



REPUBLIC OF KENYA
TWELFTH PARLIAMENT
THE SENATE
VOTES AND PROCEEDINGS
SPECIAL SITTING
TUESDAY, JANUARY 28, 2020 AT 9.00 A.M.

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

The Speaker conveyed the following Communication from the Chair-

‘Honourable Senators,

Let me take this opportunity to welcome you back for this Special Sitting of the Senate. 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.

Honourable 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 11.00am. This is aimed at ensuring that the investigation process is conducted seamlessly and timeously.

Consequently, immediately following this brief communication, I will direct that all members of the public including the media to 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.’

Thereupon, the Senate proceedings continued in camera.

4. **BRIEFING ON THE RULES OF PROCEDURE FOR THE HEARING AND DETERMINATION OF THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR OF KIAMBU COUNTY.**

Upon invitation by the Speaker, the Clerk of the Senate briefed Senators on the Rules of Procedure for the hearing and determination of the proposed removal from office, by impeachment, of Hon. Ferdinand Ndung'u Waititu Babayao, the Governor of Kiambu County, as well as the hearing programme.

Thereupon, the Senators deliberated on the Rules and the hearing programme.

5. **SUSPENSION OF THE PROCEEDINGS OF THE SENATE**

Upon conclusion of deliberations in camera, the Speaker suspended proceedings of the Senate until Eleven O'clock.

6. **HOUSE RESUMED** – at Eleven O'clock (The Speaker in the Chair)

7. **COMMUNICATION FROM THE CHAIR ON THE MANDATE OF THE SENATE, RULES OF PROCEDURE AND HEARING PROGRAMME**

The Speaker conveyed the following Communication from the Chair-

'Honourable 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.

Honourable 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 –

- (i) the Order Papers of the County Assembly of Kiambu for the 127th and 128th sittings both held on 19th December, 2019;
- (ii) 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

- (iii) 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 Sittings of the Senate. The business to be transacted at these Special Sittings shall be the investigation of the proposed removal from office, by impeachment, of Hon. Ferdinand Ndung'u Waititu Babayao, the Governor of Kiambu County.

Honourable 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.

Honourable 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 pm on Saturday, 25th January, 2020 setting out –

- (i) the Governor's response to the Particulars of Allegations;
- (ii) the mode of appearance before the Senate: whether in person, by advocate or in person and by advocate;
- (iii) 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
- (iv) 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, 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 pm on Saturday, 25th January, 2020 documentation –

- (i) designating the Members of the County Assembly, being not more than three Members, if any, who shall attend and represent the Assembly in the proceedings before the Senate;
- (ii) indicating the mode of appearance before the Senate: whether in person, by Advocate, or in person and by Advocate;
- (iii) 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
- (iv) specifying any other evidence to be relied on.

Honourable 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 & Co. 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-

- (i) the names of three members of the County Assembly 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;
- (ii) a list of four witnesses and their witness statements; and
- (iii) 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.

Honourable 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.

Honourable 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 Members of the County Assembly of Kiambu representing the County Assembly, by stating the full name and designation of each person.'

Thereupon, Mr. Mbuti Gathenji introduced himself as Lead Counsel for the County Assembly of Kiambu, and proceeded to introduce the following: -

- i) Mr. Nani Mungai – Advocate;
- ii) Hon. Solomon Kinuthia – MCA, Ndenderu Ward;
- iii) Hon. Gideon Gachara Gitau – MCA, Ndeiya Ward/ Majority Leader;
- iv) Hon. Yvonne Wanjiku Waweru – MCA (Nominated)/ Chair, Implementation and Legal Affairs Committee

‘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.’

Thereupon, Mr. George Ngángá Mbugua introduced himself as Lead Counsel for the Governor, and proceeded to introduce the following: -

- i) Mr. Peter Wanyama – Advocate;
- ii) Mr. Charles Njenga – Advocate;
- iii) Hon. Ferdinand Ndung’u Waititu Babayao – Governor, Kiambu County

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.’

8. **READING OF THE CHARGES ON THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HONOURABLE FERDINAND NDUNG’U WAITITU BABAYAO, GOVERNOR OF KIAMBU COUNTY**

The Speaker directed the Clerk to read to the Honourable Ferdinand Ndung’u Waititu Babayao, the Governor of Kiambu County, particulars of the allegations against him as presented by the County Assembly of Kiambu.

Upon invitation by the Clerk, the Governor proceeded to take the stand;

Thereupon, pursuant to Rule 15 of the Rules of procedure for the hearing and determination of the proposed removal from office by impeachment of a Governor (Part 1), the Clerk proceeded to read out the particulars of the allegations, as follows: -

‘Honourable Senators, pursuant to section 33(3)(a) of the County Governments Act and standing order 75(1)(a) of the Senate Standing Orders, I hereby proceed to read the Charges against Hon. Ferdinand Ndung’u Waititu Babayao, the Governor of Kiambu County as contained in the Resolution passed by the County Assembly of Kiambu on 19th December, 2019. Honorable Senators, please note that this is a full recital of the charges as passed by the County Assembly.

- (a) Gross violation of the Constitution of Kenya 2010, the County Governments Act, 2012, the Public Finance Management Act, 2012 and the Public Procurement and Disposal Act, 2005-
 - i) Lack of accountability in the management of County resources by incurring unsustainable debts and other pending obligations to the tune of 4 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 Public Finance Management 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 Article 6 and Article 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) (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 Kshs. 2.1 Billion road tarmacking contracts against as approved total Roads, transport, Public Works and Utilities Budget of Kshs. 1.4 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 honoring 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 acts, 2012 as well as Article 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.

(b) 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 ha 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.

(c) 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% 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%.

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.

Honourable Senators, that marks the end of the recital of the charges.

I thank you.’

Taking of plea:

The Clerk of the Senate invited the Governor to plead to the particulars of the allegations as read;

Thereupon, the Governor pleaded ‘Not Guilty’ to the charges.

9. **HEARING AND DETERMINATION OF THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR OF KIAMBU COUNTY.**

Pursuant to the Standing Orders, the Speaker invited the parties to make their opening statements for not more than thirty minutes each;

Thereupon, the opening statement on behalf of the County Assembly of Kiambu was made by Counsel on record;

Subsequently, the opening statement on behalf of the Governor was made by the Governor, together with the Counsel on record;

And the business for the morning session having been concluded, the Speaker adjourned the Senate at thirty-five minutes past Twelve O’clock without Question put.

- 10. **SENATE ROSE** – at thirty-five minutes past Twelve O’clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Tuesday, January 28, 2020 at 2.00 p.m.*