

THE CHARGES BY THE COUNTY ASSEMBLY OF KERICHO AGAINST THE GOVERNOR OF KERICHO COUNTY

1. GROSS VIOLATION OF THE CONSTITUTION AND THE PUBLIC PRIVATE PARTNERSHIP ACT, 2013

(a) Irregular agreement between the County Government of Kericho and Bluetech UK Group Limited

1. The County Assembly in the Particulars of Allegations stated that the Governor on the behalf of Kericho County Government entered into an agreement with a private company by the name Bluetech UK Groups Limited. The terms of the agreement were that the private company would design, build, finance, operate and subsequently transfer to the County a 100 MW solar plant whereby the proposed generation of 100 MW electricity would be implemented in phases. The cost would be 1,350,000 USD (one million three hundred and fifty thousand) per MW.
2. According to the County Assembly, section 20 of the Public Private Partnerships Act provided for the procedures which would require to be followed before entering into such agreements. Section 20 of the Public Private Partnership Act, 2013 provides as follows –

A contracting authority shall prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following –

- (a) *technical issues;*
- (b) *legal, regulatory, technical framework;*
- (c) *institutional capacity status;*
- (d) *commercial, financial and economic issues; and*
- (e) *such other issues as the Cabinet Secretary may stipulate.*

3. The County Assembly averred that the office of the Governor had failed to undertake a diagnostic study into the legal, regulatory and technical framework when entering into the agreement.
4. In his response, the Governor stated that the agreement in question was a Memorandum of Agreement or Understanding and not a contract. The Governor referred to the Cambridge Dictionary and stated that it defined a Memorandum of Agreement as “*a document that records the details of agreement between two companies or organizations which has not been legally approved*”.
5. The Governor was of the opinion that Memorandums of Agreement are not legally binding but carry a degree of seriousness and mutual respect, stronger than a gentleman’s agreement. The Governor noted that a Memorandum of Agreement is a first step towards a legal contract and further noted that in the United States, a Memorandum of Agreement is synonymous with a letter of intent, which is a non-binding written agreement that implies that a binding contract is to follow. The Governor further noted that a Memorandum of Agreement was more formal than a verbal agreement, but less formal than a contract and that organizations could use a Memorandum of Agreement to establish and outline collaborative agreements, including service partnerships or agreements to provide technical assistance and training. According to the Governor, a Memorandum of Agreement may be used regardless of whether or not money is to be exchanged as part of the agreement.
6. The Governor was therefore of the view that no legal contract had been entered into between the County Government of Kericho and BlueTechs UK Groups Limited. He therefore stated that “*it is just a gentleman’s agreement at a serious level*”.

7. The Governor referred to Clause 1(i) of the Agreement which provided as follows–

The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require considerable outlay of funds. The commencement of the project will be subject to the outcome of the study.

(b) Contravention of the provisions of Article 201 of the Constitution

8. Further, on the matter of the alleged irregular agreement between the County Government of Kericho and Bluetech UK Groups Limited, the County Assembly referred to Article 201 of the Constitution and stated that the Article highlights the principles of public finance and states that there shall be openness and accountability including public participation, in financial matters. Article 201 of the Constitution provides as follows –

The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters;*
- (b) the public finance system shall promote an equitable society, and in particular—*
 - (i) the burden of taxation shall be shared fairly;*
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and*
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;*
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
- (d) public money shall be used in a prudent and responsible way; and*

(e) financial management shall be responsible, and fiscal reporting shall be clear.

9. According to the County Assembly, the Governor contravened the provisions of Article 201 by failing to seek the approval of the County Assembly prior to entering into the public private partnership agreement and therefore failed to ensure *openness and accountability* in the process.

10. The Assembly further stated there was no evidence that the Governor conducted public participation under any platform established under section 91 of the County Governments Act particularly in view of the fact that the County was to contribute ten percent of the consideration which amounted to 135,000 USD (one hundred and thirty five thousand US Dollars) per MW. Section 91 of the County Governments Act provides as follows –

The county government shall facilitate the establishment of structures for citizen participation including—

- (a) information communication technology based platforms;*
 - (b) town hall meetings;*
 - (c) budget preparation and validation fora;*
 - (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
 - (e) development project sites;*
 - (f) avenues for the participation of peoples’ representatives including but not limited to members of the National Assembly and Senate; or*
 - (g) establishment of citizen fora at county and decentralized units.*
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11. In addition, the County Assembly stated that the provisions of Article 201 of the Constitution required that the Assembly, for purposes of openness and accountability, approves such projects but the approval of the Assembly was not sought in this instance.

12. In response, the Governor stated that during the signing of the agreement on the 13th January, 2014, stakeholders, who included, members of the County Assembly, County staff, community representatives and other stakeholders, were invited. He referred to the following documents –

- (a) the letter of invitation to the Clerk of Kericho County Assembly dated 10th January, 2014 attached as *Annex 10*;
- (b) the programme of the meeting at Tea Hotel on 13th January 2014 attached as *Annex 11*;
- (c) a photograph of the signing ceremony outside Tea Hotel attached as *Annex 12*; and
- (d) the DVD containing BlueTechs function at Tea Hotel on 13th January, 2014.

13. The Governor also informed the Committee that public consultations and participation were carried out in Kipsitet on 15th January, 2014 and referred to *Annex 13*. The Governor noted that in both forums, the details of the Memorandum of Agreement were provided and that those details included the contributions by the County, that is, the ten percent contributions that were to be contributed by the County Government to the project.

14. The Governor also noted that the County Executive had also indulged the following House Committees on the proposed project as part of enhancing public participation –

- (a) the Energy Committee;
- (b) the Trade Committee;
- (c) the Budget and Appropriation Committee; and
- (d) the Planning Committee.

57. In this respect, the Governor referred to the documents marked as *Annexed as 14 and 15 and to the Hansard*. The Governor noted that details of the investment had been openly shared with the County Assembly and further noted that in all stages of the process the approval of the County Assembly would be sought.

(c) Contravention of section 148 as read with section 2 of the Public Finance Management Act, 2012

15. The County Assembly referred to section 22 of the Public Private Partnerships Act which provides as follows –

Where a contracting authority intends to enter into a public private partnership, a person shall not, unless he is the accounting officer of the authority, enter into a project agreement in relation to that project on behalf of the authority.

16. The County Assembly stated that the agreement was executed by the Governor. According to the County Assembly, such execution was unlawful as the Governor was not an accounting officer in terms of section 148 as read with section 2 of the Public Finance Management Act, 2012.

17. Section 2 defines an accounting officer as follows –

“accounting officer” means—

- (a) an accounting officer of a national government entity referred to in section 67;*
- (b) an accounting officer of a county government entity referred to in section 148;*
- (c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or*
- (d) in the case of the Parliamentary Service Commission, the Clerk of the Senate and the Clerk of the National Assembly;*

Section 148 of the Public Finance Management Act provides as follows –

- (1) *A county executive committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.*
- (2) *Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.*
- (3) *A county executive committee member for finance shall ensure that each county government entity has an accounting officer in accordance with Article 226 of the Constitution.*
- (4) *The Clerk to the county assembly shall be the accounting officer of the county assembly.*
- (5) *A county government may, in order to promote efficient use of the county resources, adopt, subject to approval by the county assembly, a centralised county financial management service.*

18. According to the County Assembly, the Governor abused his office by unlawfully entering into the contract.

19. In response to the allegations, the Governor stated that no contract had been entered into and that what was executed was a Memorandum of Agreement.

(d) Contravention of section 61(3) of the Public Private Partnerships Act, 2013

20. The County Assembly referred to section 61(3) of the Public Private Partnership Act, 2013 which provides as follows –

A contracting authority shall not consider a project for procurement under this section unless it is satisfied that –

- (a) *the project shall provide value for money;*
- (b) *the project shall be **affordable**; and*
- (c) *the appropriate risks are transferred to the private party.*

21. The County Assembly referred to the definition of the word “*affordability*” under section 2 of the Public Private Partnership Act, 2013 which defines the word as follows –

“affordability” means that-

- (a) *the financial commitments to be incurred by a contracting authority in terms of a project agreement can be met by funds –*
 - (i) *designated within the existing budget of the contracting authority for its function for which the agreement relates; and*
 - (ii) *assigned to the contracting authority in accordance with its relevant future budgetary allocation:*

Provided that the commitment shall be sustainable and shall not impose an unreasonable burden to the contracting authority; and

- (b) *the cost of delivering a facility or service in relation to the project by the contracting authority does not impose an unreasonable financial burden on the end users;*

22. According to the County Assembly, the Governor signed the contract by committing ten percent of the consideration hence violating the first condition under section 2 of the Public Private Partnerships Act as the funds were never budgeted for.

23. The County Assembly also stated that by failing to carry out due diligence before entering into the agreement, the Governor exposed the County to an unreasonable burden of getting into debts hence violating the second condition of section 2 of the Public Private Partnerships Act.

24. According to the County Assembly, the word “*affordability*” could also be described to mean “*the cost of delivering a facility or service in relation to the*

project of the contracting authority does not impose an unreasonable financial burden on the end users”.

25. The County Assembly stated that by failing to conduct public participation and to carry out due diligence, the County could not ascertain the actual costing of the project. This would mean that the end users would be subjected to high fees, charges and taxes so as to meet the costs of delivering the service. According to the County Assembly, the Governor, by entering into such contracts, exposed the County to unnecessary risks.
26. In response, the Governor stated that there was no contract in the first place and that consequently the ten percent was never committed. The Governor further stated that the implementation of the project was due to be subjected to an extensive and final feasibility study and regulatory compliance was anticipated. The Governor referred to section 1(i) on page 4 of the Agreement which provides that –

The above terms and conditions are subject to an extensive and final feasibility study to be conducted by an expert team as such studies require considerable outlay of funds. The commencement of the project will be subject to the outcome of the study.

27. The Governor while referring to the Memorandum of Agreement further stated that the implementation of the project was anticipated to commence between nine to twelve months from the time of signing the agreement. This therefore meant that commencement, if approved, would fall within a different financial year, as provided in section 1(f) of the agreement which states as follows –

It is further mutually agreed that there will be a period of 9-12 months from date the aforesaid lease takes effect entirely for pre-operational purposes.

(e) Contravention of section 29 of the Public Private Partnerships Act

28. In addition, the County Assembly stated that all projects should be procured through a competitive bidding process as stipulated under section 29 of the Public Private Partnership Act which provides as follows –

(1) Except as otherwise provided for under this Act, all projects shall be procured through a competitive bidding process.

(2) In procuring and awarding a contract to a private party under this Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity in accordance with the guidelines made under this Act.

29. According to the County Assembly, no bidding was ever done for this project hence the whole process was an illegality. The County Assembly stated that no requests were made for qualification of such services as there was no notice or advertisement published in any newspapers. According to the County Assembly, even if the Governor had privately initiated the investment, there were certain conditions which had to be fulfilled as stipulated in section 61 of the Public Private Partnerships Act and the Governor needed prove that the conditions had been met. The conditions as set out in section 61(3) are –

(a) the project shall provide value for money;

(b) the project shall be affordable; and

(c) the appropriate risks are transferred to the private party.

30. According to the County Assembly, the County Executive did not establish a fund as per section 68 of the Public Private Partnerships Act which provides as follows–

(1) There is established a Fund to be known as the Public Private Partnership Project Facilitation Fund.

(2) There shall be paid into the Fund-

(a) grants and donations;

- (b) *such levies or tariffs as may be imposed on a project;*
- (c) *success fees paid by a project company to the unit;*
- (d) *appropriations-in-aid; and*
- (e) *moneys from a source approved by the State department responsible for matters relating to finance.*

(3) *The moneys received into the Fund shall be applied to-*

- (a) *support contracting authorities in the preparation phase of a project, the tendering process and project appraisal under this Act;*
- (b) *support the activities of the unit under this Act;*
- (c) *extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government;*
- (d) *provide a source of liquidity to meet any contingent liabilities arising from a project; and*
- (e) *settle the transaction advisor's retainer fees.*

(4) *The Fund shall be administered in such a manner as the Cabinet Secretary shall prescribe.*

31. In response, the Governor stated that section 61(3) of the Public Private Partnership Act was quoted in isolation and should have been interpreted in totality starting from section 61(1), (2), (3) which provides as follows –

(1) A contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where

- (a) *there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical:*

Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority;

- (b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial;*
- (c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or*
- (d) there exists any of the circumstance as the Cabinet Secretary may prescribe.*

(2) A contracting authority shall, before commencing negotiations with a private party under this section –

- (a) prescribe a criteria against which the outcome of negotiations shall be evaluated;*
- (b) submit the proposal to the unit for consideration and recommendation;*
- (c) upon obtaining the recommendations of the unit, apply for and obtain approval from the Committee to negotiate the contract; and*
- (d) conduct the negotiations and award the tender in accordance with the prescribed process in the regulations to this Act.*

(3) A contracting authority shall not consider a project for procurement under this section unless it is satisfied that-

- (a) the project shall provide value for money;*
- (b) the project shall be affordable; and*
- (c) the appropriate risks are transferred to the private party.*

32. The Governor further stated that the project was a privately initiated proposal hence it would not be subjected to competitive bidding as per section 61(1) of the Public Private Partnerships Act 2013. According to the Governor, there was therefore no violation of the Act as all the factors would be taken into

consideration during the Public Private Partnership compliance, feasibility study, BSA, EIA and other processes stipulated for regulatory compliance. The Governor referred to *Annex 16*.

33. The Governor also responded by stating that the project was a proposed project and that the only stage concluded was the signing of the Memorandum of Agreement. The Governor also stated that the other processes were ongoing, including compliance with the Public Private Partnership Act and referred to *Annex 17*. The Governor further stated that no money had been lost nor any liability incurred from the proposed project and referred to the letter from BlueTechs UK Groups Limited dated 9th May 2014 at *Annex 18*.

(f) Contravention of section 68 of the Public Private Partnerships Act, 2012

34. The County Assembly averred that it did not approve any law regarding the establishment of any public private partnership project facilitation fund as required under section 68 of the Public Private Partnerships Act, 2013. Accordingly, the Assembly stated that the Governor entered into an agreement without ensuring that there was indeed a fund that would be used to prepare for the project and hence, failed to comply with the tendering process and project appraisal.

35. In response, the Governor stated that the implementation stage for the project had not been reached. The Governor further stated that the County had begun the process of engaging the Public Private Partnership Unit regarding the Compliance with and understanding of the Public Private Partnerships Act 2013.

(g) Loss of land

67. The County Assembly further stated that clause 1(c) and (g) of the agreement provided that the County was to contribute 10% of the capital investment and land. The County would lease, for a period of twenty five years, the period of the contract, five hundred acres of land to Bluetech UK Group Limited for the project.

The Assembly further noted that the exit clause in the agreement stated that either party may terminate the agreement by giving six months notice and consequently, assets which included the land and liabilities would be apportioned on the basis of the ratio 70:30 where the private company would get seventy percent and the county would get thirty percent of the same.

68. The County Assembly cited section 65(4) of the Public Private Partnerships Act, 2013 which provides as follows -

A project agreement involving the use of a contracting authority property by the private party shall not divest the contracting authority of the responsibility for ensuring the property is appropriately protected against factors which may negatively affect the property including forfeitures, theft, loss or wastage.

69. According to the County Assembly, in case of termination, as per clause 5(d) of the Memorandum of Agreement, the County stood to lose seventy percent of the land property notwithstanding the period or term of the contract, hence exposing the County to loss or wastage by entering into such an agreement.

70. In response, the Governor referred to clause 5(d) of the agreement which was the exit clause and which provides that –

Either party hereto can terminate this Agreement by giving six (6) months prior written notice to the other. Consequently assets and liabilities will be apportioned on the basis of the ratio intimated in 1(g) above.

71. The Governor was of the opinion that there was no indication in the clause supporting the County Assembly's contention. The Governor stated that the ration of 70:30 was on the benefits sharing agreement. The Governor noted that the basis

of the County Assembly's allegation that that the County stood to lose 70% of the land was not clear.

72. Additionally, the County Assembly referred to section 107 (1) of the Public Finance Management Act 2012 which provides as follows -

In managing the County Government public finances, the County Treasury shall enforce the following fiscal responsibility principle –

(f) the fiscal risks shall be managed prudently.

(h) Risks

73. According to the County Assembly, the County Executive Committee Member for Finance admitted in the Kericho County Fiscal Strategy Paper 2014/2015 (page 16 of Annex ****) that the risks to the output for 2014 included the County Government embracing the Public Private Partnership framework in implementing key infrastructure projects. The County Executive Committee Member for Finance also stated that there were fiscal risks associated with contingent liabilities which could undermine fiscal discipline and referred to the public private partnership agreement which, according to the County Assembly, was entered into without due process. According to the County Assembly, it was clear that the Governor acted outside his mandate and in breach of laid down laws in entering into the said agreement. The Assembly referred to Annex 19 and 20.

74. In response, the Governor stated that the Advisory was going to be adhered to in the subsequent events and processes and there was no attestation of refusal by the Executive to comply. The Governor further stated that the County Executive Committee Member for Finance gave a precaution that the projects to be implemented under the arrangement of the Public Private Partnership would be scrutinized to safeguard the interests of the general public. The Governor also

stated that if the project was to take off under the same arrangement, the outcome of the feasibility study would outline the viability, cost implication and the returns from the same and that this would inform the County Government on its implementation. The Governor referred to part 2.7 of the County Fiscal Strategy Paper 2014/2015 and stated that this was not specific to the proposed solar project but a caution in general for any project to be implemented under the Public Private Partnership arrangement (Annex 21).

75. According to the Governor, the word "*affordability*" is also described to mean the cost of delivering a facility or service in relation to the project of the contracting authority does not impose an unreasonable financial burden on the end user.

2. GROSS VIOLATION OF THE PUBLIC FINANCE MANAGEMENT ACT 2012, THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE RULES MADE THEREUNDER AND VIOLATION OF THE CONSTITUTION

(a) Irregular agreement between E-Plus Medical Service and Kericho County Government

76. The County Assembly stated that on 7th January 2014, the Governor entered into an agreement on behalf of Kericho County Government with a company, E-Plus Ltd. According to the County Assembly, the terms of the agreement were that the private company was to provide comprehensive emergency services which included seven ambulances, paramedics and ambulance operators to Kericho County. The County Assembly further stated that contract price was Kshs. 600,000/= (Kenya Shillings six hundred thousand shillings) per month, per unit, which meant that the total consideration would be Kshs. 4,200,000/= (Kenya Shillings four million, two hundred thousand shillings) per month. According to the County Assembly, the contract period was for twelve months which would

then amount to Kshs. 50,400,000/= (Kenya Shillings fifty million, four hundred thousand).

77. According to the County Assembly, Article 201 of the Constitution highlights the principles of public finance which State that there shall be openness, accountability including public participation in financial matters. The County Assembly stated that there was no evidence that indeed public participation was done on any platforms established under Section 91 of the County Government Act. Section 91 provides for -

The county government shall facilitate the establishment of structures for citizen participation including—

- (a) information communication technology based platforms;*
- (b) town hall meetings;*
- (c) budget preparation and validation fora;*
- (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
- (e) development project sites;*
- (f) avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or*
- (g) establishment of citizen fora at county and decentralized units.*

78. In response, the Governor stated that public participation was undertaken through the County Integrated Development Plan process where teams went to all the wards in Kericho County to engage the public in putting the plan in place. He referred to Chapters seven and eight of the County Integrated Development Plan which stated that provision of ambulance services was one of the most common felt health needs by the residents throughout the County.

(b) Budgeting for the contract

79. The County Assembly stated that consideration in relation to the contract was never budgeted for and referred to Annex 22.

80. According to the County Assembly, the Governor ought not to have entered to such an agreement and by doing so, he violated the provision of Article 226(5) which provides as follows -

If the holder of a public office, including a political office directs or approves the use of public funds contrary to the law or instructions, the person is liable for any loss arising from that loss whether the person remains a holder or not.

81. According to the County Assembly, the guiding principle of leadership and integrity as highlighted in Article 73(2) of the Constitution includes selfless service based solely on the public interest demonstrated by honesty in the execution of public duties. Article 73(2) of the Constitution -

(2) The guiding principles of leadership and integrity include-

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*
- (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*
- (c) selfless service based solely on the public interest, demonstrated by-*
 - (i) honesty in the execution of public duties; and*
 - (ii) the declaration of any personal interest that may conflict with public duties;*
- (d) accountability to the public for decisions and actions; and*
- (e) discipline and commitment in service to the people.*

82. The County Assembly was of the opinion that the Governor was never honest by entering into the said contract with the knowledge that there were no funds for the

same as the money was no budgeted for.

83. In addition, the County Assembly stated that under the Public Procurement and Disposal Act and the rules made thereunder, any procurement for services such as the present one should comply strictly with the provisions of these mandatory provisions. According to the County Assembly, these provisions were not followed in the procurement of the above referenced ambulance services.
 84. In response, the Governor stated that a Memorandum of Understanding was signed on 7th January, 2014, which is attached as *Annex 23* . The Governor referred to the clause on the first paragraph on the last page which stated that the memorandum of understanding would take effect on 20th February 2014 which was the date of commencement date and would continue in force for one year subject to termination or renewal.
 85. The Governor further stated that the contract was budgeted for in the supplementary budget which had already been submitted to the County Assembly and that the supplementary budget was anticipated to be approved before 20th February, 2014. The Governor also stated that on 13th January, 2014 the acting County Executive committee member for Health, the County Executive committee Member for Finance and Economic Planning and the Kericho County Assembly Health Committee had a meeting to discuss the same matter. The Governor referred to the Hansard provided by the County Assembly in contending that the Committee was convinced about the hiring of the ambulances.
- (c) **Gross violation of the Constitution**
86. According to the County Assembly, Article 179 (4) of the Constitution provided that the County Governor is the Chief Executive Officer of the County while

Article 179 (6) of the Constitution provided that the members of the County Executive Committee were accountable to the Governor for the performance of their function and exercise of their powers in consequence thereof. Article 179 provides as follows -

(1) The executive authority of the county is vested in, and exercised by, a county executive committee.

(2) The county executive committee consists of-

(a) the county governor and the deputy county governor; and

(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

(3) The number of members appointed under clause (2) (b) shall not exceed-

(a) one-third of the number of members of the county assembly, if the assembly has less than thirty members; or

(b) ten, if the assembly has thirty or more members.

(4) The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.

(5) When the county governor is absent, the deputy county governor shall act as the county governor.

(6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.

(7) If a vacancy arises in the office of the county governor, the members of the county executive committee appointed under clause (2) (b) cease to hold office.

87. The County Assembly was therefore of the view that the Governor was liable for gross violation of Article 27 of the Constitution for -

(a) failing and/or neglecting to ensure that the contracts for procuring the ambulance and solar plant in accordance with a system that is fair, equitable,

transparent, competitive and cost effective; and

(b) neglecting to follow the statutory procedures in procuring for the solar plant and hiring of ambulance on a bid to defeat fairness, transparency, competitiveness and cost effectiveness in application of public funds.

88. The County Assembly referred to Article 10(2) of the Constitution which provides as follows -

(2) The national values and principles of governance include--

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

89. According to the County Assembly, Article 10(2) of the Constitution pronounces good governance, integrity, transparency and accountability as among the National values and principles of governance to which every State organ, State officer or any public officer is bound. The County Assembly was of the opinion that the Governor had violated this Article by failing to ensure adherence to laws and Regulations that aid transparent and accountable use of County resources among them the Public Procurement Disposal Act 2005 and Regulations thereunder and the Public Finance Management Act 2012.

90. In response, the Governor stated that he had not violated the Constitution in any way because he had terminated the process of procurement on the hiring of ambulance services on advice given after consultations with the members of the County Assembly Health Committee.

91. According to the Governor, on Friday 14th February, 2014 there was a meeting between the County Executive Committee Member for Health Services, County Executive Committee Member for Finance and Economic Planning, the Acting Chief Officer Health Services and the Kericho County Assembly Health Committee. The Governor stated that after much discussion, the Committee was of the opinion that the ambulance line item be removed from the budget. The Governor further stated that the Committee further indicated that the ambulances would be budgeted for in the next financial year and that they would visit the Counties that had hired ambulances and those that had bought their ambulances in order to compare and have a balanced opinion. The Governor referred to the Hansard which*****
92. The Governor further stated that following the meeting of the County Assembly of Kericho, the County Executive Committee Member for Health Services advised him of the resolution on the same day vide a letter dated 14th February, 2014 and marked as *Annex 24*. The Governor further stated that a cancellation letter dated 14th February 2014 was sent to KRCS E-Plus Limited way before the commencement date and referred to Annex 25****. The Governor further stated that a response was received from the Kenya Red Cross Secretary General vide a letter dated 19th February 2014 marked as *Annex 26* which absolved the County Government from any liability. The letter stated ****

3. **GROSS VIOLATION OF THE COUNTY GOVERNMENT ACT**

Unlawful recruiting of Personnel and creating in the County contrary to the provisions of Section 59, 60 and 62

93. According to the County Assembly, the County Public Service Board is mandated to establish and abolish offices in the County Public Service pursuant to section 59 of the County Government Act which provides as follows -

(1) The functions of the County Public Service Board shall be, on behalf

of the county government, to-

- (a) establish and abolish offices in the county public service;
- (b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
- (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
- (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
- (e) promote in the county public service the values and principles referred to in Articles 10 and 232;
- (f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
- (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
- (h) advise the county government on human resource management and development;
- (i) advise county government on implementation and monitoring of the national performance management system in counties;
- (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.

The County Assembly also referred to sections 60 and 62(2) of the County Government Act which provide as follows -

60. (1) The County Public Service Board shall establish a public office within the county public service if it is satisfied that –

- (a) the establishment of the public office shall serve public interest in line with the core functions of the county government;**
- (b) there exists no other public office in the county public service discharging or capable of discharging the duties for which the county is requested to establish another office;**
- (c) upon the establishment of the office, the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures;**
- (d) the establishment of the office including its level of grading, qualification**

and remuneration shall not disadvantage similar offices in the county public service or occasion unfair competition for staff among county public bodies;

(e) the establishment of the office shall not confer unfair advantage to a group of or individual serving public officers;

(f) the county government entity has prudently utilized offices previously provided in its establishment; and

(g) funding for the office to be established is duly provided for.

Section 62 (2) of the County Government Act provides as follows -

"If the Board intends to establish or abolish an office, it shall submit its proposal to the County Assembly for approval through the County Executive Committee member responsible for the County Public Service"

94. According to the County Assembly, the Governor violated sections 59, 60 and 62 of the County Governments Act by creating offices on diverse dates from May, 2013 to April, 2014 contrary to the County Governments Act. According to the Assembly, the offices created as per the letter dated 25th April, 2014 are unlawful as the offices were not established by the County Public Service Board nor approved by the County Assembly. In addition, the County Assembly stated that the offices, which were not competitively sourced, were as follows -

(a) Assistant Peace and Conflict Management;

(b) Assistant Political Advisor;

(c) Assistant Chief of Staff;

(d) Assistant Economic Advisor; and

(e) Assistant Advisor, Science, Technology, Innovation and Research.

129. The County Assembly further stated that the Governor went ahead to appoint personal staff who failed to give adequate information to***** which includes copies of their curriculum vitae, academic and professional qualification as is required by the Transitional Authority guidelines. The offices include;

- (a) Chief of Staff;
- (b) Economic Advisor;
- (c) Legal Advisor;
- (d) Messenger;
- (e) Gardener; and
- (f) Tea Person.

130. According to the County Assembly, the Governor also appointed two other unqualified persons to the position of;

- (a) Director Governor's Press; and
- (b) Political Advisor

131. The County Assembly was of the opinion that all holders of the above cited offices unlawfully drew salaries from the County Treasury and burdened the ever increasing Wage Bill. The County Assembly referred to ***Annex 27*******.

132. In response the Governor stated that with regard to the allegations relating to the illegal establishment of offices, with the establishment of County Governments after the elections of March 2013, Governors came into office when there were only two cadres of staff at the County level. These, according to the Governor were the categories under the former Local Authorities and staff that had been deployed to the Counties to man some critical positions.

133. The Governor further stated that the Transition Authority had issued guidelines on the cadre of staff to be in place once the Governor was in office. According to the Governor, the guidelines marked as ***Annex 28*** provided that the Governor would identify the persons to be appointed to the positions, which would be regularized by the County Public Service Board once they were in place. These positions included -

- (a) Chief of Staff;
- (b) Economic Advisor;
- (c) Legal Advisor;
- (d) Political Advisor;
- (e) Director, Governor's Press Service; and
- (f) Support Staff (Personal Assistant, Personal Secretary, Gardener, Cook, Driver and Messenger).

134. The Governor was of the opinion that these positions were effectively established by the Transition Authority and did not need to go through the Assembly as required under section 62 of the County Governments Act. The Governor pointed out that the guidelines issued by the Transition Authority did not indicate that the Governor could not recruit other Personnel when there was need. The Governor also referred to section 31(d) of the County Government Act which provides as follows -

The governor-

- (a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;*
- (b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*
- (c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and*
- (d) shall have such powers as may be necessary for the execution of the duties of the office of governor.***

135. According to the Governor, other positions set out under the guidelines issued by the Transition Authority were to be filled competitively once the County Public Service Board was in place as required by sections 59 to 61 of the County

Governments Act. The Governor stated that some of the positions had since been filled including the appointment of Chief Officers, Chief Budget Officer, Chief Economist and the Head of Human Resource Management, among others.

136. With regard to the appointment of Assistant Advisors, the Governor stated that the appointments were done following the realization that the volume of work in the Governor's office kept increasing as the citizens started dealing with the County Government in earnest. The Governor further stated that the Advisors at this time were virtually one man offices and considering that an officer takes leave or may be indisposed at times, it was apparent that some of the officers under the Governor's personal staff would require assistants. He referred to a request made by the Chief of Staff to the Governor (Annex 29). The Governor was of the opinion that the Transition Authority did not in any way suggest or imply that the Governor could not recruit assistants.
137. The Governor further stated that in order to meet the objectives of the relevant laws in promoting the interests of the County and facilitating necessary development, he felt that there was a need to have a Research Advisor. In the Governor's opinion, the disturbances which had been witnessed in the County particularly during election time warranted the appointment of an Advisor to look into issues of peace and conflict resolution. The Governor was of the opinion that no investor would want to have anything to do in a County that is perennially going through never ending cycles of violence and further stated that peace was seen as a critical component in the establishment of a strong foundation for economic development.
138. With regard to the allegation that there was inadequate information regarding the qualification of personnel, the Governor responded by stating that this was not true. The Governor stated that the documents relating to the personnel were in

their respective files at the Registry and had so far been availed to the County Public Service Board.

139. Concerning the recruitment of political and economic Advisors without the qualifications given in the guidelines issued by the Transition Authority, the Governor stated that the exposure of the two individuals in their careers put them in a position where they were actually overqualified for the positions to which they were appointed by the Governor.
140. The Governor also stated that the Political Advisor was someone who had spent most of his working life as a trade unionist to the extent of rising to the level of a National Chairman of Kenya National Union of Teachers and would "*obviously be several times more competent than a young man with any first degree that has been jobless for five years*".
141. With regard to the appointment of the economist, the Governor responded by stating that the economic mainstay of the majority of the residents happened to be tea farming. The Governor was of the opinion that "*the appointment of a person who has risen to the highest level in one of the multinationals in the sector could not have been a mistake*". The Governor further stated that "*the appointee [had] vast experience including in processing, value addition and research [and] could deliver more to the County compared to a job seeker with a degree with a degree in economics*".
142. The Governor further stated that personal staff as the word indicates should be people well acquainted with the user and whom the user has all the confidence in. The personal cook to the Deputy Governor does not have a Form four certificate but this is the person the Deputy Governor felt she could trust in her house.

142. While noting the contents of sections 59 to 62 of the County Governments Act and the guidelines issued by the Transition Authority which the Governor stated did not categorically indicate that the Governor could not fill other positions which he felt were desirable in the interest of the County, the Governor stated that it was agreed that the County Public Service Board would seek an advisory from the Transition Authority on whether the recruitment of additional appointees could be regularized by the Board. The Governor referred to the letters by the County Public Service Board marked as *Annex 30 and 31* to the Transition Authority dated February 2014 and the reminder sent in April, 2014. According to the Governor, this was proof that no one wanted to break the law.
143. The Governor also stated that the reply was received in April, 2014 in a letter dated 23rd April 2014 and the advice contained therein was that the Governor should not recruit personnel and that recruitment of staff should be as given in the Act. According to the Governor, the advisories would not have been sought if indeed the Governor wanted to break the law and the office would not have taken advantage of this "*lacuna*" if indeed this was the case.
144. According to the Governor, following the receipt of the advisory, the Board and the Governor's office were undertaking the following specific actions –
- (a) positions which the County Government felt were essential in the interests of the people of the County and its development would be established procedurally and filled competitively; and
 - (b) officers who met the requirements for the positions would apply for the positions if they so wished.
145. In conclusion, the Governor stated as follows -
- (a) the period under consideration was a period of transition in the

implementation of the Constitution. The County was just over one year old since the County Governments took office. Indeed the Transition Authority itself was still in place. The fact that the body was still operating confirms that transition is ongoing;

- (b) the transition period was a period to clarify areas of interpretations which were not clear in the laws of the Constitution. The fact that several cases of interpretation had been filled with the judiciary by various Counties confirmed this;
- (c) to the extent that the basis for staff recruitment was based on the circular of the Transition Authority which was not explicit on the limits the Governor should be deemed not to have broken any law;
- (d) the office was in the process of finalizing the County's organizational structure and staff established in conjunction with the Ministry of Devolution and Planning. In the proposal, the Governor's office would have been an optimal staff of one hundred Personnel in order to enhance efficient and effective service delivery. This, according to the Governor, was above what they have now (*Annex 32******).