



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 457 OF 2016

KENYA PHARMACEUTICAL DISTRIBUTORS ASSOCIATION...PETITIONER

VERSUS

KENYA VETERINARY BOARD.....1ST RESPONDENT

VETERINARY MEDICINE DIRECTORATE.....2ND RESPONDENT

AND

PHARMACY AND POISONS BOARD.....1ST INTERESTED PARTY

KENYA VETERINARY ASSOCIATION.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. **Kenya Pharmaceutical Distributors Association**, the petitioner, is an Association of pharmaceutical distributors whose members include all registered Pharmacists registered under the Pharmacy and Poisons Act, (Cap 244) and dully permitted to practice pharmacy in the country. Under this Act, a Pharmacist is one who has a degree in Pharmacy recognized by the Pharmacy and Poisons Board, and is duly registered. Section 2 of the Act, permits Pharmacists to dispense medicines and poisons. Pharmacy and Poisons Board is charged with the mandate of ensuring quality, safety and efficacy of human and animal drugs.

2. **Kenya Veterinary Board**, 1st respondent and **Veterinary Medicines Directorate**, 2nd respondent, are corporate bodies established under the Section 3 of the **Veterinary Surgeons and Para-Professionals Act 2011**, The VET Act and Veterinary Surgeons and Para-Professionals (Regulations) 2015, respectively and whose functions are provided for in this Act.

Petition

3. Based on the above facts, the petitioner filed a petition dated 3rd of November 2016 contending that certain provisions of the VET Act are inconsistent with the **Constitution** and Pharmacy and Poisons Act singling out Section 14(c) of the VET Act whose definition of the word “**practice**” includes dispensing or administration of veterinary medicines on animals. It is also contended that **Section 39(2) (a)** of the same Act is unconstitutional for allowing the **Cabinet Secretary** to establish institutions to assist Kenya

Veterinary Board (KVD) function efficiently and effectively in the management of animal resource industry and livestock sector both nationally and in the counties.

4. The petition also questions the legality of establishing the Veterinary Medicine directorate through regulations to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons. And further that the Veterinary Regulations promulgated on the 9th October 2015 unconstitutional in so far as they are pegged on the impugned sections 14 and 39 of the VET Act.

5. The petitioner contends that the impugned provisions are in violation of the **Constitution** to the extent that they limit the right of Pharmacists to earn a livelihood and the right to property. It is the petitioner's contention that **Section 14(c)** and **39(2) (a)** of the VET Act and the VET Regulations, 2015 have the purpose and effect of forcing Pharmacists to employ Veterinary Surgeons for the purpose of dispensing animal medicines. Further, that **Section 13** of the VET Act makes it mandatory for registration of practitioners, while Section 14 defines '**practice**' to include dispensing and administration of veterinary medicines.

6. In that regard, the petitioner contend that because Pharmacists are registered under the Pharmacy and Poisons Act, it is irrational, illegal and unreasonable to require them to be registered under the VET Act in order to dispense animal drugs. It is contended that this discriminates against Pharmacists' right to earn livelihood as well as the right to property contrary to **Article 40** of the **Constitution**. In the petitioner's view, the VET Act attempts to illegally repeal the Pharmacy and Poisons Act, thereby deny Pharmacists a legitimate expectation that as qualified and registered Pharmacists, they would be allowed to freely dispense medicine without distinction between human and animal medicines.

7. The petitioner averred that the Board established under the VET Act has no capacity to regulate quality, efficacy and safety of drugs and that by requiring Pharmacists to register with KVMD, it opens them to double regulation, a deprivation of their right to property under **Article 40** of the **Constitution**, and is in breach of public interest, good governance and national values expounded in **Article 10** of the **Constitution**.

8. The petitioner also contends that enactment of **Section 14 (c)** and **39(2) (a)** of the VET Act was in breach of **Article 118** of the **Constitution** as it was done without meaningful public participation. Further contention was that VET Regulations 2015 are illegal and irrational in substance as they purport to be made by Kenya Veterinary Board pursuant to Section 6 (2) (f) of the VET Act, and that the regulations are *ultra vires* the powers donated by the Act hence are illegal.

9. There is a further contention that the regulations were not enacted in accordance with the Statutory Instrument Act, that KVB was only allowed to formulate a code of conduct, and that it is unconstitutional, irrational and illegal to establish a body corporate by way of regulations, given that regulations stand revoked within 10 years after their coming into force, and finally that the VET regulations are inconsistent with the Pharmacy and Poisons Act.

10. The petitioner argued, therefore, that Pharmacists' rights under **Articles 43** and **46** of the **Constitution** on social economic and consumer rights have been violated, and sought the following reliefs-

1. A declaration that the amendments under section 14(c) and 39(a) (sic) are unconstitutional, null and void for want of public participation.

2. A declaration that the veterinary surgeon and veterinary paraprofessionals (Veterinary medicines directorate) Regulations 2015 are inconsistent with the provisions of Pharmacy and Poisons Act, Cap 244 laws of Kenya and therefore null and void to the extent of the aforesaid inconsistency.

3. A declaration that the veterinary surgeons and veterinary medicines directorate regulations,

2015 are in breach of the provisions of the statutory instrument Act, 2013 and therefore null and void.

4. A declaration that the veterinary surgeons and veterinary para-professionals (the veterinary medicines directorate regulations, 2015 are unconstitutional.

5. The Honourable court be pleased to issue such structural interdicts as it may deem fit in the circumstances.

Responses

11. Two parties other were enjoined in these proceedings as interested parties, namely; **Pharmacy and Poisons Board** and **Kenya Veterinary Association**, 1st and 2nd interested party respectively.

First Interested Party's Response

12. The **Pharmacy and Poisons Board**, the 1st interested party, filed a replying affidavit by **Dr. Kiprotich Koskei**, sworn on 9th November 2016, supporting the petition. According to his depositions, the preamble to Pharmacy and Poisons Act's the Act was intended to make **"better provisions for the control of the profession of pharmacy and trade in drugs and poisons."** It was also deposed that the Act establishes the Pharmacy and Poisons Board as body corporate to ensure proper administration of the Act. The Board, he deposed, comprises the Director of Medical Services, as chair, Chief Pharmacist, Director of veterinary services and a veterinary surgeon nominated by him, 3 Pharmacists representing public service, community pharmacy and pharmaceutical industry, as well as two persons representing Faculty, Boards of Departments of Pharmacy in Universities, making the Pharmacy and Poisons Board have inclusive representation in human and veterinary medicines.

13. Dr. Koskei deposed that the Board is the only National medicines regulatory authority recognized globally, (by WHO), with mandate to oversee chemical trials, market authorization, registration, licensing and inspection, marketing, surveillance and enforcement. He deposed that the Board is, therefore, the only body with the primary mandate of ensuring quality, safety and efficacy of medicines in the country.

14. **Dr. Koskei** further deposed that only a registered Pharmacist can dispense medicines which includes preparing, mixing and compounding drugs, and that only qualified persons can be registered by the Board to practice pharmacy. It was **Dr. Koskei's** deposition that a veterinary professional can only carry out the business of veterinary medicines upon getting a license to do so from the Pharmacy and Poisons Board. Further, that under the Pharmacy and Poison Act, qualified Practitioners, Dentists and Veterinary Surgeons, (Prescribers), may by special order from the Cabinet Secretary be allowed to dispense Part 1 poisons for purposes of medical, dental or veterinary treatment only, and also that importation of drugs is regulated by the Pharmacy and Poisons Board.

15. In a nutshell, **Dr. Koskei** deposed that the regulations under the Pharmacy and Poisons Act have an elaborate process for manufacture and importation of drugs and medicinal substances. He therefore stated that the impugned provisions intend to make provision for trading, registration and licensing of Veterinary Surgeons and Para-Professionals to provide for matters relating to animal health and welfare in contravention of the Pharmacy and Poisons Act. In his view, the VET Act is to control and regulate the profession of Veterinary Surgeons, but not veterinary medicine which falls under the Pharmacy and Poisons Board.

16. Dr Koskei also deposed that the impugned regulations were enacted without taking into account the mandate of the Pharmacy and Poisons Board. According to Dr. Koskei, the Pharmacy and Poisons Act and its regulations were not amended by the VET Act and regulations made thereunder, thus the two regulatory bodies will lead to double regulation and confusion and as result, transfer costs to consumers. Dr. Koskei took issue with **Section 15 (7)** of the VET Act which makes it an offence for one to practice veterinary medicine or surgery without being registered under the Act which in essence, outlaws Pharmacists from dispensing animal drugs yet it is not possible to separate human medicine animal

medicine.

1st Respondent's Response

17. The 1st respondent filed a replying affidavit by **Dr. Indraph Mugambi Ragwi**, sworn on 22nd November 2016. Dr Ragwi deposed that the the Act and impugned provisions, were a culmination of **Sessional Paper No.2 of 2008, (the National Livestock Policy)**, which advocated different managements of human and animal medicines which made regulation through the Act and regulations necessary for implementation of fundamental freedoms, good health, protection of socio-economic interests and quality services, in line with international standards.

18. **Dr Ragwi** denied that the regulation interferes with anyone's right to property under **Article 40** of the Constitution, but stated that it only regulates Veterinary Medicine and services in order to protect human and animal health. According to the Dr. Ragwi, the impugned regulations do not repeal Pharmacy and Poisons Act, but only regulate animal medicines. Dr. Ragwi further stated that there was no evidence that Kenya Veterinary Board had no capacity to regulate veterinary medicine, and maintained that veterinary professionals are well trained to perform their duties under the impugned Act.

19. It was also contended that the National Assembly performed its legislative role and there was full public participation as required by the **Constitution** and the law. He denied that there was breach of fundamental rights to good health, services and protection of socio-economic rights, since the National Assembly properly enacted the legislation and regulations.

Second Interested Party's Response

20. The 2nd interested party filed a replying affidavit through **Dr. Samuel Kahariri** sworn on 18th November 2016, opposing the petition. It was deposed that whereas members of the petitioner may include veterinary practitioners, members of the 2nd interested party are professionals trained in animal health, and that the VET Act provides for the practice of veterinary which includes regulation of veterinary medicines. He referred to the process leading to enactment of the VET Act, and added that the regulation is justified and reasonable. **Dr. Kahariri** deposed that the regulations do not interfere with property rights under **Article 40** of the **Constitution**, but regulate services which have to do with manufacture, distribution and use of veterinary Medicines. According to **Dr. Kahariri**, the VET Act and regulations made thereunder are constitutional and do not contravene the Pharmacy and Poisons Act and regulation made there under, He also denied that there will be no double regulation since members registered under the Pharmacy and Poisons Act can also comply with the VET Act.

21. **Dr. Kahariri** deposed that there was public participation before passing of the Act and regulations hence they were enacted in accordance with the Constitution and the law.

22. The Attorney General filed grounds opposing the petition, dated 11th November 2016 and filed in Court on the same day. It was stated that there was a misjoinder of parties and cause of action in the petition, that the government had published gazette Notice Supplement No. 45 of 8th April 2016(corrigenda) correcting the fact that the regulations had been made by the Cabinet Secretary, and not Kenya Veterinary Board, that the petition is frivolous and vexation, thus a waste of time, and that the petitioner did not plead with precision the constitutional provisions violated, the manner of infringement and the jurisdictional basis of the action before court.

Submissions

23. Mr Muturi, learned counsel for the petitioner, submitted that the petition was grounded on **Section 39(2)(a)** of the VET Act which was enacted without public participation. Counsel also submitted that the enactment of the regulations under the Act was unconstitutional and illegal in so far as they were enacted pursuant to Section 39 and without public participation.

24. Referring to the further affidavit in support of the petition, and motion counsel pointed out to **anexture “KWM2”** a copy of the **Hansard** of National Assembly proceedings for 31st March 2011 to show that an amendment was introduced on the floor of the House to **Section 39** in the third reading. In counsel’s view, this was in contravention of **Article 118** of the **Constitution**, which requires that there be public participation in the legislative process. Counsel submitted this also violated **Article 10** of the **Constitution** in respect to public participation.

25. Counsel contended that the amendment gave the minister power to make regulations and craft institutions, and following this amendment, Counsel submitted, the minister made regulations in 2015 under the impugned Section. A directorate was also formed under regulation 5 establishing the **Veterinary Medicines Directorate**, a body corporate, and the 2nd respondent herein.

26. Counsel cited **Article 94(1)** of the **Constitution** and submitted that the legislative authority of the republic is derived from the people and is exercised on their behalf by the legislature. According to counsel, where legislation is not subjected to public participation, it is unconstitutional. Counsel further submitted that people reserved their right to participate in governance through legislation and, therefore, have the right to public participation. Counsel again referred to **Article 2(2)** of the **Constitution** and submitted that no one can exercise state authority except as authorized by the constitution.

27. Mr. Muturi’s contention was that introducing an amendment in the third reading was illegal, unreasonable and contravened **Article 10** of the **Constitution**. Counsel went on to argue, that to determine whether or not there was public participation, the whole process leading to the enactment of the impugned legislation must be interrogated. To support this proposition, counsel referred to the decision in the case of *Law Society of Kenya v Attorney General & 2 others [2013] eKLR*.

28. Counsel further argued that public participation has to be real and not a mere formality, and referred to the case of *Robert W. Gaturu and others v Governor Kiambu County and 3 others [2014], eKLR* for the submission that public participation gives people a chance to take part in making legislations that affect their lives. He contended, therefore, that **Section 39** was enacted without public participation.

29. Regarding the regulations made under Section 39, counsel submitted that they infringe consumer rights under **Article 43** of the **Constitution**. Counsel urged the Court to look at the purpose and effect of **Section 39** which is explained in the affidavit of **Dr. Mugambi** sworn on 22nd November 2016, in that Pharmacists will have to pay certain fee to the 2nd respondent in order to practice the veterinary profession, an expensive undertaking.

30. Counsel argued that under the impugned regulations, the petitioner’s members’ rights will be taken away given that they will pay fee without due process. In this case, the petitioner’s members will pay fees under the Pharmacy and Poisons Act and also to the body created by the impugned **Section 39** and the regulations made thereunder, which regulations were merely lifted from the Pharmacy and Poisons Act.

31. Counsel contended that under **Articles 40(2)** of the **Constitution**, the National Assembly is prohibited from enacting a law that negatively affects people’s property, and more so when such law mandates charging of fees without having been subjected to public participation, which contravenes Article 118 of the **Constitution**.

32. Counsel also submitted that petitioner’s members’ practice is highly specialized and veterinary surgeons will not be able to manage the profession including quality and efficacy of veterinary medicines, that the VET Board is composed of veterinary professionals who will regulate medicines which indirectly affect people’s lives.

33. It was counsel’s further contention, that consumer rights to goods and services of reasonable quality guaranteed under **Article 46** of the **Constitution** will be affected. This is so, counsel contended, because goods and services will be expensive due to double charge. Learned counsel submitted that Pharmacy and Poisons Board has the necessary capacity to check quality and efficacy of poisons and should be left to be in charge, rather than have another body established under the impugned provisions thus lead to

duplication of roles between it and the Pharmacy and Poisons Board.

34. Counsel argued that a body corporate established under the impugned legislation cannot be of any meaning because it will only be in place for 10 years in view of the provisions of the Statutory Instruments Act, which is a waste of public funds.

1st Interested Party's Submissions

35. **Mr. Kibet**, learned counsel for 1st interested party, supported the petition and submitted that the 1st interested party is recognized by **WHO** as the National Medicine Regulatory body with mandate to regulate human and animal medicines, and is the only body that has capacity to carry out that mandate as well as the efficacy of poisons.

36. Counsel submitted that a Veterinary Surgeon is only allowed to diagnose and treat animals, while a Pharmacist prepares and dispenses drugs. Counsel contended that the impugned provisions, to wit, **Sections 14(c) and 39(2) (a)** are unconstitutional. He referred to the preamble to both statutes and submitted that whereas Pharmacy and Poisons Act is on the regulation of drugs, the VET Act, is on regulating the Veterinary profession, and according to counsel, Sections **14** and **39** limit those who can deal with animal drugs. In that case, it limits the Pharmacists' right to deal in veterinary drugs.

37. It was submitted that Sections 19 and 24 of the Pharmacy and poisons Act create a legitimate expectation and, to the extent that section 39 of the VET Act only allows veterinary Surgeons to practice, is unconstitutional and violates **Article 43** of the **Constitution** in so far as Pharmacists are concerned, given that the provisions take away rights Pharmacists enjoyed under sections 19 and 24 of that Act thereby violating their legitimate expectation.

38. Regarding the veterinary regulations, it was submitted that they are in conflict with the work of the Pharmacy and Poisons Board in that whereas a Pharmacist has the ability to determine efficacy of drugs, a Veterinary Surgeon cannot be allowed to regulate drugs.

39. It was further submitted that the process of formulating regulations did not comply with **Section 11** of the **Statutory Instruments Act** which requires that a statutory instrument should not be inconsistent with a statute. In their view, the regulations under the VET Act are in conflict with the Pharmacy and Poisons Act which has not been amended. The introduction of another regulatory body, it was submitted, will create confusion and lead to use of more public resources due to duplication of duties and functions

Respondent's submissions

40. Mr. Kaumba learned counsel for the respondents, submitted that the enactment of the VET Act, particularly **Section 39** and the regulations made there under, are consistent with the **Constitution** both in terms of content and manner of enactment.

41. It was submitted that the regulation was enacted from a national policy (Sessional Paper No 2 of 2008) perspective which was debated and passed by the National Assembly. Counsel contended that the VET Act and regulations were meant to regulate the veterinary profession whose weakness had been noted in the Sessional Paper No 2 of 2008, and that that regulation of veterinary medicine was at the core of the stakeholders' discussions.

42. On the constitutionality of the impugned provisions of the Act and regulations, counsel submitted the two are consistent with the **Constitution**. Counsel also contended that there was public participation and that the allegation that Section 39 was introduced in the third reading without public participation has no merit. It was submitted that public participation depends on the circumstances of each case and referred to the case of *Ministry of Health v New Clicks South Africa(PTY)Ltd and another [2006] (2) SA 311(CCT)* for the proposition that parties should be given a reasonable opportunity to participate in the legislative process, and that whether or not there was public participation must be judged from the circumstances of the case.

43. In the case of the impugned legislation, counsel submitted that public participation began with the Sessional paper. It was contended that during the legislative process public participation was driven by the national assembly, and whether or not there was public participation is a matter of fact which was to be proved by the petitioner. And in that regard, counsel submitted, the petitioner did not enjoin the Speaker of the National Assembly to complain that there was no public participation in the process leading to the enactment of the impugned sections of the VET Act.

44. Counsel further referred to the case of ***Consumer Federation of Kenya v Public Service Commission & another [2013] eKLR*** for the proposition that where people are represented in parliament, public participation is indirectly achieved, and that not all people must be consulted. It was contended that stakeholders attended meetings where the regulations were discussed and for those reasons, there was public participation. Counsel also contended that **Section 39** was informed by clear policy considerations and therefore the section is not inconsistent with the **Constitution**.

45. Regarding the contention that the enactment of the impugned provisions and regulations introduced double regulation, counsel submitted that although the Pharmacy and Poisons Act addresses both human and animal medicines, weaknesses and deficiencies were captured in Sessional Paper No 2 of 2008 which led to the enactment of the VET Act to address those deficiencies.

46. On the submission that there are two regulatory regimes, counsel contended that it is not the duty of Courts to declare which legislation is or is not legal. Rather the Court's duty is to harmonize the two legislations taking into account the intention of the Legislature. In counsel's view, where there are two conflicting legislations, the latter legislation takes precedent over the former. Reference was made to the case of ***EMMHU v RH [2016] eKLR*** to support this contention. In any case, it was submitted, regulation 63(transitional clause) of the impugned regulations takes care of the petitioner's concerns.

47. Regarding the contention that the provisions violate the rights of the petitioner's members especially those who conduct business in animal health drugs, it was submitted that the enactment of the legislation was informed by public policy in sessional paper no 2 of 2008 which was done in a free and democratic society. It was contended that the basis of enacting the legislation was to ensure that there were standards enforceable through the regulations and regular inspection, and in that regard, the economic rights of the petitioners will flourish. It was submitted that the enactment of the regulations complied with the Statutory Instruments Act in that they were accompanied with a memorandum and report on the regulatory impact. It was the respondent's position that benefits accruing from the impugned provisions and regulations for outweigh the feared hardships.

48. In answer to the contention that it was unconstitutional to create a body corporate through regulations, counsel submitted that the regulations are not unconstitutional, and referred to **Sections 2 and 3** of the state corporation Act to show how corporations can be formed, and further **Section 21 (1) (b)** of the Statutory Instruments Act to the effect that a corporate entity can be exempted from expiring after 10 years.

49. On the submission that veterinarians are not well equipped and do not have capacity to manage the profession, it was submitted that there was no evidence to support the assertion. It was also submitted that regulation 8 allows co-option of other professionals with relevant experience and expertise into the organization, hence there is diversity. In response to the contention that pharmacists have legitimate expectation, it was submitted that **regulation 63** as a transitional provision addresses the issue of legitimate expectation to the effect that those already licensed will continue to practice. In counsel's view, this was already a case of change management and the issue had been addressed administratively through correspondence between Head of Public Service and the Attorney General, after it was raised by the Pharmaceutical Society of Kenya.

2nd Interested Party's Submissions

50. **Mrs. Mbaabu**, learned counsel for the 2nd interested party relied on the affidavit by **Dr. Kahariri**, and associated herself with the submissions made on behalf of the respondents. Counsel, however, added

that there was public participation since the legislative process went through the national assembly as exemplified by the **Hansard**. Counsel pointed out that while debating the Bill, even the Minister for Medical Services raised the issue of the need to have a Board to regulate the veterinary profession.

51. Counsel further submitted that the role of the Board is provided for in Section **6 (2) (a)** of the Act, that Section 39 gives the Cabinet Secretary mandate to formulate regulations and that a *corrigenda* was published to correct the fact that the regulations were made by the Cabinet Secretary in exercise of the powers conferred on him under the Act. Counsel made reference to the case of ***Re the Matter of Pharmacy and Poisons Board & others V Ministry of Health & others Exparte Dr. Pius Wanyala JR No. 159 of 2016*** at Paragraph 109 of the Judgment, for the submission that where power to make regulations is given by a statute, that power must be strictly followed and the power exercised must be within the statute.

52. It was, therefore, submitted that the Cabinet Secretary acted within the powers conferred by the Act and for that reason the regulations are constitutional. It was also submitted that it was necessary to enact the law to separate human medicines from animal medicines. Regarding the alleged conflict between the two statutes, much weight was placed on the **Pharmacy and poisons case (supra)** especially on double regulation, where it was stated that provisions of an earlier legislation stand repealed by those of the new legislation in the event of a conflict. It was therefore submitted that the enactment of the VET Act did not introduce provisions that are in conflict with those of the Pharmacy and Poisons Act relating to veterinary services.

Petitioner's Response to Respondents' Submissions

53. In reply to the respondents' submissions, **Mr. Muturi**, submitted that Courts are empowered to deal with all issues and referred to **Article 2** of the **Constitution** for the submission that no person should exercise authority except as authorized by the **Constitution**, and **Article 2(4)** for the submission that any law that is inconsistent with the **Constitution** is invalid. He also referred to **Article 94(1)** of the **Constitution** to submit that legislative authority is derived from the people and that Parliament is enjoined by **Sub-Article (4)** to promote democratic governance of the republic. Counsel submitted that **Article 165(3)** gives Courts authority to determine whether a right or fundamental freedom has been denied, infringed or is threatened, and that this Article must also be read together with **Article 165(3) (d) (iii)** which gives the Court power to check whether anything said to be done has been done in accordance with the Constitution.

54. Counsel submitted that the regulations formulated by the Cabinet Secretary under the VET Act intrude into the rights of some citizens. On public participation Counsel contended that there was no public participation in the enactment of section 39 of the VET Act and referred to **Dr. Mugambi's** affidavit of 22nd November 2016 and in particular **Annexure "IM4"**, a letter from the office of The Attorney General which stated that the issues raised by the Pharmaceutical Society could have been addressed at the Policy formulation stage prior to the enactment of the legislation. In Mr. Muturi's view, this is a clear manifestation that there was no public participation.

55. Counsel contended that what was brought to Court was participation prior to the legislation and held the position that there was no public participation during legislation. Counsel contended that **Articles 10** and **118** of the **Constitution** envisage values of people part in the legislative process. He referred to the case of ***Robert N. Gakuru v Governor Kiambu County & 3 Others*** [2014]eKLR and in particular paragraph 58 of the judgment to argue that participation should be facilitated at the critical stage of legislation. In his, view there was no meaningful public participation.

56. Finally Counsel submitted that under **Section 21(i)** of the **Statutory Instrument Act**, a statutory instrument is revoked after 10 years of its making hence a body corporate established under regulations is undesirable and any extension can only last for twelve months. Counsel contended that the impugned regulations were lifted from the Pharmacy and Poisons Act and are inconsistent with that Act which allows Pharmacists to dispense medicines, including Veterinary medicines, yet the impugned regulations criminalize dispensing of Vet medicines by pharmacists.

57. According to Counsel, as long as **Section 14(c)** of the VET Act defines “**practice**” as dispensing and administration of veterinary medicines, and **Section 15** of the VET Act criminalizes practice of Veterinary medicine unless one is registered, and imposes a jail term on the offenders, the Act violates the rights of Pharmacists and their legitimate expectations.

Analysis and Determination

58. I have considered this petition, responses thereto, submissions by Counsel for the parties and authorities cited. From the pleadings and submissions, I have identified the following issues for determination, namely; whether Sections 14 (c) and 39 (2)(a) of the Veterinary Surgeons and Veterinary Para- professionals Act 2011 are unconstitutional; whether the Veterinary surgeons and Veterinary Para=professionals (The Veterinary Medicines Directorate) Regulations, 2015 are inconsistent with the Pharmacy and Poisons Act, and whether the Veterinary surgeons and Veterinary Para-professionals (The Veterinary Medicines Directorate) regulations, 2015 were made in breach of the Statutory Instruments Act and the **Constitution** are therefore unconstitutional.

59. The petitioner and 1st interested party have argued that **Sections 14(c)** and **39 (2)(c)** of the Act are unconstitutional for violating Pharmacists’ right to practice veterinary medicine and lack of public participation. They also contended that the regulations made under the VET Act are inconsistent with the Pharmacy and Poisons Act and to that extent they are unconstitutional null and void, and that the regulations were formulated in breach of the Statutory instruments Act.

60. Before delving into the main issues in the petition, it is important to underline the guiding principles in determining the constitutionality of a statute or statutory provision.

61. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and that it is the duty of the person alleging the unconstitutionality to prove that the statute or statutory provision is in fact unconstitutional. The principle is based on the fact that the legislature which is the representative of the people understands the problems faced by the people they represent and, therefore, legislations they enact are geared towards solving these problems, hence the legislation is constitutional.

62. The principle was stated in the case of ***Ndynabo v Attorney General of Tanzania*** [2001] EA 495 that an Act of parliament is Constitutional, and the burden of proving the country lies with the person alleging otherwise. The Court should also consider the object, purpose and effect of implementation of the legislation whether that violates constitutional rights. Where that is the case, the statute or statutory provision must give way for being unconstitutional.

63. This was stated in the case of ***Olum and Another v The Attorney General*** [2002] EA, where the Constitutional Court of Uganda dealt with the question of determining the constitutionality of a statute and observed;

“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

64. This principle of law had earlier been stated in the Canadian case of ***The Queen v Big M. Drug mart Ltd.*** 1986 LRC (Const.) 332, thus-

“Both purpose and effect are relevant in determining Constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and ultimate impact, are clearly limited, but indivisible.

Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.”

65. When dealing with the question of unconstitutionality of a statute or statutory provision, the Court must also bear in mind the principles set out in **Article 259** of the **Constitution**. The Court is enjoined to interpret the **Constitution** in a manner that promotes its purposes, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

66. These principles were well stated in the case of *Institute of Social Accountability and another v National Assembly & 4 others* [2015]eKLR thus-

“First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, value and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 259 (2) (e) of the Constitution to protect and promote the purposes and principles of the Constitution.

*Second, there is the general presumption that every Act of parliament is Constitutional and the burden of proof lies on the person who alleges otherwise. (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act, 2013 is Constitutional and valid unless the Contrary is established by the petitioners.*

*Third, in determining whether a statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Muranga Bar Operators and Another v Minister of State for Provisional Administration and Internal Security and others Nairobi petition No 3 of 2011* [2011]eKLR, *Samuel G. Momanyi; v Attorney General & another.*). Further in examining whether a particular statutory provision is unconstitutional, the Court must have regard not only to its purpose but also its effect.”*

67. It is also important to bear in mind that the **Constitution** should be given a purposive and liberal interpretation. As stated by the **Supreme Court** in the case of *Re The matter of Interim Independent Electoral and Boundaries Commission, Constitutional Application No 2 of 2011*, at paragraph 51 (quoting the word of Mahomed A J in the Namibian case of *State v Acheson* 1991 20-A 805, 813);

“The constitution of a nation is not simply a statute which mechanically defines the government and the relationship between the government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and ..aspirations of a nation. The articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside over and permeate the process of judicial interpretation and judicial discretion.”

68. And in the case of *Tinyefuza v Attorney General of Uganda, Constitutional petition No 1 of 1997 (1997 UGCC3)*, provisions of the Constitution must be read as an integral whole, without any one particular provision destroying the other but each sustaining the other.

69. With the above principles in mind, we now proceed to determine the issues raised in the petition. First the petitioner contends that Sections 14(c) and 39(2)(c) are unconstitutional. To understand the petitioners concern, it is important to reproduce those concerns as captured in the petition.

Paragraph 3.8 “your petitioner contends that the following provisions contained in the VET Act No 29 of 2011 are inconsistent with the provisions of the constitution to the extent of that inconsistent.

38(a) Section 14 definition of practice

For the purpose of this Act, a person practices as a veterinary surgeon if such a person engages in the

3.8(b) (c) ***dispensing or administration of veterinary medicine on animals.***”

3.8(b) section 39 2(a) institutions and the animal resources secretary

1) ***The Cabinet secretary may establish institutions to enable the Board to function efficiently and effectively in the management of the animal resource industry especially the livestock sector, both nationally and within the county governments***

2) (a) ***A veterinary medicines directorate to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons.***

3.8(c) The entire VET rules of 9th October 2015 as the same are premised on Sections 14 and 39 of the VET ACT.”

70. From the above reproduced portions of the petition, the petitioner’s concerns are first, that Section 14(c) in so far as it defines the word “***Practice***” to mean ***dispensing or administration*** of veterinary medicines on animals, violates the pharmacists’ right to practice. In the petitioner’s understanding, a person practices veterinary medicine if he/she dispenses or administers veterinary medicines on the animals. According to the petitioners, that is what Pharmacists do dispensing veterinary medicines.

71. Second, the petitioner contends that Section 39 (2) (a) of the VET Act which allows creation of veterinary medicines directorate to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons, was amended on the floor of the National Assembly without public participation and the body created under the Act rivals the Pharmacy and Poisons Board under the Pharmacy and Poisons Act. Third, the petitioner opposes the veterinary surgeons and Para-Professionals (The Veterinary Medicines Directorate) Regulations 2015-VET rules 2015 because they are inconsistent with the Pharmacy and Poisons Act and also contravene the Statutory Instruments Act.

72. In supporting the position that Sections 14 (c) and 39(2)(c) are unconstitutional, the petitioner has relied on **Articles 24 and 40 of the Constitution**, and argued that rights and fundamental freedoms in the Bill of Rights should not be limited except by law, and only to the extent that the limitation is **reasonable and justifiable** in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The petitioner has also relied on **Articles 43 and 46 of the Constitution** and contended at paragraph 4.2 of the petition that “***The provisions of section 39(a) (sic) of the VET Act and the VET rules limits their (pharmacist) right to earn a livelihood and their right to property as the provisions have the effect and purpose of forcing them to employ a veterinary surgeon for the purposes of dispensing poisons.***”

73. In that context, the petitioner hold the view that **Section 14(c)** will deny Pharmacists the right to dispense veterinary medicines which they are allowed to do under the Pharmacy and Poisons Act, and in a way, limit their right to practice veterinary medicine, and as a consequence, force them to employ a veterinary surgeon in order to continue with the practice. What informed the enactment of Sections 14 (c) and 39(2)(a) of the VET Act; and does it limit or violate the Pharmacists’ right to practice veterinary medicine?. Before determining whether the impugned provisions violate the Pharmacists’ rights to practice veterinary medicine, a little back ground to the enactment of the VET Act and the regulations is necessary.

74. In 2008, the government came up with **Sessional Paper No 2 of 2008**, the **National livestock policy** which identified the problems bedeviling the livestock industry and possible solutions. In chapter 2 of the Sessional paper, item 2.12 paragraphs 5 and 6, the problem was captured as follows-

“Enforcement of animal health and product quality standards has also been complicated by

conflicting legal mandates, particularly between the Public Health Act (Cap 242) and the Meat Control Act (Cap 356). The Department of Veterinary Services which is the competent authority has been unable to inspect meat countrywide, currently they are incharge of ---- out of ----- districts (76%) due to lack of personnel. Meat inspection is under two acts of parliament as stated above which causes conflicts in implementation. The bodies responsible for control of veterinary drugs and pesticides are variously placed in the Ministries of Health and Agriculture (Cap 244-Pharmacy and Poisons Act and Cap346-Pest Control Products Act). However, the Ministry responsible for animal health and food safety has no control over these conflicting statutes on drugs or pesticides. There is, therefore, need for harmonizing these conflicting jurisdiction in order to adequately address animal health and product quality standards. According to the international standards, veterinary medicinal products are regulated by the ministry responsible for veterinary services in order to safeguard animal and human health.

To address the above challenges, it is necessary that a thorough review of both policy and Institutional frameworks of the livestock sector be undertaken to allow further development of a competitive livestock industry. This policy paper provides various policy options necessary for achieving sustainable development and management of the livestock sub-sector. The policy will guide the development of the sub-sector to increase house hold incomes, assure good security and create employment through improved livestock farming, value addition and support livestock-based industries among others.” (emphasis)

75. In order to address the challenges identified in the sessional paper, the National assembly enacted the VET Act which contains the impugned provisions. The **preamble** to the Act states that it is ***an Act of parliament to make provisions for training, registration and licensing of Veterinary Surgeons and Veterinary Para-Professionals to provide for matters relating to animal health services and welfare and connected purposes.***

76. It is clear from the preamble, that the Act was intended to provide for training and registration of Veterinary Surgeons and Para-Professional in the livestock industry. This was supposed to cure the problems identified in the policy paper. The bodies responsible for control of veterinary drugs and pesticides were under the Ministries of Health and Agriculture outside control of the Ministry responsible for livestock. Placing training, registration and regulation of Veterinary Surgeons and Para Professionals and institutions relating to livestock under the VET Act, would bring them under the control of the responsible ministry, thus bring harmony within the livestock sector, thus safeguard animal; and human health according to international standards.

77. Section 2 of the Act defines **“Veterinary Surgeon”** to mean a person whose name appears for the time being in the register of Veterinary Surgeons maintained pursuant to section 19. The petitioner’s guns were trained against **Section 14(c)** of the Act. The Section which defines the word **“practice”**, provides as follows;

“For purposes of this Act, a person practices as a Veterinary Surgeon if such a person engages in the –

- a) Prevention of an infectious or organic disease or pathological condition.***
- b) Performance of a surgical operation on an animal;***
- c) Dispensing or administration of veterinary medicines on animals***
- d) Giving of any treatment, advice, training, research consultancy services, diagnosis or attendance and other related veterinary services.***
- e) Inspection of foods of animal origin for purposes of food safety;***
- f) Provision of animal welfare services.” (emphasis)***

78. Section 15(1) of the Act provides for qualifications for one to be registered as a veterinary surgeon, namely; must be a citizen of Kenya, holds a degree in veterinary medicine from a recognized university, has served internship for not less than twelve months under a veterinary surgeon of not less than five years standing; and is a member of a registered professional association representing interests of veterinary surgeons. The petitioner's contention in so far as section 14 (c) is concerned, is that Pharmacists will no longer dispense veterinary medicines since doing so amounts to a criminal offence, and, therefore, their right to practice this branch of medicine has been curtailed and limited by the VET Act.

79. **Article 24** of the **Constitution** provides that a right or fundamental freedom in the Bill of Rights should not be limited except by law, and even then, only to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors; including the nature of the right or fundamental freedom, the importance of the purpose of limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the right and fundamental freedoms of others, and the relation between the limitation and the purpose; and whether there are less restrictive means to achieve the purpose.

80. **Section 14(c)** of the VET Act defines "**practice**" to include dispensing or administration of Veterinary drugs. That means only persons registered under Section 15 of the Act will be allowed to dispense or administer animal medicines. To that extent, Pharmacists will not dispense animal drugs thus limiting their practice in this area. However in my view, the limitation, if it be so called, is a limitation by law and, therefore, meets the criteria set by **Article 24 (i)** of the **Constitution**. As to whether the limitation is reasonable I take the view that it is reasonable and justifiable. This is because the limitation is intended to bring harmony, order, control and professionalism in the Veterinary sector so that there is responsibility on those who dispense animal drugs thus, protect human and animal health in accordance with international standards. This is discernable from both the National Livestock Policy (sessional paper No 2 of 2008) and the preamble to the Act.

81. One must also bear in mind that the Act should be given a holistic interpretation in order to give true meaning to the legislative intent. As stated by the Court of Appeal in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013

“One of the canons of statutory interpretation is a holistic approach. As stated in Halsbury’s Laws of England 4th Edition Vol. 44 paragraph 1484, no provision of any legislation should be treated as ‘stand -alone’ An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”

82. Looking at the **preamble** to the Act, through section 2 on the meaning of "**registered persons**", the meaning of '**veterinary surgeons**', the definition of '**practice**' as contained in **Section 14** including impugned **Section 14 (c)**, **Section 13 (1)** which bars anyone from practicing veterinary medicine unless they qualify for registration and are registered as a veterinary surgeon, and giving the Act a holistic interpretation, there is no doubt that the Act has a good intentions, and one cannot isolate Sections 14(c) and 39(2)(a) as unconstitutional, without destroying the legislative intent.

83. The petitioner's contention is that the Pharmacy and Poisons Act allows Pharmacists to dispense veterinary drugs but this right is being taken away by the impugned provision. However, in terms of **Article 24(i) (b)** and **(c)**, of the constitution, the importance and nature of the limitation is clear from the National Livestock Policy and preamble to the Act. The extent of the limitation is to **dispensing or administration** of animal drugs only, and makes it clear that only registered persons should do so.

84. In dealing with this issue, the Court has a duty to look at the greater public interest as opposed to the narrow commercial interest of pharmacists, a small segment of society. The Pharmacists' right to do business, if a right it be, cannot outweigh the greater public interest that the veterinary profession, including dispensing and administration of animal drugs be regulated for the benefit of human and animal

health. Pharmacists may employ Veterinary Surgeons or Para- professionals or even get into some form of arrangement with them in order to meet the requirements of the Act, a lesser burden than nullifying statutory provisions in order to serve a small class of our population. I am not therefore satisfied that **Section 14 (c) of the VET Act** violates the petitioner's members' fundamental rights. It is not unconstitutional.

85. There was also a suggestion that there is a conflict between this provision and those in the Pharmacy and Poisons Act. This argument is not viable. It is true that prior to the enactment of the impugned provision, Pharmacists were allowed to dispense animal drugs under the Pharmacy and Poisons Act. This is no longer possible in view of the various provisions in the VET Act. The principle of law is that if there is irreconcilable conflict between provisions of two statutes, those of the former Act are deemed to have been repealed by the latter. This was stated in the case of **Martin Wanderi and 19 others v Engineers Registration Board of Kenya & 5 others** [2014]eKLR, where Mumbi Ngugi J stated-

“Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same power vested in the Commission for Universities Education to accredit courses for Universities, takes away the powers vested in the Board by section 7(1) (l). This is because of the canons of interrelation with regard to the timing of legislation and the doctrine of implied repeal which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one.”

86. In **Steve Thoburn v Sanderland City Council** 202 EWHC. 95, the Court referring to two conflicting provisions of statutes in that case, stated-

“I should certainly hold.... that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions...If they are inconsistent to the extent that they cannot stand together, then the earlier Act is impliedly repealed by the later in accordance with the Maxim ‘Larger Posteriores Contrias abrogant.’”

87. In the case of **Craywan Enterprises Limited v Attorney General & Another** petition No. 196 of 2011, the Court observed;

“The petitioners claim is based on the apparent inconsistency between the two Acts in so far as they relate to purchasing. In my view, there is no conflict as it is now settled that where there are two provisions in Acts of Parliament that are in conflict, the later Act repeals the former. I agree with the dictum of Avory J, in Vauxhall Estate Limited v Liverpool Corporation (supra) that if they are inconsistent to that extent, then the earlier Act is impliedly repealed by the later.”

88. In the case of **David Sejjaka Nalima v Rebecca Musoke**, Civil Appeal No 12 of 1985, the Court of Appeal of Uganda observed;-

“According to principles of Construction, if the provisions of a latter Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another proposition is if the provisions are wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are exempted or their operation is excluded with respect to the cases falling within the provisions of the Act.”

89. The jurisprudence arising from the decisions referred to above is that a latter provision or statute overrides the older one or is deemed to have repealed the earlier one. Applying that principle to the present situation before the court, the provisions of the VET Act being of a latter statute override those of Pharmacy and Poisons Act where appropriate.

90. Next, the petitioner took issue with section, 39 2(a) of the VET Act, arguing that an amendment to the

section was introduced in the third-reading on the floor of the House without public participation. Counsel referred to Parliamentary proceedings (the **Hansard**) to drive his point home. He submitted that for that reason, the legislative process lacked a vital component vitiating the constitutionality of the section.

91. The petitioner's grievance is captured at paragraph 4.10 of the petition as follows

“Your petitioner contends that the passing of section 4 (c) (sic) and 39 (a) (sic) of the VET Act was in breach of Article 118 and 10 of the Constitution of Kenya as no meaningful participation was carried out as the amendment to include “dispensing medicine” was moved at the third committee stage which amendment had far reaching effects of encroaching on the statutory mandate of PPB under Cap 244.”

92. Counsel must have had in mind sections 14(c) and 39(2)(c) of the VET Act. He referred to the **Hansard** of Thursday 31st March 2011 to submit that the amendments were introduced during debate in the National Assembly. **Article 10** of the Constitution contains National values and principles of governance. **Article 10(2) provides that the national values and principles of governance include; (a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.** Public participation in governance is engraved in the constitution as a national value and principle.

93. **Article 118** of the **Constitution** on the other hand, provides that **parliament shall (a) conduct its business in an open manner and its sittings and those of its committees shall be open to the public and (b) facilitate public participation and involvement in the legislative and other businesses of parliament and its committees.** The Constitution requires parliament to facilitate public participation in its legislative process. There is no doubt that the National Assembly has a constitutional obligation to facilitate public participation in the law making process and failure to do so would lead to invalidation of a legislation for being unconstitutional.

94. Kenyans have a right to participate in governance issues more so in the legislative processes that affect their lives. In the case **Minister of Health & Another v New Clicks South Africa (pty) Ltd and others** [2006] (2) SA 311 (CC) the Court stated-

“The forms of facilitating an effective degree of public 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 these issues and to have adequate say. What amounts to a reasonable opportunity depends on the circumstances of each case.”

95. The Court was clear in that case that members of the public should be given a reasonable opportunity to participate in legislative process, and as to what amounts to reasonable opportunity will depend from one case to another. In the case of **Moses Munyendo & 908 Others v The Attorney General and Minister for Agriculture** [2013] eKLR, the Court stated-

“The National Assembly and Public Participation have a broad measure of discretion in how they achieve the object of public participation. How it is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public.”

96. Once again, the Court was clear in this case that the public must have been afforded an opportunity to participate in the legislative process. This point was made clear in the case of **Doctors for Life International v Speaker of the National Assembly and others** CCT 12/05 [2006] ZACC 11: 2006 (12) BCLR 1399 CC, the Constitutional Court of South Africa stated on this point;

“It is implicit, if not explicit, from the duty to facilitate public participation in the law making process, that the Constitution values public participation in the law making process. The duty to facilitate public participation in the law making process would be meaningless unless it is sought

to ensure that the public participate in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law making process consistent with our democracy. Indeed it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law making process... The nature and degree of public participation that is reasonable in a given case will depend on a number of factors. They include; the nature and importance of the legislative and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”

97. And in the case of *Robert N. Gakuru & others v Governor Kiambu County & 3 Others* [2014] eKLR the Court made it clear that Public participation ought to be real and not illusory and should not be a mere formality to simply fulfill Constitutional dictates.

98. The constitutionality attack on the impugned provisions is centred on the premise that the amendments to sections 14(c) and 39(2) (c) were introduced in the third reading without public participation. The petitioner has not contested the constitutionality of the entire VET Act or the whole of sections 14 and 39 of the Act. The grievance, as I understand it, is that members of the National Assembly in the course of their legislative business during debate on the VET Bill, introduced amendments including the word “*dispensing*” to section 14 (c) of the Act which it is argue, limits Pharmacists’ right to dispense veterinary medicine, which it consider unconstitutional.

99. Public participation as a Constitutional requirement has to be employed during the legislative process, and it is the duty of parliament to facilitate it. Whether or not there was public participation is a question of fact, and for the Court to annul a statute or statutory provision on account of lack of public participation, it must be shown that the public was not given reasonable opportunity to participate in the law making process, for Parliament decides when and how to conduct public participation taking into account circumstances of each case.

100. The standard for compliance with public participation was restated by the Constitutional Court of South African in the case of *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC22 thus-

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”

101. In the present case the challenge on the provisions is mainly because changes were introduced on the floor of the national assembly in the course of debate. It is inconceivable that this alone should invalidate the statutory provisions. There is no allegation that the Bill was not subjected to public participation. The only complaint is that amendments were introduced on the floor during debate. I do not think the national assembly could adjourn debate on the Bill at that stage of legislative process and embark on of public participation again on that aspect alone.

102. I have perused the **Hansard** for 31st March 2011 and it is clear that the committee of the whole House considered the Bill and approved it with the proposed amendments which members of the national assembly lauded as having strengthened the Bill. I do not think this was so serious as to affect the constitutionality of the process leading to the enactment of the impugned sections.

103. The legislative authority of the republic is derived from the people and exercised, at the National Level, by parliament, which manifests the diversity of the nation and represents the will of the people. Parliament exercises that sovereign power on behalf of the people in enacting legislations. When the National assembly enacts laws, it does so behalf of the electorate, and the people indirectly participate in that legislative process. I do not agree with the petitioner that the National Assembly failed to conduct Public participation with regard to the changes made in sections 14 (c) and 39(2)(c). of the VET Act. The petitioners have not shown that the national assembly acted contrary to the **Constitution, the law or Standing Orders** in the process by introducing those changes which would make the provisions unconstitutional. In my respectful view, this complaint has no basis at all.

104. The other attack directed at **section 39 (2) (a) was that** the section gives the Cabinet Secretary mandate to establish institutions. For the avoidance of doubt, section 39 provides as follows-

“(1) The Cabinet Secretary may establish institutions to enable the Board to function efficiently and effectively in the management of the animal resource industry, especially the livestock sector, both nationally and within the county governments.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary shall establish—

(a) a veterinary medicines directorate to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons;

(b) an animal health inspectorate service for quality assurance of animal production inputs and animal products;

(c) a special inspectorate to oversee the use and utilization of non- traditional animal resources such as genetically modified organisms, and guarantee bio-safety to human consumers, animal health and welfare;

(d) the Kenya Livestock Research Institute; and

(e) the Kenya Livestock Marketing and Development Authority.

(3) The Cabinet Secretary shall, through a competitive process, appoint an animal resources secretary whose function shall be to co-ordinate the animal resources industry in order to foster economic development and improve livestock-based livelihoods both nationally and in the counties, and perform such other functions as may be assigned.”

105. The mandate of parliament is to legislate and the Court cannot question its wisdom in legislating in the manner it did. The duty of the Court is and should always remain to determine whether parliament discharged its legislative mandate in accordance with the Constitution, the law and standing orders and give effect to the legislative intent.

106. With regard to section 39 2(c), my understanding of the petitioner’s main concern as can be discerned from their submissions, is that the institution established pursuant to section 39 2(c) will rival the Pharmacy and Poisons Board established under the Pharmacy and Poisons Act. The petitioner also contends that the institution does not have capacity to carry out its mandate in terms of personnel and training unlike the Pharmacy and Poisons Board. The petitioner further holds the view, that there will be conflict of roles, duplicity of duties and functions between the two institutions. The respondents, contended, on their part, that there will be no clash of roles or duties.

107. In my view, institutions established under different legal regimes are independent with specific functions, duties, mandate and or roles assigned to each by the constituting statutes. In the case of the institution contemplated in section 39(2) (a), its mandate is **to regulate the manufacture, importation, exportation, registration, distribution, prescription and dispensing of veterinary medicines and poisons.**

This is aimed at ensuring that there is professionalism in the veterinary industry. Its role and mandate is thus limited to regulating the veterinary medicines and poisons in the Country. On other hand, the Pharmacy and Poisons Act and the Board established thereunder, control and regulate the profession of Pharmacy and trade in drugs and poisons which is a general mandate. If there be any conflict between the two statutes, the law is that the general provisions give way to the special or specific provisions.

108. In this respect I take guidance from the **Supreme Court of India's** observation in the case of **Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd** [2014] SCR that;

“It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origin in the latin maxim of generalia specialibus non derogant, i.e, general law yields to special law should they operate in the same field on same subject. The principle has found vast application in cases of there being two statutes; general or specific with the latter treating the common subject matter more specifically or minutely than the former.”

109. The Court then went on to state:-

“when construing a general and specific statute pertaining to the same topic, it is necessary to consider the statutes as consistent with one another and such statutes therefore should be harmonized, if possible, with the objective of giving effect to a consistent legislative policy... Where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control. The provisions more specifically directed to the matter at issue prevails as an exception to or qualification of the provision which is more general in nature, provided that the specific or special statute clearly includes the matter in controversy.”

110. Applying the above principle to the present case, both the VET Act and Pharmacy and Poisons Act deal with the practice of dispensing of medicines and poisons, and the dispute relates to this practice. The VET Act is a specific statute dealing with veterinary medicines and drugs, while the Pharmacy and Poisons Act is a general legislation on the issue of dispensing medicines and poisons. In that respect, the provisions of the VET Act being of a specific or special statute prevail over those of Pharmacy and Poisons Act.

111. The petitioner's further contention that veterinary surgeons are not sufficiently endowed in terms of training and personnel to manage veterinary medicines and poisons is a policy issue and it is not for the Court to determine which of the two institutions has capacity. Even if the Court were to venture to address that aspect, no materials were placed before it in terms of statistics to enable the Court do so.

112. Lastly the petitioner took issue with the subsidiary legislation, the **veterinary surgeon and Para-professionals (Veterinary Medicines Directorate) regulations, 2015**, contending that they violate the Statutory Instruments Act 2013 that they did not go through public participation, and were made by Kenya Veterinary Board which was ultra vires thus they unreasonable and unconstitutional. In their view, to establish a body corporate through regulations yet the body will stand revoked after 10 years is a waste of public resources. The petitioner further contended that the regulations are inconsistent with the Pharmacy and Poisons Act.

113. The respondents supported the regulations pointing out that a corrigenda was published to correct the anomaly and clarified that the regulations were made by the Cabinet Secretary under Section 45 of the VET Act contrary to what was in **Legal Notice No 209** of 9th October, 2015 that the regulations were made by the **Kenya Veterinary Board** pursuant to **Section 6 (2) (f)** of the VET Act. Section 6(2) only empowered Kenya Veterinary Board to formulate and publish a code of ethics for veterinary surgeons.

114. **Dr. Indraph Mugambi** attached to his further affidavit sworn on 17th January, 2017, Gazette

Supplement No 45 of April 2016 containing **corrigenda** to legal Notice No. 209 correcting the fact that the regulations were made by the Cabinet secretary under section 39 (2) (a). The letter forwarding these documents to the Clerk to the national assembly was also signed by the Cabinet Secretary. That being the case, the submission that the regulations were made by the Board and are **ultra vires** is now moot.

115. I note however, that the Corrigenda states that the regulations were made pursuant to section 39(2) (a) of the VET Act. Power to make regulations is donated by section 45(1) of the VET Act, giving the cabinet secretary mandate to make regulations generally for the better carrying out of the provision of the Act. The corrigenda obviously cited wrong provisions of the Act. I am not prepared to nullify the regulations on account of this irregularity alone. I will give the Cabinet Secretary an opportunity to correct this irregularity and cite the correct provision of the Act which he should do within three months.

116. Second, the petitioner argued that the regulations were not made in accordance with the Statutory Instruments Act. The Act applies to every statutory instrument made directly or indirectly under Acts of Parliament. A statutory instrument includes regulations directions etc. made in exercise of powers conferred under an Act of parliament. Section 5(1) of the Act requires that before a regulation making authority makes a statutory instrument and, in particular, where the proposed instrument is likely to affect business in a direct or indirect manner, or restrict competition, the regulation making authority should make appropriate consultations with the persons likely to be affected by the purposed instrument. Section 6 further provides that if the proposed instrument is likely to impose significant costs on the community or part of the community, the regulations making authority has to prepare regulatory impact statement about the instrument.

117. I have perused the responses to the petition and more so the affidavit by Dr. Mugambi which has annexures showing that there was a stakeholders' workshop on the regulations. There is also an explanatory memorandum on the regulations as well as a regulatory impact assessment report which, he deposes, was notified through **Gazette Notice No 9023 of 19th December, 2014**. There is also a letter from the Pharmaceutical Society of Kenya to CEO, Kenya Veterinary Board, dated 29th December 2014 copied to among others, Chief of staff in the office of the President over the impugned Regulations. The petitioner has not denied the facts as deposed regarding the process leading to making of the regulations.

118. What is clear from all these is that there was stakeholders' engagement prior to making of the regulations and the petitioners were aware of the process and even made their views known. In my view, there was requisite public participation and compliance with the Statutory Instruments Act in so far as the making of regulations is concerned.

119. The petitioners further contended that the impugned regulations were lifted from the Pharmacy and poisons Act and are, therefore, inconsistent with that Act. The regulation making authority was under duty to make regulations. The law requires that regulations be consistent with the parent Act. The parent Act in this case is the VET Act and not Pharmacy and Poisons Act. When making regulations the authority is usually concerned with the parent Act because regulations are meant to help implement provisions of the Act. He does not have to know all statutes for him to avoid inconsistency between the regulations and the statutes. The petitioner would have made a point had it been contended that the regulations are inconsistent with the VET Act. But in so far as they seek to implement provisions of the VET Act, they are not inconsistent with the Pharmacy and Poisons Act and do not violate pharmacists' rights for that matter.

120. On whether the regulations can be invalidated for creating a body corporate, that alone cannot make a regulation illegal or unconstitutional. The petitioner's contention that regulations only last for 10 years in terms of section 21 of the Statutory Instrument Act is not sustainable. The section provides a cure for such an eventuality where either the statutory instrument may be repealed, may expire sooner than its 10th anniversary or a regulation may be made exempting the regulations from expiring. These are options available to the regulations making authority, and the Court cannot decide on the suitability of the regulations establishing corporate entity.

121. From the above analysis and considering the facts of this case, the law and judicial pronouncements,

I am not persuaded that the petition meets the threshold for declaring the impugned provisions and regulations unconstitutional. Consequently the Petition dated 2nd November 2016 is declined and dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 29th Day of September 2017

E C MWITA

JUDGE