

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 28th January, 2020

Special Sitting

*(Convened via Kenya Gazette Notice
No. 380 of 22nd January, 2020)*

*The House met at the Senate Chamber,
Parliament Buildings, at 9.10 a.m.*

[The Speaker (Hon. Lusaka) in the Chair]

PRAYER

COMMUNICATION FROM THE CHAIR

PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR OF KIAMBU COUNTY

The Speaker (Hon. Lusaka): Hon. Senators, let me take this opportunity to welcome you back for this Special Sitting of the Senate.

We shall, today, Tuesday, 28th January, 2020 and tomorrow, Wednesday, 29th January, 2020, hold Special Sittings as per the Gazette Notice No.380 of 24th January, 2020 to investigate the matter of the proposed removal from office, by impeachment, of Hon. Ferdinand Ndung'u Waititu Babayao, the Governor of Kiambu County.

Hon. Senators, as is the tradition, we will hold a closed preparatory or briefing session to discuss the management of the investigation that will be held in Plenary in the next two sitting days starting at 11.00 a.m. This is aimed at ensuring that the investigation process is conducted seamlessly and timelessly.

Consequently, immediately following this brief communication, I will direct that all members of the public including the media withdraw from the galleries and any form of broadcast from the Chamber will therefore cease.

The open session and hearing will commence at 11.00 am.

I thank you.

Serjeant-At-Arms, ensure that what I have communicated is adhered to; all other members of the public to clear from the galleries.

*(All members of the public and the media
withdrew from the galleries)
(The House went into camera)*

(End of in-camera session)

(The House adjourned temporarily at 10.30 a.m.)

(The House resumed at 11.00 a.m.)

**HEARING AND DETERMINATION OF THE PROPOSED REMOVAL FROM
OFFICE, BY IMPEACHMENT, OF HON. FERDIDAND NDUNG’U WAITITU
BABAYAO, THE GOVERNOR OF KIAMBU COUNTY**

**RECITAL OF THE MANDATE OF THE SENATE, RULES OF
PROCEDURE AND HEARING PROGRAMME**

The Speaker (Hon. Lusaka): Hon. Senators, ladies and gentlemen, having dispensed with the pre-hearing meeting of Senators, which was a closed session, it is now time to commence the proceedings of the Proposed Removal from Office, by Impeachment, of Hon. Ferdinand Ndung’u Waititu Babayao, the Governor of Kiambu County.

Hon. Senators, ladies and gentlemen, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on 19th December, 2019, the County Assembly of Kiambu passed a Resolution to impeach the Governor of Kiambu County, Hon. Ferdinand Ndung’u Waititu Babayao. By a letter dated 20th December, 2019, Ref: CAK/1/19/10(24) and received in my office on Monday, 23rd December, 2019, the Speaker of the County Assembly of Kiambu informed me that at its 127th and 128th sittings held on Thursday, 19th December, 2019, the County Assembly of Kiambu passed a Resolution to impeach the Governor of Kiambu County, Hon. Ferdinand Ndung’u Waititu Babayao, pursuant to the provisions of section 33(2) of the County Governments Act, 2012.

The Speaker of the County Assembly also forwarded to me copies of the following documents:-

- a) the Order Papers of the County Assembly of Kiambu for the 127th and 128th sittings, both held on 19th December, 2019;
- b) a Notice of Motion on the proposed removal of the Hon. Ferdinand Ndung’u Waititu Babayao from the Office of County Governor of Kiambu, dated 2nd December, 2019; and,
- c) copies of documents containing the grounds and particulars on which the proposal for impeachment was made.

Pursuant to section 33(3)(a) of the County Governments Act, 2012, and Standing Order 75(1)(a) of the Senate Standing Orders, on Tuesday, 21st January, 2020, a Special

Sitting of the Senate to hear charges against the Governor of Kiambu County was held. During the Special Sitting, the Senate resolved to investigate the matter of the proposed removal from office, by impeachment, of the Governor of Kiambu County, in plenary.

Thereafter, on the request of the Senate Majority Leader and with the support of the requisite number of Senators, I appointed today, Tuesday, 28th January, 2020 and tomorrow, Wednesday, 29th January, 2020, as days for Special Sitzings of the Senate. The Business to be transacted at these Special Sitzings shall be the investigation of the proposed removal from office, by impeachment, of Hon. Ferdinand Ndung'u Waititu Babayao, the Governor of Kiambu County.

Hon. Senators, ladies and gentlemen, allow me to remind you of the mandate of the Senate in so far as it relates to the removal of a Governor from office as provided for under Article 181 of the Constitution as read together with section 33 of the County Governments Act, 2012, and Standing Order 75 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 mentioned in clause (1).

Section 33 of the County Governments Act, 2012, Standing Order 75 of the Senate Standing Orders and the Fifth Schedule to the Senate Standing Orders provide for the procedure to be followed in the hearing and determination of the proposed removal from office, by impeachment, of a Governor.

Hon. Senators, ladies and gentlemen, by way of a status update, pursuant to rules 4(a) and 6 of Part 1 of the Fifth Schedule to the Senate Standing Orders, the Senate invited the Governor to appear and be represented before the Senate during its investigation. The Senate further invited the Governor, if he chose to appear before the Senate, to file an answer to the charges with the Office of the Clerk of the Senate by 5:00 p.m. on Saturday, 25th January, 2020 setting out—

- a. the Governor's response to the particulars of allegations;
- b. the mode of appearance before the Senate: whether in person, by advocate or in person and by advocate;
- c. the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Senate; and,
- d. any other evidence to be relied on.

Pursuant to rules 4(b) and 7 of Part 1 of the Fifth Schedule to the Senate Standing Orders, the Senate notified the County Assembly of the date for the commencement of

the investigation and invited the County Assembly to designate Members of the County Assembly (MCAs), being not more than three Members, if any, who shall appear before the Senate to represent the County Assembly during the investigation.

The County Assembly was further invited, if it chose to appear before the Senate, to file with the Office of the Clerk of the Senate by 5:00 p.m. on Saturday, 25th January, 2020 documentation—

- (a) designating the MCAs, being not more than three Members, if any, who shall attend and represent the Assembly in the proceedings before the Senate;
- (b) indicating the mode of appearance before the Senate: whether in person, by advocate, or in person and by advocate;
- (c) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Senate; and
- (d) specifying any other evidence to be relied on.

Hon. Senators, ladies and gentlemen, on Saturday, 25th January, 2020, the Office of the Clerk of the Senate received a Notice of Preliminary Objection to the invitation to appear issued to the Governor. The Notice of Preliminary Objection also indicated that the Governor would appear before the Senate by his advocates, M/s Mbugua Ng'ang'a and Company Advocates.

On the same day, the Office of the Clerk of the Senate also received a response to the Invitation to Appear from Dr. Francis Ndirangu, the Acting Clerk, County Assembly of Kiambu, which provided—

- (a) the names of three MCAs designated to attend and represent the Assembly in the proceedings before the Senate and also stated that the County Assembly would appear in person and by advocate. The County Assembly did not indicate the name of the advocate;
- (b) a list of four witnesses and their witness statements; and,
- (c) further evidence to be relied on.

Pursuant to rule 8 of Part 1 of the Fifth Schedule to the Senate Standing Orders, on Monday, 27th January, 2020, the Clerk of the Senate furnished each party with the documentation filed by the other party.

Hon. Senators, ladies and gentlemen, the Hearing Programme which has been circulated 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 states that today, Tuesday, 28th January, 2020, 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 an opening statement to be made on behalf of the County Assembly. Thereafter, an opening statement shall be made on behalf of the Governor. After the conclusion of the opening statements, the presentation of the case of the County Assembly shall commence and should take us up to the end of today's Sitting.

At the Sitting scheduled for tomorrow, Wednesday, 29th January, 2020, the Governor will have an opportunity to present his case before the Senate. This will be

followed by a closing statement on behalf of the County Assembly and a closing statement on behalf of the Governor.

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 75(6) of the Senate Standing Orders, the voting shall be by county delegations.

The Governor shall cease to hold office if a majority of all county delegations of the Senate vote to uphold any impeachment charge. If, however, the vote in the Senate fails to result in the removal of a Governor, pursuant to Standing Order 75(7), the Speaker of the Senate shall notify the Speaker of the County Assembly of Kiambu accordingly.

As I conclude, I would like to assure you that the Senate is cognizant of the gravity of the matter with which it is seized and shall accord the parties a fair hearing.

Hon. Senators, ladies and gentlemen, I will now invite Counsel for the County Assembly of Kiambu, if any, to introduce the legal team of the County Assembly and the MCAs of Kiambu representing the County Assembly, by stating the full name and designation of each person.

INTRODUCTION BY THE KIAMBU COUNTY
ASSEMBLY TEAM

Mr. Mbuti Gathenji: The Hon. Speaker and Members of the Senate, my name is Mbuti Gathenji. I am a counsel appearing for the County Assembly. My team includes Mr. Nani Mungai and Mr. Karuga Maina. The MCAs designated for the purpose of these proceedings are Hon. Solomon Kinuthia Wambui, who is also the Mover of the Motion. He is the MCA for Ndenderu Ward. The second one is hon. Gideon Gachara Gitau, who is the MCA for Ndeiya Ward. He is also the Majority Leader. The third one is hon. Yvonne Wanjiku Waweru, who is also the Chairperson of the Committee on Implementation and Legal Affairs.

Hon. Speaker, we will be calling witnesses stated in the document that was submitted to the House.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Hon. Members, I now similarly invite Counsel for the Governor to introduce the legal team representing the Governor and the Governor, by stating the full name and designation of each person.

INTRODUCTION BY THE KIAMBU COUNTY
GOVERNOR'S TEAM

Mr. Ng'ang'a Mbugua: The Hon. Speaker and hon. Senators, on behalf of the Governor, the representation is as follows. For the lawyers acting for the Governor, there is Mr. Peter Wanyama and Mr. Charles Njenga, who are both present. I will be leading that team. My name is Ng'ang'a Mbugua.

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Hon. Speaker, I also wish to bring to the attention of the Senate that the Hon. Governor of Kiambu County is personally present before this Senate, and he will be answering to the charges in person. That is as far as our representation goes.

I thank you.

The Speaker (Hon. Lusaka): On behalf of the Senate, I welcome the County Assembly team, the Governor's team, members of the public and the media to the Senate and to these proceedings.

I thank you.

I now call upon the Clerk to read the charges.

READING OF THE CHARGES

The Clerk of the Senate (Mr. Nyegenye): The Hon. Ferdinand Ndung'u Waititu Babayao, please take the stand.

(Gov. Ferdinand Ndung'u Waititu Babayao took the stand)

Hon. Governor, Ferdinand Ndung'u Waititu Babayao, the charges against you as received from the County Assembly of Kiambu are as follows:

(1) Gross Violation of the Constitution of Kenya 2010, the County Governments Act, 2012, the Public Finance Management (PFM) Act, 2012, and the Public Procurement and Disposal Act, 2005-

(i) Lack of accountability in the management of county resources by incurring unsustainable debts and other pending obligations to the tune of Kshs4 billion. These pending obligations were never disclosed in the County Fiscal Strategy Paper 2019, thus violating Article 201(e) of the Constitution 2010 and Section 107(2)(e) of the Public Finance Management Act, 2012.

The County Executive under the leadership of the County Governor intentionally failed to draft the Medium Term Debt Management Strategy for the Financial Year 2018/2019, in contravention of Section 123 of the PFM Act, 2012. This places Kiambu County in a highly precarious financial position as it may lead to protracted and costly court battles with the creditors and eventual auctioning of county assets.

(ii) Violation of Articles 176(1) and 185 of the Constitution of Kenya, 2010, by disregarding the County Assembly as an arm of the County Government and further undermining its three cardinal roles of legislation, oversight and representation through systematic non-remittance of requisitioned funds in the Financial Year 2018/2019.

The Governor diverted funds intended for use by the Assembly to projects where he would obtain personal benefits through irregular procurement. This systematic crippling of the Assembly operations compromises the independence of this honourable House. This unwritten edict of the County Governor violates Articles 6 and 10 of the Constitution of Kenya, 2010, that engenders the spirit of mutual respect, cooperation and consultation amongst all arms of governance.

Violation of Article 201 (a) and (d) of the Constitution of Kenya, 2010 that sets fundamental principles of public finance and further Section 5 and 130 (1) (b)(i) of the Public Finance Management Act, 2012;

Violation of the Constitution of Kenya, 2010 Articles 201 (a), (d) and (e) on principles of public finance, Articles 227 (1) on procurement of goods and services and Public Procurement and Disposal Act, 2005 by failing to adhere to the stipulated dictates of the law in awarding Kshs2.1 billion road tarmacking contracts against as approved total Roads, transport, Public Works and Utilities Budget of Kshs1.4 billion in the Financial Year 2018/2019. The purpose of the irregular awards was not to provide public roads, but was intended to enable the Governor obtain personal benefit through kickbacks.

This has exposed the county to huge losses through potential suits for breach of contract and/or pending bills. Further, it has exposed the County Assembly Members to ridicule in their wards where promises to repair/construct roads were made on promises from the Governor who had no intention of honouring the promises.

(iii) Failure to establish the County Budget & Economic Forum as stipulated in Section 137 of the Public Finance Management Act, 2012; as a result the County Governor has sabotaged public consultation as regards the preparation of the County Plans and Budgets ultimately violating the provisions of Sections 87, 91 and 115 of the County Governments Act, 2012 as well as Articles 10 and 201 (a) of the Constitution that demands involvement of the public in decision making. The failure was deliberate to create an atmosphere of chaos to facilitate the plunder and loss of public resources.

(2) Crimes under the National Law

The County Governor committed serious crimes under National Law in the following way-

(i) Violation of Article 40 of the Constitution of Kenya, 2010 on the protection of every person's right to property and Section 155 of the Land Act, 2012, which bars unlawful acquisition and occupation of property through the forceful dispossession of Mrs. Cecilia Njoki Mbugua, a widow of two prime plots of land within Thika Municipality. The two plots namely Thika Municipality/Block XI/877 and Thika Municipality/878 were part of the widow's inheritance from her deceased husband.

The County Governor promptly facilitated the irregular transfer of the said land totaling to 0.135 hectares on the 2nd January 2018 to Mrs. Esther Wamuyu Nyatu a common law wife of and mother of the children of the Governor. The Governor and his wife made admission to the Ombudsman of the irregular acquisition of the land. The Ombudsman is a constitutional body and its findings of fact implicate the Governor in impeachable conduct.

(3) Abuse of Office/Gross Misconduct

The County Governor exhibited gross misconduct in the following ways:

i. Conflict of interest and contravention of the Public Procurement and Disposal Act, 2005 in influencing the award of lucrative tenders to companies associated with immediate family and close relatives.

- ii. Violation of the Section 74 of the County Governments Act, 2012 by usurping the Powers of the County Public Service Board to regulate the engagement of persons on contract, volunteers and casual workers in the County of Kiambu by directly creating directorates and hiring staff on casual basis as Directors and Assistant Directors, as well as Sub County Administrators and Ward Administrators. Further, to this, the County Governor has hired over 600 casuals without the involvement of the Public Service Board. Upon realizing that he had broken the law the Governor caused all the said staff to be fired exposing the County to risk of multiple suits and loss of public funds.
- iii. Violation of Article 226 (5) of the Constitution of Kenya, 2010 through the imprudent use of public funds in payment of staff without authorized staff establishment records as required under Section B5 (2) of the County Public Service Human Resource Manual. Examination of the Staff records and payroll by the Auditor General in 2017/2018 audit revealed that the County had employed 706 new employees yet there were no positions advertised in the newspapers declaring vacant positions.
- iv. Incurring unsustainable wage bill above the expected threshold of 35 per cent in contravention of Regulation 25 (1) (b) of the Public Financial Management (County Government) Regulations, 2015.
- The statement of receipts and payments on wages and benefit for public officers serving in Kiambu County Government for the Financial Year 2017/2018 was Kshs 5.9 Billion while the actual revenue collected during the year under review was Kshs 12.6 billion, an indication that the percentage of wages and benefits of public officers to the total revenue was 47 per cent.
- The net effect of the above audited scenario is unsustainable bloated wage bill therefore revenue collected is used to finance wages instead of financing development projects that enhances service delivery and overall wellbeing of Kiambu County residents.

Hon. (Gov.) Waititu, how do you plead; guilty or not guilty?

Gov. Ferdinand Ndung'u Waititu Babayao: Not guilty.

The Speaker (Hon. Lusaka): Hon. Senators, I will now give 30 minutes for opening statement from the County Assembly of Kiambu.

OPENING STATEMENT ON BEHALF OF THE
KIAMBU COUNTY ASSEMBLY

Mr. Njoroge Nani Mungai: Hon. Speaker, hon. Senators, I am Njoroge Nani Mungai; Counsel for the County Assembly. This is our opening statement –

The Speaker has started by setting out the mandate of this House in these proceedings. That mandate is to investigate and confirm that there is adequate evidence that substantiates the allegations made against the Governor.

The courts have ruled on that question and there are two elements that I would like to bring to the attention of this House –

The first, in the case of *Martin Nyaga Wambora versus the County Assembly of Embu and five others; Civil Appeal No. 194 of 2015* – the Court of Appeal had occasion to consider the question of the removal of a governor, and it stated that the removal of a governor is not about criminality or culpability but it is about accountability, political governance as well as policy and political responsibility.

The evidence that you will hear in the course of today will demonstrate beyond reasonable doubt, that Gov. Waititu has failed on the account of accountability, political governance and political responsibility, and has done so in a manner that warrants his removal.

The court then went on to ask the question of the threshold that is required to be demonstrated under Article 181 before a governor can be removed.

The court held that there must be a nexus between the Governor's conduct and the alleged gross violations. It is, therefore, not enough for us to demonstrate that there were violations; we must be able to demonstrate that those violations are directly linked to the conduct of the Governor.

In the course of today, this House will hear evidence of the Governor's direct involvement in acts of breach of the Constitution, breach of the law, as well as criminal conduct that has been investigated and established by a Constitutional Commission. It will be our submission at the end that there is sufficient nexus between the Governor's conduct and the alleged gross misconduct. At the end, when the Senate retires to deliberate, what you must ask is; do the facts and evidence support the impeachable charges? It is our humble submission that when you look at that evidence, you will find that that will have been established.

A couple of points in terms of the evidence; the County Assembly provided the evidence that was used in the impeachment, and the Speaker has alluded to that. The Notice of Motion contains the evidence and we have also filed additional evidence and witness statements. What is not in dispute is that at no time has Governor Waititu disputed a single fact that has been presented; not at the County Assembly, and not before you. Therefore, any allegations or facts that have been presented have been met by only one document, which is his notice of preliminary objection.

Therefore, the question that you will have to ask is; in the absence of evidence from the Governor and in light of the compelling evidence that you will have received from the County Assembly, do you have sufficient evidence to impeach the Governor? I do not wish to get into the details of evidence at this point, but it is important to sign-post to the Senate so that when we come to present the evidence, you are able to follow what it is that we are trying to do with the evidence.

There are three broad charges that are brought against the Governor; the first is the violation of the Constitution and the various stated statutes. The evidence that you will see with regards to violation of the Constitution and the stated statutes – the County Governments Act and the Public Finance Act – will lead to one irresistible inference. That is; that there was a concerted and consistent effort by the Governor to subvert the checks, balances and controls that have been put in place to safeguard public finances. You will, for example, see that when it comes to the budgeting process, the law and the

Constitution requires that you not only budget, but you do not procure anything that is outside of that budget. You will see that that stipulation will have been violated.

When it comes to the question of the breach of international or national law, this is where you will find some fairly shocking evidence; and it is shocking at three levels. Governor Waititu used his Office--- The County Government has the mandate of fiscal planning under the Constitution. You will find evidence that a widow who was left property by her deceased husband applied for planning approvals. However, when she did that, the County Government involved itself in machinations to try and frustrate that process, including trying to compulsorily acquire that land. The widow had to go to court to compel the county to undertake its mandate.

Now, that is not the shocking part; the shocking part is that the widow received a telephone call calling her to the Governor's Office, and the Governor personally demanded from her that she transfers two parcels of land. Those parcels of land were to be transferred to his wife so that she could get the approvals that she needed. Because of her desperate situation, she did that, but fortunately, the Constitution provides a remedy for her.

She went to the Commission for Administration of Justice (CAJ) or the "Ombudsman," and made a formal complaint. The Constitution and the Act that sets up the CAJ provides a mechanism that allows one to complain. It empowers the CAJ to, *inter-alia*, investigate abuse of office. Therefore, she went to the right forum. The CAJ carried out detailed investigations, called Mr. Waititu and his wife, and they confirmed that that the property had been transferred to the wife for no consideration. The CAJ made a finding in a ruling that implicated Ferdinand Waititu personally for that particular offense, and ordered that the property be retransferred; and that was done.

Therefore, when you retire to deliberate, I think this is one of those offenses for which, apart from breaching Article 40 of the Constitution, which is on the protection of right to property, and apart from breaching the law in terms of abuse of office, this conduct is contrary to the Bible. Exodus 22 tells us, "Do not oppress a widow and if you do, the wrath of God shall be upon you." However, I do not wish that the Senators look at Exodus; Governor Waititu will meet his maker on the judgment day, and he will be able to deal with that. However, you will find that the evidence shows that this is a man who not only breaches the Constitution and the law, but one who is not even afraid of the wrath of God.

The last category of evidence that we shall be submitting to you relates to conflict of interest. The conflict of interest charges are linked to the first group of charges. In the first group of charges, we told you that there was a systematic weakening and destruction for the safeguarding of public funds. There was a reason why Governor Waititu did this, and the reason is that having weakened the systems, Governor Waititu then proceeded to put at the disposal of his family the resources of the people of Kiambu.

Procurement contracts were done that resulted in Governor Waititu's wife and daughters all receiving funds from the county budget; and this was a clear conflict of interest. The evidence you will see has the tenders, the award letters, the CR12s from the lands office, demonstrating that these properties and monies were going to Waititu's wives.

The only thing that one could commend Governor Waititu for is that he does not discriminate. When it came to looting public resources and giving them to the wives, he gave each wife resources.

(Laughter)

Therefore, it is going to be the County Assembly's case that the Governor systematically weakened the controls so as to put the resources of the county into his family's hands.

The last evidence that we will submit is with regard to illegal employment. The employment of county officers is governed by the law, and the responsibility of recruitment is with the County Public Service Board. Governor Waititu systematically disregarded that law and employed over 600 people directly. The letters of appointment are there and you will see them; they are signed by himself directly in total disregard of the law.

At some point, when there were investigations about disappointments by the Ethics and Anti-Corruption Commission (EACC), the Governor decided to sack these people. You have double jeopardises for the people of Kiambu. On the one hand, people are employed irregularly. But on the second hand, they are now saddled with potential claims by persons who have been irregularly terminated.

It would be our submission at the end that there is compelling evidence and facts, none of which have been controverted by the Governor, to substantiate the allegations. For those reasons, we will be then asking that this Senate do undertake its mandate of protecting devolution. Protection of devolution includes protecting it from persons who choose to violate the purpose for which devolution was instituted.

The reason to why this country passed the 2010 Constitution, partly was that we wanted resources to go closer the people. The devolution provisions were not intended to devolve corruption to the grassroots, which is what Governor Waititu and his conduct as revealed by the evidence and facts, which he has controverted will do.

That is the opening statement on behalf of the County Assembly. This afternoon we will lead the House through the evidence. Thank you.

The Speaker (Hon. Lusaka): Thank you for your opening statements. I now invite Governor Waititu's Counsel to give its opening statements in 30 minutes.

OPENING STATEMENT ON BEHALF OF THE
KIAMBU COUNTY GOVERNOR

Gov. Ferdinand Ndung'u Waititu Babayao: Mr. Speaker, Sir, I would like to have few minutes for my opening statement and then I donate some of my minutes to my lawyer.

Mr. Speaker, Sir, I will start by thanking the Senate for giving me this chance and opportunity to be heard; a chance that I was denied by the County Assembly. It is important to mention that I had sent my lawyers because I feared the humiliation and shouting match that could have been in the Assembly. I sent my two lawyers, they were

there representing me. However, they were never given a chance to give my answers to all those questions that have been levelled against me.

I would also like to mention that all the answers are lying at the office of the Serjeant-at-Arms. The answers are there. I wish the Speaker allowed those answers to be brought to the Hon. Members.

Mr. Speaker, Sir, I listened carefully to all the accusations. Last week, I also listened and watched the deliberations of the Senate. I must say that I am happy to know that for all the governors who have gone through the Senate, this has had a positive impact in their counties. I hope that after this process, there will be a serious positive impact in the whole of Kiambu County.

Mr. Speaker, Sir, when I was elected in Kiambu County, politics did not stop when I went to the office. There has been a lot of propaganda through social media. Bloggers are being paid by politicians to malign my name. It has gone to a level that they always get away with the propaganda and achieve their goals. They repeat a lie so many times and it ends up looking like it is the truth.

Mr. Speaker, Sir, some of you know very well that sometime back, there was an article that went viral that my daughter was found with an account of Kshs100 million. It was found to be untrue. She had an account with only Kshs9,000. That is the level of propaganda that is in Kiambu County. Now that the matter has come to this House, I strongly believe that this House has the mandate to give the residents of Kiambu County and the how country the truth and justice they require. Justice should also extend to me as the accused person.

Mr. Speaker, Sir, when I was given the Notice of the Motion, the Assembly took over 17 days to deliberate on a Special Motion. They went against the Kiambu County Assembly Standing Orders, which requires that a Special Motion be disposed of within 14 days. When it came to that day in the Assembly, I was never given a chance to be heard. I had sent my lawyers who were sitting there. They were recognized from the morning and they were waiting to be heard after the accusations, but they were never given that chance.

On the same day, because of that culture of believing in propagating lies, and knowing that they have been succeeding in propaganda, a House that had 57 Members only, since the whole day of deliberation, the threshold in Kiambu County as stipulated in the County Government Standing Orders, is two-third. In Kiambu County, we have 92 Members. The two-third is supposed to be 62 Members for the Motion. That threshold was not there in the Assembly; there were only 57 Members. One of the members voted no in my support. He was there throughout the day. He is here and he can testify to that.

Mr. Speaker, Sir, the Motion that has been brought before this Senate, having not met the required threshold - having been a Member of Parliament twice, a Member of County Assembly of Kiambu and former Deputy Governor of Nairobi, honestly speaking, numbers count. It is the Constitution that outlines what must be done with clear procedures and directions.

Mr. Speaker, Sir, however bad I might look politically or otherwise, or whatever people think about me, I should be given justice. I am pleading to this House that as a Kenyan, I should be given justice like anybody else. That is why the Constitution

guarantees everybody, fair hearing and judgement. When the Motion, which according to me did not meet the threshold was brought to the Senate, they did not also meet the days that are required. They are supposed to bring the Motion after two days. They brought that Motion to the Senate after four days. To me, that is a breach of the procedures in the Standing Orders of the Senate and of the County Assembly.

The Senate Standing Orders mentions that the Senate is to be convened in seven days, but the Members were called way above the seven days. I know that some of you will be governors in 2022 as it happened last time. I know that a big number of you will also become governors and you will expect justice when you come here.

(Laughter)

I was in this compound for two terms as a Member of Parliament, but I am now in the dock. I am sure that some of you will also come here and you will expect justice. I beseech you to serve me justice.

Mr. Speaker, Sir, accusations have been brought here against me. I have experts in the county who deal with finance. They are highly qualified. Some of the things in those accusations were handled by different people in the county who are qualified to do that work in the finance and procurement department. I am not part of the procurement process. There are so many things that happen in a county that has over 8,000 employees. I cannot be held accountable, by any means, for everything that happens to people who are employed there. It is true that I am the Governor and I do chair some Committees, but I beseech you to be fair where I have no mistake.

Things have been said about the lady and the plots in Thika. I want my accusers to produce a single document or evidence that implicates me. The people who dealt with that matter are adults. I do have many relatives who deal with many things and some of them just want to enjoy the title that I have. However, those people should be held accountable for what they do and I should be held accountable for what I do as a Governor. I never called the lady as indicated here. The accusers should produce proof, if there is any. I never requested the registrar to transfer the plots. They should produce the proof, if it is there. I was never called by the Ombudsman.

All these issues came when I was taken to court over corruption and I am still pushing with my case. There are so many people who have cases in court and I am just one of them. I am innocent until proven guilty. You cannot nail me because of a case that is going on and I have not been found guilty. I am requesting you to let the case court to continue. I might actually be proven innocent. You will not have done justice to me if you are to pin me down because of that case. I request you to be fair.

Mr. Speaker, Sir, you should listen to the facts and evidence rather than propaganda. Kiambu is known for serious propagandists. That is the nature of Kiambu. You all know the politics in Kiambu. You should not judge me because of those politics. These deliberations should help change the narrative and the thinking of the people of Kiambu who think that they can propagate lies and succeed and that they can succeed in getting rid of somebody just because they do not want that person. I am a victim of that, but I request this House to serve me justice. Be fair to me. You should look at facts and

evidence as adduced. I have all the answers to the accusations in the Serjeant-at-Arm's Office.

Thank you, may God bless you. I now call upon my lawyer to sum up what we have said. I think that I have not used all the 30 minutes.

The Speaker (Hon. Lusaka): Do we have time?

Mr. Ng'ang'a Mbugua: Mr. Speaker, Sir---

The Speaker (Hon. Lusaka): You have 18 minutes.

Mr. Ng'ang'a Mbugua: Thank you, Mr. Speaker, Sir. I will actually take less time and yield a few minutes to my learned colleague, Mr. Njenga.

Today, we gather before this august House to discharge a most noble and solemn task that only this Senate can undertake, which is the consideration of the proposed removal from office by way of impeachment of a popularly elected Governor of the second most populous county in this country. This task underlies the supremacy of this House. No other House in this country has the sovereign power to terminate the social contract between a governor and his people or even the President and his people. Being such a solemn duty, it calls for a lot of restraint and great circumspection.

The tool of impeachment, correctly understood, should only be deployed as a measure of last resort and where it has been shown that all oversight mechanisms have either failed or are otherwise inadequate. It is a duty that this House has been called into action to undertake. Before it undertakes that duty, this Senate has an obligation to audit the entire process that was undertaken by the Assembly and satisfy itself that the process was proper, lawful and valid. This is particularly important because this Senate was not conceived to rubberstamp decisions and resolutions passed by the Assembly.

Primarily, the Senate was conceived to protect counties and their governments. One of those protections is to protect elected governors who are the chief executive officers of those counties. It is important that this Senate protects governors from marauding assemblies who might seek to deploy impeachment tool for their own selfish motives. This House comprises noble men and women of great character and integrity and whom we believe will rise to the occasion, at the appropriate time, and make a determination on the facts, evidence and the law and find that the charges that will be presented before this Senate lacks any basis.

There are some critical preliminary issues that my learned friend will advert to in his opening remarks and I do not wish to rehash those because Mr. Njenga will deal with those. This has to do with the question of whether the Governor was given opportunity to be heard before the Assembly, whether the Constitution and statutory timelines before the Assembly were complied with, whether there was public participation and whether the charges contravene the *sub judice* Standing Order of this honourable Senate.

You have been told that we have not controverted the facts and the evidence. First, it is the Governors case that he was not given a chance to be heard by the Assembly. Therefore, the opportunity to controvert that evidence at that preliminary level was deprived hence it cannot lie in the mouth of the Assembly to say that the Governor has not controverted the charges, facts and the evidence.

As relates to the documents that we have filed, we did file a notice of preliminary objection when we were served with the invitation to appear, but it was not possible

within the three days that we had been allowed to present substantive evidence. As soon as we finish making the opening remarks, we shall make an appropriate application under the relevant provisions of the Standing Orders for admission of that evidence out of time. I will revisit that shortly.

Mr. Speaker Sir, you will be told that there was an alleged violation of the Constitution, the Public Finance Management Act (PFM), and the Public Procurement Assets and Disposal Act; and that there were unsustainable debts that were incurred. What we do not understand is which law criminalizes what is called unsustainable debts.

You have been told that the Governor has been undermining assembly business by not remitting funds to the assembly. That allegation is not founded on the evidence that we shall be producing.

You have been told that there was failure to adhere to budgetary estimates in procurement and alleged failure to establish the County Budget and Economic Forum. Those allegations are baseless, subject to admission for the evidence that we shall be producing. We shall demonstrate that, that is not factual.

Mr. Speaker, Sir, as regards to allegations to do with conflict of interest, it is important to point out that, that particular charge is the subject of active criminal litigation. In as far as that particular charge is concerned, we shall be raising an objection to its admissibility or consideration by this Senate when it is indeed the subject matter of a core process.

There are no impeachable grounds that we call crimes under national law. The impeachable ground should be reasons to believe. Therefore, we shall be again raising an issue as to how that particular charge is crafted and whether it can indeed found a basis of an impeachable offence under Article 181 of the Constitution.

Mr. Speaker, Sir, regarding the issue of staffing and again procurement, we shall be demonstrating to you that there is absolutely no direct nexus between the alleged violations and the conduct of the Governor. The Governor plays no role in the procurement process. Yes, he might be the County Executive Officer (CEO) of the county, but he does not award and evaluate tenders, and he does not sign contracts. What you will not be told is where the evidence with regards to those subject tenders is and where the Governor's hand is.

You will not be told all that. You will be told about the alleged high wage bill as a ground for impeachment. This is a national issue; it cuts across all counties. The reasons are diverse; delayed release from the Exchequer and inherited debts from the previous regime. All those have been lumped together to couch an alleged charge of an alleged unsustainable wage bill that has been flowerily crafted; it says that the County of Kiambu is threatened with auction. Far from it. We will be demonstrating that, that phenomenon has nothing to do with the conduct of the Governor.

On the whole, we shall be urging this Senate to reject all the grounds and charges for not having been proved. I will yield the remainder of my time to Mr. Njenga to make some brief opening remarks on the process issues and the legal deficiencies of the Motion that was presented to the Speaker of the Senate by the Speaker of the Assembly.

Mr. Speaker Sir, I yield the floor.

Mr. Charles Njenga: Thank you, Mr. Speaker Sir. I only have 10 minutes, so allow me to dive right into it. Mine is to speak to a few legal issues that are very material to this session. In the case cited by my senior who was interesting my pupil master and my trainer, Mr. Nani Mungai, the court has said that the jurisdiction and mandate of the Senate to hear an impeachment flows from a resolution of the county assembly.

Therefore, without a resolution, this gathering is not properly constituted. This session to hear the charges against the Governor cannot be legally and competently moved without a proper resolution of the county assembly. Why do I say this? It is because in the proper and exhaustive evolution of the facts, you will realize that there is a fraud upon the Senate.

The law is clear on the extent that it provides for a number threshold required to pass a resolution for the removal of a governor. The law says that when you have two thirds then you have a valid resolution. The evidence available – and that will be demonstrated – shows that on the material date, only 57 members of the County Assembly of Kiambu were available and participated. Even without further interrogation, that by itself calls into question the validity of the resolution, and invites the Senate to make a determination as to whether it has been properly moved to hear and determine the proceedings of these charges.

The courts have said that there cannot be justice without the law. I know that we are all itching to proceed to the facts and to remove the Governor, the country is in the mood. However, the law is there to safeguard all of us. We are here, before a legislature and before the Senate of the republic of Kenya - which is enjoined under Article 94 of the Constitution - to protect the Constitution and the democratic governance of the republic. Therefore, the law is an issue and we have to consider it as a preliminary issue.

The second thing that calls into the investigation of this Senate is the question of statutory timelines. Where the law provides a statutory timeline within which an action should be done and resolved, there cannot be any other argument. If we are to be loyal and subservient to the law, we must interrogate our own processes and confirm at the first instance whether we are compliant with the law.

The Governor is here on allegations of violations of law and the Constitution. Before we put him to the sword, we have to look within ourselves and confirm whether we are properly constituted. I say that based on the material evidence before this House that shows that this House was notified on the 23rd of December, right before Christmas.

In no uncertain terms, the law requires that the Senate be convened within seven days. That is Section 33 of the County Governments Act. It does not give any conditions, any accommodation or latitude to extend that time. The facts herein show that the Senate was convened on the---

(Sen. Moi stood up in his place)

The Speaker (Hon. Lusaka): The Senator of Baringo County, take your seat.

(Laughter)

Proceed, Counsel.

Mr. Charles Njenga: Thank you, Mr. Speaker, Sir, for that protection.

The Senate was convened by the Speaker on the 21st of January, 28 days later. The law says seven days--- ‘shall within seven days convene the Senate to hear charges’. We were convened 28 days later.

Clearly, we cannot ignore the critical issues of law that call to account and to issue the validity of the proceedings that we are now in. We shall raise them in material detail when we are prosecuting our preliminary objection, but it is important to say that, that is an issue that we shall be raising as a preliminary issue.

As I sit, you have been told that there are many allegations against the Governor. Yes, there are, and you can see them in the grounds set out. This House has had occasion to hear over eight such impeachment Motions and proceedings. In reports and matters that I have personally participated in this Senate has said that it is not enough to allege. Hon. Senators, what you must look for is evidence. When you are told a title was transferred you must ask for that transfer and find out who signed it.

If you are told that persons were employed, you must interrogate the process. When you are told that the governor accumulated debts, you must find out whether those debts occurred or were incurred during his tenure or they inherited debts and what the Auditor General has said about those debts because all those are factors that have not been disclosed to you.

When you look at them in the very end, you will be surprised that these are mere allegations. They are high in hype and emotions, but deficient on evidence. The question and game here is evidence. That is what you must look for. In the totality of the facts before you, and I have looked at the documents filed by the county assembly, there is no evidence filed to support the allegations.

Therefore, we shall be saying in our final submissions that the charges before this House have not been substantiated. We shall be making extensive reference to previous reports of this House because this is a House of precedent, and there are certain things it has said are not impeachment questions.

On questions like convening a county budget forum, the House has said that those are not impeachment questions. They have to rise to a level and the stature of gross violations as anticipated by Article 181 of the Constitution and Section 33 of the County Governments Act. Therefore, our submission in support of the governor’s case is that before you are politically instigated allegations that are deficient in evidence and cannot be substantiated.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Thank you very much, Counsel for both sides; the County Assembly of Kiambu and the Governor of Kiambu.

ADJOURNMENT

The Speaker (Hon. Lusaka): Hon. Senators, you have heard from the opening statements weighty matters raised on both sides. Therefore, as per our programme, the House will adjourn for lunch and reconvene at 2.00 p.m.

The Senate rose at 12:15 p.m.