



**Council of County Governors v Kenya Tissue and Transplant Authority &
2 others; Senate (Interested Party) (Constitutional Petition E413 of 2022)
[2023] KEHC 21046 (KLR) (Constitutional and Human Rights) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E413 OF 2022**

LN MUGAMBI, J

JUNE 30, 2023

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISION
OF ARTICLES 1(1), 1(3), 2(2), 2(4), 3(2), 23, 73(1), 73(2), 129(1), 174,
189, 258(1), 258(2), 259, 6, 10, 73, 189 OF CONSTITUTION OF KENYA**

BETWEEN

THE COUNCIL OF COUNTY GOVERNORS PETITIONER

AND

THE KENYA TISSUE AND TRANSPLANT AUTHORITY ... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT

THE HON. ATTORNEY GENERAL OF KENYA 3RD RESPONDENT

AND

THE SENATE INTERESTED PARTY

Establishment of the Kenya Tissue and Transplant Authority declared unconstitutional for violating provisions of the Constitution and the Health Act

The main grievance of the petition was the establishment of the Kenya Tissue and Transplant Authority (the 1st respondent) with the mandate to oversee the implementation of the policy on blood transfusion, tissue and organ transplants. The court held that policy formulation on matters health was a preserve of the National Government. The court further held that in creating the 1st respondent to oversee the implementation of the policy without due regard to the county governments, the respondents violated the objects of devolution. The court finally held that the establishment of the 1st respondent under a general statute (State Corporations Act) in disregard of the specific provision under the Health Act was unlawful.

Reported by Kakai Toili



Devolution – cooperation between the National and County Governments – cooperation on policy formulation on health matters – claim that the Kenya Tissue and Transplant Authority (the Authority) was established as an entity of National Government to oversee the implementation of the policy on blood transfusion, tissue and organ transplants (the policy) without consultation with county governments - whether policy formulation on matters health was a preserve of the National Government - whether the establishment of the Authority was unconstitutional - whether the establishment of the Authority without due regard to the county governments violated the objects of devolution – Constitution of Kenya, 2010, articles 6(2), 10(2)(a), 189, 259 and Fourth Schedule, Part 1 clause 28 and Part 2 clause 2; State Corporations Act, Cap 446, section 3; Health Act, Cap 241, sections 15(1)(c) and 80.

Statutes – interpretation of statutes – interpretation of the State Corporations Act vis a vis the Health Act - whether the Health Act superseded the State Corporations Act in reference to the development of a policy on the matters of organ and transplant facilities - State Corporations Act, Cap 446, section 3; Health Act, Cap 241, section 80.

Brief facts

The petitioner claimed that under Part XI of the Health Act, 2017 the Cabinet Secretary, Ministry of Health was given authority to develop regulations for tissue and human organ transplant services but the regulations had never been developed. The main grievance of the petition was the establishment of the Kenya Tissue and Transplant Authority (the 1st respondent) through Gazette Notice number 142 of 2022 by the President through an Executive Order pursuant to section 3(1) of the State Corporations Act by which he conferred it with the mandate to ensure access to safe and ethical use of human cells, tissues and organs; registering and licencing facilities and establishments dealing with human tissues and organs and transplant services and to maintain a registry of transplant service providers, donors and recipients.

The petitioner averred that the creation of the 1st respondent as an entity of the National Government to carry out the stated health services was an unconstitutional attempt to assign delivery of a devolved functions of health to the 1st respondent without consultation. The petitioner contended that the State Corporations Act had not been reviewed as required by section 7 of the Sixth Schedule to align it to the Constitution whereby the exercise of the President’s powers under the State Corporations Act had to be read with necessary alterations and adaptation to avoid interfering with the constitutional functions of county governments without their consent. The petitioner thus sought for among other orders; a declaration that the establishment of the 1st respondent was unconstitutional.

Issues

- i. Whether policy formulation on matters health was a preserve of the National Government.
- ii. Whether the establishment of the Kenya Tissue and Transplant Authority and assigning it with responsibilities of county governments relating to health devoid of any agreement between the two levels Governments was unconstitutional.
- iii. Whether the establishment of the Kenya Tissue and Transplant Authority to oversee implementation of the policy on blood transfusion, tissue and organ transplants without due regard to the county governments violated the objects of devolution.
- iv. Whether the Health Act superseded the State Corporations Act in reference to the development of a policy on the matters of organ and transplant facilities.

Held

1. The Fourth Schedule to the Constitution listed the functions of the different levels of Government: Part 1 clause 28 of the Schedule designated the formulation of health policy under the National Governments. Part 2 clause 2 of the Schedule provided for the roles of counties in the health sector. They included management of county health facilities and pharmacies, ambulance services and promotion of primary healthcare. The Fourth Schedule placed the responsibility of the formulation of health policy under the National Government.



2. It was not the entirety of the health function that was devolved. There was a demarcation where policy formulation on matters health remained a preserve of the National Government under the Constitution. That particular field of tissue and organ transplant had been without policy regulation or legislation to guide it. The development of the relevant policy therefore was the constitutional mandate of the National Government but policy formulation was not the end in itself as the implementation component must be factored in the policy development as well.
3. Cooperation between the two levels of Government was emphasized especially in matters that cut across between the two levels of Government. Article 189 of the Constitution called for the cooperation of the two levels of Government in exchanging information and of coordination of policies. Additionally, section 15(1)(c) of the Health Act placed responsibility on the National Government Ministry responsible for health to develop health policies in consultation with the county governments, and health sector stakeholders and the public.
4. Article 10(2)(a) of the Constitution established public participation as a national value and principle of governance. State organs, State officers, public officers and all persons were bound by the Constitution to engage in public participation when making or implementing public policy decisions.
5. In a scenarios like the instant case where the matter in question was preceded by consultations between the two levels of Government and there was a certain degree of consensus that the matter was to be collaboratively approached by both levels; it was incumbent upon the respondents to justify any departure from that common position that had been reached during the last validation consultative meeting of November 18, 2021 whereby creation of a joint committee of the two levels of Governments to oversee the implementation of the policy in that area of health had been reached in recognition that both levels of Government had a role to play. Instead, the respondents went ahead and unilaterally established a semi-autonomous regulatory and oversight body that was anchored in the National Government against that consensus.
6. Under article 259 of the Constitution, the court was obligated to *inter alia* interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and in a manner that contributed to good governance. The fact the 1st respondent was created and assigned all the responsibilities including those that had clearly been earmarked as falling on the county governments, meant that the National Government allocated itself those functions devoid of any agreement between the two levels Governments hence acted in disregard of article 187 of the Constitution which provided that a function or power at one level may be transferred to a Government at the other level by the agreement between the Governments. No agreement was reached that the National Government was to scoop everything to itself including the roles that discussions revealed fell under the devolved functions of the county governments.
7. The Executive Order that was the subject of contention in the petition was contained in Legal Notice No. 142. The order was known as the Kenya Tissue and Transplant Authority Order, 2022, established under the State Corporations Act, Cap 446 Laws of Kenya. Section 3 of the State Corporations Act empowered the President by order, to establish a State corporation as a body corporate to perform the functions specified in that Order. However as provided under article 10(2)(a) of the Constitution, those powers must be exercised under the principles of governance among them, public participation.
8. The provisions of article 3(1) of the Constitution provided that every person including the President had an obligation to respect, uphold and defend the Constitution. That meant that while carrying out his functions and obligations under the Constitution, the State Corporations Act and any other legislation, the President must comply with the provisions of the Constitution. The Executive Order went against what was generally agreed during the consultative forums where the 1st respondent was set up as an independent semi-autonomous agency yet the discussions were geared towards creating a joint committee to oversee the policy.



9. Article 6(2) of the Constitution provided that the Governments at national and county levels were distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation and thus in matter like the instant one where one level of Government acted in complete disregard of the other level despite evidence that they had all discussed and pointed towards approaching the matter collaboratively, the policy could not be said to have met the required constitutional threshold envisaged in article 6(2).
10. If the policy commended itself that various health responsibilities required to be undertaken transcended the National Government to other levels of governments in the counties, centralizing everything in the National Government by establishing the 1st respondent in that level of Government only went against the objects of devolution. Under article 159(2)(e), the court was enjoined to protect and promote the purposes and principles of the Constitution.
11. Although the respondent argued that the scope of the county governments involvement in health matters was circumscribed in the Fourth Schedule Part 2 to include, county health facilities and pharmacies, ambulance services and promotion of primary health care among others; the Fourth Schedule was not to be construed strictly but loosely as setting out of a framework for which consultations may ensue to determine the scope or extent of the function.
12. With emerging health developments; the role of the county governments would also continue to expand. Establishing the 1st respondent within the National Government as the fulcrum upon which everything concerning the policy on blood transfusion, tissue and organ transplant rotated despite clear indications during policy discussions that county governments functions were also embedded in that new area of health was inconsistent constitutional objective of devolution.
13. In taking one-sided step to create the 1st respondent to oversee the implementation of the policy on blood transfusion, tissue and organ transplants without due regard to the county governments, the respondents violated the devolution object and in particular article 189(1)(a) of the Constitution that called for Government at either level to perform its functions and exercise the powers in a manner that respected the functional and institutional integrity of Governments at the other levels. It also went against article 6(2) of the Constitution that required the Governments at national and county levels to conduct their mutual relations on the basis of consultation and cooperation.
14. Although article 189(1)(d) of the Constitution provided a viable guide in dealing with the matter in question considering that it was already generally accepted that it involved shared responsibilities between the two levels of Government; the respondents overlooked that article and proceeded to singly establish the 1st respondent.
15. One of the canons of statutory interpretation that assisted in deciding which of the two statutes, the Health Act and the State Corporations Act, applied when faced with a situation where both laws may apply was what was expressed in Latin maxim as '*generallis specialibus non-derogant*'. It meant that general laws did not prevail over special laws or the general did not derogate from the specific. The maxim came in when the court was required to decide which Statute was applicable between two statutes particularly when the scope of two laws was in issue as in the instant case.
16. Section 80 of the Health Act expressly provided for the Minister to make the policy under the Health Act on the matters of organ and transplant facilities. On the other hand, the State Corporations Act was non-specific in regard to the subject matter, it was a general statute. The establishment of the 1st respondent under a general statute in disregard of the specific provision under the Health Act was *ultra vires* and unlawful. Parliament expressly provided that policy on the subject matter was to be made under the Health Act.

Petition allowed.



Orders

- i. *A declaration was issued that legal notice number 142 of 2022 on the establishment of Kenya Tissue and Transplant Authority Order 22 was unconstitutional for violating articles 6(2), 10, 187 and 189 and also legally defective for being ultra vires section 80 (3) of the Health Act.*
- ii. *An order of prohibition was issued stopping implementation of legal notice number 142 of 2022 establishing the Kenya Tissue and Transplant Authority. That order however did not affect a past action that had already been undertaken by the Authority.*
- iii. *Each party to bear its own costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR) - (Explained)
2. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Explained)
3. *Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party)* Constitutional Petition 203 of 2020; [2021] KEHC 454 (KLR) - (Explained)
4. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012, 34 of 2013 & 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) (Consolidated); [2017] eKLR - (Explained)
5. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
6. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Civil Appeal 42 of 2014; [2014] KECA 95 (KLR) - (Explained)
7. *Okiya Omtatah Okoiti v Refugee Affairs Secretariat (RAS) Kenya & 2 others* Petition 311 of 2018; [2020] eKLR - (Explained)
8. *Okiya, Omtatah Okoiti & another v Attorney General & 6 others* Civil Appeal 362 of 2014; [2020] KECA 627 (KLR) - (Explained)
9. *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* Judicial Review Case 434 of 2015; [2016] eKLR - (Explained)
10. *Republic v Ministry for Finance & another Ex parte Nyong'o & 2 others* Miscellaneous Civil Appeal 1078 of 2007; [2007] KEHC 1874 (KLR); [2007] KLR 299 - (Explained)
11. *Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO* Miscellaneous Civil Application 461 of 2016; [2019] KEHC 10312 (KLR) - (Explained)
12. *Republic v Transition Authority & another ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others* Judicial Review 317 of 2013; [2013] KEHC 674 (KLR) - (Explained)

South Africa

1. *Affordable Medicines Trust and Others v Minister of Health and Another* (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) - (Explained)
2. *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Explained)

Statutes

1. Constitution of Kenya articles 1 (3)(b); 3(1); 6; 10; 43; 73 (1); 131; 132 (3) (b); 3(1); 186 (3); 187 (1); 189 (1); 209; 259; Schedule 4, part 1, paragraph 28; 6, paragraph 7 — Interpreted
2. Evidence Act (cap 80) section 107 — Interpreted



3. Health Act (cap 241) part XI; sections 15(1)(c); 19; 80; 85 — Interpreted
4. Human Tissue Act (cap 252) In general — Cited
5. State Corporations Act (cap 446) section 3(1); 5(d) — Interpreted

International Instruments

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 — article 12

Advocates

None mentioned

JUDGMENT

The Petitioner's Case

1. The petition dated 17/8/22 averred that Kenya has no policy, regulatory/operational framework to guide tissue and organ transplant services. That despite the 1967 *Human Tissue Act*, cap 252 being amended in the year, 2012, to provide limitations for organs removal and use of parts of bodies of deceased persons, the Act did not envision ethical, medical and legal complexities surrounding the whole subject matter of tissue and organ transplants.
2. The petitioner points out that under part XI of the *Health Act, 2017* the Cabinet Secretary, Ministry of Health is given authority to develop regulations for tissue and human organ transplant services but the regulations have never been developed.
3. The main grievance of this petition is the establishment of The Kenya Tissue and Transplant Authority (the 1st respondent) on 1/8/22 through gazette notice number 142 of 2022 by the President of Kenya through an executive order pursuant to section 3(1) of the *State Corporations Act* by which he conferred it with the mandate to ensure access to safe and ethical use of human cells, tissues and organs; registering and licencing facilities and establishments dealing with human tissues and organs and transplant services and to maintain a registry of transplant service providers, donors and recipients.
4. The petitioner (Council of Governors) averred that the creation of the 1st respondent as an entity of National Government to carry out the said health services is an unconstitutional attempt to assign delivery of a devolved functions of health to the 1st respondent without consultation.
5. The petitioner's stated the *State Corporations Act* has not been reviewed as required by section 7 of the sixth schedule to align it to the *Constitution* whereby the exercise of the President's powers under the *State Corporations Act* have to be read with necessary alterations and adaptation to avoid interfering with the constitutional functions of County Governments without their consent.
6. The petition is supported by two affidavits, both deposed by Mary Mwiti, the petitioner' Chief Executive Officer, dated August 17, 2022 and February 10, 2023.
7. In its supplementary affidavit, the petitioner disputed the 2nd respondent's assertion that consultative meetings took place in regard to the creation of the 1st respondent and insisted that the 2nd respondent was misleading the court by claiming in its replying affidavit that public participation that resulted in the creation of 1st respondent was conducted and maintained that the forums that the 2nd respondent was referring to as having been carried out were specifically for the formulation of the Kenya Policy on Donation, Transfusion and Transplant of Human Derived Medical Products and not for the establishment of the 1st respondent. the petitioner insisted that the establishment of the 1st respondent via an executive order was thus done arbitrarily.



The petitioner thus sought the following reliefs:

- a. That this honourable court issues a declaration that the establishment of the 1st respondent through Legal Notice No 142 of 2022 on the Kenya Tissue and Transplant Order, 2022 as an entity of the National Government to undertake devolved functions is unconstitutional and contrary to the provisions of articles 6, 10, 73(1), 187(1) and 189(1) of the [Constitution](#);
- b. That the Honourable Court issues an order of prohibition stopping the continued implementation Legal Notice No 142 of 2022 establishing the Kenya Tissue and Transplant Authority;
- c. Such further and other reliefs be granted to the petitioner as this court deems fit; and
- d. Costs of the petition

The 1st & 2nd Respondent's Case

8. The 1st respondent and the 2nd respondent jointly filed grounds of opposition dated August 29, 2022 and further filed a single replying affidavit sworn by the Cabinet Secretary, Ministry of Health on the same date.
9. The replying affidavit described tissue and organs as lifesaving in regard to the intended recipients who would most likely die or suffer long term incapacity in case they are not provided with them when needed. He stated that most commonly used tissues and organs for transplant purposes include kidney, liver, heart, lung, small bowel, skin, ligaments, bones and cornea.
10. He deposed that Kenya has for a long time been without a regulatory or operational policy on blood transfusion, human tissue and organ transplant.
11. He stated that it is against this background that the [Health Act, 2017](#) provided in section 80 and 85 for the formulation of a legal framework to regulate matters related to tissue and human organs transplant and for Kenya Blood Transfusion Service by an Act of Parliament.
12. In the year 2019, the Ministry of Health expanded the mandate of the Department of Blood Transfusion Service to include the tissue and human organ transplant. That despite the progress made following this expansion, gaps continue to thrive in regard to sustainable, effective and efficient implementation of a national response to availability of timely human derived products of medical origin and establishment of mechanisms for protection of organ donors especially the most vulnerable.
13. As a result, a review of global approaches and normative standards with a view to coming up with recommendations and incorporation of a Kenyan System was initiated through a working group comprising of experts in transfusion, transplant and legal systems which submitted recommendations for Transfusion and Transplant Bill to the National Assembly on June 21, 2021.
14. The National Assembly considered the recommendations and passed the National Blood Transfusion Service Bill and forwarded the same to the Senate. This Bill excluded human tissues and organs.
15. The 1st respondent deposed further that the World Health Organisation expects member states to develop policy promoting access to life saving medical products of human origin which are expected to strengthen governance and regulatory oversight standards and products in the Universal Health Coverage. He went on to list countries like Australia, India, United Kingdom and Canada that had adopted either the differentiated approach or the integrated approach to the matter.



16. That the Health Ministry in Kenya opted to adopt the differentiated approach to the governance and regulation of transfusion and transplant services to meet the international best practice.
17. The 2nd respondent stated that consultations for the formulation of the framework involved all the stakeholders from the National and County governments including the County Executive Members in charge of health from every county and also representatives of Faith Based Organisations and that there was a general consensus that there was need for a legislation and an authority to regulate the sector.
18. The respondent elaborated further that an Intergovernmental Framework on Coordination of Blood Transfusion Services was agreed upon and the Chairperson Council of Governors, health committee, Prof Anyang' Nyong'o and the 1st respondent's deponent signed and acknowledged a partnership between the national and county governments on the issue of blood transfusion and organ transplant. That the stakeholders especially the experts and the technocrats in the health sector were involved and acknowledged the framework developed in regards to the creation of the policy document.
19. He took a swipe at the petitioner of coming to court with unclean hands insisting that they participated in the whole process and should thus not disown it. He pointed out that there seems to be conflicting interest between the secretariat of the petitioner and the caucus of the County Executives on health because consultations are still going on with the latter still on board since there is need to regulate this critical area in public interest.
20. The respondent further alluded that the only body that can oversee and regulate this critical sector is the Kenya Tissue and Transplant Authority that was created through a consultative and participatory process and none of its functions contravene the Constitution.
21. The Respondent deposed that there is a need to create an authority to regulate this crucial area of health which is not part of the functions that are devolved to county governments hence the national government can develop a policy on the same as part of its mandate.

The Petitioner's Submissions

22. The petitioner filed written submissions dated March 10, 2023 and identified the following issues as falling for determination:
 - a. Whether there was public participation and consultation specifically with regards to the establishment of the 1st respondent;
 - b. Whether the establishment of the 1st respondent was constitutional; and
 - c. Whether the impugned executive order claws back on the roles of County Governments contrary to the fourth schedule of the Constitution of Kenya, 2010.
23. On the first issue, the petitioner insisted that there was neither public participation nor consultations whatsoever on the establishment of the 1st respondent. He described its creation through the executive order reflected in Legal Notice No 142 of 2022 and issued pursuant to section 3(1) of the State Corporations Act as arbitrary. The petitioner reaffirmed its assertion in the supplementary affidavit that the consultative meetings that the respondents conducted were specifically related to formulation of the Kenyan Policy on Donation, Transfusion and Transplant of Human Derived Medical Products and not for the establishment of the 1st respondent. He relied on the High Court case of Mui Coal Basin



Local Community & 15 others vs. Permanent Secretary Ministry of Energy & 17 others, Constitutional Petition No 305 of 2012 to emphasize the importance of conducting public participation.

“...It is the government agency or public official who is to craft the modalities of public participation but in doing so the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth...”

24. He argued that under section 107 of the Evidence Act, the burden was on the respondent to prove that the petitioner was involved in the process of establishment of the 1st respondent. That despite the petitioner’s attempt to engage the 2nd respondent prior to submitting the cabinet memorandum for creation of the 1st respondent by highlighting the petitioner’s objection, the 2nd respondent went ahead and executed the unlawful formation of the 1st respondent. That the case of Kenya Human Rights Commission v Communications Authority of Kenya & 4 others, Constitutional Petition No 86 of 2017, in the High Court of Kenya at Nairobi, underscored the fact that public participation and consultation ought to be real and not a mere formality. The court held:

“.... The replying affidavit by the third respondent paint a picture of inadequate consultations...Further it was also averred that the public were not engaged were and that there were pending issues which were never addressed...All these decisions are in agreement that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the constitutional dictates...”

25. The petitioner urged this court to find that no public participation and consultation with the relevant stakeholders was done prior to the establishment of the 1st respondent.
26. On the second issue, the petitioner submitted that the establishment of the 1st respondent was illegal and unlawful as it was done arbitrary in violation of articles 6, 187 and 209 of the Constitution of Kenya, 2010. That in addition, section 80(3) of the Health Act requires the 2nd respondent to develop regulations to prescribe the criteria for the approval of organ transplant facilities which regulations have never been developed. The petitioner thus argued that the 2nd respondent cannot purport to irregularly establish the institution for tissue and organ transplants through cabinet meetings and executive orders as it is a clear contravention of the Health Act. That there is no provision of the law that allows for development of legislative functions vide arbitrary executive orders. That further, all actions must be done within the confines of the law failure to which it amounts to an illegality. The petitioner relied on the case of Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development ex parte Soweto Residents Forum CBO, Civil Application No 460 of 2016 in the High Court of Kenya at Nairobi, where the court ruled that the action complained had to conform to the statutory provisions and pass the constitutional test.
27. The petitioner submitted further that the impugned executive order interferes with the system of checks and balances and further contravenes the classical doctrine of the separation of powers which envisages that the power of enacting law should be separated from the power of administering the state.
28. That the order is legislative in nature and performs a legislative function that goes beyond the president’s legislative functions which are limited by article 115 of the Constitution of assenting to bills passed by parliament. That although the president is the head of state and government, that in itself is not a blanket cheque for the president to purport to exercise powers not conferred on him by the Constitution. The petitioner placed reliance on the case of Law Society of Kenya v Office of the Attorney



General & another; Judicial Service Commission (Interested Party), Constitutional Petition 203 of 2020 in the High Court of Kenya where the court held thus:

“...in determining the scope and extent of the president’s power under article 115, it is necessary to consider the system of checks and balances within the doctrine of separation of powers. This system is applied in constitutional governments as a means of sharing power amongst the separate branches of government...”

29. The petitioner concluded its submissions on this issue by stating that the Constitution of Kenya, 2010 entrenches the principle of legality and provides the foundation for the control of public power. As such the Executive must function within the limits prescribed by the Constitution.
30. On its third issue, the petitioner submitted that the establishment of the 1st respondent has the effect of clawing back devolved functions conferred to County governments by the Constitution because the fourth schedule thereof confers functions to both levels of government, with the delivery of health services lying squarely within the Counties and health policy formulation and management of national referral hospital falling within the National Government’s ambit. That further, section 21 of the Health Act, 2017 requires the National Health System to work in a manner that respects the distinct levels of government and the principles of coordination and cooperation.
31. The petitioner submitted further that the executive order prejudices the County Governments because it amounts to an unconstitutional attempt to assign the delivery of devolved functions to the 1st respondents. It quoted section 5 of the executive order which provide for the functions of the authority to be among others: “provide services for transfusion and transplant systems” which intend to take charge of blood transfusion and tissue transplants. That the functions further infringe on the revenue raising powers of the County Governments as provided under article 209(4) of the Constitution. That those functions outlined under the order are a gross violation of the fourth schedule of the Constitution.
32. The petitioner urged this court to find and hold that the establishment of the 1st respondent usurps and claws back on the devolved functions set out under the fourth schedule.
33. The petitioner concluded its submissions by urging this court to find merit in its petition and hold that the same is merited and should be allowed with costs as against the respondent.

The Respondents’ Submissions

34. In their submissions, the respondents’ submitted on the following issues for determination:
 - a. Whether the petitioner pleaded the alleged constitutional violations to the required degree of precision;
 - b. Whether the President’s executive order Legal Notice No. 142 of 2022 is unconstitutional, null and void to the extent that it established the Kenya Tissue and Transplant Authority;
 - c. Whether the County Governments were excluded in development of the Kenya Police on Donation, Transfusion and Transplant of Human Derived Medical Products and the Inter-Governmental Framework on Coordination of Blood Transfusion Services; and
 - d. Who bears the responsibility of health functions that have not been devolved?
35. On the first issue, the respondents submitted that it is trite law that petitions must be drafted with a reasonable clarity and precision so as to meet the ends of justice by enabling the court to discern the provisions that are alleged to be violated and the manner and extent to which those provisions were violated. That the principle of precision demands setting out the allegations of



constitutional violations and infringements clearly as held in the case of *Anarita Karimi Njeru v Republic* (1979-1980) where the court said:

“The constitutional violations must be pleaded with a reasonable degree of precision

- i. The articles of the *Constitution* which entitles rights to the petitioners must be precisely enumerated and how one is entitled to the same
- ii) The violations must be particularised in precise manner
- iii) The manner in which the alleged violations were committed and to what extent must be clearly stated”

36. They also relied on the case of *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 others* where the court reaffirmed the principle of precision in constitutional petitions observing that the

“... Petition before the High Court referred to articles of the *Constitution* in the title but provided little or no particulars as to the allegations and the manner of the alleged infringements without enumerating any particulars.”

37. The respondents submitted that petitioner was under obligation to set out the rights it claimed were infringed as well as the manner and the extent to which the constitutional provisions were violated; That although it had enumerated various constitutional provisions, it did not sufficiently demonstrate how the said provisions had been violated. That in particular paragraph 34 of the Petition did not clearly indicate the violation that will manifest on the County Governments following the establishment of the 1st respondent.

38. On the second issue, the respondents submitted that the president’s authority has been set out under article 131 of the *Constitution* while his functions are stipulated under article 132, in particular, 132(3) (b) which provides that:

‘the President shall direct and coordinate the functions of ministries and government departments.’

39. That further article 132(4) mandates the president to perform any other executive function provided for in the *Constitution* or national legislation and that it is in line with the above provisions that he established the Kenya Tissue and Transplant Authority on the August 1, 2022. They submitted that the Authority was established by the President’s in adherence to the *Constitution*, its purpose, values and principles, good governance and advancement of human rights and fundamental freedoms in the bill of rights. They relied on the case of *Affordable Medicines Trust and others v Minister of Health and others* stated that:

“The exercise of public power must therefore comply with the *Constitution* which is the Supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which is an incident of the rule of law, is one constitutional controls through which the exercise of public power is regulated by the *Constitution*. It entails that both the legislature and the executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the *Constitution* of the entrenches the principle of legality and provides the foundation for the control of public power.”



40. That the petitioner in paragraph 35 of the petition duly acknowledged the need for the establishment of a robust legal framework for regulation of human organs, human blood, blood products cells and tissue donations and transplants in Kenya. That these products are life-saving without which the intended recipients are likely to suffer long term incapacity. That there is a gap in sustainable, effective and efficient implementation of a national response to availability of timely human derived products of medical origin, establishment of mechanisms for protection of organ donors especially among the most vulnerable, recourse for those aggrieved in donation process and a framework for protection and oversight of transfusion and transplant process. The respondents submitted that the World Health Organisation expects its member states to develop a policy that promotes access to lifesaving medical products of origin which are expected to strengthen governance and regulatory oversight of standards and products in the context of Universal Health Coverage. The respondents reiterated the need to adopt a differential approach to governance and regulation of transfusion and transplant services to meet international best practise and termed that as the main reason for the formation of the Authority. They further relied on article 12 of the *International Convention on Economic, Social and Cultural Rights* which provides that:

“The state parties to the present covenant recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

41. The respondents asked this court to take judicial notice of the fact that there have been many cases of organ trafficking and individuals selling their organs for money hence there is an urgent need for regulation and for the government to protect its citizens from harm. They further submitted that the Executive Order, Legal Notice No 142 of 2022 establishing the 1st respondent is in tandem with the spirit and provision of the *Constitution* and aims at promoting human rights and fundamental freedoms.

42. On the third issue, the respondents submitted that the stakeholders from both national and the county assembly were involved in the formulation of the frameworks that proposed the need for regulation of human tissue, blood, cells and organs. He relied on article 6(2) of the *Constitution* and section 21 of the *Health Act, 2017*. That the discussion on the Kenya Policy on Donation, Transfusion and Transplant of Human Derived Medical Products involved various stakeholders on diverse dates: September 29, 2021, October 7, 2021, 25th and October 26, 2021, 4th and November 5, 2021 and the 11th and 12th of November, 2021. That the final meeting was held on the 18th of November, 2020 and in all the respective meetings, there was a consensus between the two levels of the government that there was a need for a legislation to mandate semi-autonomous governance and management of blood, tissue, organs transfusion and transplant services. That the Petitioner should therefore be precluded from denying a document that it was part of its formulation.

43. The respondent submitted further that the County Governments equally participated in the formulation of the Intergovernmental framework on Coordination of Blood Transfusion Services and the deponent of the petitioner’s replying affidavit acknowledged the petitioner’s participation in formulation of the framework. They relied on the case of *Okiya Omtata Okiiti & another v Attorney General & 6 others* [2020] eKLR

“ Given the extent of consultation and participation that is required in the devolution exercise, the distribution of powers and functions within the two levels of government, in the Fourth Schedule, that were broad, was not by accident as this paved way for consultation and compromise to give content to the functions during the transfer of the functions distributed....”



44. He also relied on the case of *Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v County Government of Nairobi & 3 others* [2014] eKLR where it was observed that:
- “Public participation does not imply that each of the county residents must give their oral views in the public forum or otherwise write their memoranda respecting that views on a Bill. But simple acts of say conducting random public forums posting programmes on popular radio station and publishing the bill in the dailies with wide circulation would do.”
45. The respondents insisted that all the necessary and meaningful consultations and public participation between the County Governments and the National Government in coming up with the framework before the Executive Order establishing the 1st Respondent was issued.
46. The final issue that the respondents submitted upon was: who bears the responsibility of health functions that have not been devolved? The Respondents submitted that the fourth schedule of the *Constitution* provides for the distribution of functions between the National and County Governments. Article 186(3) of the *Constitution* provides that a function or power not assigned by the *Constitution* or national legislation to a county is a function and power of the national government. That section 19 of the *Health Act*, 2015 provides that the development of the health policies is the function of the National Government in consultation with the County Governments, stakeholders and the public. The respondents submitted further that the President is empowered by section 3 of the *State Corporations Act* to establish a state corporation as a body corporate to perform functions specified in that order.
47. The respondents concluded by stating that the current petition is premature as the Kenya Tissue and Transplant Authority was created to regulate issues surrounding organs, tissues, transfusion and transplants until such a time the services will be established through Parliament. They urged this court to dismiss the petition with costs to the respondents.

Analysis and Determination

48. From the parties’ pleadings and submissions, it is evident that the issues that arise for determination are:
- a. Whether there was public participation in the formulation of the framework that led to the establishment of the 1st respondent;
 - b. Whether the President’s executive order Legal Notice No 142 of 2022 is unconstitutional, null and void;
 - c. Whether an order of prohibition should issue against the continued implementation of the Legal Notice No 142 of 2022;
 - d. Who bears the costs of this suit?
49. Before delving into the main issues for determination, the petitioner wanted this court to elaborate on whether the delivery of health function is a devolved function and whether one level of government can use the provisions of the *State Corporations Act* to establish authorities/institutions to undertake functions of the other level of government without executing the necessary agreement as provided under article 187 of the *Constitution*.
50. The fourth schedule of the *Constitution* lists the functions of the different levels of government: Part 1 clause 28 of the schedule designates the formulation of health policy under the National Governments. Part 2 clause 2 of the schedule provides for the roles of Counties in the health sector. These include



management of County health facilities and pharmacies, ambulance services and promotion of primary healthcare.

51. This schedule clearly places the responsibility of the formulation of health policy under the National Government.
52. It is thus obvious that it is not the entirety of the health function that was devolved. There is a demarcation where policy formulation on matters health remains a preserve of the National Government under the Constitution. This particular field of tissue and organ transplant has evidently been without policy regulation or legislation to guide it to date. The development of the relevant policy therefore is the constitutional mandate of the National Government but policy formulation is not the end in itself as the implementation component must be factored in the policy development as well.
53. Cooperation between the two levels of Government is emphasized especially in matters that cut across between the two levels of Government. Article 189 of the Constitution calls for the cooperation of the two levels of government in exchanging information and of coordination of policies. Additionally, section 15(1)(c) of the Health Act places responsibility on the National Government Ministry responsible for health to develop health policies in consultation with the county governments, and health sector stake holders and the public.
54. The Court in Republic vs. Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] eKLR held thus:

“...In the fourth schedule, Part 1 No 28 to the Constitution, it is clear that the Health Policy remains a function of the National Government. The inadequacies of provision of health services in this Country is a matter of national concern and it is the obligation of the National Government to ensure that every person’s right to the highest attainable standard of health as stipulated under Article 43 of the Constitution is attained...The fact that Health services are devolved does not discharge the national Government from its obligation to ensure that its Constitutional obligations are fulfilled. In our view, under article 1(3)(b) of the Constitution, there is only one State organ known as the Executive with structures at national level and in the county governments. Accordingly, we do not accept the contention that devolution of Health services ipso facto ought to necessarily lead to loss of jobs or disadvantageous terms of employment, salaries, remuneration, pensions and gratuities which terms in our view ought to be determined by the Salaries and Remuneration Commission.”
55. Turning now to the 1st issue for determination in this petition, which is whether there was public participation in the formulation of the framework that informed the Executive Order that led to the establishment of the 1st respondent; the petitioner contends that there was no public participation on the establishment of the 1st respondent that was discussed during the consultative meetings. The respondents on the other hand states that all stakeholders in the health sector including the petitioner’s representatives were involved in the various consultative forums where the subject matter featured as part of development of a policy framework. In its rebuttal, the petitioner conceded participation in the consultative forums that took place in regard to development of the policy framework on Kenya Policy on Donation, Transfusion and Transplant of Human Derived Medical Products BUT was categorical that establishment of the 1st respondent never featured in those deliberations.
56. Article 10(2)(a) of the Constitution establishes public participation as a national value and principle of governance. State organs, State officers, public officers and all persons are bound by the Constitution to engage in public participation when making or implementing public policy decisions.



57. Public participation and what it encompasses has received extensive judicial exposition as reflected in case law since the passage of the new *Constitution*. In *Okiya Omtatah Okiiti v Refugee Affairs Secretariat (RAS) Kenya & 2 others* [2020] eKLR, Justice W Korir held that:

“...Public participation in the decisions of administrators is confirmed as a national value and principle of governance under Article 10 of the *Constitution*, and therefore everyone would anticipate that all policy decisions and administrative actions would involve their input. By failing to hold any public forum to gauge the concerns and obtain the input of the refugee community, the respondents did infringe the legitimate expectation held by the refugees that the guidelines governing the election of their leaders would be subjected to public participation.”

58. Further, in *Republic v Ministry of Finance & another ex parte Nyong'o* Nairobi HCMCA No 1078 of 2007 (HCK) [2007] KLR 299, the Court held:-

“...Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.”

59. In the case of *Doctors for Life International v Speaker of the National Assembly & others* [2006] ZACC 11, the Court held that:-

“...The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected....91. Significantly, the ICCPR guarantees not only the ‘right’ but also the ‘opportunity’ to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.”

60. In the case of *Republic v County Government of Kiambu ex parte Robert Gakuru & another* [2016] eKLR the court held: -

“...However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case...”



61. The respondents were categorical that consultative forums and public participation that led to formulation of policies on tissue and organ transplant that birthed the 1st respondent were conducted widely.
62. The petitioner, in paragraph 6 of the supplementary affidavit acknowledges that stakeholder forums were held but insisted that those forums were not for the establishment of the 1st respondent; rather, those that took place were for formulation of Kenya policy on donation, transfusion and transplant of human derived medical products.
63. In the 2nd respondent's replying affidavit, he attached as evidence that the stakeholder forums that took place, among them annexure was 'MK-10' which he said were minutes of the final validation meeting held on 18/11/2021. The title of the document is:-

Minutes of the Virtual Review Meeting with Council of Governors (CoG), County Executive Committee Members Health, Kenya National Blood Transfusion Services (KNBTS) on Validation of Policy on Donation, Transfusion and Transplant of Human Derived Products and Intergovernmental Framework (IGF) on blood coordination held on 18/11/2021 between 8.30 a,m and 10 am.

under which there is Minute 2 with the sub-heading; 'Policy validation' and which reads as follows: 'The team discussed the policy document on donations, transfusion and transplant of human derived products, the key highlights were:

Page 33 of policy on assigned roles was rephrased to state that counties will guide implementation, local mobilization and enforce compliance in transfusing facilities as per Mombasa meetingA strategy was added on objective 8 that there shall be a joint committee between National and County Governments to oversee the implementation of the policyAdditional of technical service function under counties that indicates counties can test blood as per standard'Members agreed that the policy document is now ready to move to the next phase for Cabinet ratification. This was proposed by Hon Prof Muga and seconded by Hon Dr Dadu..."

64. This document is very critical for being the final validation document, it captures key issues that were validated in their summary form. In this final validation document, there is no mention that a semi-autonomous agency was to be established to provide oversight in this area of tissue and organs for medical use. Instead, these minutes reflect that a joint committee of national and county governments was to oversee the policy implementation in recognition that both levels of Government had their respective roles in the matter. To emphasize, the policy captures this aptly in the above minute as

'a strategy was added on objective 8 that there shall be a joint committee between national and county governments to oversee the implementation of the policy.'

65. It is thus no surprise that the petitioner felt short-changed and protested through the letter dated 1/3/22 to the solicitor general against the establishment 1st respondent. Despite petitioner's protest, the 1st respondent went ahead unconstrained to establish the 1st respondent five months later on, that is on 1/8/22.
66. It is apparent that the concerns by the petitioner did not even attract a response hence one can safely infer that due consideration was not given to the issues raised notwithstanding the previous discussions clearly showing that the petitioner had clear roles to perform in that matter. In *Republic v County Government of Kiambu ex parte Robert Gakuru & another* [2016] eKLR the court said as



follows in regard the need to giving appropriate amount of attention to the views made during public participation: -

“What the courts are saying is that whereas the views expressed by the public are not necessarily binding on the legislature due consideration must be given to them before they are dismissed. In other words, public participation ought not to be taken as a mere formality for the purposes of meeting the constitutional dictate.”

67. In a matter like the present case, where the matter in question was preceded by consultations between the two levels of government and is manifest that there was a certain degree of consensus on the matter was to be collaboratively approached by both levels; it was incumbent upon the Respondents to justify any departure from that common position that had been reached during the last validation consultative meeting of 18/11/21 whereby creation of a joint committee of the two levels of governments to oversee the implementation of the policy in this area of health had been reached in recognition that both levels of government had a role to play. Instead, the respondents went ahead and unilaterally established a semi-autonomous regulatory and oversight body that was anchored in the national government against that consensus. Under article 259 of the Constitution, the court is obligated to among others interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and in a manner that contributes to good governance. The fact the 1st respondent was created and assigned all the responsibilities including those that had clearly been earmarked as falling on the county governments, it means that the national government allocated itself the said functions devoid of any agreement between the two levels governments hence acted in disregard of article 187 of the Constitution which provides that a function or power at one level may be transferred to a government at the other level by the agreement between the governments. No agreement was reached that the national government was to scoop everything to itself including the roles that discussions revealed fell under the devolved functions of the county governments.
68. The second issue was whether the executive order is unconstitutional, null and void. The positions of the parties were conflicting. The respondents submitted that the Constitution in article 132(3)(b) empowers the President to coordinate the functions of ministries and government departments and sub-article (4)(a) of the same article gives the President the power to perform any other executive function provided for in this Constitution or in National legislation hence the President has a wide mandate to make an executive order which he applied in this particular instance.
69. The Executive Order that is the subject of contention in this petition is contained in Legal Notice No 142. The order is known as the Kenya Tissue and Transplant Authority Order, 2022 established under the State Corporations Act, cap 446 Laws of Kenya. Section 3 of cap 446 empowers the President by order, to establish a state corporation as a body corporate to perform the functions specified in that order. However as provided under article 10(2)(a) of the Constitution, these powers must be exercised under the principles of governance among them, public participation. In the South African case of Affordable Medicines Trust and others v Minister of Health and others [at para 18] (2005) ZACC 3; 2006 (3) SA 247 (CC) at paras 49, 75 and 77, Ncgobo CJ held as follows:-

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’ In this sense the



Constitution entrenches the principle of legality and provides the foundation for the control of public power.”

70. The provisions of article 3(1) of the Constitution provide that every person including the President of the Republic of Kenya has an obligation to respect, uphold and defend the Constitution. This means that while carrying out his functions and obligations under the Constitution, the State Corporations Act and any other legislation, the President must comply with the provisions of the Constitution. The respondent submitted that the executive order was based on a framework that was deliberated upon by the representatives of the petitioner through various meetings with the Petitioner and public consultations. I have already found as a fact that the executive order went against what was generally agreed during the consultative forums where the 1st respondent was set up as an independent semi-autonomous agency yet the discussions were geared towards creating a joint committee to oversee the policy. Article 6(2) of the Constitution provides that the governments at national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation and thus in matter like this where clearly one level of government acted in complete disregard of the other level despite evidence that they had all discussed and pointed towards approaching the matter collaboratively, the said policy cannot be said to have met the required constitutional threshold envisaged in article 6(2).

71. The other grievance raised by the petitioner against the making of the said executive order is that it had the effect of assigning devolved functions on a body belonging to the National Government to the detriment of county governments which undertake delivery of devolved health functions. For instance, in the meeting of 18/11/2021- annexure MK 10 which was attached to the replying affidavit of the 2nd respondent, it was recorded in Minute 2 bullet 4 as follows: ‘Addition of technical service function under counties that indicate that counties can test blood as per standards.’ In addition, page 7 of the ensuing policy document that the 2nd respondent attached in his replying affidavit captures this:

‘...The County Governments are responsible for health services delivery while the National Government is responsible for health policy formulation, management of referral facilities and capacity building of the counties. In this regard, various responsibilities of the two levels of the Government with regard to blood, organs, tissue and stem cells are shared...’

72. If the policy commends itself that various health responsibilities required to be undertaken transcended the national government to other levels of governments in the counties, it goes without saying that centralizing everything in national government by establishing the 1st respondent in that level of government only went against the object on devolution. Under article 159(2)(e) the Court enjoined to protect and promote the purposes and principles of the Constitution. Although the Respondent argued that the scope of the county governments involvement in health matters is circumscribed in 4th schedule section 2 to include, County health facilities and pharmacies, Ambulance services and Promotion of primary health care among others; it should be noted that the 4th schedule is not to be construed strictly but loosely as setting out of a framework for which consultations may ensue to determine the scope or extent of the function. In that regard, I entirely agree with the holding in Okiya Omtata Okiiti & anor v Attorney General & 6 others [2020] eKLR where it was observed thus:

“... Given the extent of consultation and participation that is required in devolution exercise, the distribution of powers and functions within the two levels of government, in the Fourth Schedule, that were broad, was not by accident as this paved the way for consultation and compromise to give content to the functions during the transfer of the functions distributed...”



73. As such with emerging health developments; the role of the county governments will also continue to expand. Establishing the 1st respondent within the national government as the fulcrum upon which everything concerning the policy on blood transfusion, tissue and organ transplant rotated despite clear indications during policy discussions that county governments functions were also embedded in this new area of health was inconsistent constitutional objecting of devolution.

74. It is the finding of this court that in taking one-sided step to create the 1st respondent to oversee the implementation of the policy on blood transfusion, tissue and organ transplants without due regard to the county governments, the respondents violated the devolution object and in particular article 189(1) (a) that calls for government at either level to perform its functions and exercise the powers in a manner that respects the functional and institutional integrity of governments at the other levels. It also went against article 6(2) that requires the governments at national and county levels to conduct their mutual relations on the basis of consultation and cooperation. Although article 189(1)(d) provided a viable guide in dealing with the matter in question considering that it was already generally accepted that it involved shared responsibilities between the two levels of government; the respondents overlooked the said article and proceeded to singly establish the 1st respondent. Article 189(1) (d) which should have guided the respondent states: -

‘Government at each level, and different governments at the County level, shall cooperate in performance of functions and exercise of powers, and for that purpose, may set up joint committees and joint authorities.’

75. The final issue was whether the policy was anchored on the proper law. The submission by respondent was that Health Act at section 80(3) provides that the Cabinet Secretary shall prescribe through regulations the criteria for approval of organ transplant facilities and procedural measures to be applied for such approval, yet the policy that was gazetted by the respondent to deal with the matter under a different Act, namely; section 3(1) of the State Corporations Act where at section 5(d) named the objectives of the establishing the 1st respondent was among others to be ‘provide support services for transfusion and transplant systems including testing, grouping, typing, banking, processing, distribution, manufacturing and quality control.

76. The respondent cited article 132 on the functions of the President particularly article 132(3)(b) which provides that ‘The President shall direct and coordinate the functions of Ministries and government departments’ and also article 132(4) which provides that the President may perform any other executive function provided for in the Constitution or national legislation. That it is in accordance with that authority that the President established the 1st respondent in accordance with section 3(1) of the State Corporations Act, hence the actions of the President were lawful and complied with the legislation.

77. Clearly, the main issue here is,

‘as between the State Corporations Act and the Health Act, which was right law to anchor this policy?’

This may not so much about the Constitution as far as this issue is concerned.

78. One of the canons of statutory interpretation that assists in deciding which of the two statutes apply when faced with a situation where both laws may apply is what is expressed in Latin maxim as ‘*generallis specialibus non-derogant*’. It means that general laws do not prevail over special laws or the general does not derogate from the specific. The maxim comes in when the court is required to decide which statute is applicable between two statutes particularly when the scope of two laws is in issue as in the present case. The Petitioner’s contention is that the provisions of the Health Act supersede those State



Corporations Act in reference to the matter of development of a policy on blood transfusion, tissue and organ transplant as the Health Act speaks expressly to the subject matter in question whereas the State Corporations Act does not.

79. I agree with the submissions of the petitioner that section 80 expressly provides for the Minister to make the policy under the Health Act on the matters of organ and transplant facilities. On the other hand, the State Corporations Act is non-specific in regard to the subject matter, it is a general statute. The establishment of the 1st respondent under a general statute in disregard of this specific provision under the Health Act was *ultra vires* and unlawful. Parliament expressly provided that policy on the subject matter was to be made under the Health Act.
80. The upshot of the foregoing findings is that this petition succeeds.
81. The following reliefs are therefore granted:
1. A declaration is hereby issued that legal notice number 142 of 2022 on the establishment of Kenya Tissue and Transplant Authority Order 22 is unconstitutional for violating articles 6(2), 10, 187 and 189 and also legally defective for being *ultra vires* section 80 (3) of the Health Act.
 2. An order of prohibition be and is hereby issued stopping implementation of legal notice number 142 of 2022 establishing the Kenya Tissue & Transplant Authority. This order however does not affect a past action that has already been undertaken by the said authority.
 3. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 30TH DAY OF JUNE, 2023.

L.N MUGAMBI

JUDGE

