



**REPUBLIC OF KENYA**

**ELEVENTH PARLIAMENT – FOURTH SESSION**

**THE SENATE**

**VOTES AND PROCEEDINGS**

**SPECIAL SITTING**

**TUESDAY, SEPTEMBER 13, 2016 AT 11.10 A.M.**

1. The Senate assembled at ten minutes past Eleven O'clock.
2. The Proceedings were opened with Prayer said by the Speaker.
3. **COMMUNICATION FROM THE CHAIR ON THE MATTER OF THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR OF NYERI COUNTY**

The Speaker conveyed the following Communication from the Chair-

"Honourable Senators, let me take this opportunity to welcome you back for this Special Sitting of the Senate which is the sixth during the current recess. In addition, Honourable Senators, we shall, tomorrow, Wednesday, 14<sup>th</sup> September, 2016 and on Thursday, 15<sup>th</sup> September, 2016, hold the 7<sup>th</sup> and 8<sup>th</sup> Special Sitzings, respectively, during this recess. Your finding time to come each time you are required to do so in this recess is a clear demonstration of your dedication to the service of the people of Kenya and your readiness to execute your constitutional mandate.

Honourable Senators, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 2<sup>nd</sup> September, 2016, the County Assembly of Nyeri approved a Motion for the removal from office of the Governor of Nyeri County.

By a letter dated 2<sup>nd</sup> September, 2016 and received in my office on 5<sup>th</sup> September, 2016, the Speaker of the County Assembly of Nyeri informed the Speaker of the Senate of the approval of the Motion by the County Assembly of Nyeri and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly.

Pursuant to section 33(3)(a) of the County Governments Act, 2012, and standing order 68(1)(a) of the Senate Standing Orders, on Wednesday, 7<sup>th</sup> September 2016, the Speaker of the Senate convened a meeting of the Senate to hear charges against the Governor of Nyeri County. Further, on the same date, the Senate resolved to investigate the matter of the proposed removal from office, by impeachment, of the Governor of Nyeri County by the Senate, in Plenary.

Honourable Senators, the mandate of the Senate in so far as it relates to the removal of a Governor from office is provided for under Article 181 of the Constitution as read together with section 33 of the County Governments Act, 2012 and standing order 68 of the Senate Standing Orders. In particular, Article 181 of the Constitution provides as follows-

- (1) A county governor may be removed from office on any of the following grounds—*
  - (a) gross violation of this Constitution or any other law;*
  - (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;*
  - (c) abuse of office or gross misconduct; or*
  - (d) physical or mental incapacity to perform the functions of office of county governor.*
- (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).*

Honourable Senators, as you may recall in a ruling that I made on Thursday, 8<sup>th</sup> September, 2016, I stated that neither Article 181 of the Constitution nor section 33 of the County Governments Act, nor indeed our own Standing Orders, shed any light on the procedure to be followed where the hearing and determination of the proposed removal from office of a governor, by impeachment, is to be undertaken by the Senate in Plenary. Accordingly, pursuant to standing order 1 of the Senate Standing Orders, I directed that the procedure which the Senate has previously utilized in special committees established pursuant to section 33(3) of the County Governments Act, 2012 and standing order 68(1) of the Senate Standing Orders would apply, with necessary modifications, to the hearing by the Senate in Plenary.

In this regard, Honourable Senators, the Rules of Procedure for the Hearing and Determination of the Proposed Removal from Office by Impeachment of a Governor have been circulated to all Senators and to both the County Assembly and the Governor. The Rules of Procedure shall apply to these proceedings.

Honourable Senators will further note that a Hearing Programme has been circulated which details the various activities in the hearing and

determination of the matter and the time allocated to each activity. It will be crucial that all the parties comply with the time allocated. In summary, the Programme is as follows-

- (a) Today, Tuesday, 13<sup>th</sup> September, 2016, after we have dispensed with preliminary matters, the charges against the Governor as submitted by the County Assembly shall be read to the Governor. This will be followed by Opening Statements to be made on behalf of both parties and thereafter, the presentation of the case of the County Assembly.
- (b) On Wednesday, 14<sup>th</sup> September, 2016 the Governor will have an opportunity to present his case before the Senate. This will be followed by Closing Statements by both parties. The Senate urges all parties to observe the time allocated to them in the Hearing Programme so as to ensure that the matter is disposed of expeditiously.
- (c) The Senate shall then proceed to a closed session for deliberations prior to voting on each of the charges. In accordance with section 33(7) of the County Governments Act, 2012 and standing order 68(5) of the Senate Standing Orders, the voting shall be by county delegations.
- (d) The Governor shall cease to hold office if a majority of all county delegations of the Senate vote to uphold any impeachment charge. If the charges are not substantiated, the Governor will remain in office.

Honourable Senators, it is important to observe that pursuant to rule 11 of the Rules of Procedure, the hearing of evidence, once it commences, shall proceed and continue on until the Senate concludes the hearing of the matter. As the Senate embarks on the hearing and determination of the matter, the Senate must therefore undertake this task expeditiously and in addition, observe procedural propriety. The Senate, acting as a quasi-judicial organ, must also observe the principles of natural justice.

I wish to emphasize that the Senate is cognizant of the gravity of the matter with which it is seized and that it shall accord all the parties to the proceedings a full and fair hearing.

I thank you."

4. **HEARING AND DETERMINATION OF THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HON. JAMES NDERITU GACHAGUA, THE GOVERNOR OF NYERI COUNTY**

The Senate proceeded to consider the matter of the proposed removal from office, by impeachment, of Hon. James Nderitu Gachagua, the Governor of Nyeri County, as follows –

**a) Introduction of the Members representing the County Assembly of Nyeri and their Counsel**

The Members representing the County Assembly of Nyeri and their Counsel were introduced by Mr. Charles Njenga, Counsel to the Assembly, as follows –

- i) Mr. Charles Njenga - Counsel for the County Assembly
- ii) Mr. George Ng'ang'a - Counsel for the County Assembly
- iii) Ms. Wambui Ngunjiri - Principal Legal Counsel, Nyeri County Assembly
- iv) Hon. Baragu Mutahi - Chairperson, Public Accounts Committee, Nyeri County Assembly
- v) Mr. Mathew Kibui - Clerk Assistant, Nyeri County Assembly

**b) Introduction of the Governor and the Counsel representing the Governor**

The Governor of Nyeri County, Hon. James Nderitu Gachagua, introduced himself, and the team accompanying him, as follows –

- i) Hon. James Nderitu Gachagua - Governor, Nyeri County
- ii) Mr. Peter Wanyama - Counsel for the Governor
- iii) Ms. Eunice Mwanza - Legal Assistant
- iv) Ms. Alice Wachira - Ag. County Secretary, Nyeri County

**c) Reading of the Charges against the Governor**

The following Charges facing Hon. James Nderitu Gachagua, the Governor of Nyeri County, were read out to him by the Clerk of the Senate –

**i) Gross Violation of the Constitution of Kenya, 2010, the County Governments Act, 2012, the Public Finance Management Act, 2012 and the Public Procurement and Disposal Act 2005; in particular -**

- a) That the Governor, being the Chief Executive of the County, failed to account or make proper disclosure of Kshs.352,976,913/= contrary to Article 201(a) of the Constitution of Kenya, 2010, and Section 104(1)(i) of the Public Finance Management Act, 2012;
- b) Utilizing local revenue at source contrary to Article 207 of the Constitution of Kenya, 2010, and Section 109 of the Public Finance Management Act, 2012;
- c) Irregular procurement contrary to the Public Procurement and Disposal Act, 2005;

- d) Lack of prudence in refurbishment of buildings amounting to Kshs.81,384,118.40 in contravention of Article 201 (d) of the Constitution of Kenya, 2010, and Section 104 (1)(i) of the Public Finance Management Act, 2012;
- e) Splitting of Tenders, contrary to Section 30 of the Public Procurement and Disposal Act, 2005;
- f) Lack of prudence in use of public funds, contrary to Section 201(d) of the Constitution of Kenya and Section 104(1)(i) of the Public Finance Management Act, 2012;
- g) Failure to establish the County Budget and Economic Forum as stipulated under Section 137 of the Public Finance Management Act, 2012;
- h) Undermining the legislative authority of the County Assembly, contrary to Article 185 of the Constitution of Kenya 2010 and delaying the budget making process; and
- i) Failure to consider and/or assent to County Bills passed by the County Assembly, contrary to Section 30(2)(g) of the County Governments Act 2012.

**ii) Failure to comply with the law; in particular –**

- a) That the Governor violated Article 41(1) of the Constitution of Kenya 2010 that ensures every person the right to fair labour practices and Section 19 of the Employment Act, by failing to remit and/or delaying the remittance of statutory deductions of County Officers;
- b) That, under the Governor's Stewardship, the County Executive contravened Section 109(4)(b) of the PFM Act by deliberately delaying the release of salaries for the month of July, 2016 for the Members and staff of the County Assembly;
- c) That the Governor failed to define the responsibilities of every member of the County Executive Committee by notice in the gazette, contrary to Section 30(2)(i) of the County Governments Act;
- d) That the Governor has established extra sub-counties in Nyeri County in contravention of Section 48(1) (b) of the County Governments Act and without the approval of the Assembly; and
- e) That the Governor, in the composition of the County Executive Committee, violated the Constitution and the law by failing to consider gender parity, representation of minorities, the marginalized and the community and cultural diversity.

**iii) Abuse of Office/ Gross Misconduct;** in particular -

- a) That the Governor appointed a County Secretary in acting position for an indefinite period of time, contrary to Section 44 and 64 of the County Governments Act. Further, that the Governor blatantly ignored the resolution of the County Assembly having found the Acting County Secretary, Alice Njamiu Wachira, unqualified and unsuitable to hold the said position, by retaining the Acting County Secretary in office;
- b) That, the County Public Service Board had been conducting its functions in the absence of a chairperson and secretary for a very long period of time. Further, that the Governor, in violation of Section 58 of the County Governments Act, purportedly and unlawfully appointed an acting secretary from among the officers of the county government, who had not been vetted and approved by the County Assembly; and
- c) That the Governor had, for a long duration of time, operated with perennial acting county executive committee members and acting chief officers, who had not been vetted by the county assembly, thereby jeopardizing service delivery and accountability in the County.

The Governor was then invited to plead to the Charges as read;

Thereupon, the Governor pleaded ***'Not Guilty'*** to each of the three Charges.

**d) Opening Statements on behalf of the County Assembly**

The opening statements on behalf of the County Assembly were made by the Assembly's Counsels, Mr. Charles Njenga and Mr. George Ng'ang'a.

In their statements, Counsels for the County Assembly submitted that Article 181 of the Constitution provides an opportunity for intervention within the term of a governor for reasons stated, and for evidence and grounds that could be adduced. Counsels also cited a judgment of the Court of Appeal where the Court stated that removal of a governor is not about criminality or culpability, but about accountability, political governance, as well as policy and political responsibility.

The Counsels further stated that the governor, as chief executive, could not avoid responsibility by claiming that actions complained of were committed by officers serving under him. The Counsels submitted that if such was allowed, the objectives of devolution, including promoting

democratic and accountable exercise of power and enhancement of checks and balances, would be defeated.

The Counsels finally presented an overview of the charges filed against the Governor, and of the evidence they would be presenting in support of the said charges, including presentation of one witness.

**e) Opening Statements on behalf of the Governor**

Hon. James Nderitu Gachagua, the Governor of Nyeri County, made his opening statement, and was supplemented by a statement from Counsel representing him, Mr. Peter Wanyama.

In his statement, Hon. Gachagua stated that the charges levelled against him by the County Assembly arose from political differences, related to allocations the County Assembly had made for projects in each ward, a sauna and wellness centre, and bursaries of Kshs. 90 million for needy students in the County. The Governor further stated that some politicians from Nyeri County, including those aspiring for election as Governor, were behind the impeachment motion at the County Assembly.

The Governor also stated that he was not accorded an opportunity to be heard by the County Assembly before the vote on the impeachment Motion was taken, and that he had appeared voluntarily before the Senate expecting that justice would be done.

On his part, Counsel for the Governor stated that there are certain fundamental criteria, safeguards and guidelines which the Constitution requires to be met before any impeachment is upheld. Consequently, Counsel submitted that the Governor would adduce evidence to rebut the allegations levelled against him by the County Assembly, and to demonstrate that the threshold required for impeachment had not been met in this case.

And there being no other business for the Morning Session, the Speaker adjourned the Senate at fifty minutes past Twelve O'clock without Question put, pursuant to the Standing Orders.

5. **SENATE ROSE** – at fifty minutes past Twelve O'clock.

**M E M O R A N D U M**

*The Speaker will take the Chair on  
Tuesday, September, 13, 2016 at 2.00 p.m.*

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