

REPUBLIC OF KENYA



Mr. Speaker

Recommended for
approval for tabling.

PARLIAMENT OF KENYA

THE SENATE

27/02/19

TWELFTH PARLIAMENT

THIRD SESSION

THE STANDING COMMITTEE ON HEALTH

Approved
27/2/2019

REPORT ON THE PUBLIC PETITION BY RESIDENTS OF ISIOLO COUNTY
REGARDING THE AGREEMENT BETWEEN THE COUNTY GOVERNMENT OF ISIOLO
AND LIVING GOODS LIMITED FOR PROVISION OF COMMUNITY HEALTH SERVICES
IN ISIOLO COUNTY

PAPERS LAID	
DATE	27/02/19
TABLED BY	Chairperson
COMMITTEE	Health
CLERK AT THE TABLE	Lillian

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

26th February, 2019

Contents

PREFACE.....	2
ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON HEALTH OF THE SENATE	4
EXECUTIVE SUMMARY	5
CHAPTER ONE: INTRODUCTION.....	10
A. Background.....	10
B. Summary of Issues raised in the Petition.....	10
C. Prayers to the Senate.....	13
CHAPTER TWO: ISIOLO COUNTY HEALTH PROFILE	15
CHAPTER THREE: LEGAL AND POLICY PROVISIONS RELATING TO THE PETITION.....	16
3.1 The Constitution of Kenya.....	16
3.2 Acts of Parliament.....	17
3.3 Judicial precedents.....	20
CHAPTER FOUR: SUBMISSIONS ON THE PETITION	21
4.1 Submissions by Sen. Fatuma Dullo, M.P., Dep. Majority Leader, Senator, Isiolo County.....	21
4.2 Submissions by the Petitioners.....	22
4.3 Submissions by Representatives of the Isiolo County Executive led by.....	23
c) Need to harness technology and expertise for the provision of community health services	24
ii) <i>The process through which Isiolo County entered into partnership with Living Goods Limited.....</i>	24
iii) <i>Responses to the Issues Raised in the Petition.....</i>	26
4.4 Submissions by Representatives of Living Goods Limited.....	29
CHAPTER FIVE: COMMITTEE OBSERVATIONS.....	31
CHAPTER SIX: COMMITTEE DETERMINATIONS	34
ANNEXES	36

PREFACE

Mr. Speaker Sir,

On 4th October, 2018, a public petition by residents of Isiolo County was tabled before the Senate and committed to the Standing Committee on Health pursuant to Standing Order No. 226(1) of the Senate Standing Orders.

The petition was related to an agreement entered into by the County Government of Isiolo and Living Goods Ltd for 'strengthening provision of community health services in Isiolo, Merti and Garbatulla sub-counties' at a cost of KShs. 443,210,224.00 effective 1st October, 2018, for a period of four (4) years.

In conducting its investigations, the Committee met with key parties in relation to the petition, including: Sen. Fatuma Dullo, M.P., Deputy Majority Leader and Senator of Isiolo County, the Governor of Isiolo County, the petitioners and representatives of Living Goods Ltd. In addition, the Committee raised pertinent issues in relation to the petition at a consultative meeting with the Cabinet Secretary for Health held on 13th November, 2018.

The Committee also reviewed relevant documents and memoranda from various government agencies and departments including the National Treasury.

The Committee findings, observations and recommendations arising from this process are contained in this report.

Mandate of the Standing Committee on Health

The Senate Standing Committee on Health is mandated, under the Second Schedule of the Senate Standing Orders, to, *"to consider all matters relating to medical services, public health and sanitation."*

Committee Membership

The Membership of the Committee is composed of the following:

- | | | |
|--------------------------------------|---|-------------------------|
| 1. Sen. (Dr.) Michael Malinga Mbitio | - | Chairperson |
| 2. Sen. (Dr.) Ali Abdullahi Ibrahim | - | Vice-Chairperson |
| 3. Sen. Beth Mugo | | |

4. Sen. Nderitu John Kinyua
5. Sen. Iman Falhada Dekow
6. Sen. Okong'o Omogeni
7. Sen. Naomi Shinyonga
8. Sen. Petronilla Were Lokorio
9. Sen. Fred Outa

Mr. Speaker Sir,

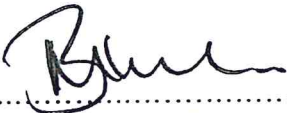
The Standing Committee on Health wishes to thank the Offices of the Speaker and the Clerk of the Senate for their support during the process of considering this petition.

Mr. Speaker Sir,

The Standing Committee on Health also wishes to thank the Deputy Majority Leader and Senator from Isiolo, for bringing the petition to the floor on behalf of residents of Isiolo County. The people of Isiolo County are very privileged to have her their representative.

Mr. Speaker Sir,

It is now my pleasant duty and privilege to present this report of the Standing Committee on Health, for consideration and approval by the House pursuant to Standing Order No. 226(2) of the Senate Standing Orders.

Signed.....  Date..... 26-02-2019

SEN. MBITO MICHAEL MALING'A, MP
CHAIRPERSON, STANDING COMMITTEE ON HEALTH

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON HEALTH OF THE SENATE

We, the undersigned Members of the Standing Committee on Health of the Senate, do hereby append our signatures to adopt the Report-

1. Sen. (Dr.) Michael Malinga Mbiti	Chairperson	
2. Sen. (Dr.) Ali Abdullahi Ibrahim	Vice-Chairperson	
3. Sen. Beth Mugo	Member	
4. Sen. Nderitu John Kinyua	Member	
5. Sen. Iman Falhada Dekow	Member	
6. Sen. Okong'o Omogeni	Member	
7. Sen. Naomi Shinyonga	Member	
8. Sen. Petronilla Were Lokorio	Member	
9. Sen. Fred Outa	Member	

EXECUTIVE SUMMARY

On 4th October, 2018, a public petition by residents of Isiolo County was tabled before the Senate and committed to the Standing Committee on Health pursuant to Standing Order No. 226(1) of the Senate Standing Orders.

The petition was related to an agreement entered into by the County Government of Isiolo and Living Goods Ltd for 'strengthening provision of community health services in Isiolo, Merti and Garbatulla sub-counties' at a cost of KSHs. 443,210,224.00 effective 1st October, 2018, for a period of four (4) years.

In their prayers, the petitioners requested the Senate to:-

- i. Assert its constitutional functions under article 96 of the Constitution of Kenya;
- ii. Urgently investigates the conduct of the Isiolo County Executive in relation to the Agreement negotiated with Living Goods Ltd;
- iii. Ensures that all public funds utilised during the negotiation of the Agreement are reimbursed to the county government and that those who are responsible are held accountable;
- iv. Take any other appropriate action.

In conducting its investigations, the Committee met with key parties in relation to the petition, including: the Deputy Majority Leader and Senator of Isiolo County Sen. Fatuma Dullo, M.P., the Governor of Isiolo County, residents of Isiolo County and representatives of Living Goods Ltd. In addition, the Committee raised pertinent issues in relation to the petition at a consultative meeting with the Cabinet Secretary for Health held on 13th November, 2018. The Committee also reviewed relevant documents and memoranda from various government agencies and departments.

In relation to the matters raised in the petition, the Committee made the following general observations:

- 1. Variations in the draft Agreement as captured in the petition and during Committee Proceedings:** The Committee observed that the Petition was brought to the Senate before the agreement was signed. This could explain

why there are significant differences in the initial draft agreement that was scheduled to come into effect on 01 October 2018, and the revised version that was executed on 06 November 2018. It is apparent that these changes resulted from several revisions to the original draft that appear to have taken cognizance to the concerns and issues raised by the petitioners.

2. The signed Agreement did not conform to the Public Finance Management (Isiolo County Community Health Services Fund) Regulations 2012: The Committee noted the following with regards to the revised Agreement, PFM Act and the Regulations passed by the Assembly:

- a) With regards to provisions contained in section 7.2 of the Agreement relating to the opening and operating of a jointly operated special purpose account, the Committee observes that this contravenes provisions of the Public Finance Management Act, 2012.
- b) The regulations governing the Fund violate Section 109(4)(b) of the PFM Act by authorizing monies to be paid directly to a Special Purpose Account. In addition, they violate Sections 106(6) and (7) which provide that withdrawals from the County Exchequer Account must be approved by the Controller of Budget.
- c) In addition, the regulations contravene the Public Finance Management (County Governments) Regulations 2015, which require project-specific funds/accounts to be operated from the Central Band of Kenya.
- d) The Committee further observes that there are anomalies in the definition of 'Fund Agreement' whereby the regulations purport to define a 'Fund Agreement' as an 'agreement between the Fund and an external partner'. Clarity is needed as to who the agreement specifically relates to.
- e) In addition, the regulations provide that *'Initial Capital shall consist of such monies as may have been allocated by the County Government in its annual budget at the time of the promulgation of the regulations as well as monies injected into the Fund by donors'*. The Committee observes that this provision makes an assumption that monies received from donors do not form part of the county's annual budget. This is in contravention of the PFM Act.
- f) In addition, the regulations are not clear on the type of donor funding
Isiolo County shall receive from Living Goods, either as a loan or a grant.

Different conditions in the PFM Act govern the receipt of grants and donations (Section 138 (3)) vis a vis loans (Section 140). The regulations are not clear on what conditions shall apply.

3. **The County Integrated Development Plan (CIDP) (2018-2022) and the Annual Development Plan for Isiolo County:** The Committee notes that the Isiolo County CIDP broadly provides for the provision of community health services. The Office of the Controller of Budget in a letter dated November 16, 2018, indicated however that there is no provision for the specific agreement (annexed).
4. **The legal status of Living Goods Limited:** The Office of the Attorney General, company records relating to the company indicate that Company has four directors: one Kenyan and three Americans. They are Thomas Opiyo, Cheryl Marion Scott Slaughter and Charles Lewis. They are a company limited by grantee. During their presentation, the Living Goods provided information similar to that provided by the office of the Attorney General. The Committee does note that the petitioners provided a Certificate of Incorporation which showed Living Goods as a Limited Company.
5. **Data collection and privacy concerns:** The Committee notes with concern that under the signed Agreement, Living Goods has been empowered to collect extensive household data from the people of Isiolo. The agreement does not contain provisions to safeguard the data collected.

In respect of the prayers made in the petition, the Committee made the following determinations:

- i. **Prayer One:** *Assert its constitutional functions under article 96 of the Constitution of Kenya*

Committee Response: The Committee in respect of this prayer has met with key interested parties in relation to the Petition including representatives of the County Government of Isiolo, the area Senator, the petitioners, and representatives of Living Goods Limited. In addition, the Committee has reviewed relevant documents and memoranda from

various government agencies and departments including the Controller of Budget, and the Office of the Attorney General.

- ii. **Prayer Two:** *Urgently investigates the conduct of the Isiolo County Executive in relation to the Agreement negotiated with Living Goods Ltd;*

Committee Response: The Committee in respect of this prayer has conducted its investigations and confirmed that some of the matters raised in this petition are legitimate.

- iii. **Prayer Three:** *Ensures that all public funds utilised during the negotiation of the Agreement are reimbursed to the county government and that those who are responsible are held accountable.*

Committee Response: The Committee in respect of this prayer observes that there are significant differences in the initial draft agreement that was scheduled to come into effect on 01 October, 2018, and the revised version that was executed on 06 November, 2018. It is apparent that the positive changes to the initial draft resulted from several revisions that appear to have been informed by the concerns and issues raised by the petitioners. In addition, while there are areas of concern in the final Agreement, the Committee recognises that the development of the Agreement was a process rather than an event, and that it involved the participation of the entire Isiolo County Government, including the County Assembly and residents of Isiolo County. As public participation processes are provided for in the Constitution and in statute, the reimbursement of funds utilised during the development of the Agreement in question does not arise.

- iv. **Prayer Four:** *Take any other appropriate action.*

Committee Response: The Committee in respect of this prayer resolves that:

- (a) The County Government of Isiolo halt all activities related to its Agreement with Living Goods Limited and makes the necessary

amendments to the agreement to ensure that it complies with the PFM ACT.

- (b) The Ministry of Health report to the Senate on the areas of expertise and competence of Living Good and its activities. Further, that the Ministry provide clarification on the agreement that it has entered into with Living Goods Limited.
- (c) That the Isiolo County Government, keeps the Senate Health Committee and the Senator of Isiolo County, abreast of their agreement and association with Living Goods.
- (d) Once the County Government of Isiolo meets the provision of the PFM ACT, the amended agreement be sent to the Senate Health Committee, The Senator Isiolo County and the National Treasury.

In light of the above, the Committee resolves that:

1. This report be dispatched to the County Government of Isiolo for purposes of halting all activities related to its Agreement with Living Goods pending conformity to the PFM ACT and regulations contained in the Agreement and the resulting Regulations.
2. This report be dispatched to the National Treasury for purposes of recommending remedies to the Agreement, and ensuring compliance with all the legal provisions relating to the use of public funds.
3. This report be dispatched to the Ministry of Health to report back to the Senate on the nature of the relationship it has with Living Goods Limited, and the type of agreement they have entered into **within 3 months** of receipt of this report.

CHAPTER ONE: INTRODUCTION

A. Background

On 4th October, 2018, a public petition by residents of Isiolo County was tabled before the Senate and committed to the Standing Committee on Health pursuant to Standing Order No. 226(1) of the Senate Standing Orders.

The petition was related to an agreement entered into by the County Government of Isiolo and Living Goods for 'strengthening provision of community health services in Isiolo, Merti and Garbatulla sub-counties' at a cost of KSHs. 443,210,224.00 effective 1st October, 2018, for a period of four (4) years.

B. Summary of Issues raised in the Petition

A summary of the issues raised by the petitioners with regards to the agreement entered into by the County Government of Isiolo and Living Goods Limited is provided below:

1. That the county government of Isiolo had failed to conduct due diligence on Living Goods Limited with regards to its directors as well as country of incorporation.
2. That the scope of services to be provided by Living Goods Limited as contained in the agreement would include:
 - a. Situational analysis of existing healthcare infrastructure;
 - b. Developing methodology for assessing/measuring impact;
 - c. Providing material necessary for operational requirements;
 - d. Purchase, maintenance and insurance for vehicles and motorcycles for the project;
 - e. Recruitment, training, certification and supervision of 920 community health volunteers;
 - f. Hiring and supervising a consultant to develop a county community health policy/bill;

- g. Conducting publicity, sensitisation and advocacy;
 - h. Supporting the county government with forecasting for procurement of essential medicines and supplies; and,
 - i. Providing support with restocking essential medicines and supplies.
3. That the responsibility for delivery of healthcare services to the people of Isiolo is a constitutional obligation of the County Government of Isiolo as provided for under Article 186 and Schedule 4 of the Constitution and cannot therefore be relinquished to a private entity.
 4. That the agreement unconstitutionally delegates the power of developing legislation – the Community Health Bill – including the requisite public participation process to a private entity.
 5. That the agreement confers extensive powers to Living Goods Limited over healthcare services provision without much practical control and participation of the county government, except for the provision of funds. As conceived, the Agreement envisioned the county government's control over the project as extending only to overseeing its implementation and receiving and analysing reports. Consequently, the county executive would not be in a position to know exactly what actions Living Goods Limited was taking in furtherance of the agreement, neither would it be able to influence the course of events in the implementation of the agreement, thereby opening up Isiolo's healthcare system and the health of its people to unethical intrusions by entities that owe them no constitutional duty of accountability.
 6. That the agreement purports to bypass the County Integrated Development Plan process and other constitutional budgeting processes by binding the county government to, among others: include the cost of the implementation of the project in its budget; commit to project-related procurement; and, provide funds, office space, logistical support, drugs, supplies and staff necessary for the project;
 7. That the agreement binds the county government to co-fund the cost of the project which is projected to be KSHs. 443,210,224.00.

8. That the agreement requires the money to be deposited in a joint special purpose account between the county government and Living Goods Limited, thereby exposing public funds to private management in contravention of constitutional principles of financial management.
9. That the agreement provides that monies from the special purpose account shall be disbursed to Living Goods Limited accounts, thereby exposing public funds to private management in contravention of constitutional principles of financial management.
10. That the agreement requires Living Goods Limited to provide an accurate record of assets purchased using the common funds only if such a record is demanded, thereby contravening the constitutional principles of transparency and accountability as well as the legal requirements of the Public Procurement and Asset Disposal Act of 2015 on acquisition and disposal of public assets.
11. That the agreement is silent on the responsibilities of Living Goods Limited to the county government in relation to funds upon termination of the Agreement.
12. That the agreement had been negotiated without the requisite public participation as envisaged by the constitutional and statutory provisions cited above.
13. That being an essential public service whose policy-development mandate is constitutionally exercised by the national government in accordance with the Fourth Schedule of the Constitution the county government should have consulted the relevant national government organs, specifically the national Ministry of Health.
14. That being an essential public service, the county government should have consulted local stakeholders including the general public.
15. That further, the agreement is a thinly-veiled attempt to enter into a Public Private Partnership (PPP) without following the procedure provided in the Public Private Partnerships Act, , specifically sections 4,11, 16,17, 20-25,29,31-35 and 37-57; and the Health Act, specifically sections 15, 23 and 92.

16. That overall, the process had failed to appreciate the legal requirements on public participation, prudent fiscal management and the principles of devolved government including the oversight role of the Senate.
17. That the agreement irresponsibly exposes public funds to potential misuse, misappropriation and corruption in contravention of the constitutional and statutory principles of fiscal management cited above.
18. That the agreement potentially exposes an essential public service to unregulated capture by private entities and poses a health risk to the people of Isiolo County.
19. That healthcare is a crucial county government function that significantly impacts the lives of the people of Isiolo and as such, the county government should not casually and arbitrarily divest itself of this essential responsibility to the public by delegating it to private sector actors who have no direct responsibility and accountability to the public.
20. That the actions of the county government contravene the legal provisions enumerated above and are therefore unilateral and unlawful, hence null and void.

The petitioners further aver that they have made the best efforts to have these matters addressed by the relevant authorities all of which have failed to give a satisfactory response.

Further, the petitioners aver that none of the issues raised in the petition is pending in any court of law or any other constitutional or legal body.

C. Prayers to the Senate

In light of the above, the petitioners pray that the Senate:-

- i. Assert its constitutional functions under article 96 of the Constitution of Kenya;
- ii. Urgently investigates the conduct of the Isiolo County Executive in relation to the Agreement negotiated with Living Goods Ltd;

- iii. Ensures that all public funds utilised during the negotiation of the Agreement are reimbursed to the county government and that those who are responsible are held accountable;
- iv. Take any other appropriate action.

CHAPTER TWO: ISIOLO COUNTY HEALTH PROFILE

Below is a summary of the key reproductive, maternal and child health indicators in Isiolo County in relation to the national status as drawn from the Kenya Health Information System (DHIS), Ministry of Health.

Isiolo County has a population of just over 143,000 people. Almost about half of the population is aged below 15, 16% are aged under 5 and 24% are aged 10-19. Isiolo County's total fertility rate (4.9) is higher than the national rate of 3.9 and also means that Isiolo County has a high birth rate. The adolescent birth rate is also high – more than 1 in every 10 girls aged 15-19 gives birth every year. Isiolo County is one of 15 Counties that account for over 60% of maternal deaths in Kenya. The latest estimate of the County's maternal mortality ratio (MMR) is 790 deaths per 100,000 live births. Child death rates in Isiolo County mirror the national trend although the neonatal death rate is slightly higher and infant and under five death rates are slightly lower. High maternal and child death rates are linked to high birth rates and limited access to life saving maternal and child health interventions. This fact sheet highlights the status of key reproductive, maternal and child health interventions in Isiolo County, in relation to the national status. The data are drawn from the 2009 and 2014 Kenya Demographic and Health Survey, the Kenya AIDS Indicator Survey (KAIS, 2007), the UN and other national and global studies.

CHAPTER THREE: LEGAL AND POLICY PROVISIONS RELATING TO THE PETITION

3.1 The Constitution of Kenya

a) Role and Mandate of Parliament

Articles 94 as read together with Article 96 of the Constitution provides for the role of Parliament in general, and the Senate in particular. Generally, the Houses of Parliament exercise the legislative mandate of the people, deliberate on matters of national interest and oversight the exercise of power by other arms of government.

b) Right to Petition Parliament

The right to petition Parliament is provided for under Article 119 of the Constitution, which provides as follows:-

“Every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation.

Parliament shall make provision for the procedure for the exercise of this right.”

Further, Standing Order 226 the Senate Standing Order outlines the procedure for the committal of a petition to a Committee and transmission of its decision to the Petitioner. The Standing Committee on Health is mandated to consider all matters related to medical services, public health and sanitation. Further, the Petition to Parliament (Procedure) Act, 2012 and the Standing Orders of the Senate provide for the procedure to be followed in the submission, processing and consideration of a Petition.

c) Right to the Highest Attainable Standard of Health

Article 43 (1) (a) of the Constitution guarantees every person the right to ‘the highest attainable standard of health, which includes the right to health care services, including reproductive health care’. The Fourth schedule of the Constitution lists promotion of primary health care as a county function to be carried out by County governments.

3.2 Acts of Parliament

a) The County Governments Act, No. 17 of 2012

Section 6 of the County Governments Act, 2012 provides for the powers of county governments. Section 6 (3) provides that a county government may enter into partnerships with any public or private organization as follows –

A county government may enter into partnerships with any public or private organization in accordance with the provisions of any law relating to public or private partnerships for any work, service or function for which it is responsible within its area of jurisdiction.

Further when undertaking such partnerships, county governments are mandated to undertake public participation. In addition, section 87 (a) provides that citizen participation in county governments shall be based on among others, the principle of promotion of public-private partnerships, such as joint committees, technical teams and citizen commissions to encourage direct dialogue and concerted action on sustainable development.

b) The Public Private Partnerships Act, No. 15 of 2013

The Public Private Partnerships Act was enacted in 2013 to provide for –

- (a) the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements; and
- (b) the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects.

Section 2 of the Act defines a public private partnership agreement as a contract concluded between the contracting authority and a project company under which the project company is entrusted to undertake a project. A contracting authority under the Act means a State department, agency, state corporation **or county government which intends to have a function undertaken by it performed by a private party.**

c) The Public Procurement and Asset Disposal Act, No. 33 of 2015

The Public Procurement and Asset Disposal Act was enacted in 2015 to provide for the procedures for efficient public procurement and for assets disposal by public entities.

Section 2 of the Public Procurement and Asset Disposal Act provides that "procurement" means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.

d) The Public Finance Management Act, No. 18 of 2012 and its Public Finance Management (County Governments) Regulations, 2015

The Public Finance Management Act was enacted in 2012 to provide to ensure that—

- (a) Public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and
- (b) Public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies.

Section 2 of the Public Finance Management Act defines **"development partner"** to mean a foreign government, an international organisation of states or any other organisation prescribed by regulations for the purpose of this Act while regulation 70 (1) states **"donor or development partner or external financier"** is used in this Part interchangeably to refer to the providers of external resources.

Section 138 (1) of the Public Finance Management Act provides that a "grant" means the provision of financial or other assistance by a development partner which is not repayable and—

- (i) where public money is paid to or used by a grant recipient;

- (ii) which is intended to finance the development of projects or delivery of services or otherwise assist the grant recipient to achieve goals that are consistent with the policy objectives of the county government; and
- (iii) where the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement;

The section further provides that a **“grant recipient” means the county government or a county government entity authorised to control or spend money** under this Act. Subsection (5) further provides that the funds received in the form of grants shall only be spent in accordance with Article 224 of the Constitution.

In addition, regulation 72 of the Public Finance Management (County Governments) Regulations, 2015 grants shall be disbursed through the revenue mode of disbursement or supply of goods and services in which case development partners shall undertake to submit expenditure returns in a prescribed format by the County Treasury in the grant agreement.

The regulation also requires that county governments ensure grants are factored in the budgets and counterpart funds appropriated accordingly by the County Assembly before commencement of disbursements.

Regulation 74 (5) states that monies received for specified projects which have been paid into the County Revenue Fund, shall be released when required to the appropriate project bank account.

Regulation 76 provides that the county government should open and maintain only one account in the name of the specific project at the Central Bank of Kenya into which all funds relating to the project shall be kept unless the county government is exempted by the Cabinet Secretary in writing where the Central Bank of Kenya has no branch or banking facilities.

It also provides that every payment or instruction for payment out of the project account shall be strictly on the basis of the approved estimates of budget and financing agreement.

3.3 Judicial precedents

In determining what constitutes adequate public participation, the Court of Appeal in **British America Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others (2017) eKLR** (page 12), stated—

51. We have on our part examined the record and find that there is sufficient affidavit evidence that there were consultative stakeholder forums/meetings held on 18th March 2014 and 14th August 2014 in which both the appellant and the affected party participated. There is also evidence of various meetings having been held between the 2nd respondent and the Parliamentary Departmental Committee on Health. Thus there were several meetings held prior to the publication of the said Regulations and there was also exchange of communication that included the appellant and the affected party both of whom were persons upon whom the statutory instrument is likely to have a direct or a substantially indirect effect. This is because the Regulations were made pursuant to the Tobacco Control Act whose aim is to control the production, manufacture, sale, labeling, advertising, promotion and sponsorship of tobacco products, a matter in which the appellant and the affected parties who manufacture and sell tobacco products have an interest.

52. The appellants have maintained that the consultations and interaction did not provide adequate public participation or consultation. In our view, this submission goes against the weight of the evidence that clearly reveals meetings, discussions and communications regarding the Regulations prior to their publication. What the appellant is really saying is that although they had their say, their views were not adequately considered. However, **the fact that the views of the appellant and the interested parties did not carry the day was neither here nor there.** All that the learned judge needed to establish was the fact that that step of involving the public and any other affected persons was taken. Given the facts that were before the learned judge, we have no reason to fault the learned judge for finding that **the stakeholder meetings, discussions and communications constituted adequate public participation and consultation.**

CHAPTER FOUR: SUBMISSIONS ON THE PETITION

During its proceedings, the Committee:

A. Held meetings with key interested parties to the petition as follows:

- i) Sen. Fatuma Dullo, M.P., Dep. Majority Leader, Senator, Isiolo County
- ii) The Petitioners
- iii) Representatives of Isiolo County Executive led by Gov. (Dr.) Mohammed Kuti
- iv) Representatives of Living Goods Limited

B. Reviewed relevant documents from the following key institutions:-

- i) Isiolo County Government
- ii) County Assembly of Isiolo
- iii) Living Goods
- iv) Office of the Attorney General
- v) Controller of Budget

4.1 Submissions by Sen. Fatuma Dullo, M.P., Dep. Majority Leader, Senator, Isiolo County

The Senator of Isiolo took the Committee through the petition. The Committee was informed that public participation was not done in this agreement before it was signed. The members of the public therefore do not know what was going on. The County government has indicated on numerous occasions that the agreement is a Public Private Partnership (PPP). However the institutions that would be involved in a Public Private Partnership were not involved. The PPP unit and the Treasury are not aware of the agreement.

The Senator indicated that the issue of procurement was not done according to the law. No advertisements was done and while there are 2 other companies that were present, they criteria of how living goods was chosen is not indicated.

The Senator indicated that the PFM act was not followed as the County intended to open a joint account with Living Goods. The joint account would have signatories from both County Governments and living Goods. The agreement binds the County Government to Co Fund the cost of the project. The special purpose account which is joint is being created without approval from County Assembly. The agreements bypasses IFMIS by creating a special purpose account.

The County Assembly of Isiolo passed regulations and guidelines they had received from County executive.

The Committee was informed that due diligence was not done on living goods. They have 3 directors who are all foreigners. The county Government has been calling Living Goods an NGO while they are a Private Company by guarantee. Additionally, articles of incorporation for living goods was not provided.

When the Senator of Isiolo raised all this issues and submitted a petition to the Senate it was reported that Living Goods pulled out of the agreement.

The in her written submission Senator for Isiolo indicated that the agreement presented to the Senate is different from what was approved by the County Government and did not bear the seals of living goods and County Government of Isiolo. The Senator further added that the agreement was not included in the County Intergrated Development Plan (CIDP) and therefore the County Government would be forced to fund the project through a supplementary budget.

The Draft agreement denies the County Government of Isiolo practical and meaningful participation in the control and implementation of the project.

The requisite Public and Stakeholder Consultation was not done. The County Government instead selected people in invited meetings with the County executive in order to provide an illusion of public consultation. The public participation required and invitation card.

4.2 Submissions by the Petitioners

The Petitioners informed the Committee that no public participation was done in the agreement. 10 people from each of the 10 wards were selected and called. This

is what the Isiolo County Government termed as public participation. The Committee was informed that the agreement was signed on 1st October, 2018. Living Goods is a completely unknown company to the people of Isiolo. The County Government of Isiolo wants to entrust over 300 Million Kenya shillings to that unknown company. The County Government claims that living Goods is a not for profit company even though it is not registered under the NGO Act. The articles of Association of the company was not listed and the memorandum of understanding does not include the provision of specialized equipment. The County Government was delegating legislative power to a private entity

The Petitioners informed the Committee that Living Goods does not have any capacity to provide for services and they should be accountable and transparent in their dealings. Further to public participation, the Committee was informed that public participation is a process and not event. Civic education should be carried out and the objective should be to strengthen community health in Isiolo, Merti and Garbatulla yet the Community was not involved. The Committee was informed that the agreement is not part of the CIDP plan.

The Chairperson then summarized the issues raised as follows:

1. Was public participation done
2. What does the memorandum of Association indicate?
3. Is Living Goods and NGO or not and are they registered in the NGO ACT
4. How do you guarantee the funds with an unknown entity?
5. Has due diligence been done.
6. What services are being provided by living Goods
7. Is the project part of the CIDP Plan?

4.3 Submissions by Representatives of the Isiolo County Executive led by

i) Justification for entering into an agreement with Living Goods Limited

In his submissions, the Governor justified his government's decision to enter into an agreement with Living Goods on the following basis:

a) Poor health indicators in Isiolo County

The need to reverse poor health indicators in Isiolo County had informed the county government's decision to enter into an agreement with Living Goods Limited. Relevant health data and statistics for Isiolo County were provided as follows:

- Isiolo County area in km²: 256,000 km²
- County Population: (approx.) 180,000 people
- Maternal Mortality Rate (MMR): 790 mothers die out of every 100,000 livebirths
- Neonatal Mortality Rate (NMR): 154 neonates die out of every 1000 livebirths
- Distance to the nearest health facility: 49 km (in comparison to 5km as recommended by WHO)
- Rate of skilled deliveries: 45% against a national average of 61.2%
- Rate of 4th ANC visits: 28.3% against a national average of 57.6%
- HIV Prevalence: 3.2% (highest in the region)

b) **Collapse of Community Health Services in Isiolo County**

Community health services had previously been provided in Isiolo County but had collapsed owing to lack of support. This had resulted in a reduction of functional community units from 40 to 17 at the start of the project.

c) **Need to harness technology and expertise for the provision of community health services**

In addition to providing community health services, Living Goods had demonstrated the capability to harness technology to strengthen community health services through the use of an innovative smart phone application. The smart phone application had several advantageous features including basic clinical guidelines, organizing CHV activities and setting reminders.

d) **Reduced financial burden on Isiolo County for the provision of community health services**

The county's budget for community health services for the FY 2018/2019 stood at KShs. 20 million against a budgetary requirement of KShs. 75 million as captured in the Annual Development Plan. By entering into a partnership with Living Goods Limited, a non-profit organization with donor funding and support, Isiolo County stood to gain from a 50:50 financing agreement that would significantly reduce its budget deficit for the provision of community health services.

ii) The process through which Isiolo County entered into partnership with Living Goods Limited

The Governor further provided a chronology of the events that led to the signing of the agreement between Isiolo County Government and Living Goods Limited as follows:

- *May 2018:* Governor meets a representative of Living Goods Limited at the side lines of the World Health Assembly in Geneva.
- *29th May 2018:* Following meeting in Geneva, Living Goods representatives visit Isiolo County for a meeting with the Governor, the CEC, the County Officers of Health and the County Health Management Team. During this visit, Living Goods Limited is accompanied Dr. Salim Ali Hussein, Head of the Community Health Services Unit at the Ministry of Health.
- *12th September, 2018:* Governor holds a joint consultative meeting of the County Executive and County Assembly of Isiolo at Sarova Panafric Hotel, Nairobi. A presentation is made by representatives of Living Goods Limited and the meeting resolves to support the Governor's initiative to go into partnership with Living Goods Limited.
- *15th September, 2018:* Local radio announcements on the intended partnership are aired for purposes of informing the public generating heightened public interest and debate.
- *29th September, 2018:* A draft agreement is crafted and subjected to public participation at a local hotel in Isiolo where 250 residents drawn from every ward in Isiolo are invited to attend. Owing to heightened public interest, this meeting is followed by a consultative forum with women leaders in the county to further clarify on the intended partnership with Living Goods.
- *4th October, 2018:* A public participation meeting is held at Landmark Hotel and is attended by civil society, religious leaders, women, youth groups, community health group representatives etc.
- *19th October, 2018:* A public participation meeting is held at Rangeland Hotel and is attended by the entire government of Isiolo County including all the Chief Officers, heads of department, members of the County Public Service Board and the County Health Management Team.
- *20th October, 2018:* Governor announces to a public *baraza* his intention to hold a live consultative meeting on the intended partnership with Living Goods Limited on 25th October, 2018.
- *22nd October, 2018:* A letter of invitation is sent to the area Senator informing her of the intended live consultative meeting on 25th October, 2018.
- *25th October, 2018:* A nationally aired *live* consultative meeting is held with all past and present elected leaders of Isiolo County and the intended partnership is publicly endorsed. Following the public's endorsement, the draft agreement is submitted to the County Assembly for consideration.

- 6th November, 2018: County Government of Isiolo signs agreement with Living Goods Limited.

iii) Responses to the Issues Raised in the Petition

1. *On the allegation that the county government of Isiolo failed to conduct due diligence on Living Goods Limited* the Governor submitted that Living Goods has been engaged as a key agent of the Ministry of Health in the UHC agenda. The Governor further submitted that prior to entering into an agreement with Living Goods Limited, he sought information from the other counties in which they are operating including Kisii, Kakamega, and Busia. To this end, the Governor tabled the following evidence before the Committee:
 - i. Letter from CEC Health Kisii County clarifying Kisii County's relationship with Living Goods Ltd (*Annex*).
 - ii. MOU between Kisii County and Living Goods Limited (*Annex*).
 - iii. MOU between Kakamega County and Living Goods Limited (*Annex*).
 - iv. MOU between Busia County and Living Goods Limited (*Annex*).
2. *On the country of incorporation of Living Goods Limited and the directors of the company*, the Governor submitted the following documents in his defence:
 - i. Certificate of Incorporation of Living Goods Limited as a company limited by guarantee (*Annex*)
 - ii. Identification of incorporation number: (*Annex*)
 - iii. Identification of directors: (*Annex*)
3. *On the issues raised that Living Goods Limited as a private entity is not envisioned by the Constitution to deliver public services* the Governor submitted that as a company limited by guarantee, Living Goods was a not for profit company.
4. *On allegations that Isiolo County Government had relinquished its responsibility to provide health services* the Governor submitted that whereas Living Goods was facilitating the delivery of community health services, it had no direct relationship with health facilities in the county.
5. *On allegations of unconstitutional delegation of legislative power to Living Goods* the Governor submitted that the county had requested Living Goods Ltd to hire consultants to help the county develop a Community Health Bill and policy. This role was purely facilitative and therefore did not amount to delegating legislative power to Living Goods.
6. *On allegations that the county government had failed to consult with the relevant national government organs, specifically the Ministry of Health* the Governor submitted that Living Goods was one of the key partners in the Ministry's implementation of the UHC agenda.

7. *On allegations of conferring extensive powers to Living Goods over healthcare services provision without much practical control and participation of the county government* the Governor submitted that the signed agreement clearly stipulated the respective roles of Living Goods vis a vis the County Government of Isiolo.

Further, the Governor clarified that in the partnership model adopted by Isiolo County, all drugs and supplies were supplied by KEMSA and distributed free of charge by Community Health Volunteers in line with the Community Health Strategy policy guidelines.

8. *On allegations that the agreements sought to bypass the CIDP* the Governor submitted that the **CIDP (Annex) envisaged a budget of KShs. 508 million** for the provision of community health services. With the relationship with Living Goods, the county government of Isiolo had since managed to raise KShs. 345, 542,347.00 million of the stated amount through a co-funding mechanism as follows:

- 1st year: Co-funding on a 50:50 contribution basis
- 2nd year: Co-funding on a 57:43 contribution basis
- 3rd year: Co-funding on a 71:29 contribution basis
- 4th year: Co-funding on a 84:16 contribution basis

Under this arrangement, funding was to be shared equally in the first year. For purposes of sustainability, the county would then be gradually weaned off with the contribution from Living Goods reducing from year to year based on expected growth in capacity at the county level.

The total contribution of **Isiolo County** over the four years would thus come to **sixty-six per cent** at **KShs. 226,554,367.00** while that of **Living Goods** would come to **thirty-four per cent** or **KShs. 118,987,980.00** exclusive of support towards the development of relevant policy/legislation and certain specified aspects of capacity development.

Further, the agreement directly links the contribution of each party to its responsibilities as captured in the agreement. For instance, the budget for the purchase of a land cruiser and ten motor cycles is captured under the KShs. 118,987,980.00 contribution by Living Goods.

In addition, the agreement obligated the County Government to facilitate the activities of 21 CHEWs. As such, at least 98% of the county government's contribution was going towards direct payment of CHVs and CHEWs.

A detailed breakdown of each party's contribution in relation to its responsibility in the project is annexed to this report (*Annex*).

9. *On monies from the joint special purpose account being deposited in Living Goods accounts*, the Governor submitted that this was one of the provisions of the agreement that had been amended by the County Assembly of Isiolo. In its amended form, the special purpose account is jointly operated by the County Government and Living Goods for purposes of easy execution of projects and efficient flow of funds. Regulations to this effect were passed by the County Assembly.
10. *On management of assets that will be obtained by Living Goods* the Governor submitted that under the agreement, Living Goods would be responsible for the following assets:
- One (1) Landcruiser
 - Ten (10) motorcycles
 - Seven-hundred and twenty (720) smart phones
 - CHV kits
11. *On allegations that the agreement is silent on the responsibilities of Living Goods Limited to the county government in relation to funds upon termination of the Agreement* the Governor submitted that this was provided for under sections 10.3-10.5 of the Agreement (*annexed*).
12. *On allegations that the agreement had been negotiated without the requisite public participation as envisaged by the constitutional and statutory provisions cited above* the Governor submitted that the process outlined above demonstrated that full public participation had been conducted prior to entering into the agreement. He thereafter submitted a report of the public participation process (*Annex*).
13. *On allegations that the agreement is a thinly veiled attempt at a PPP*, the Governor submitted that a PPP would be applicable were the county paying for services rendered by Living Goods. However, as provided in the agreement, Isiolo County stood to receive support from Living Goods and would not be procuring any goods or services from the entity. In addition, Living Goods is not a private entity but is rather a not for profit company.
14. *On allegations that the process failed to appreciate the legal requirements on public participation, prudent fiscal management and the principles of devolved government including the oversight role of the Senate* the Governor submitted that all due processes had been followed including submitting the agreement to the County Assembly and preparing the necessary regulations. With regards to prudent fiscal management, he submitted that this had been adequately catered for under provisions for 'project funding' and 'project funding management' as contained in pages 6 and 7 of the agreement which states that '*the execution of the project shall be guided by the Public Finance Management Act 2012 and the Public Procurement and Asset Disposal Act.*'

4.4 Submissions by Representatives of Living Goods Limited

Living Goods indicated that they entered into an agreement seeking to strengthen the provision of Community health Services in Isiolo, Merti and Garbatulla Sun Counties for a term of four years.

Living Goods indicated that they are a company limited by guarantee and duly incorporated in Kenya and issued with the number CPR/201399245 and they are a not for profit company. They operate in Uganda, Zambia, USA and Kenya. In Kenya they operate in Kakamega, Kisii, Kiambu and Busia Counties. Additionally, they have an MOU with the National Government. Their area of operation is in the community level. They get their funding from USAID, the Bill and Melinda Gates foundation and Global Alliance for Vaccines and Immunization (GAVI). The Company has medical staff from doctors, nurses and clinical workers who have all the requisite information. Additionally Living goods has all certifications from government regulatory agencies like Pharmacy and Poisons Board.

Living Goods usually identifies a gap and in most instances the issues of Community Health is usually underfunded. Living goods usually operates with Community Health Volunteers whom they train. Some of the things that they do include immunizations and delivery of ORS to children who are volunteering. They work within protocols established by the Ministry of Health. They do not work outside the framework set.

Isiolo County Government approached Living Goods to train and assist them with the issues of Community Health. They were to provide technical backstopping. Additionally while providing training and technical backstopping they provide the Community Health Volunteers with income generating activities since they are only provided a ksh 2000 stipend. This provided a way to incentivize the Community Health Volunteer. Some of the activities include sale of mosquito nets.

They work with technology that allows for mapping and data collection. This data collection allows for easier treatment through referring of previous records. It allows for tracking of Community Health workers to ensure that they provide the care they have been trained for. The agreement with Isiolo County is different from other Counties. In Isiolo County they are not providing for income generating activities for the Community Health Volunteers.

The agreement they had provided for a cofounding mechanism, however after an advisory from Treasury, on 8th February, 2019, Isiolo County Government stopped the process of opening a joint account as there were inconsistencies with the Public Finance and Management ACT 2012.

Living Goods indicated that they are currently in a hold position await for further direction from the County Government of Isiolo. Living goods indicated that the process was open and continues to be open. That they would like to follow all the requirements need.

CHAPTER FIVE: COMMITTEE OBSERVATIONS

1. **The petition was presented to the Senate prior to signing of the Agreement between the County Government of Isiolo and Living Goods Ltd:** The Committee observed that the Petition involved an Agreement which had not been executed. This could explain why there are significant differences in the initial draft agreement that was scheduled to come into effect on 01 October 2018, and the revised version that was executed on 06 November 2018. It is apparent that these changes resulted from several revisions to the original draft that appear to have taken cognizance to the issues and concerns raised by the petitioners.
2. **Compliance of the signed Agreement and the Public Finance Management (Isiolo County Community Health Services Fund) Regulations to the PFM Act 2012 and its Regulations:** The Committee noted the following with regards to the revised Agreement and the **Public Finance Management (Isiolo County Community Health Services Fund) Regulations** passed by the County Assembly:
 - a) With regards to provisions contained in clause 7.2 of the Agreement the Committee observes that the jointly operated special purpose account contravenes provisions of the Public Finance Management Act, 2012, and its regulations.
 - b) The Public Finance Management (Isiolo County Community Health Services Fund) regulations governing the Fund violate Section 109 (4) (b) of the PFM Act by authorizing monies to be paid directly to a Special Purpose Account. In addition, they violate Section 106 (6) and (7) by proposing to bypass the requirement that withdrawals from the County Exchequer Account must be approved by the Controller of Budget.
 - c) Further, the Public Finance Management (Isiolo County Community Health Services Fund) regulations contravene the Public Finance Management (County Governments) Regulations 2015, which require project-specific funds/accounts to be operated from the Central Band of Kenya.

- d) The Public Finance Management (Isiolo County Community Health Services Fund) regulations definition *'Initial Capital shall consist of such monies as may have been allocated by the County Government in its annual budget at the time of the promulgation of the regulations as well as monies injected into the Fund by donors'* contravenes the PFM Act by creating the assumption that monies received from donors do not form part of the county's annual budget.
- e) Further, the Public Finance Management (Isiolo County Community Health Services Fund) regulations are unclear on the conditions that apply to the monies received from Living Goods Limited since different conditions in the PFM Act govern the receipt of grants and donations (Section 138 (3)) vis a vis loans (Section 140).
3. **The County Integrated Development Plan (CIDP) (2018-2022) and the Annual Development Plan for Isiolo County:** The Committee notes that the Isiolo County CIDP broadly provides for the provision of community health services. The Office of the Controller of Budget in a letter dated November 16, 2018, indicated however that there is no specific provision for the agreement (annexed). The Committee further observes that the County Government has not made any specific requests based on the Agreement.
4. **The health situation in Isiolo:** The Committee observes that the poor health indicators in Isiolo County warrant the strengthening of community health services.
5. **The legal status of Living Goods Limited:** Company records obtained from the Office of the Attorney General indicate that Living Goods Ltd has four directors: one Kenyan and three Americans. They are Thomas Opiyo, Cheryl Marion, Scott Slaughter and Charles Lewis. It is registered as a company limited by Guarantee.
6. **Competence of Living Goods Ltd:** The Committee observes that Living Goods Ltd is licensed by the Pharmacy and Poisons Board. Further, Living Goods Ltd has under its employment, health personnel with the requisite

qualifications and certifications to carry out the activities envisaged in the project.

7. Public Participation: Based on the evidence presented (*annexed*), the Committee is satisfied that the County Government carried out public participation prior to executing the Agreement.

8. Data collection and privacy concerns: The Committee notes with concern that under the signed Agreement, Living Goods has been empowered to collect extensive household data from the people of Isiolo. The agreement does not contain provisions to safeguard the data collected.

CHAPTER SIX: COMMITTEE DETERMINATIONS

In respect of the prayers made in the petition, the Committee made the following determinations:

- i. **Prayer One:** *Assert its constitutional functions under article 96 of the Constitution of Kenya*

Committee Response: The Committee in respect of this prayer has met with key interested parties in relation to the Petition including representatives of the County Government of Isiolo, the area Senator, the petitioners, and representatives of Living Goods Limited. In addition, the Committee has reviewed relevant documents and memoranda from various government agencies and departments including the Controller of Budget, and the Office of the Attorney General.

- ii. **Prayer Two:** *Urgently investigates the conduct of the Isiolo County Executive in relation to the Agreement negotiated with Living Goods Ltd;*

Committee Response: The Committee in respect of this prayer has conducted its investigations and confirmed that some of the matters raised in this petition are legitimate.

- iii. **Prayer Three:** *Ensures that all public funds utilised during the negotiation of the Agreement are reimbursed to the county government and that those who are responsible are held accountable.*

Committee Response: The Committee in respect of this prayer observes that there are significant differences in the initial draft agreement that was scheduled to come into effect on 01 October 2018, and the revised version that was executed on 06 November 2018. It is apparent that the positive changes to the initial draft resulted from several revisions that appear to have taken cognizance of the concerns and issues raised by the petitioners. While there are still areas of concern in the final Agreement,

the Committee recognises that the development of the Agreement was a process rather than an event, and that it involved the participation of the entire Isiolo County Government, including the County Assembly and residents of Isiolo County. As public participation processes are provided for in the Constitution and in statute, the reimbursement of funds utilised during the development of the Agreement in question does not arise.

iv. **Prayer Four:** *Take any other appropriate action.*

Committee Response: The Committee in respect of this prayer recommends that:

- (a) The County Government of Isiolo halts all activities related to its Agreement with Living Goods Limited and makes the necessary amendments to the agreement to ensure that it complies with the PFM Act and Regulations; and
- (b) The County Government of Isiolo submits, within **one (1) month**, the amended agreement to the Senate Health Committee, the Senator Isiolo County and the National Treasury

In light of the above, the Committee resolves that:

1. This report be dispatched to the County Government of Isiolo for purposes of halting all activities related to its Agreement with Living Goods pending resolution of the legal anomalies contained in the Agreement and the resulting Regulations.
2. This report be dispatched to the National Treasury for purposes of recommending remedies to the Agreement, and ensuring compliance with all the legal provisions relating to the use of public funds.
3. This report be dispatched to the Ministry of Health to report back to the Senate on the nature of the relationship it has with Living Goods Limited, and the type of agreement they have entered into **within 3 months** of receipt of this report.