 7 of the Public Procurement and Disposal Act, County Governments Regulations 2013, is very clear. It is clear both on its purpose and also on its requirements. It proposes or states that for purposes of ensuring the procurement or asset disposal decisions are made in a systematic corporate structured manner, a county procuring entity shall establish the following standing committees from within its

members of staff and the first one in Sub-section 1(a) is the Tender Committee specified in the Schedule to these regulations.

These regulations which are also part of the regulations specify the particular persons who are supposed to be in this Tender Committee. They also specify the manner in which these persons are supposed to be appointed. Why I highlight this background is for it to become clear in your investigation that there cannot be and there could have not been any appointment of members to the Tender Committee without strict adherence to the law that provides for their composition and for the appointment of members to these committees. The principle of which is a requirement that all members of the Tender Committee have to be appointed in writing.

I am reading from the Schedule to those regulations. On the first one it says:-

“On the County Government Tender Committee, the Chairperson shall be an officer appointed in writing by the Secretary of the County. The Deputy Chairperson shall be a county chief officer appointed in writing by the Chief Secretary of the County”.

It proceeds like that. As such – this is a rebuttal to an allegation that was made by the Governor when he stood here before you that he is not in charge of any function relating to procurement and the composition of these committees and instead thereof is the County Public Service Board. The Regulations and the Schedule is clear. The County Public Service Board has no role whatsoever in the composition and appointment of members to a Tender Committee. This is an executive function executed by the county executive committee through the Secretary who is the County Secretary.

**Mr. Wilfred Nyamu:** On a point of order, Mr. Chairman, Sir. With due respect to counsel for the County Assembly, it would be unfair for him to mislead this Committee because at no point did the Governor or his team say that the County Assembly Service Board appoints members of the Tender Committee. These are their own submissions and they ought not to be visited upon the Governor or associated with him. I beg to ask that he withdraws that particular statement, otherwise, the same ought to be clarified from whoever was writing the proceedings.

**The Chairperson** (Sen. (Dr.) Khalwale): The easier way to do it is for you to allow him to proceed to the end, take note of those things and now when you will be commenting you will negate the things which to you think do not reflect the truth. We are not saying that what he has said is gospel truth, but we shall weigh it against what you will say in response *vis-a-vis* the evidence you will table to support your arguing otherwise. Otherwise, if we allow that, we will get confused.

I am also reminded that the HANSARD is on and even if you miss something you have a chance to refer to it after many hours. So just remain calm. As we told you at the beginning, we are going to hear you in full and it will be fair.

**Mr. Wilfred Nyamu:** We expect it.

**The Chairperson** (Sen. (Dr.) Khalwale): Yes.

**Mr. Charles Njenga:** Thank you, Mr. Chairman, Sir. Having set out the law, I wish to invite the Committee's evaluation of the document now presented as a response to these allegations by the Governor. I am referring to the volume of documents bound in blue. I want to start with page 1. I do not know how to differentiate both the bundles because they are both in blue, but the earlier one is big.

**Sen. Orengo:** Mr. Chairman, Sir, I want to appeal to counsel that when they are presenting their case, like they have made an allegation against the Governor that there was no Tender Committee, it would be useful for him to point out to us in their body of evidence the documents they have filed, where to find that evidence, and then you can say that the Governor has said this in response to the following which we disagree with. This is because it is their case and they can tell us where evidence is so that we do not just make assumptions.

**Mr. Charles Njenga:** Mr. Chairman, Sir, I will take all the documents together so that I save time. But I will go fast through those documents. I wish to refer the Committee to a letter written and dated 16<sup>th</sup> January 2013. It is not paginated. That is the bundle that was received from the County Assembly of Embu marked as CAE2.

Now CA2 is a letter written to the Clerk, Embu County Assembly and it is written by the Secretary, Public Service Board, Johnson Nyaga. I hope we are together. The context of this particular document is the resolution by the County Assembly Committee and that resolution is marked as CAE 6 together with CAE 7 where the County Assembly of Embu's Committees made certain recommendations upon investigations, recommending action to be taken against Members of the tender committee that were involved in the procurement in question under those two reports. That recommendation was passed to the County Public Service Board for action.

The County Public Service Board is now writing back to the Implementation Committee of the Embu County Assembly to advise on whether or not it has acted upon the recommendations of the County Assembly. With regard to action being taken against Members of the Tender Committee, the Public Service Board on Page 2 of that letter, paragraph "C" confirms that. The Secretary writes:

"At around 1.40 a.m, the County Secretary called me and from where she was, advised me that the Chief Officer may not give names as he was not the appointing authority and requested that the letter be directed to her for attention for necessary action. The same was done with a deadline of Monday 13<sup>th</sup> January, 2014, at 2.00 pm."

The request was a list of Tender Committee Members who had participated in the award of the two tenders and documents supporting the award, pursuant to Section 12(6) of the Public Procurement and Disposal Regulations of 2006.

On 14<sup>th</sup> January, 2014, the Board met and confirmed that nothing had been submitted and concluded that it was not possible to take any action against any person without ascertaining;

(a) Availability of any evidence of appointment of the officers. (The officers in this context are as referred to in the previous paragraph – members of the Tender Committee).

The Public Service Board could not find any record, whatsoever of having been an appointment of any member of staff to the Tender Committee of the County Executive of Embu. It was writing to the County Assembly to state that their actions and recommendations cannot be acted upon because there is nobody in that Committee to whom disciplinary action and the recommendations proposed can be taken against. This is confirmed in the Governor's documents where on Page 1 of the earlier big blue bundle of the Governor's document, there is the summary and MNW1 Tender Committees and that is there the pagination at the top right by a felt pen starts. It is headed; First Tender Committee. I hope we are together.

There is a list of Members. I am not sure in which document and we are not told and the list does not show where it was issued from – of concern to the County Assembly and to anybody. Getting this as a response to a specific enquiry that there are no Members of a Tender Committee is manifestly inadequate. What this Committee and Members of the County Assembly would have expected is a list and a set of letters appointing these Members to the Tender Committee. A list is not evidence of membership to any entity known in law; certainly, not the Tender Committee.

Secondly, there is a different list of Members. Again, there are no letters to show, indeed, that these persons were appointed to that Committee. Of note is that the first list which we are not told when they were appointed is substantially different from the second one. On page 3, there are minutes of the Embu Tender Committee, dated 8<sup>th</sup> November, 2013 with another set of Members. Membership of this Committee as presented by the Governor has mutated three times within a span of one month.

On appendix 16, there is a schedule of payments. We are now paying them without any appointments. On page 16, there is a list dated 3<sup>rd</sup> October, 2013 that shows that certain persons were paid---

**The Chairperson** (Sen. (Dr.) Khalwale): There is seems to be unrest. Is there a problem?

**Mr. Charles Njenga:** There is a problem with the pagination. In my bundle, it says page 16, but probably, in your bundle, it is in a different page. Probably, you may have to follow it up as I present it. Here, there is a different set of Members.

On 9<sup>th</sup> October, on page 18 of my bundle, we have another set of Members in the Tender Committee. The question that poses is: why the differentiation? Why the turn over? Why the avoidance of evidence of appointment of all these persons as a way of satisfying the

County Assembly, the public and this Committee that, indeed, according to the regulations that are now available and to be applied in all counties, due process was followed in putting in place a Tender Committee.

Hon. Members, we had occasion to go through the HANSARD of the proceedings that were before the County Assembly and the letter that I have referred to from the County Public Service Board shows that there was never, at any time, a Tender Committee procuring for works and goods and services in the Embu County Executive Committee.

**The Chairperson** (Sen. (Dr.) Khalwale): Order, counsel! That is a very critical point. For comparative purposes, let us look at the list on page 19 and the list on page 17. I think our page 19 is 18 on your file. On page 17, the difference I have seen here is that the names have not come in the same order as they were in the other. However, they are the same names apart from the fact that on 10<sup>th</sup>, there appears to have been more Members present than on 8<sup>th</sup>. Are you with me counsel?

On page 19, the people, No.1 up to 7, the meeting of 9<sup>th</sup> October, are the same ones with those of the meeting of 3<sup>rd</sup> only that they are not in the same order. The one of 3<sup>rd</sup> has 11 people. Is it because more people attended, probably? Could it be made clear to me?

**Sen. Mositet:** On page 19, Silas Wachira No.4 does not appear on page 17.

**The Chairperson** (Sen. (Dr.) Khalwale): The reason I am posing this is because counsel has told us that the two lists are completely different. The fact that your name is missing on one list might as well mean that you did not attend that meeting. When he says that they are totally different, that does not add up.

**Sen. Wamatangi:** Mr. Chairman, Sir that is quite right. That could be one possibility. However, it is the onus of the team of the Governor, when they take the podium to explain, substantiate and prove that, indeed, those Members were just absent. Suffice to say they have to carry out that duty.

**The Chairperson** (Sen. (Dr.) Khalwale): I am not disputing, but clarifying further. Where I am convinced is where you say that they mutated from Tender Committee 1, 2 and 3. Indeed, I see that mutation. However, when you go to the actual payments where they seem to have been receiving actual payments, you will see that I am not convinced.

If you have no comment on that, you can carry on.

**Mr. Charles Njenga:** Mr. Chairman, Sir, this is what they have brought to us as evidence of membership and existence of tender committees. We cannot refer to any other document that has been given to us. If this is the evidence of membership at different times, then we can only cite what they have brought. Had they brought minutes or letters, we could as well have given them the benefit of doubt because there would have been a reference point from where we could explain that, probably, in some meetings, some Members were not present. However, those are assumptions that we cannot make without

those documents. I do not wish to belabour the point because the critical issue in law is that there is no process disclosed of how, indeed, any of these Members came to be eligible for these payments. There has to be an appointment to an office before you are paid.

In fact, this is a clear demonstration of illegality. There has to be, in putting in place of that office, the appointment of persons to that office. Payment comes last. All of us are paid last.

**Sen. Orengo:** In fairness to him, if you look at the minutes of the Tender Committee held on 8<sup>th</sup> November, on page 3, one would be interested to see that in respect of that meeting of 8<sup>th</sup>, there was a payment against that attendance. However, the ones we are seeing, for 3<sup>rd</sup> and 9<sup>th</sup> October, there are no minutes to show that meetings were attended which deserve payment. So, there is a bit of a mix up which tends to show that this records do not help as much in dealing with the issue of appointment or the existence of a tender Committee. The one of 8<sup>th</sup> November seems to have completely different names. If you look at page 3, you will see that the names are completely different.

**Sen. Kittony:** Mr. Chairman, Sir, I also see a problem on the Report on Technical Evaluation, on page 13. If you look at that page, you will see the special team that wanted to evaluate. They came and they were two people. That is 12 and 11. When you go to page 15, there are four people. What they did is not clear. Something is amiss. You need to look at that. If you look at the people who attended, you will see that they grew from two to four. There is an anomaly and something is not right.

**The Chairperson (Sen. (Dr.) Khalwale):** It is now noted. We needed to be clear. It becomes difficult for this part of evidence from the Governor, based on what we have explained, to be justification, that this was a Tender Committee. You have made your point that this is not a Tender Committee.

**Mr. Charles Njenga:** That is the point I wanted to make. I am sure when you retire, you shall evaluate the document in totality.

Having made that point, Mr. Chairman, I wish to proceed and demonstrate that the failure to have this very paramount foundational committee is, indeed, the reason even the audit report was returned by the Auditor-General on the financial affairs of Embu County. That report is next to the bundle of documents forwarded by the Assembly. Let me just pick the reference for you. It is CAE3.

On CAE3 which is an Auditor-General's report signed by the Auditor-General, there are several findings. Of relevance to this investigation, although I am sure the whole report is relevant, are the findings from page 33 on the paginations at the foot of the page going all the way up to page 41. Without going into the documents because the document is there for your evaluation, you will see clear headings of issues picked out by an independent auditor. This is not an office under the County Assembly of Embu. This is an independent auditor making findings that:-

1. There was an irregular award of contracts for repair works.
2. A contractor was at the Town Hall and probation office. That is on page 33. The numbers are given at page No.34.
3. There was unwarranted disqualification of interested bidders. The particulars are set out by the Auditor-General.
4. There was favoritism in consideration for responsiveness of tenders during evaluation.

The material period we are talking about is from 3<sup>rd</sup> March to 30<sup>th</sup> June. This is a period where the Governor was in charge of the County. The Governor was sworn-in on 27<sup>th</sup> March, 2013. After that, he was fully in charge and in control of all executive functions within this county. This is during his watch that the Auditor-General is saying and giving clear justification.

On financial and technical evaluation of contracts, he states that there is no evidence whatsoever that the bidders' financial and technical capabilities to undertake contracts were properly evaluated.

There was irregular reallocation of funds. Even contractors were not being given formal contracts. This was a finding. There is a citation of those particular instances when this happened. An unregistered sub-contractor got work in a public entity under the watch of the Governor. That is a finding by the Auditor-General on page 36.

There is irregularity in the procurement methods applied. I do not wish to go word for word throughout the whole report. But for purposes of my submission---

**The Chairperson** (Sen. (Dr.) Khalwale): Order, Mr. Njenga! Since this is on HANSARD and this is very critical, you can finish. Page 41 is just around the corner. Complete the way you are putting it. I want it clearly on the HANSARD.

**Mr. Charles Njenga:** Very well, Mr. Chairman, Sir. I am guided. I was on page 36. The Auditor finds that there was application of irregular procurement methods. There was delay in completion of works and there was an irregular award of a contract to a contractor since the other competing firms were not even listed as part of the registered contractors as provided by the Ministry of Public Works.

On page 38, there is citation of failure to upgrade a power line where monies had been allocated, bills of quantities supplied, but the power line had not been upgraded. Money had been provided to construct a Project Manager's office. There was a very clear and good recommendation by the Auditor-General that procurement laws should be applied in all procurement processes without exception. The County Government should also ensure that those contracted should complete all the work without further delay.

There is also an application of an irregular procurement procedure under the sub contract for installation and commissioning of a generator. That is on page 38.

On page 39, the Auditor-General finds that in this contract referenced EBUCNTM2052012 to 2013, there was no disclosure of bid prices for five of the tenderers.

Under Paragraph (c) the Auditor-General finds that there was no formal contract signed between the client – the client here being the County Government of Embu and the sub-contractor to show the binding terms of the contract, the engagement with this contractor, contrary to clear express provisions of Section 68 of the Public Procurement and Disposal Act, 2005.

The Auditor-General also finds there is lack of certificates of testing and physical verification. A generator was bought and installed. There was no evidence that this generator was working in good condition as initially intended.

There is certification of an amount of Kshs300,000 that was not due, but certified. Again, out of sufficient concern and abundance of caution, the Auditor-General reiterates the recommendation that procurement laws should be applied in the procurement of all goods, services and works in the future.

At page 40, there are very clear particulars that have been set out with regard to the purchase of a motor vehicle that was even registered by way of a civilian number plate. The Auditor-General was taking issue with that. The particulars and numbers are given out in the audit report.

Lastly, at page 41, the Auditor-General takes issue with the procurement of fuel and in particular the fact that despite there being expended monies to the tune of Kshs819,000 no store records were maintained. That means that nobody can know whether this fuel was bought, how it was ever used or whether it was used for county or private purposes. Nobody can know because there were no store records to show the inflow and outflow of this fuel. This is clear contravention of Section 18(2) of the Government financial regulations and procedures.

We submit that all this will not have happened had there been in place a tender committee properly constituted. It would have been seized of all these procurements, taken out proper procedures and the loss visited upon the people and the county of Embu would have been averted from the outset.

**The Chairperson** (Sen. (Dr.) Khalwale): Order. I think because this is very critical, I want to take you back to page 37(b) of the Auditor-General's Report. Are you there?

**Mr. Charles Njenga:** I am there, Mr. Chairman, Sir.

**The Chairperson** (Sen. (Dr.) Khalwale): This is on award of the contract. You have not said it, but I would like you to confirm that it is also part of your evidence, the finding of the Auditor on part (b) that the tender was irregularly awarded to the contractor since the

other six competing firms as per the evaluation minute were not in the list of registered contractors provided by the Ministry of Public Works. Is that part of your evidence?

**Mr. Charles Njenga:** Yes, indeed. I thought I mentioned it.

**The Chairperson** (Sen. (Dr.) Khalwale): You did not.

**Mr. Charles Njenga:** Sorry for that. That is part of our evidence.

**The Chairperson** (Sen. (Dr.) Khalwale): I want to take you to page 41 where in the same report under (ii) at the top, the Auditor is saying:-

“In the circumstances stated above, therefore, ownership of the vehicle could not be confirmed.”

Is that also part of your evidence? We want to be clear.

**Mr. Charles Njenga:** Mr. Chairman, Sir, yes, indeed, that is the conclusion from the inquiry on purchase of a motor vehicle. That is, indeed, part of our evidence.

**The Chairperson** (Sen. (Dr.) Khalwale): Thank you.

**Mr. Charles Njenga:** Thank you, Mr. Chairman, Sir, for that guidance.

Mr. Chairman, Sir, from this clear and well documented evidence, it will be safe to say that the content of the allegations made against the Governor and as contained in the resolutions which were brought before the Senate have been substantiated.

With regard to the procurement of maize seeds, I am taking the first and second particulars of violations together because this regards the Public Finance Management Act, I have not referred to the page yet.

With regard to the procurement of maize, I wish to start with a report marked as CAE No.7. It is a report of a Joint Committee of Agriculture, Livestock, Fisheries, Co-operatives and Committee on Public Accounts and Investments on maize seeds procurement by the County Executive. Attached or annexed to that particular report is a letter dated 14<sup>th</sup> November, 2013 written annexure 2 on top. It is a letter written to the Clerk of the County Assembly of Embu. After the report, there is annexure 1 which is a letter dated 25<sup>th</sup> October. There is another annexure 1, which has a number 38 in circle. There is also a document written comparison schedule. That is all annexed to CAE No.7.

Lastly, there is a letter dated 14<sup>th</sup> November, 2013 addressed to the Clerk of the County Assembly of Embu written on top as annexure two.

This is a letter written by the County Executive Committee member in that specific docket that is, Agriculture, Livestock, Fisheries and Co-operative Development and

addressed to the County Assembly of Embu. It is in regard to Seed Maize Distribution and Germination Report for Embu East and Embu West.

It forwards a field research on maize seeds distributed to farmers and a report on the same as requested by the Assembly. In that seed report, one of the headings, that is on the fourth page, the one written "Field Survey on Seed Germination."--- Mine does not have a number I think they were paginated later.

On that, I wish to refer the Committee – these are farmers sampled throughout the county. At the far end corner is given a ratio or a percentage of germination of these seeds. You will see in respect to number one to nine, only 10 per cent of the seeds supplied germinated. Number ten is zero per cent. Number 11 is 10 per cent. Then there is 5 per cent, 40 per cent and 50 per cent. There is another list that extends to the following page. These are basically giving an average germination rate of these seeds at about 10 per cent.

On the observations which are in the follow up of that page, this is a field research report. It says there is a maize variety called *Nduma 43* which was issued at Mufu and farmers were not complaining about it--- I do not know if the Chair is following me.

Then DK8031 had either not germinated or is germinating very poorly, less than 20 per cent of what was planted.

Observation No. 3 says that DK8031 which has already germinated has very weak shoots.

Those are observations of a field research on maize.

The question that immediately springs for evaluation upon this report is: where did this DK8031 come from? How did it come to be planted by farmers in Embu County? I propose and proceed to show, back to the report that is here in No.7, the first annexure, written in the letterhead of the office of Governor, Embu County Government. Just go through the report, this is the first annexure after the signatures to the report. There is a letter dated 25<sup>th</sup> October, 2013.

*(Loud consultations)*

Mr. Chairman, Sir, do I proceed?

**The Chairperson** (Sen. (Dr.) Khalwale): Proceed.

**Mr. Charles Njenga:** Very well. This is a letter, first of all, written on the letterhead of the Office of the Governor, Embu County Government dated 25<sup>th</sup> October, 2013, and it is requesting or directing for the purchase of seeds; and it reads – it is a very brief letter:-

“As a matter of urgency, please arrange to purchase seeds as below.

We have no problem with green grams and cowpeas; it is the maize that has brought us here today. The maize requested for here is DK8031; the same maize variety that, as you have seen from the field research, failed to germinate. It has been requested for by the County Secretary (CS), Embu County.

Now, back to the field research findings; the one that I had referred the Committee earlier to and the last appendix; that is Appendix 1 where it is headlined “Seed Requisition by Variety” from the place where we were reading about the observations. Are we together?

This is kind of the procurement plan. This is the maize that the specific Ministry within Embu County had proposed to be bought for the farmers in Embu County. The writings are not very clear. On the table, there where it is written “Seed procurement plan request for short rains 2013,” if you go down to the type of seed to the last one, that is maize, the variety that the Ministry had requested for is KDV1 or KDV6. The quantity is 8 tonnes and there is an amount given there. So, the question that this Committee has to ask itself is; where then did this requisition under the hand and the letterhead of the Governor by the County Secretary requesting for a different variety of maize, first of all, and double the quantity; what informed this purchase? What informed this requisition? Why were we buying 8031DK that does not grow in Embu and did not germinate? Why are we giving this maize to farmers to plant? I may know very well from a technical report that it cannot support a harvest. That is a question that only the Governor can answer and must answer.

The other question that comes for evaluation is---

**The Chairperson** (Sen. (Dr) Khalwale): Order! We are concentrating; so far so good, but I just wanted you to know that you have done 55 minutes.

**Mr. Charles Njenga:** Mr. Chairman, Sir, you will also appreciate that---

**The Chairperson** (Sen. (Dr) Khalwale): We intercepted?

**Mr. Charles Njenga:** Mr. Chairman, Sir, because of the documents, I do not take offence or take issue with the interjections, but it is a necessary result of the manner in which the documents were---

**The Chairperson** (Sen. (Dr) Khalwale): How many more minutes would you like to go on?

**Mr. Charles Njenga:** Well---

**The Chairperson** (Sen. (Dr) Khalwale): Say the time you need so that we---

**Mr. Charles Njenga:** Let me just check. I think I will need another 55 minutes.

**The Chairperson** (Sen. (Dr) Khalwale): How much time?

**Mr. Charles Njenga:** Another 55 minutes.

**The Chairperson** (Sen. (Dr) Khalwale): So, you are looking for two hours in total?

Yes, proceed, because this is why we came.

**Sen. Orenge:** Mr. Chairman, Sir, just for completeness, I am looking at a document here on Page 171; it is a letter that the County Assembly Clerk--- And it is signed by Dr. Patricio Njiru. She signs as a member of the County Executive Committee (CEC) Member, which means she is a member of the Cabinet. Would it be true that this research is carried out under the hand of this particular officer; the research that you have been alluding to about seed maize distribution and germination report for Embu East and Embu West?

**Mr. Charles Njenga:** Yes, it was carried out by a member of the Cabinet. In fact, he owns the report; he says:

“Having carried out a field research on maize seeds distributed to farmers, I hereby submit a report on the subject as you had requested.”

The Committee had summoned this particular person here and requested him to answer the issue that had arisen from the farmers; and he dutifully did a research and returned a report.

**Sen. Orenge:** And I can see there is a copy of that report and the letter to the Governor.

**Mr. Charles Njenga:** Yes; there is a copy to the Governor.

**The Vice Chairperson** (Sen. Murkomen): Mr. Chairman, Sir, I know that, as a lawyer, I should be one of the most cautious persons when it comes to leading or aiding any side of the group in the County Assembly. But I think something very instructive in that letter is in the second page, called the introduction in the same letter; the one for Patricio Njiru. Because he disowns the--- I think he says something to do with:-

“Embu County receives 16 tonnes packaging pails of this or that--- The seeds were of maize variety of DK8031; the seeds were delivered directly to main distribution centres in the various places. The CEC Member for Agriculture and the County Director for Agriculture were not involved; neither was it communicated to them about the distribution plan. The sub County Agriculture Officer was dealing directly with the CS’s office on the issue; we cannot ascertain how the seeds were procured, neither who inspected the seeds upon delivery. The information can be acquired from the procurement officer. The official launch of the seed distribution was presided over by the Governor;”

So, Mr. Chairman Sir, I think there is a direct disownment by the CEC. I was just pointing that issue out to the hon. Members.

**The Chairperson** (Sen. (Dr) Khalwale): Yes, counsel? He was pointing out something for you which you had not touched on. Are you okay with that?

**Mr. Charles Njenga**: Yes, Mr. Chairman, Sir; I appreciate. All I can say is that we are summarizing and we availed this report knowing all too well that we may not point out all the issues from where we stand. But we shall invite your evaluation on all the contents of the reports and the letters we are referring to.

Now, allow me, Mr. Chairman, Sir, to now refer you to this report returned by the Committee that was investigating the matter. It is a Committee of the County Assembly of Embu, seized of the matter directed by the Assembly upon an inquiry by one of the Members. We note that in the body of the report that this Committee summoned the CS, and that is at Annexure 3. The same report after the research document, there is a letter written "Annexure 3" on top; County Assembly of Embu.

**The Chairperson** (Sen. (Dr) Khalwale): Hon. Members, it is at page 180.

**Mr. Charles Njenga**: Mr. Chairman, Sir, I did not have the benefit of the page numbers, but I am sure you are able to follow.

Very well; now, this was a summons to the CS to appear before this Committee to explain these issues that arose about and around the maize. What is important to note from the report is that the CS refused and failed to appear.

**The Chairperson** (Sen. (Dr) Khalwale): She did not appear?

**Mr. Charles Njenga**: Mr. Chairman, Sir, that is recorded in the body of the report and that is at page 12 of the report; that is the report marked "CAE No.7." You will see a page headlined---

**The Vice Chairperson** (Sen. Murkomen): Sorry; which secretary did not appear?

**Mr. Charles Njenga**: The County Secretary (CS) who requested for this maize and who signed the letter that we have seen directing for the purchase of the maize.

**The Vice Chairperson** (Sen. Murkomen): I thought the letter is to the--- Unless I lost something, Annex 3 is the CEC Finance; it is not the CSs letter.

**Mr. Charles Njenga**: I am sorry; that is---

**Mr. Wilfred Nyamu**: I am sorry to interrupt; we did not want to interrupt, but this is rather obvious---

**The Chairperson** (Sen. (Dr) Khalwale): If you have something to say, counsel, talk through the Chairman.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we find it very difficult sometimes because we were restrained from interjecting; and sometimes there are situations that warrant interjections. For example, this letter was going to pass and simply because I was told not to interject, I was quiet. But I have been rescued by the hon. Member.

**The Chairperson** (Sen. (Dr) Khalwale): I suspect that all along, the reason why you have been quiet is because we have been rescuing you. So, you are okay; you can see how impartial we are!

*(Laughter)*

Go on.

**Mr. Wilfred Nyamu:** So, maybe you may need to go back to the right letter.

**The Vice Chairperson** (Sen. Murkomen): I was just saying that this letter is to Finance and Planning, and not to the CS.

**Mr. Charles Njenga:** I think it should be the next letter. I am sorry for that. Just give me a minute; let me get the right letter, because it is a very important letter that we need to refer to.

**The Chairperson** (Sen. (Dr) Khalwale): Let Annex 7 help you; look at Annex 7 in front.

**Mr. Charles Njenga:** Yes; it is Annex 7. Thank you, Mr. Chairman, Sir; I knew it was here.

Annex 7 is a letter written by the CS. My colleague will get me the reference so that we are able to proceed.

**The Chairperson** (Sen. (Dr) Khalwale): But counsel, why I was suggesting that it could help you is because in Paragraph one, she admits that she was summoned. Are you seeing it? It says: "I am in receipt of your summons dated 3<sup>rd</sup> of January, 2014."

She has admitted and you are looking for that letter. So, she---

**Mr. Charles Njenga:** Mr. Chairman, Sir, I can refer to it through the reference in her response; the facts being that she was, on the 3<sup>rd</sup> of January, 2013, invited to appear before the Joint Committee on Agriculture, Fisheries, Livestock and also Committee on Public Investments and Accounts. She did not appear; that is the long and short of this letter. This letter is dated on the date when the proceedings of the Committee were in process. She wrote the letter on the date when the Committee was sitting, which is as referred to in the body of this report at page 12. The Committee had already noted that

the CS, upon being summoned by the Committee, snubbed the summons and instead wrote a letter highlighted as Annexure 7. She chose not to appear and, instead, wrote this letter, which does not in any way explain the matters that were in consideration before the Committee.

So, material to note in this report by the Joint Committee---

**The Vice Chairperson** (Sen. Murkomen): But even then, just because we want to know the truth, under Annex 7, she is requesting for 14 days; right? I think so; she is requesting for 14 days:-

“Within which my office will communicate the sequence of presentation within and without departments of the civil service as listed herein--- Allow my office time to conduct the assortment of the stakeholders and to do itinerary of presentation by the aforementioned and communicate accordingly---”

That was on the 6<sup>th</sup> of January. I just want to mention this for the refreshment of our minds. When did the impeachment proceedings take place? Was it on the 6<sup>th</sup>?

**Mr. Charles Njenga:** Mr. Chairman, Sir, it was on the 6<sup>th</sup> that the Motion was tabled.

**The Vice Chairperson** (Sen. Murkomen): So, if the 14 days had been granted, the impeachment would have began--- Okay, the time she would have been able to answer was on the 20<sup>th</sup>; did the Committee consider anything about whether they acceded to her request or declined, and reasons behind it?

**Mr. Charles Njenga:** Mr. Chairman, Sir, this letter demonstrates that, first of all, she did not appear to make that particular request. A letter was rendered to the Committee saying that “I need 14 days” without clear justification. I would imagine that even if I am summoned today by a Committee of the Senate – and the Constitution is clear on the powers of even the Committees of the County Assembly to summon witnesses – at the very least, I would appear and seek for more time and give justification. But from the report, there are references to documents that were now provided by the CEC Agriculture and CEC Finance, who appeared. It is these documents that now informed the basis of this report.

In the matter of her appearance, which is now not in this record; although there are references to the proceedings, she indeed proceeded to the High Court to file a Motion for judicial review, challenging the proceedings of the Committee on the basis that she was not accorded enough time. Those proceedings are still pending at the High Court. So, I do not wish to comment---

**The Chairperson** (Sen. (Dr) Khalwale): At what stage did she go to the High Court; was it after she wrote a letter on 6<sup>th</sup> asking for 14 days?

**Mr. Charles Njenga:** Mr. Chairman, Sir, it was I think on the 20<sup>th</sup> of January; I am not sure.

It was on the 16<sup>th</sup> of January; that is when the Motion was filed in the High Court.

**The Chairperson** (Sen. (Dr) Khalwale): Okay.

**Mr. Charles Njenga:** So, Mr. Chairman, Sir, there were recommendations made by the Committee and later adopted by the County Assembly; and these recommendations did not imply or impute any guilt on the part of the---(*Technical Hitch*).

This recommendation did not imply or impute any guilt on the part of the county secretary. In fact, the first recommendation was that the Ethics and Anti-Corruption Commission--- I am reading the body of the report, page 17 of CAE No.7. At page 17, we have recommendations.

Recommendation No.3 was that the Ethics and Anti-Corruption Commission (EACC) should undertake investigation and other actions that will aid in the recovery of public funds and that until cleared by the EACC on these specific matters, the county secretary in her capacity as the authorizing officer and the entire tender committee should step aside from the performance of the duties and discharge of their powers in their respective public offices with immediate effect. This is the recommendation that was now forwarded to the Governor and also the EACC.

It is referred to in the affidavit sworn by the Governor, that is, CAE No.8A. It is one of the last documents. The context of this affidavit should be clearly understood. This is an affidavit filed in response to an application by the county secretary, seeking to stay the recommendations of the Committee, with specific regard to the investigations proposed with the EACC. The long and short of this affidavit is that the Governor proceeds to exonerate the county secretary. In fact, he says that it is not her who was in charge of the accounting procedures of the county at the time. I am looking at paragraphs 7 and 8. Paragraph 8 says that the accounting officers in respect of the department of agriculture, infrastructure and sports are the officers appointed under Section 148 to head those entities.

**The Chairperson** (Sen. (Dr.) Khalwale): Read out paragraph 6 so that it goes on the HANSARD.

**Mr. Charles Njenga:** Paragraph 6 reads:-

“Legally, the *ex parte* applicant is not in charge of procurement as per the provisions of the Public Procurement and Disposal Act, Section 9, as it is the responsibility of the user departments to undertake conformity assessment of supplied goods, works and services.”

In respect to paragraph 9 where the Governor, in his affidavit, was ascribing liability or any responsibility to the concerned chief officers, this Committee should note that the letter done by the county secretary was done on 25<sup>th</sup> October, 2013. It is her letter. As at 25<sup>th</sup> October, 2013, the chief officers responsible for agriculture and sports had not even been appointed. So, they cannot have been responsible for matters that arose prior to their appointment. The evidence of their appointment and the dates for their appointment--- There is a supplementary list of documents which we have filed. It was filed on 9<sup>th</sup> February, under the firm of Muchoki, Kang'ata, Njenga and Company Advocates.

Documents Nos.2 and 3--- I am now referring to a supplementary list of documents. It is a white document, which is not bound, for the county assembly, filed by Muchoki, Kang'ata, Njenga and Company Advocates. It has a list of six documents. My reference in this regard is to documents that are listed as Nos.2 and 3. Document No.2 flows from page 3. That bundle is---

**The Chairperson** (Sen. (Dr.) Khalwale): Wait a minute! I want Members to have access to those copies. Do you have them now?

**Mr. Charles Njenga:** It is paginated in red. I am sure that yours is a photocopy. So, it may be black. It is written: "Supplementary list of documents."

**Sen. Sijeny:** Is your document a further supplementary?

**Mr. Charles Njenga:** Yes, it is a supplementary list of documents. It is page 43 going to--

**Sen. Sijeny:** What is the document?

**Mr. Charles Njenga:** It is a report on the vetting of chief officer, agriculture portfolio.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we seem not to have that particular document. It has not been served upon us.

**The Chairperson** (Sen. (Dr.) Khalwale): You will be given a copy.

**Mr. Wilfred Nyamu:** They seem to have filed a supplementary one without leave.

**The Chairperson** (Sen. (Dr.) Khalwale): Counsel, you have a valid concern. What are you saying at the back?

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, we are concerned that there could be one filed without leave of this Committee. We were unaware of a supplementary document from them.

**The Chairperson** (Sen. (Dr.) Khalwale): This one was received yesterday and we were given. So, it did not require the leave of this sitting.

**Mr. Wilfred Nyamu:** We pray that we be served forthwith, so that we follow the proceedings.

**The Chairperson** (Sen. (Dr.) Khalwale): If your complaint is that you do not have a copy, then we are directing that you be served with a copy. You will have plenty of time to look at it, because your matter is far away.

**Mr. Wilfred Nyamu:** Thank you.

*(Mr. Nyamu was given a copy of the document)*

Is it the same document that we have?

**Mr. Charles Njenga:** It is the same. Just go to page 54, up there – the handwritten pagination.

**The Chairperson** (Sen. (Dr.) Khalwale): Can we proceed?

**Mr. Charles Njenga:** What we have in that particular document is a report made by the relevant committee of the County Assembly on vetting of the officer proposed to take up the position of chief officer, agriculture portfolio. This was on 4<sup>th</sup> December, 2013 and it is duly signed by the chairman of that particular committee requesting the assembly to adopt the report recommending the appointment of Francis Nyaga Kathuri to the position of chief officer, agriculture. So, at the date when maize was bought, and we have seen and gone through the documentation showing that maize was actually bought in October-- The report by the CEC, agriculture, who is a member of the Cabinet of the County Government of Embu, in fact, details that this maize was distributed by the Governor himself on 1<sup>st</sup> November, 2013. It cannot, therefore, be the responsibility of a person and officer appointed after 4<sup>th</sup> December, to take liability for actions that happened in October and November. The deposition by the Governor in that affidavit is false. It cannot lie that the chief officer, who was not in place at the time, is now being told: “You are responsible before the facts.”

So, we urge this Committee, in considering all these documents, to find that even the very deposition under oath by the Governor, is misleading on the facts. That also raises integrity issues.

Now, I will go back to CAE (7). The recommendations were also made to the EACC to institute investigations in the matter. This is a constitutional organ mandated to undertake investigations of this character. I wish to refer the Committee to the affidavit of an investigator with this Commission. That affidavit appears at page 55 of the document that we were looking at – the one that has the reports. That is our supplementary list of documents. Maybe your paginations are different, but there is an affidavit by Japheth Mbaithalu, where he confirms that, indeed, the complaint and request for investigations was received by his office. He was saying that the EACC, as a constitutional body, would

evaluate all the documents and form an opinion as to whether there was complicity on those two investigations cited under paragraph 8.

Mr. Chairman, Sir, you will note that this is an affidavit filed in the same matter as the affidavit of the Governor; which I have referred to earlier. In that particular matter, the county secretary was seeking to stay even the investigations proposed to be undertaken by the EACC. So, the Governor had taken the position that even the EACC ought not to have been seized of this matter, in view of the clear recommendation for investigations by the County Assembly.

**The Vice-Chairperson** (Sen. Murkomen): Sorry, to be clear on that one. Where does the Governor come in here?

**Mr. Charles Njenga:** I am saying that this affidavit has to be looked at in the context of the other affidavit filed by the Governor. The affidavit by the Governor was filed in support of an application by the county secretary, against even the directions or recommendations made by the County Assembly to the EACC to investigate the matter. The Governor did not want even the EACC to investigate this matter and that is why the EACC, through its official – an investigator – was raising this matter and these issues before the court and saying: “We are a constitutional body; we shall investigate fairly. There is no reason to worry. As long as all the documents are presented and the county secretary has no questions to answer, then she should not be worried.”

Annexed to that affidavit, as Annexure J.B.3., is the letter that had now been written by the Clerk of the County Assembly of Embu, forwarding those recommendations. Material to note is that this letter is copied to the Governor of Embu County. So, he cannot say that he was not seized of these recommendations. He cannot say that he did not know that the Assembly had resolved that investigations should be undertaken on the maize issue and that the EACC should come in and investigate; and pending those investigations it would only be proper that the county secretary does step aside, to facilitate the investigations.

Mr. Chairman, Sir, may I kindly take a five minutes break, so that I catch my breath.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Members, it is quite understandable. The counsel has been on his feet for one hour and forty five minutes. So, we will break so that he has a cup of tea to replenish his glucose levels and resume thereafter.

**Mr. Charles Njenga:** Thank you, Mr. Chairman, Sir, for your kindness.

**The Vice-Chairperson** (Sen. Murkomen): How many more minutes will you need?

**Mr. Charles Njenga:** I think that I can now safely say that I will not need more than 30 minutes.

**The Chairperson** (Sen. (Dr.) Khalwale): In fact, you are at exactly 30 minutes to go.

**Mr. Charles Njenga:** I will keep my word and time.

**The Chairperson** (Sen. (Dr.) Khalwale): We will take a 15 minutes break and resume at 6.30 p.m.

*(The Committee adjourned temporarily at 6.15 p.m.)*

*(The Committee resumed at 6.45 p.m.)*

**The Chairperson** (Sen. (Dr.) Khalwale): Order! Distinguished Senators, Ladies and Gentlemen, we now want to go back to session. Please manage your phones. We want to re-invite the counsel for the County Assembly of Embu to resume from where he left. You have 30 minutes, so you are expected to end by 7.05 p.m.

**The Vice-Chairperson** (Sen. Murkomen): Chair, just for clarification sake. Does that mean there is still another time for the co-counsel?

**The Chairperson** (Sen. (Dr.) Khalwale): It is their time. They wanted one hour but we have given them an extra one hour. So, if one wants to donate some time to his colleague, he can do so but complete at 07.05 p.m.

**The Vice-Chairperson** (Sen. Murkomen): What was initially the plan?

**Mr. Charles Njenga:** Mr. Chairman, Sir, you will notice that the charges are about five, that is, the particular violations cited. I have taken out the first two. The last one is general or a summary of all the others. We have proposed with my colleague that he does take number three and four but by the very content of those particular violations and the particulars offered, he would not need anything more than 20 minutes. The main substantive allegations are as I have presented together with what I will finalize on.

**The Chairperson** (Sen. (Dr.) Khalwale): Are you confirming that you will finish by a quarter past seven?

**Mr. Charles Njenga:** On my part I will but I do not know about my colleague.

**The Chairperson** (Sen. (Dr.) Khalwale): Proceed.

**Mr. Charles Njenga:** I want to finalize on the issue of maize with reference to the same report that I had referred to quite extensively, that is, CAE7 and the annexures to that report. The last document I just wish to highlight on is Annexure 1. That is the document immediately following the letter signed by Lorna Margaret Kariuki, the County Secretary. There is a document written on top "Prices Comparison Schedule" which appears to be an extract of minutes of a committee discussing this particular procurement, that is, the procurement of maize. On the following page, the page following is headlined "Prices Comparison Schedule". This is all annexed to CAE7 on the main document. After that, there is a letter that is written Annexure 1 that I have referred to and I do not wish to go back to it. Then there is another document written Annexure 1, minute number

EBUCNT/M7/04 2013-2014, page 168 where the item is specified as procurement of maize seeds for distribution to farmers, Embu County and the department is specifically set out as County Secretary.

On the following page, there is a prices comparison schedule and I do not wish to make any remarks on that but on the following page, there is the document that is now signed by a chairman and a secretary which starts by saying “There being no other business, the meeting ended at 1.15 p.m.” that is a minute of people who were procuring this maize. What I want to point out to the Committee is the date. These are minutes developed and signed on 27<sup>th</sup> November, 2013 purporting to authorize procurement of maize seeds for distribution to Embu farmers, which maize had already been procured and distributed as confirmed by the county executive committee member in charge of agriculture. In fact, in the letter that we were referring to, he confirms, on the page that Sen. Murkomen referred to, that indeed the official launch of the seed distribution was presided over by the Governor of Embu County on Friday, 1<sup>st</sup> November, 2013 at Ogweri’s Chief Camp, Karurumo Polytechnic,

**The Chairperson** (Sen. (Dr.) Khalwale): Order. Counsel, can you start again?

**Mr. Charles Njenga:** Mr. Chairman, Sir, I am referring to the document annexed as Annexure 1. It is a minute headlined “EBUCNT/M7/04 2013 – 2014. The item is set out – Procurement of Maize Seeds for Distribution in Embu County, department – County Secretary.

I am now referring to show this Committee that this could not have been minutes representing any process that was applied to procure this maize. By the fact that this particular minute was signed on 27<sup>th</sup> November, 2013, there is a signature page signed by one Edwin James (there is a hard name there), Principal Finance Officer and two secretaries, Joshua K. Munyaka – Interim Head Supply Chain Management dated 27<sup>th</sup> November, 2013.

**Sen. (Prof.) Lesan:** We cannot follow these dates. Where are these dates?

**Mr. Charles Njenga:** I read that together with the letter by the county executive committee member in charge of agriculture. The letter is dated 14<sup>th</sup> November, 2013 with a report annexed to it. We had previously referred extensively to this report. I just wish to refer to it once again with regard to the date when this maize was distributed by the Governor, Embu Governor. He distributed the maize on 1<sup>st</sup> November, 2013 in person.

**The Chairperson** (Sen. (Dr.) Khalwale): Do you have access to the full minutes? Apparently, what you are showing us is when the minutes were approved, that is, proposed by Eric and seconded by the head of human resource management. Do you have a document showing when the meeting took place?

**Mr. Charles Njenga:** We can undertake to provide the whole document for the evaluation by the Committee.

**The Vice Chairperson** (Sen. Murkomen): Whose document is this?

**Mr. Charles Njenga:** This is a document in the office of the county secretary.

**The Vice Chairperson** (Sen. Murkomen): How will you undertake to confirm?

**Mr. Charles Njenga:** I will undertake to confirm whether my client has a copy of the full minutes.

**The Chairperson** (Sen. (Dr.) Khalwale): You have made a very significant remark, that this document is fraudulent because it is attempting to sanitize what had been distributed. So, for you to carry your claim, you must give us the date when that meeting took place. If that date then agrees with what you have assumed, then you would have made your point.

**Mr. Charles Njenga:** As my colleague finds me the date so that I save time so that I briefly finalize on the matter of procurement of works regarding Embu Stadium, I will confirm the actual date as my colleague checks the dates.

Mr. Chairman, Sir, the issue of the Embu Stadium arose in the County Assembly by way of a question and a committee was constituted by the Assembly to evaluate and investigate all matters arising in that respect. This report is marked CAE6. This is largely informed by the evidence of the county executive member for infrastructure, one Eng. David Gitonga, who appeared before it. It is well set out in the body of this particular report. He has further forwarded a report that is annexed to the Annexure CAE6, that is, Annexure No.2A. It is a letter to the Clerk of the Assembly. It falls immediately after the report. After the report, there are minutes of the joint committee and then there is a letter written and dated 3<sup>rd</sup> January, the heading of the reference is “Facelifting of Embu Municipal Stadium”.

With particular regard to my submissions, there is a report attached to that letter, where the county executive committee member on the second page of that report, Annexure, No.1 on procurement procedures, the CEC infrastructure confirms his position; he says; “My Ministry has no role in this process” He is talking about procurement “and was not involved at any stage. Hence, I am not in the right position to respond on this.” It confirms that there was a budgetary allocation of Kshs8 million and that a supplementary budget had been requested for; an addition of Kshs30 million and particulars given.

Mr. Chairman, Sir, in the report of the County Assembly and with regard to the procurement, no clear documentation was produced to show how the particular contractor who was awarded these works came to be awarded that particular contract. We have seen now, I am now summarizing, and allow me to refer to the minutes set out in the Governor’s document, page 3 to the extent that they make reference to the works at Embu Stadium.

The third minute after matters arising, you can see that this particular tender was designated as a restricted tender. In law, restricted tendering is an alternative form and mode of procurement that is applied upon satisfaction of clear parameters that are set out in the Public Procurement and Disposal Act. Restricted tendering is provided for under Section 73 of the Public Procurement and Disposal Act of 2005. It sets out in clear detail when and in what instances restricted tendering may be applied. This is in recognition of the fact that the best mode of procurement for all public entities is an open tendering process, an open competitive tendering process. So, to the extent that the county executive Embu chose to apply a budget of Kshs8 million, using a restricted tender, then it behooves them to explain to the County Assembly, to the Committee and to the public as to why and how these particular works fell under the parameters that could have entitled them to the restricted tender for these works.

In our submission, there was no reason, either given in the minutes or disclosed in these documents that would have necessitated a restricted tendering process to be applied in regard to the works of face-lifting the Embu County Moi Stadium. Allow me to refer to sub-section A:

If the following conditions are satisfied:-

1. Competition for contract because of the complex and specialized nature of the goods, works or services.
2. The time required to examine and evaluate large numbers of tenders would be disproportionate.
3. There are only few known suppliers of the goods, works and services.

They were only these three conditions. It is only under these three instances that a public entity can procure for goods and services by way of a restricted tender. So, the question is; under which of these three did the works proposed to be done in Embu County fall so as to require there to be a restricted tender? That is the question that the Governor must answer because by the very nature of the process applied, then it creates room for doubt to be planted and for there to be doubt on the integrity of the entire process. These are normal usual ordinary construction works. They were not putting up a complex like KICC. They were simply face lifting by putting, for example, a corridor in order, planting grass, *et cetera*.

Why would a procuring entity determine that that did not deserve to be openly and competitively sourced? What was the urgency that would have made the time and cost for open tendering become disproportionate to the value of Kshs8 million? It is not a specialized art that only a few known people can do. In any event, it is incumbent upon a procuring entity and the tender committee involved to explain within the minutes as to how this mode of procurement was arrived at. There should be a minute if this was indeed a transparent process.

There should be a minute specifying the particular justifications given as to why this particular contract was not open to competition by all persons who would have been interested to do that.

That is why the Committee again invited the County Secretary on 3<sup>rd</sup> January to appear before it to explain and her response is annexed to annexure CEAS/6 as annexure 2(d). It is a letter by the Clerk of the Assembly dated 3<sup>rd</sup> January, 2014. It is a summons made to the County Secretary to appear. Again she did not appear. A similar letter to the earlier one initially evaluated. This one dated 6<sup>th</sup> January was presented to the Committee and where the County Secretary was asking for 21 working days extension of time within which to avail certain documents or to make any response to the summons. That was noted in the committee findings and there were clear recommendations made; that in view of all these issues arising, then this matter should be investigated by the Ethics and Anti-Corruption Commission (EACC), and that that report be made available to the Assembly. That is the report of investigations proposed to be taken up by the EACC. Indeed, the EACC took up the matter and annexed to the affidavit that I had earlier referred the Committee to.

In the County Assemblies' supplementary list of documents, the affidavit of the investigator from the EACC confirms indeed that he was advised of the matter and annexure JB4 is a letter from the EACC to the Assembly where the Commission is requesting specifically for certain documents. They are numbered (i) to (xv). That is the letter dated 9<sup>th</sup> January, 2014. It is an annexure to the affidavit by Japheth Mbaithalu requiring the County Secretary to produce for its evaluation these 15 documents.

Mr. Chairman, Sir, before you in the bundles that have been submitted by the Governor and by all the parties, I can confirm to you that nowhere have these documents been annexed even in the face of a specific request by a commission established by the Constitution. These documents have not been forwarded. If indeed they were forwarded to the EACC, they have not been presented to this Committee. In our submission, it is because they do not exist and for that reason, the very omission of these documents; clear documents that apply to any tender, certified copies of advertisement, blank tendering documents, tender buying register, copies of bid bonds, tender opening minutes and certified copies of adjudication minutes. This is the list that we would have expected to see presented by the Governor, but it is not there.

In my submission, it is because those documents are not available. Accordingly, and in my final reference to any document in my presentation, we urge this Committee to find that the procurement of the works relating to Embu Stadium was not undertaken in the manner anticipated in the law. Kshs8 million as confirmed by the committee member concerned was allocated and budgeted for and spent without clear documentation showing how the tendering was done. This precipitated the investigation and inquiry by the committee of the County Assembly and further informed largely the Motion that has brought us to where we are.

The final document on the same that I wish to refer to before I sit is on the Governor's bundle of documents at page 358. It is a letter dated 3<sup>rd</sup> February, 2014. This was last week. That is the big bulky document submitted by the Governor. It is a letter dated 3<sup>rd</sup> February, 2014. The reference is "Construction of Embu Stadium". I think it is on page 360. In my bundle it is 358 but I think in the other bundles it is 360. It is from the Embu County Works officer, a Mr. Ndaire, Ministry of Lands, Housing, Urban Development. I just want to invite the Committee to look at the entirety of that letter. It is sort of an audit. The last remarks before the signature confirms that indeed certain documents were given to the EACC which was investigating these matters and these include letters requesting for evaluation of the bids and an unsigned payment voucher without complete documentation.

These were part of the documents forwarded as found by the Ministry evaluating the project, that an unsigned complete voucher without complete documentation had been forwarded for payment and that is why the EACC had taken up these documents for further investigations. This indeed confirms that even in the eyes of the Ministry and in the consideration of the Ministry, there were questions arising as to how the funds and the budget allocated for this project was expended, as to how the tendering for the works was done and as to how the payments were made for the works that were done.

Mr. Chairman, Sir, I can see my time is up and I do not wish to dishonour my word. I think I have made my points and indeed referred the Committee to the documents which upon its full evaluation will be able to clearly see that under the watch of the Governor and his county executive committee which, under the law, he chairs - this is his cabinet appointed by him - indeed confirm that the procurement undertaken as better highlighted in the documents was not undertaken in the manner or to the standard anticipated for by the law. This is why the County Assembly of Embu in its capacity and mandate, as the people's representatives, took up the matter. It is not a light matter or a witch-hunt, as there are clear issues arising.

It made clear recommendations through its committees, which recommendations were forwarded for action to the office of the Governor, but no action was taken. Were the people of Embu supposed to sit back, relax and move on? Not indeed. It has reached a stage and a time in society and in particular respect and in our counties that members have to call matters into order and demand that the accountability that is provided for as an obligation by the law to the office of the Governor and to all county executive members be implemented. Where there is no accountability, then there is clear reason for the Motion to impeach the Governor.

This Motion and the resolutions have by way of these documents that have been made and presented before you, been clearly substantiated. We urge the Committee to find in consideration of the totality of these documents, that indeed, the Motion and the resolutions proposing the removal of the Governor of Embu by way of impeachment was not a frivolous Motion or a vexatious Motion. It had clear sufficient merit to warrant it to be adopted by this Committee and by the Senate of the Republic of Kenya which has the constitutional mandate to safeguard, to enforce and to fight for devolution.

I beg to rest.

**The Chairperson** (Sen. (Dr.) Khalwale): You are most welcome. Hon. Senators, I had requested that before you raise any issues for clarification we allow the other counsel to do his 20 minutes and then we will see if there are issues to be raised.

**Mr. George Ng'ang'a Mbugua:** I promise to take less than 20 minutes given that we have all had a long day. Thank you very much for your patience.

Mine is a very short brief. I will be prosecuting the count No.3. I will do that together with count No.4 because both of them are intertwined. On Count No.3 on charges of violation of the County Governments Act of 2012, I will address the issue of the creation of offices within the county without due regard to the requirement for approval by the County Assembly. In the bundle of documents that was forwarded to the Speaker of the Senate, I will refer hon. Senators to Annexure CEA4. This is the newspaper advertisement run on the 9<sup>th</sup> August 2013. The advertisement was run calling for applications to fill offices within the county. If you look at the entirety of that document, you will note that there are no less than 33 offices that were sought to be filled through that newspaper advertisement.

There are offices that are duly provided for by the County Governments Act 2012 under Section 52 to 55 of the Act for which the approval of the County Assembly is not necessary. Those positions are; under Section 50 of the County Government's Act, the Office of the Sub County Administrator which is created by the Statute. That is under Section 50. That is one of the positions that a recruitment was sought to be made. So, in that respect, the approval was not necessary.

Section 51 on the establishment of the Ward Administrator, we are submitting that, that did not require the approval of the County Assembly. Under Section 52, the Village Administrator as well did not require approval. Sections 53 up to 54, you will realise that from the vacancies that were available, we can only say that five did not require the approval of the County Assembly. That is from position one up to position No.5. However, for the other offices, Mr. Chairman and hon. Senators, regard to provisions of Section 62(2) of the County Governments Act ought to have been had in which the approval of the County Assembly should have been sought.

**The Chairperson** (Sen. (Dr.) Khalwale): For the sake of clarity and a clear record by the HANSARD, it will not take you five minutes to read the positions that require approval.

**Mr. George Ng'ang'a Mbugua:** Thank you for your guidance, Mr. Chairman. The ones that did not require approval are first the County Secretary. Actually, the County Secretary requires. There is the Chief Officer, the Sub County Administrator, Town Administrator and the Ward Administrator. Those are the ones provided for under the Statute which the Governor says did not require the approval of the County Assembly. That is the position they are talking about.

The position they are taking is this: That, these are offices that were supposed to be filled, duly provided for and under the provisions of Section 62(2) and - this is the way I understand it – if a Board intends to establish or abolish an office, it shall submit its proposal to the County Assembly. So, unless it is an office which is already created--- We are saying that as far as the position of the County Secretary is concerned, the Sub County Administrator positions are already created and in existence.

**The Chairperson** (Sen. (Dr.) Khalwale): You have already made that point. All I was saying is that you should read the list of those positions that required approval from the County Assembly; approval which the Governor did not seek.

**Mr. George Ng'ang'a Mbugua:** Position number 6 is that of the Office of the County Information Officer; position No.7 of the Director of Governor's Press Service; Head of Budget and Expenditure which is position 8; position No.9 is Head of County Procurement and Supply Chain Management Office; position 10, Head of County Revenue Officer; position 11 is the Principal Legal Officer; Principal Information Officer; Deputy Principal Information Officer; County Principal Finance Officer; Deputy Principal Finance Officer; County Human Resource Officer; County ICT Manager; Deputy County ICT Manager; Principal Internal Auditor; Deputy Principal Internal Auditor; County Payroll Manager; Deputy Head County Payroll Manager; Sub County Revenue Officers; Clerical Officers; Messengers and Tea persons; Secretarial Personnel; Drivers; Head of County Fire Fighting Officers; Deputy Head County Fire Fighting Officers; Head of County Enforcement Officer; and, finally, Deputy Head County Enforcement Officer.

The case of the County Assembly is this: You seek to recruit to fill an office. Their case is that this is about appointments. However, you do not appoint to fill a non-existent office. To the extent that the approval of the County Assembly was not sought to create the offices that I have gone through, clearly, there was a violation of the law. That is Section 62(2) of the County Governments Act.

If there was any such evidence, I will invite you to look at the response by the Governor. There ought to have been evidence either by way of minutes or a Report of the County Assembly making a proposal to create those various offices. You will realise that there is no such evidence. The creation of these offices, this is the case of the County Assembly, is that it impacts on use of county resources. These are people that were being recruited to be paid with resources that belong to the public. We are submitting that where you seek to create offices without the oversight approval or the approval of the County Assembly, then we cannot say that there is prudent and accountable use of public resources within the county.

Under Section 30(3)(a) of the County Governments Act, the Governor is supposed to provide leadership and he is the Chief Executive of the County. These are matters touching on exercise of Executive Authority and it cannot be sufficient for the Governor to allege or state that these are matters that are within the purview of the County Public

Service Board. Right from the time that the County Public Service Board is created, persons are nominated by the Governor with the approval of the County Assembly. So, he is involved in the constitution of the County Public Service Board. He cannot then say that there has been non-compliance with the law and say; I am sorry but that is not my department. That will not be demonstrable of leadership and to the extent that he failed to do that, we are saying that the Governor is culpable. By complicity, he allowed creation of offices unlawfully and without due regard to the law.

I now want to marry this with the issue of the County Secretary. Perhaps before I go there, I wish to take two minutes on the response given by the Governor at page 5 with respect to the allegation of creation of those particular offices.

Mr. Chairman, if you look at response No.3(1) at page 5, this is what he says. This is page 5 of the Governor's response. It is paginated by hand. I am not sure we are looking at the same page. It is paginated page 5 on my copy.

This is the response by the Governor on the Violation to the County Governments Act. I want to highlight the response.

With response to No.1, the Governor says that the County Assembly only has power to approve establishment or abolition of offices and not appointments. This is the question that we pose to this honourable Committee. When you seek to recruit, will you be seeking to recruit non-existent offices? Certainly not! You are tacitly saying that you have created that office that you are seeking to recruit and fill.

If you look at response II, he says, specifically in respect to advertisement Ref. CAE 4 in the County Assembly's bundle, the Governor says in respect to that annexure;

"It is important to note that the positions were established through legislation."  
So, he is telling us that all these positions were created on legislation.

**Mr. Wilfred Nyamu:** On a point of order, hon. Chairperson, Sir. There is a document that came together with the supplementary documents which my learned friend does not seem to be using. I had indicated earlier, when I made my application, that there was a document that was circulated but he deliberately chooses not to use it but to use the document he wants to use.

**The Chairperson** (Sen. (Dr.) Khalwale): In the process of that, what do you fear he is breaching?

**Mr. Wilfred Nyamu:** Mr. Chairman, I had indicated earlier on that the document that was brought to the House was compiled in a haste to beat the deadline. Therefore, we decided to bring a better refined document which has been supplied to all parties, including himself. So, that would be prejudicial to us if used a document that we have already replaced.

**The Chairperson** (Sen. (Dr.) Khalwale): Counsel, you did not withdraw this document. You only brought an additional document. Therefore, your colleague is perfectly in order to refer to any of them. You did not withdraw it.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, if we move that way, we are likely to get into a state of contradiction and all that.

**The Vice Chairperson** (Sen. Murkomen): Why can you not take us to that specific page of that supplementary document that contradicts this one, we take note of it as counsel proceeds? Even you requested earlier to have additional information; you did not say that it would lead to recanting of the information in the earlier documents. Assuming that is the case, why can you not draw our attention to a particular page in the other document, then you allow the counsel, George, to continue.

While admitting the other document, Mr. Chairman, we did not withdraw this bundle. Assuming that this document will amend some of the provisions on the other one, draw our attention on the relevant page and allow the counsel to continue.

**Mr. Wilfred Nyamu:** Mr. Chairman, Sir, I draw the Committee's attention to page 6 of the other document where there is the violation of the County Governments Act. That is where it was addressed. This is on page 6, 7 all through.

**The Chairperson** (Sen. (Dr.) Khalwale): Counsel for the County Assembly, if you could go back to the podium. Counsel for the Governor, you have to remain organized. As far as we are concerned – it is on HANSARD – you never applied to withdraw the original document that you filed yesterday. You only made an addition and we have no problem with that. So, for that reason, counsel for the County Assembly withdrew for 45 minutes to study the new document. Therefore, he is in a position to refer to both documents interchangeably.

He will continue doing that. It is only when your turn comes that you will probably speak to what you think he has done unfairly. He may have a chance to speak to it again in case you have misquoted him. So, let him finish his time.

**The Vice Chairperson** (Sen. Murkomen): In any case, the document you have referred us to, the 3(2) reads the same. You will help us later.

**The Chairperson** (Sen. (Dr.) Khalwale): Let us remain organized. Counsel for the County Assembly, could you continue from where you were stopped?

**Mr. George Ng'ang'a Mbugua:** Thank you very much, Mr. Chairman and hon. Senators. I was at the point where the justification for what was done with regard to the filling of these offices under No. II is where the Governor seeks to justify the action taken by saying; I will quote the response verbatim.

“That specifically, in respect to the advertisement, Ref.CAE 5 on 9<sup>th</sup> August, 2013, it is important to note that the positions were established through legislation. Sections 50 to 55 of the County Governments Act establish the said positions”. In the fullness of time, hon. Senators, you will - I am certain – look at sections 50 to 55 and see the only offices that have been created by the Statute. If the Governor seeks to validate the action taken by saying that all those offices have been created, I am sure that in the fullness of time, you will establish where the truth lies.

**The Chairperson** (Sen. (Dr.) Khalwale): It is, therefore, your evidence that Sections 50 to 55 establish the five and not the entire 33?

**Mr. George Ng’ang’a Mbugua:** Yes.

**The Chairperson** (Sen. (Dr.) Khalwale): Then, you better make it clear so that we do not spend too much time.

**Mr. George Ng’ang’a Mbugua:** Yes, that is the submission I am making. It only provides for the five that are enumerated and not the entire 33 offices that were sought to be filled in that advertisement.

**The Chairperson** (Sen. (Dr.) Khalwale): Okay.

**Mr. George Ng’ang’a Mbugua:** Mr. Chairman, Sir, No.IV, it has been averred by the Governor that the allegations we have enumerated on the various breaches regarding the unlawful creation of offices does not amount to a ground for impeaching a Governor. That is under No.IV.

I will invite you to look at the foundation for the removal of the Governor enshrined under Article 181(1)(a).

181(1)(a) “A county governor may be removed from office on any of the following grounds-“

If we can establish only one ground, then that would form a basis for removal and that is; “(a) gross violation of this Constitution or any other law.”

The County Governments Act falls squarely within the definition of any other law. So, if we can demonstrate that there has been a breach of one section of any other law that provides for a basis for removal of the Governor - Finally, before I wind up---

**The Vice Chairperson** (Sen. Murkomen): Before you wind up, you need to read the section that the Governor has provided in full. I will be happy to hear from you what the link is.

The Governor says, not only has there been no wrong doing proven, one must state that the appointments and the advertisements are a function of the County Public Service

Board and not a function carried out by the Governor as he is not personally responsible. No wrong doing has been proved.

**Mr. George Ng'anga Mbugua:** Thank you, hon. Senator. I will respond to that.

First, using what the Governor has said regarding the executive function, if you look at (i), he admits that this filling of offices is an executive function. Appointments for positions in the County Executive is clearly an executive function. Who heads the Executive of the county? It is the Governor.

Advertisements and appointments for positions in the County Executive is clearly an Executive function implemented by the County Public Service Board in liaison with the county chief officers as per Section 63(2) of the County Governments Act. The only role played by the County Assembly as per Section 62 of the County Governments Act is to approve the establishment or abolition of offices and not appointments. I had addressed that by saying that the recruitment was meant to fill offices so that you, first of all, create an office before you seek to recruit.

In response to what my learned friend, the hon. Senator, has remarked, this is how I wanted to tie my argument. That on one hand, he concedes that it is an executive function. He is the head of the Executive in the county. Clearly, under the responsibility of the Governor, under Section 30 (3)(f) of the County Governments Act provides that:

“(3) In performing the functions under subsection (2), the Governor shall:-  
(f) be accountable for the management and use of the county resources.”

The submission of the County Assembly is that the creation of these offices and the appointments that were made, were for persons that were to be remunerated through resources that he is enjoined to ensure that they are accountably and prudently used so that if there is a requirement by statute that before he does any of that, he seeks the approval of another organ. He needs to seek that approval first before he seeks to fill. That is the only way that then the requirement for him to provide leadership will fall in place. He cannot then argue that: “No, it is the role of another body.” So, if he sees the County Public Service Board or the County Secretary breaching----

This is even more fundamental because if you look at the resolution that was made by the County Assembly asking the County Secretary to step aside, he was being asked: “Suspend this officer so that investigations can be carried out.” So, he is enjoined to demonstrate leadership by taking appropriate action. If he says: “I did not do it”. What action did he take especially in light of clear resolutions coming from the County Assembly to the directly culpable officer for him to take action? He did not. What he sought to do is to file an affidavit in court to support the case of an officer against whom allegations were made. The submission of the County Assembly is this, that, in fact, when those allegations were made against the County Secretary, if he was beyond reproach, he should have taken a neutral position. It is not the business of the Governor to support the County Secretary in a matter facing the County Secretary directly. But when

he went into the arena of supporting the case that was filed by the County Secretary to challenge the resolution by the County Assembly asking her to step aside, then clearly, you are seeing complicity here. This is not just an innocent bystander. We are seeing a clear case of complicity.

Mr. Chairman, Sir, as I wind up, leadership falls in place. Accountability and the buck stops with the Governor. He cannot feign ignorance of these matters. We are saying that to the extent that he did not take action, he must bear responsibility as the executive head of the county.

Mr. Chairman, Sir, unless there is any clarification that may be coming from the hon. Members, I wish to rest the case of the County Assembly on those two counts.

**The Chairperson** (Sen. (Dr.) Khalwale): Hon. Senators, we have now reached a point where all of us will have an opportunity to seek clarifications. Allow me, since the counsel is still very fresh, on a very important point he has made.

It looks like your evidence on Article 181 might make a very serious influence on our decision during report writing and consideration. You have invited us to read Article 181 (a) of the Constitution. You have invited us to read that gross violation of this Constitution or any other law forms the basis of his removal.

So that I understand what you understand, can you tell me, assuming that the Governor violated the other law being the County Governments Act, what is it that the Governor did that made it gross violation?

**Mr. George Ngang'a Mbugua:** Mr. Chairman, Sir, what makes the violation gross is, the County Assembly, as we have seen, passed a resolution that there are instances of breach of procurement laws by this officer and they made a resolution that he should step aside, so that investigations could be carried out.

The Governor does not deny that he is made aware of that resolution. That letter is actually in his own hand. This is the letter of 16<sup>th</sup> January, 2014 so that I bring into perspective the issue of gross violation.

The letter says:-

“Following the recent resolution of the County Assembly of Embu that the above named steps aside from the office of the County Secretary and resolution for her to be investigated over the upgrading of Embu Stadium and procurement of maize seeds, this is to inform you that she stood down yesterday. “

That was on 16<sup>th</sup> January, 2014.

On 20<sup>th</sup> January, 2014, that officer rushed to court. The Governor now swears an affidavit and seeks to vindicate this very officer to whom action has been recommended. This

action has not been recommended by one individual, but by a resolution of the County Assembly.

Mr. Chairman, Sir, the gross violation part is this; that you are informed that this has happened, you do not allow for those investigations to happen, you do not even maintain a neutral position and say: "Hey, clear your name, madam officer, once you are cleared, you will take up your position." He descends into the arena of supporting this officer knowing that the actions that were taken by the County Assembly were in line with the mandate given to the County Assembly, a proper resolution taken and forwarded to him for action. When he writes this letter, he is not being candid. When he says an officer steps aside and then that officer rushes to court and he is now supporting that officer, essentially he is saying that officer should remain in office. Is that not gross violation? If it is not, what is it?

I must say that gross nature of this violation is subjective. I mean, it is relative. What I may consider gross may not be but any neutral observer would frown at this conduct.

If, Mr. Chairman, Sir, I persuade you to frown at the conduct of the Governor and then that conduct is gross.

**The Chairperson** (Sen. (Dr.) Khalwale): Very well. I will not declare whether I am persuaded or otherwise. Our responsibility is to hear the parties. We have heard you.

Before I hear the Vice Chairperson, let me, first, hear Sen. Lesuuda.

**Sen. Lesuuda:** Mr. Chairman, Sir, while this issue is still fresh, I would like the counsel to speak to the issue of the violation of the County Governments Act, 2012. He read (2) and there is (3) where the Governor says that the positions mentioned in the allegation were in existence and had been created by the Transition Authority and all they were doing is to fill those positions. Probably if you could speak to that.

**The Vice Chairperson** (Sen. Murkomen): Mr. Chairman, Sir, I am still struggling with the link between the Governor and the advertisements because the objective of the County Public Service Board was to be independent in the operations of their functions, even in creation of offices and so forth. The model here is just like the Public Service Commission. Even if a Minister at the national level was to create an office, it would only be a violation if he created that office and advertised it without the approval of the Public Service Commission. In this instance, the advertisement looks like it was that of the County Public Service Board which is meant to be independent, almost quasi independent institution when it comes to conducting its affairs. Is there anything that the County Assembly did to try to find out what was happening at the County Public Service Board and asked questions through the relevant Committee, so that we can find the interference of the County Secretary or Governor in the process and, therefore, it showed later that he had a hand in the matter? I think this is also a legal mixture of the law, things that we, as a Senate, will have to relook in the future. The Act says in Section 44 that the County Secretary is head of the County Public Service. But it does not follow to create a

position for the County Secretary in the County Public Service Board. It does not create any entry point for the Secretary.

I want you to help us create the link, either from the County Public Service Board and the County Secretary or the Governor for whatever reason, that there was interference on that particular matter.

**Sen. Boy Juma Boy:** Mr. Chairman, Sir, I would like the counsel to enlighten me a bit. I am a bit confused. Does the Governor cease to express his opinion even on a matter that he feels that a right of an individual has been infringed? Just because he is a Governor does he cease to have that right to express his opinion; because he is a Governor and he holds that position?

**The Chairperson** (Sen. (Dr.) Khalwale: It seems there is a final one from Sen. Orengo.

**Sen. Orengo:** My question is linked to what the Vice Chairperson has expounded on very ably. But looking at Section 59(1)(a) of the County Governments Act, it states as follows:-

“The functions of the County Public Service Board shall be, on behalf of the County Government, to-

“Establish and abolish offices in the County Public Service;”

Take note of the word “shall”.

It goes on and on. These powers are not directory; they are put in very mandatory terms. It is not as if that was for nothing because if you look at the scheme of the law as suggested by the Vice Chairperson, the County Public Service Board has some protected tenure; if you look at the relevant provisions of the law. But what worries me is that the membership is not just a creation of the Governor. The Board is nominated and appointed by the Governor, but with the approval of the County Assembly. So, the Assembly is involved in the creation and establishment of the Public Service Board. I want to understand why a body which is created by both arms of Government, one arm should take the blame and the other one sits pretty.

On top of that, there are grounds for removal of the County Public Service Board. That power is with the County Assembly, it is not with the Governor. Section 58(5)(a)(b) of the County Governments Act says:-

“The members of the Board may only be removed from office:-

(a) on grounds set out for the removal of members of a constitutional commission under Article 251(1) of the Constitution; and

(b) by a vote of not less than seventy five per cent of all the members of the County Assembly.”

This Board is being enthroned to a constitutional level. There are no other grounds other than the grounds which are established in the Constitution, not even the County Governments Act.

As indicated in 58(5)(b), to remove them, again, the Governor does not play a role. They can only be removed by seventy five per cent of all members of the County Assembly. There is no procedure where the process goes to the Governor's office. So, with all that in consideration, I want to know, just like the Vice Chairperson has indicated, where do you make that linkage? It is important when you are casting blame or throwing stones at an individual or an office, there must be some linkage; if that could come out together with your comments on the law, including that of establishing and abolishing offices. Of course, you have read the Constitution; specifically, those very important provisions about accountability of the Governor but the process for taking the County Public Service Board to account looks like something solely in the province of the Assembly, not the Governor.

**The Chairperson** (Sen. (Dr) Khalwale: I can see you are about to respond---

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

**The Chairperson** (Sen. (Dr) Khalwale): But closely related to this; the County Assembly is very unhappy – and you have said so – that the Governor refused to obey their resolution. I would like you to address us on that issue of the Governor obeying a resolution of the House; is it mandatory that a Governor must obey a resolution of the Assembly?

**Mr. George Ng'ang'a Mbugua:** Yes; let me start with the last question that the Chairperson has asked. If you look at Section 31(b) of the County Governments Act, the County Secretary (CS) is, in fact, the Secretary to the County Executive.

My Chairperson, Sir, my reading of Section 31(b) is that it envisages a situation where a member of the County Executive and the Secretary to the County actually sit in the Executive is required to do so by a resolution of the County Assembly as provided by Section 40. So, if a resolution has been passed by the County Assembly, my understanding is that under Section 31(b), if there was even a resolution to dismiss, the Governor, would be enjoined to do so. That would be my reading, understanding and interpretation of Section 31(b).

Now in this instance, Mr. Chairman, Sir, the resolution was not even to dismiss, but to step aside. In fact, the CS is not being fired; look, we want to subject this matter to further investigation by the Ethics and Anti-Corruption Commission (EACC); so step aside so that once you are cleared, you then resume your duties. That was not too much to ask.

So, Mr. Chairman, Sir, I believe that the Governor was enjoined to obey that resolution.

**The Chairperson** (Sen. (Dr) Khalwale): Yes, I am convinced; but I just want you to go and read Section 40(2) of the County Governments Act and convince yourself and convince us that, that procedure was observed.

Let me hear him.

**Mr. George Ng'ang'a Mbugua:** Yes, Mr. Chairman, Sir. Section 40(2) says:-

“A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a Motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).”

And it lists in Section 40(1) as:

- “(a) incompetence;
- (b) abuse of office;
- (c) gross misconduct;
- (d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;
- (e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or
- (f) gross violation of the Constitution or any other law.”

Mr. Chairman, Sir, we are submitting that there was due compliance. As a matter of fact, there has not even been any allegation that, that particular resolution that was taken by the County Assembly was unlawfully made; there is even no such allegation. In fact, the allegation that is being given by the Governor is that this lady had asked for time to respond. So, there was a resolution that was well taken in law that recommended that she steps aside. The Governor acknowledges receiving this particular resolution. Now, what is worrying is how then this person rushes to court – and we are not saying that she had no right to go to court – but when she rushes to court and the Governor is aware of these allegations, and even before the EACC finalizes its investigations, he now descends into the arena of ‘I have to support you; I have to defend you.’ The Governor ought to have said: “Look, clear your name and once you have cleared your name, then you will take up your position.” That is the problem we are having.

**The Chairperson** (Sen. (Dr) Khalwale): Yes; before you move on, personally you have convinced me. But Sen. Orengo---

**Sen. Orengo:** Mr. Chair, just for completeness of your question, because the County Assembly might decide what they want to do; you cannot read Section 40(1) or (2) and stop there. Section 40(2) requires of you that if you have succeeded in bringing that Motion, then you proceed to Section 40(3):

“If a Motion under subsection (2) is supported by at least one-third of the members of the county assembly—

- (a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated”

So that what we have made available to the Governor here, you should make that available to that particular member of the County Executive. So, if you read the entire section – because if you read it selectively, then I think you have persuaded the Chairman – but if you read the whole scheme of Section 40 and the marginal notes “Removal of member of executive committee” If that is what you desire, then you must go the full hog and not do it with one particular procedure, you leave it; you run to the Senate or to court.

So, I think you better be clear on this one.

**Mr. George Ng’ang’a Mbugua:** Thank you---

**The Vice Chairperson** (Sen. Murkomen): Before you answer, counsel, in the first place, those are not the relevant sections for dealing with the county secretary, because she is not a member of the County Executive. So, she does not fall within the definition of the County Executive Member either in the Constitution or in the Act. But it does not mean that the County Assembly cannot pass a resolution for removal of a public officer serving at the county. So, I do not think the debate around the procedure for removal of county secretary should be contextualized within the County Executive Member of a County. You just go to the provisions that deal with the removal of a public officer serving at the county level; which means, of course, the threshold can come lower in terms of investigation, recommending for what and so on, and so forth. Which, for me, rests that debate because it is not in the domain of the two-thirds majority, a third, impeachment and so on, and so forth. But the key question is to demonstrate that – which, of course, we are still waiting – then how does that link the creation to the creation of offices and, thereafter, to the requirement that---

Because I think your colleague had made that case separately – the question of obeying the Assembly’s decision *vis-à-vis* removal of a public officer who is facing corruption charges. But there is now the link of her functions with the creation of office at the County Public Service Board.

**Sen. Orenge:** I agree with the Vice-Chairperson that one would not be applicable; although that does not mean that you cannot---

**Mr. George Ng’ang’a Mbugua:** Yes, within the larger mandate of the County Assembly to oversight, Mr. Chairman, Sir. If you look at even this resolution, I did not even understand it to mean that she was to be fired. I understand it and from the acknowledgment from the Governor himself, is that pursuant to the resolution, that she steps aside---. So, matters have come before the County Assembly touching on what she had done and a resolution has been taken; and I think within the larger oversight mandate, the County Assembly clearly had every mandate to take that particular action. I think it is

the subsequent events that now touch on the honorable Governor within the contexts of these proceedings.

Mr. Chairman, Sir, the other question that has been raised by the hon. Senator; my reading of the Act and the creation of the County Public Service Board is that it may appear autonomous, but it certainly is not independent of the Executive arm. It may appear autonomous. If you now contextualize what it does within the broad leadership role that the Governor is supposed to play, we are saying this; that the Governor, as the head or as the Chief Executive Officer (CEO) of the county, cannot see a clear violation of the law by the Public Service Board and say that, look; that is an independent arm. Because now if we interpret it that narrowly, then essentially what we shall be saying is that if a CEO somewhere sees something that is being done by so-called an independent officer, then whether right or wrong, he will be feigning ignorance. And if we take that interpretation, then we shall be sanctioning impunity. I think we must say that the buck must stop at this person who is enjoined to demonstrate leadership as the CEO of the county.

Mr. Chairman, Sir, with that I am borrowing, as I wind up, provisions of Section 30(3) – if you read it in its entirety, which I had referred to earlier--. So, it may be autonomous in carrying out its mandate, but within the broad spectrum of the operation of the County Government, it must be accountable to somebody. That is Section 30(3) on what the Governor is supposed to do in performance of his functions.

If you look at Section 30(3)(a):

“provide leadership in the county’s governance and development;”

So, the County Public Service Board, in my submission, is a function of governance. It goes on to say: (b) provide leadership to the county executive committee and administration based on the county policies and plans;

(c) promote democracy, good governance, unity and cohesion within the county;

The matters to be carried out by the Public Service Board touch on good governance. So, he cannot be heard to say “it is independent; it is autonomous, I cannot touch it.” No less, even saying that: “Look, I cannot do that because you are independent.”

Mr. Chairman, Sir, that would be, in my very humble submission and with all due respect, a very narrow approach to this; and that interpretation would, then, sanction matters being done in that same fashion that will then lead to loss of funds and misuse of resources within county governments. So, someone must take leadership and responsibility; and we are saying that the hon. Governor should.

**The Vice Chairperson** (Sen. Murkomen): Mr. Chair, Sir, just once more. I am not convinced because there has not been any document anywhere that says the County Assembly tried to inquire from the Public Service Board why they ended up advertising for positions that have not been created and approved by law; which is supposed to be the work of the County Public Service Board. If that inquiry had been done by the County Assembly, it would have been possible that they might establish a document written by

the Head of Public Service, who is the Secretary, writing to them, because the law allows the internal officer within the Government itself to write and request for the creation of office. But that does not absolve the County Public Board of the responsibility to tell the officer “Yes, we have received the letter, we will not advertise because the County Assembly has not approved positions for that; and, therefore, if that position--- I mean, I am doing this with a lot of respect. If you remember why the National Assembly – and I think this is something in the public domain – called the Minister for Lands at the national level and questioned her about some offices she had advertised in the Ministry, it was because she did that without writing first to the Public Service Commission to create that office so that, then, she can advertise; or to ask for the creation and then ask the Public Service Commission to advertise for her or for the Ministry.

So, in the same manner, this is how the County Public Service Board is operating. If a Governor through the relevant county departments in the County Public Service wants to create an office for whatever reasons; for example, there is a disaster and they want to create a Disaster Management Office or something like that, they will have to write to County Service Board to first create the office, which proposal will be tabled in the County Assembly through the relevant Cabinet Executive member, and then thereafter, to request them to advertise. So, as much as you have tried to talk about the leadership and so forth, that link has not come out and it cannot come out through a counsel like yourself. It can only come out if there were documentation demonstrating that the County Assembly was doing something about it and, therefore, reached a situation where they realized it is collusion between the Public Service. And even if where that collusion is realized, the person to punish is the County Public Service Board in their semi-autonomous positions so that, then, they can show that it was not them. And for this, clearly, the newspaper advertisement puts the responsibility squarely on the County Public Service Board.

**The Chairperson** (Sen. (Dr) Khalwale): Okay; counsel, you have done very well.

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

**The Chairperson** (Sen. (Dr) Khalwale): As the Chair, I am convinced that what my Vice-Chairperson is trying to prosecute will have its time during report writing when we shall weigh these things. So, if you have a few remarks, you can make. You have done one hour; you wanted 20 minutes.

**Mr. George Ng’ang’a Mbugua:** I apologize for that; lawyers are not the best in keeping time. My learned friend, the hon. Senator for Siaya, will confirm that. But nonetheless, I am very grateful for your indulgence. Thank you very much.

**The Chairperson** (Sen. (Dr) Khalwale): You are welcome.

Is your colleague having an issue, because very many questions have come up? Is there something burning that your fellow counsel wants to react on?

**Mr. Charles Njenga:** I think the issues that have been taken out will further be clarified during our cross examination and our final closing submissions. So, we can rest at that.

**The Chairperson** (Sen. (Dr) Khalwale): Perfect.

Hon. Senators, do you have something burning, because I am about to adjourn?

Very well; secretariat, do you have anything?

Okay; we have now reached the point of adjournment. Yes, counsel; I can see your hand?

**Mr. Wilfred Nyamu:** We have an application to make at this juncture in relation to Rule 10 of these rules.

**The Chairperson** (Sen. (Dr) Khalwale): Order! Order! I have not granted you that chance. You seem to be about to start making the application. Some of my Senators might not be listening at more than 50 per cent; the pressure has been very high. I want, first of all, to hear from you, Members; do you want to listen to the application now, or will you listen to it in the morning?

**Mr. Wilfred Nyamu:** I would request for indulgence. While I still appreciate that it is late, but the application that I wish to make is pertinent to tomorrow's session.

**The Chairperson** (Sen. (Dr) Khalwale): It is granted; you do not have to justify. Just make the application.

**Mr. Wilfred Nyamu:** We wish to apply for summons against certain officers that are witnesses enlisted in our abstract of witnesses, who without summons, may not want to come.

We wish to apply for summons against one Joshua Munyaka, who has been the interim head of supply chain at the time of procurement with relation to the stadium; and who has been serving under the Transition Authority (TA) since March, 2013. His attendance is relevant in relation to these proceedings. He is now based in Kitui. We also---

**The Chairperson** (Sen. (Dr.) Khalwale): Are these people that you are naming your witnesses?

**Mr. Wilfred Nyamu:** Yes, they are our witnesses. In these proceedings, we wish to have everything come out in the light, and he is in the list of our witnesses. We would also wish to apply for summons against one Gideon Makenge, a procurement officer based in the county government at Embu.

**The Vice Chairperson** (Sen. Murkomen): And he does not want to come?

**Mr. Wilfred Nyamu:** Basically – and this is off-record although the HANSARD is recording – some of them may not wish to come, as other issues may arise. Obviously, people do not like appearing to give evidence, generally, unless they do understand the consequences and implications of not giving evidence. We would just wish to have those two for now.

**The Chairperson** (Sen. (Dr.) Khalwale): Counsel for the Assembly, you have heard the application. We want to hear what you have to say about the same.

**Mr. Charles Njenga:** Mr. Chairman, Sir, again, I go back to the issue of disclosure, which we had fairly argued before this other document was admitted. The challenge and predicament that immediately pose to the County Assembly is: What exactly is the nature and content of the evidence that is going to be tendered by these witnesses? Is that evidence prejudicial to the position of the County Assembly? If it is, then will the County Assembly have opportunity to either change its mode of presentation of its case by maybe calling witnesses? It generally destabilizes the settled mode of proceeding that this Committee settled today.

Those are issues that cannot be wished away, because the moment you introduce new evidence midway, then it even undermines the proceedings that have already been undertaken by the Committee. These particular witnesses may comment on issues already submitted. So, the position of the County Assembly is that we are ready to proceed with these proceedings and take the witnesses already disclosed to us. We have summaries of their evidence and any other witnesses will unnecessarily prolong or complicate the proceedings that are before this Committee.

**The Chairperson** (Sen. (Dr.) Khalwale): Yes, Mr. Kibe!

**Mr. Wilfred Nyamu:** These are proceedings against the Governor.

**The Chairperson** (Sen. (Dr.) Khalwale): Order! Order! We are not going to proceed that way, Sir.

**Mr. Kibe Mungai:** Mr. Chairman, Sir, thanks for the protection. I do not know why he thinks that I will take an adverse position against him. But as a matter of flow and question of fact, the position that we shall be taking in our opening statement, when the time comes, is actually that when you interpret the Constitution and particularly the Constitution correctly, it does not envisage a situation in which, simultaneously, you can take impeachment proceedings, for example, against the President and Deputy President at the same time.

For purposes of the County Governments Act, the ten-day period that this Committee is supposed to report to the Senate on its report on its investigations, is strictly speaking time that is reserved for the Governor alone. It contemplates the Governor alone. Now, in this particular case, the Senate decided to form one Committee. This one Committee is trying the best it can, as it is evident, to consider two separate motions at the same time. It

is obvious at this stage that given the position that the Governor has taken - and as counsel they are entirely entitled to that – if we are to stick to the timelines that have been given, so that this Committee is to report on---

**The Chairperson** (Sen. (Dr.) Khalwale): Order, Mr. Kibe! I have followed and want you to be very careful, because you are enjoying undue advantage. This is not the Deputy Governor's matter. Therefore, let my plenary and the reaction from the County Assembly advise the proceedings on the decision that we shall take. I think that I cannot give you more than that. Those are the things that you are going to argue when you start your case.

**Mr. Kibe Mungai:** Actually, it is the implications on our time that I am concerned about.

**The Chairperson** (Sen. (Dr.) Khalwale): We will deal with that when we come to the Deputy Governor's case. You will enjoy space the way you are seeing your colleagues do. Nobody will muzzle you. Your time will come.

Members, I want you to ventilate on this quickly.

**Sen. Sijeny:** Thank you, Mr. Chairman, Sir. So far, are there any documents that you have produced before the Committee that these two are going to expound on or are they coming in with their own new documents? Why do you need them?

**Mr. Wilfred Nyamu:** We have documents that they are supposed to produce, especially Joseph Munyaka, who was---

**Sen. Sijeny:** If you could be specific so that, at least, we see whether their presence is really required.

**Mr. Wilfred Nyamu:** The minutes of the procurement proceedings were done when Mr. Munyaka was actually the head of supply chain at the county. He has software of letters of appointment and these rules allow this House to summon a witness if they are going to add value to these proceedings. For example, there is a document that was referred to some minutes---

**The Chairperson** (Sen. (Dr.) Khalwale): We have heard you, counsel.

Members, I want to draw your attention to Rule No.10. It says:-

“The Committee may, at the request of the county assembly or Governor, invite or summon any person to appear and give evidence before the Committee.”

So, we have that discretion and if by those witnesses being brought here, it will make us richer - we understand what took place – surely, counsel, your colleagues are not asking for too much. You will have time to cross-examine those witnesses. We grant that those witnesses be summoned. Summons will be issued. Members of the other party, prepare accordingly.

**Sen. Wamatangi:** I appreciate and it is important that they all get a fair hearing. If the summons of those two witnesses have been punctuated by the evidence that has been adduced in the proceedings of today, then we also need insulation and preparedness for that matter, because supposing then the proceedings of tomorrow are going to, again, warrant the summons of another two witnesses. So, we also need to agree that when those two witnesses have been summoned, then we also stick to some rule.

**The Chairperson** (Sen. (Dr.) Khalwale): You remember that when there was the matter of the Supreme Court on the Presidential Elections, the Supreme Court played discretion and said that certain evidence could not fit within the timelines. Surely, tomorrow because the rule is “may” it gives us discretion. So, tomorrow if such a request is made, we will wait and maybe say that they cannot be allowed.

**Sen. Orengo:** Mr. Chair, Sir, there has been reliance on a document or some minutes signed by Mr. Munyaka. Those minutes are not in the original form; they are photocopies. There is a signature there. Since they have relied on supposedly evidence from Mr. Munyaka, I think that it would not be wrong for him to come. If the County Assembly chooses to present a case without witnesses, they should not stop the other side from having us listening to the people who were doing these things at the appropriate time. That will not prejudice our decision in any way.

**The Chairperson** (Sen. (Dr.) Khalwale): You could not have put it any better.

I now wish to adjourn with the following announcements: Tomorrow, we will reconvene here at 9.00 a.m. Please, Governor, it is your matter and so, you will be the first to start. Keep time. We will be unable to accommodate you the way we did today.

The second announcement is that where you took lunch, dinner is served for you. Finally for colleagues, we will retreat to the hall for just recaps of probably five to ten minutes.

Thank you very much. Have a good night.

The Special Committee adjourned at 8.37 p.m.